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MOST RECENT UPDATE TO NEW JERSEY ADMINISTRATIVE CODE: MARCH 15, 1993
See the Register Index for Subsequent Rulemaking Activity.

NEXT UPDATE: SUPPLEMENT APRIL 19, 1993

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

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

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NEW JERSEY REGISTER

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EXECUTIVE ORDERS

(a)

OFFICE OF THE GOVERNOR
Governor Jim Florio
Executive Order No. 90 (1993)
Continuation of New Jersey-Israel Commission

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

WHEREAS, the New Jersey-Israel Commission (Commission) was created on May 31, 1989 by Executive Order No. 208 to enhance New Jersey's ability to implement the development of trade, capital investment and joint business ventures in addition to the development of cultural and educational exchanges between New Jersey and Israel as stated in the Sister State Agreement with Israel (Agreement); and

WHEREAS, the Commission originally was scheduled to expire on May 31, 1991; and

WHEREAS, the Commission was extended pursuant to Executive Order No. 35 dated July 16, 1991, which in part authorized the continuance of the Commission through and including May 31, 1993; and

WHEREAS, the Commission has helped to foster a spirit of cooperation between the citizens of Israel and the citizens of New Jersey that should continue to be available in order to achieve the goals of the Agreement; and

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

1. The New Jersey-Israel Commission shall continue in existence through and including May 31, 1995.

2. All other provisions of Executive Order No. 35 which are not inconsistent with the foregoing shall remain in full force and effect.

3. This Order shall take effect immediately.

(b)

OFFICE OF THE GOVERNOR
Governor Jim Florio
Executive Order No. 91(1993)
Recycling by State Agencies

Issued: May 3, 1993.
Effective: May 3, 1993.
Expiration: Indefinite.

WHEREAS, the procurement of products manufactured or produced from a percentage of recycled materials is acknowledged as the keystone of a successful recycling program; and

WHEREAS, purchases by Federal, State and local governments account for nearly 20 percent of the Gross Domestic Product of the United States; and

WHEREAS, government procurement of recycled products can exert economic leverage to make recycled products more competitive with products manufactured from virgin materials and move recycled products into the marketplace; and

WHEREAS, government procurement of recycled products can persuade manufacturers to develop greater production capacity, invest in research on recycled products and introduce new recycling technologies; and

WHEREAS, State laws require and provide economic incentives for the purchase of recycled products by State agencies; and

WHEREAS, State law and policy mandate the recycling of 60 percent of the solid waste stream, thereby reducing the amount of solid waste requiring disposal, conserving valuable resources and energy, and increasing the supply of reusable materials for New Jersey's industries; and

WHEREAS, local governments and private firms across New Jersey, in response to State law and policy, each year collect greater volumes of recyclable materials to be returned to the economic mainstream through remanufacturing and other recycling techniques; and

WHEREAS, Executive Order No. 34(1991) requires State agencies to serve as models for public and private entities in source reduction and recycling, and these State agencies should also serve as models to promote the expanded procurement of recycled products by public and private entities;

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

1. That each State agency and instrumentality shall implement the following mandates:

A. Appoint, within 30 days of the effective date of this Order, a coordinator from the agency procurement staff who will be responsible for coordinating with the Division of Purchase and Property in the Department of Treasury (hereinafter "Division of Purchase and Property") and the Division of Solid Waste Management in the Department of Environmental Protection and Energy (hereinafter "Division of Solid Waste Management") for the procurement of recycled products by the agency or instrumentality. The coordinator's responsibility is to ensure agency compliance with the purchasing goals of this Order.

B. Require the purchase of recycled paper and paper products of comparable quality with virgin products, with consideration given to recycled paper and paper products containing the highest percentage of post-consumer waste paper material, when such purchase is competitive as defined below. In the event that this requirement is impossible to meet due to mill or vendor supplies of paper and paper products containing recycled secondary and post-consumer content, each State agency or instrumentality shall meet, at minimum, the following purchasing schedule:

(1) Effective immediately, not less than 55 percent of the total dollar amount of paper and paper products purchased by any State agency or instrumentality shall be made from recycled paper or paper products, having a total weight consisting of not less than 50 percent secondary waste paper material and with not less than 10 percent of its total weight consisting of post-consumer waste paper materials;

(2) On and after July 1, 1993, not less than 60 percent of the total dollar amount of paper and paper products purchased by the State shall be made from recycled paper or paper products having a total weight consisting of not less than 50 percent secondary waste paper material and with not less than 15 percent of its total weight consisting of post-consumer waste paper materials;

(3) On and after January 1, 1995, not less than 65 percent of the total dollar amount of paper and paper products purchased by the State shall be made from recycled paper or recycled paper products having a total weight consisting of not less than 50 percent secondary waste paper material and with not less than 25 percent of its total weight consisting of post-consumer waste paper material; except that high grade office paper, fine paper, bond paper, offset paper, xerographic paper, mimeo paper and duplicator paper shall be made from recycled paper having a total weight consisting of not less than 50 percent secondary waste paper material and with not less than 15 percent of its total weight consisting of post-consumer waste paper material.

Except as otherwise provided by law, the Division of Purchase and Property, in consultation with the Division of Solid Waste Management, shall have discretion and authority to modify the procurement rate guidelines established in B.(1) above.

For the purposes of purchasing recycled paper and paper products, "competitive" means a price no more than 10 percent above the price of items which are manufactured or produced from virgin paper products, except that the director, upon consultation with the department, may make contracts available for recycled paper or recycled paper products at a price no more than 15 percent above the price of virgin paper products whenever the director determines that a 15 percent price preference is in the best interest of the State.

C. Print all publications and documents, including those publications and documents printed under the supervision of a State agency or instrumentality, on recycled paper where adequate supplies are available and the purchase of recycled paper is competitive as defined in this Order. The phrase "printed on recycled paper," "recycled paper" or words or symbols to that effect should be imprinted on the publication or document.

D. Review and modify all bid and product specifications, in consultation with the Division of Purchase and Property, to ensure that such specifications do not discriminate, without a sound technical or economic basis, against the purchase or use of paper or nonpaper recycled products, but encourage the maximum purchase of products made from recycled materials, (e.g. where feasible, brightness standards or their equivalents for paper or paper products shall be lowered or eliminated to remove any impediments which these standards may pose to the purchase or recycled paper or paper products).

E. Review and develop specifications for paper and nonpaper finished products, purchased by the agency or instrumentality, which are composed primarily of a single material, such as metal, glass, or plastic, to give priority to those single-material products containing recycled, post-consumer metal, glass, plastic or other recycled materials, and meet any procurement rate guidelines set for specific product or material classes by the Division of Purchase and Property, in consultation with the Division of Solid Waste Management.

F. Utilize, where technically feasible, competitively priced (as defined below) and environmentally sound, compost, mulch and other soil amendments made from municipal solid waste, sludge, yard waste, clean wood waste, and other organic materials, in descending order of priority, where the agency or instrumentality is responsible for the maintenance of public lands, engages in landscaping activities or performs construction activities at State facilities or projects. The compost derived from these listed organic waste materials shall be used in lieu of any chemical fertilizer or soil amendment.

G. Purchase re-refined motor oil, when competitively priced as defined below, for use in automobiles or other vehicles maintained by the agency or instrumentality according to the following schedule:

(1) By December 31, 1993, not less than 5 percent of the total dollar amount expended for the purchase of motor oil shall be for the purchase of re-refined motor oil;

(2) By December 31, 1994, not less than 10 percent of the total dollar amount expended for the purchase of motor oil shall be for the purchase of re-refined motor oil;

(3) By December 31, 1995, not less than 15 percent of the total dollar amount expended for the purchase of motor oil shall be for the purchase of re-refined motor oil;

(4) By December 31, 1996, not less than 20 percent of the total dollar amount expended for the purchase of motor oil shall be for the purchase of re-refined motor oil.

Re-refined motor oil is defined as oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.

H. Purchase, when competitively priced as defined below, retreaded, remolded or remanufactured vehicle tires for automobiles or other vehicles, excluding law enforcement vehicles, according to the following schedule:

(1) By December 31, 1993, not less than 5 percent of the total dollar amount expended for the purchase of tires shall be for the purchase of retreaded, remolded or remanufactured tires;

(2) By December 31, 1994, not less than 10 percent of the total dollar amount expended for the purchase of tires shall be for the purchase of retreaded, remolded or remanufactured tires;

(3) By December 31, 1995, not less than 15 percent of the total dollar amount expended for the purchase of tires shall be for the purchase of retreaded, remolded or remanufactured tires;

(4) By December 31, 1996, not less than 20 percent of the total dollar amount expended for the purchase of tires shall be for the purchase of retreaded, remolded or remanufactured tires;

(5) By December 31, 1997, not less than 25 percent of the total dollar amount expended for the purchase of tires shall be for the purchase of retreaded, remolded or remanufactured tires.

I. Purchase the following nonpaper finished recycled materials or products in lieu of manufactured or virgin materials whenever these materials or products are competitively priced, as defined below, with comparable products manufactured or produced from virgin materials:

(1) recycled concrete aggregate and recycled asphalt pavement;

(2) glassphalt (recycled glass);

(3) asphalt pavement or asphalt pavement patching material made with recycled asphalt shingles;

(4) asphalt containing recycled fly ash from coal;

(5) recycled plastic lumber, snow fencing, fencing or sign posts.

For the purposes of purchasing the recycled nonpaper finished products referenced immediately above, "competitive" or "competitively priced" shall mean a price no more than 10 percent above the price of comparable products or materials manufactured or produced from virgin materials. Any agency shall have the authority to reject a competitively priced bid for a recycled nonpaper finished product if that agency makes a determination that the price offered for the recycled nonpaper finished product or material is not accurately reflective of general market conditions for the product or material, based on the agency's past procurement experiences, current market analysis or information gained from other comparable jurisdictions.

As an alternative to the above, within the State agency bidding procedures as established by law and the preferential pricing structure contained in this Order, any agency may offer rebates to vendors for the use of recycled nonpaper finished products or materials in the supplying of any nonpaper finished product or material.

Except as otherwise provided by State agency bidding procedures established by law, any agency may, upon consultation with the Division of Solid Waste Management, make contracts (other than State term contracts) available for recycled nonpaper finished products or materials at a price no more than 15 percent above the price of comparable virgin products or materials, whenever the agency determines that a 15 percent price preference is in the best interests of the State.

For the purposes of this Order, "nonpaper finished products" shall mean all nonpaper products and materials purchased by any agency or instrumentality. For the purposes of purchasing nonpaper finished products, "post consumer material" shall include any finished product generated by a business or consumer which has served its intended end use, and which has been separated from solid waste for the purposes of collection, recycling and disposition, but shall not include waste material generated after the completion of a manufacturing process.

Where technically feasible, competitively priced and environmentally sound, each agency shall purchase nonpaper finished products containing the highest percentage of post-consumer material.

J. Require that appliances and cooling and air conditioning systems containing refrigerants (CFCs and HCFCs) be appropriately handled by purchasing and using refrigerant recovery equipment or contracting with a vendor to recover the refrigerants prior to recycling the appliance, pursuant to Section 5.1 of New Jersey's Recycling Regulations, N.J.A.C. 17:26A-1.1 et seq. and Section 608 of the Federal Clean Air Act Amendments.

K. Report semi-annually by January 1 and July 1, in writing to the Division of Solid Waste Management on the types, volume and dollar amounts of recycled paper and nonpaper finished products purchased, exclusive of State term contracts. This reporting requirement shall not apply to term contracts and Purchase Bureau line-item purchases.

L. Require government contractors and grantees, where permissible by law, to conform to the recycled paper and nonpaper finished products procurement guidelines set forth in this Order. As appropriate, these requirements shall be applied to contractors and grantees in procuring products or materials to perform contractual services for the State agency or instrumentality, providing a work product for the State agency or instrumentality, or conducting work funded by a grant from the State agency or instrumentality.

As needed to monitor conformance to these requirements, contractors and grantees may be further required to report to the State agency or instrumentality the types, quantities and total dollar amounts of recycled paper and nonpaper finished products purchased by the contractor or grantee in connection with government-funded work.

2. I further direct that the Division of Purchase and Property in the Department of the Treasury shall:

A. Ensure that all bid specifications define competitive pricing for recycled products as defined in State law and this Order.

B. Give priority consideration to the procurement of products which contain the highest percentage of post-consumer waste material.

C. Require vendors, where appropriate, to supply a manufacturer's certification that states the percentage of post-consumer waste material contained in the recycled product and, in the case of recycled paper products, states the percentage of secondary waste paper material content.

D. Identify and review, in consultation with the Division of Solid Waste Management in the Department of Environmental Protection and Energy, bid specifications adopted by other State agencies and instrumentalities that may discriminate, without a sound technical or economic basis, against the purchase or use of recycled products and materials and advise these State agencies or instrumentalities on modifications to the specifications that are necessary to promote the purchase or use of recycled products and comply with this Order.

E. Purchase photocopy machinery, including warranties, which do not restrict the use of recycled xerographic paper, and that provide for effective duplex copying.

F. Ensure that janitorial service contracts include a provision that such services supply recycled paper products for use in State-owned or leased buildings.

G. Review and revise State bid specifications, contracts and procedures in order to provide information to identify those contracts and commodities which constitute recycled products or contain recycled materials, and the quantities ordered and dollar amounts expended for those products.

H. Report semi-annually to the Division of Solid Waste Management in the Department of Environmental Protection and Energy on the types, volumes and dollar amounts of recycled product purchases covered by term contracts, Purchase Bureau line-item purchases, and direct purchases.

3. I further direct the Department of Transportation shall:

A. Continue to serve as the lead agency in the development of specifications for the use of recycled materials in roadway construction and maintenance as identified in this Order.

B. Achieve a minimum utilization rate for asphalt pavement containing recycled rubber, as a percentage of the total tons of asphalt pavement used in roadway construction, resurfacing or maintenance, including those utilization rates required pursuant to the Federal Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), as follows, whenever such utilization is competitively priced as defined above:

(1) A minimum of 5 percent by December 31, 1994;
(2) A minimum of 10 percent by December 31, 1995;
(3) A minimum of 15 percent by December 31, 1996;
(4) A minimum of 20 percent by December 31, 1997;
(5) A minimum of 25 percent by December 31, 1998;
(6) A minimum of 30 percent by December 31, 1999;
(7) A minimum of 35 percent by December 31, 2000;
(8) A minimum of 40 percent by December 31, 2001.

If the Department of Transportation, in consultation with the Division of Solid Waste Management, determines that meeting any of the above identified utilization rates is not feasible, the Department of Transportation shall submit to the Governor's Office, within 90 days of each annual utilization rate identified above, a written analysis that identifies the technical, economic or environmental constraints that preclude such use, and describe any steps that may be taken to eliminate these constraints. Such analyses, if any, shall not relieve the Department of Transportation of its responsibilities for attaining any other annual utilization rate listed.

4. I further direct that the Department of Community Affairs shall:

A. Review existing construction specifications contained in the New Jersey Uniform Construction Code and revise any specifications that discriminate, without a sound technical or economic basis, against the use of recycled products or materials for building construction. This shall be carried out within one year of the effective date of this Order and in consultation with the Division of Solid Waste Management in the Department of Environmental Protection and Energy.

B. Review and revise all regulations, in consultation with the Division of Solid Waste Management, to include the provision that permits for all construction-related activities shall indicate the markets for the disposition of all recyclable materials generated from the permitted activities, and shall require the maximum practical use of recycling alternatives available in conformance with N.J.S.A. 52:27D et seq., P.L. 1975, Chapter 217, New Jersey Uniform Construction Code, N.J.A.C. 5:23.

5. I further direct that the Division of Solid Waste Management in the Department of Environmental Protection and Energy shall:

A. Provide technical assistance to State agency coordinators to develop and implement the programs mandated by this Executive Order, in consultation with the Division of Purchase and Property in the Department of the Treasury.

B. Assist other agencies and instrumentalities in the development and implementation of educational programs for the procurement of recycled products in consultation with the Division of Purchase and Property.

C. Promote innovative research and development to identify new recycled products to be purchased by State agencies and instrumentalities.

This Order shall take effect immediately.

(a)

OFFICE OF THE GOVERNOR
Governor Jim Florio
Executive Order No. 92(1993)
Issuance of Bonds, Notes or Similar Instruments

Issued: May 4, 1993.
Effective: May 4, 1993.
Expiration: Indefinite.

WHEREAS, the citizens of New Jersey are entitled to a government that earns their trust and inspires their confidence; and

WHEREAS, nowhere in the question of public trust and confidence more important than in the area of government contracting; and

WHEREAS, our government should award contracts in a manner that not only guarantees the best price for the taxpayers, but also ensures scrupulous adherence to ethical principles; and

WHEREAS, competitive bidding is the only method of awarding contracts that consistently produces the best economic results and the highest degree of integrity; and

WHEREAS, the public contracting process must be competitive on the merits, open to public scrutiny, and effective at producing the highest quality at the lowest cost; and

WHEREAS, although current law requires the State to award most contracts on the basis of competitive bidding, a number of legal exceptions exist that may undermine the public's confidence in the contracting system; and

WHEREAS, we must take every opportunity to supplement our State's bidding laws by adopting procedures guaranteeing that all contracts are awarded on the basis solely of price and quality; and

WHEREAS, these exceptions to the bidding process—such as bond underwriting, bond counsel, architects and other professional services—ought to be subjected to the disciplining force of competition; and

WHEREAS, for these reasons, on January 12, 1993, I issued Executive Order No. 79 directing the State Treasurer to adopt procedures for imposing competitive bidding requirements on these areas of exception under current law; and

WHEREAS, I have received a report from the State Treasurer which recommends a series of positive changes to the way our government awards contracts in areas that are currently exempted from competitive bidding; and

WHEREAS, these proposals, for the first time, would require each and every State government entity, including all State authorities, to award underwriting and bond counsel contracts on the basis of open and public competition; and

WHEREAS, these proposals, for the first time, would require each and every State government entity, including all State authorities, to award architectural, engineering, and other professional contracts on the basis of open and public competition; and

WHEREAS, consistent with the letter and spirit of Executive Order No. 79(1993), these proposals would put procedures into place that significantly exceed the threshold requirements of the State's current bidding laws, as set forth in P.L. 1954, c.48 (C.52:34-6 et seq.); and

WHEREAS, these proposals represent a creative solution to the problem of imposing standardized, competitive procedures on all of State government while also allowing sufficient flexibility to accommodate the unique needs of the many different functions of government; and

WHEREAS, by implementing these proposals immediately, we can take yet another step forward in our steady attempts to reform government—an effort that has included requiring greater reliance on market competition for awarding State leases, as implemented through Exeuctive Order No. 65(1992);

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

1. It is hereby the policy of the State of New Jersey that all bonds, notes, or similar instruments shall be issued on the basis of competitive bidding, in accordance with the procedures set forth in the State Treasurer's report to me dated May 3, 1993. In particular, these procedures shall establish a presumption that, for any and all issuances of bonds, notes, or other instruments, the issuing department, authority, or instrumentality shall select a qualified underwriter on the basis solely of price, as determined by sealed bids submitted after public notification. In addition, this procedure shall be consistent with Executive Order No.

84 implementing the State's minority and women set-aside program. Under extraordinary circumstances and only for good cause shown, the State Treasurer may approve written requests to issue bonds, notes, or other instruments on the basis of a negotiated sale, but only upon a prior written and publicly disclosed finding by the State Treasurer setting forth in detail the justification for granting such approval.

2. Furthermore, it is hereby the policy of the State of New Jersey that any contract or retainer agreement with an attorney or law firm in connection with a particular issuance of bonds, notes, or other instruments, shall be awarded on the basis of open and fair competition, in accordance with the procedures set forth in the State Treasurer's report to me dated May 3, 1993. In particular, the State Treasurer shall establish procedures, applicable to all departments and authorities, for selecting bond counsel through a process of pre-qualification and sealed bidding. The pre-qualification process shall guarantee that law firms or attorneys serving as bond counsel possess the necessary professional expertise, credentials, and resources to undertake the proposed contract.

3. It is hereby the policy of the State of New Jersey that any contracts or agreements with any engineering, architectural, or similar professional firm shall be awarded on the basis of open and fair competition, in accordance with the procedures set forth in the State Treasurer's report to me dated May 3, 1993. In particular, the State Treasurer shall establish procedures, applicable to all departments and authorities, for selecting qualified engineering, architectural, and other professional services through a process of sealed bidding or fee competition.

4. All authorities which are by law required to submit their minutes, resolutions, or actions to me for my approval or veto shall fully cooperate with the State Treasurer in the implementation of this Order, and shall promptly furnish him with any and all information which he may from time to time request.

5. The State Treasurer shall continuously monitor the implementation of this Order, and shall take care to solicit the views of the public and of the affected issuers. The Treasurer shall incorporate the views expressed by the public and the affected issuers insofar as such views are consistent with the letter and spirit of this Order.

RULE PROPOSALS

COMMUNITY AFFAIRS

(a)

OFFICE OF THE COMMISSIONER

Department Records

Proposed Readoption with Amendments: N.J.A.C. 5:3.

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

Authority: N.J.S.A. 52:27D-3(f), 55:13B-7, 52:27D-201, 52:27D-203, 52:27D-124, 46:3B-5 and 52:27C-24.

Proposal Number: PRN 1993-307.

Submit written comments by July 7, 1993 to:

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

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), the chapter entitled "Office of the Commissioner," N.J.A.C. 5:3, is scheduled to expire on September 1, 1993. The Department proposes to readopt the chapter under the more descriptive title of "Department Records."

P.L. 1963, c.73 provides that all records maintained by State agencies, other than those designated either by statute or by rule as nonpublic, are deemed to be public records subject to inspection and examination and available for copying. The Department has reviewed the categories of nonpublic records that it had previously established by rule and finds that categorizing them as nonpublic continues to be appropriate because of the sensitive nature of the matters with which they deal. To the existing categories, the Department proposes to add financial, organizational and other records pertaining to the business operations of certain companies from whom information is required by the Department in connection with any code enforcement program.

The fact that a record is categorized as nonpublic does not render it immune from discovery in litigation or from examination in any official investigative proceeding.

A new rule is proposed concerning requests for voluntary submission of Social Security numbers and an amendment to ensure their confidentiality. The purpose of this new rule is to ensure that any collection or use of Social Security numbers by the Department is in conformity with applicable Federal law. Since this rule has Department-wide applicability, any other rule concerning Social Security numbers must be construed and applied in conformity with it.

Social Impact

The Attorney General's office has advised the Department that, except as otherwise provided under Federal law, it may not require persons with whom it deals to provide their Social Security numbers, but that it is not prohibited from adopting rules providing for voluntary disclosure, provided that it complies with all requirements of Federal law. All existing rules authorizing collection of this information must be construed in conformity with this rule.

Social Security numbers are used for criminal background and credit checks of participants in several Department programs involving licensing, certification, registration, and assistance of various sorts.

The amendments to the rules on nonpublic records at N.J.A.C. 5:3-2.1(a)3 are intended to assure that Social Security numbers will not be disclosed even if they are included in an otherwise public record, and at N.J.A.C. 5:3-2.1(a)5, to protect proprietary information that is submitted to the Department with the expectation that it will be used only for the Department's purposes and will not be subject to being divulged to competitors or other outsiders.

The rules proposed for readoption, and the amendments, are expected to have a positive social impact, in that the Department will be able to carry out its duties effectively, without compromising the confidentiality of information entrusted to it by members of the public.

Economic Impact

Readoption of the chapter, with the amendments and new rule, is not expected to have any discernible economic impact, since the only cost involved is the reprinting of Department forms to conform to the Federal law. There is no cost imposed by this chapter or the amendments and new rule upon any member of the public who provides information to the Department or who seeks access to information held by the Department.

Regulatory Flexibility Analysis

The chapter proposed for readoption with amendments concerns records maintained by the Department of Community Affairs; that is, what is considered public record and what is considered not public, and which may not be divulged. The rules also specify, as indicated in the Summary, what portions of public records (Social Security numbers) are considered nonpublic. The rules control information submitted to the Department and information released by the Department, both activities engaged in by small businesses, as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. There are no costs imposed by the rules upon such small businesses. The provisions of the rules provide the benefit of protection of proprietary information to those businesses required to provide information to the Department in connection with any code enforcement program.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 5:3.

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

CHAPTER 3
[OFFICE OF THE COMMISSIONER] **DEPARTMENT RECORDS**

SUBCHAPTER 1. [(RESERVED)] **GENERAL PROVISIONS**

[SUBCHAPTER 2. NONPUBLIC RECORDS]

5:3-[2.1]**1.1** Nonpublic records

(a) Throughout the entire Department of Community Affairs, the following shall not be deemed to be public records subject to inspection[,] **and** examination and available for copying pursuant to P.L. 1963, c.73:

1. (No change.)

2. All personnel records, job applications and statements filed pursuant to the Department of Community Affairs' Code of Ethics[.]; **and**

3. Any Social Security number submitted to the Department by any person. If any otherwise public record contains a Social Security number, the Social Security number shall be concealed or removed from the document before it is made available for public inspection, examination or copying.

(b) (No change.)

(c) The following records of the Division of Housing and Development are also deemed to be nonpublic records:

1.-4. (No change.)

5. All records containing financial, organizational or other information pertaining to the business operations of any firm or company required to provide information to the Department in connection with any code enforcement program.

5:3-1.2 Social Security numbers

(a) Except as otherwise provided by Federal law, no division, bureau or other unit within the Department of Community Affairs may require any person to submit his or her Social Security number as a condition for acceptance of an application for licensure, certification, registration or assistance.

(b) Units within the Department of Community Affairs responsible for the enforcement of the Rooming and Boarding House Act of 1979, the State Uniform Construction Code Act, the Uniform

Fire Safety Act, the New Home Warranty and Builders' Registration Act and the Prevention of Homelessness Act may request voluntary submission of Social Security numbers for use in connection with criminal background checks or credit checks needed for purposes of licensure, certification, registration or assistance, as the case may be. No application shall be denied for failure to comply with any such request; provided, however, that a person who refuses to submit a Social Security number may be required to submit such other information as the Department may require in order to determine an applicant's eligibility for licensure, certification, registration or assistance, as the case may be.

(c) Any form used by any unit within the Department to request submission of a Social Security number shall include the following:

1. A statement as to whether provision of the Social security number is mandatory or voluntary;

2. A citation of the statute or rule (which, in the case of a request for voluntary submission, shall be this section, together with N.J.S.A. 55:13B-7, 52:27D-201, 52:27D-203, 52:27D-124, 46:3B-5 or 52:27C-24, whichever may be applicable) that authorizes the Department to require or request the Social Security number; and

3. A statement of the use or uses that the Department will make of the Social Security number.

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Uniform Construction Code
Prior Approvals
Abandoned Wells

Proposed Amendments: N.J.A.C. 5:23-1.4, 2.16 and 2.17

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

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

Proposal Number: PRN 1993-308.

Submit written comments by July 7, 1993 to:

Michael L. Ticktin, Esq.
Chief, Legislative Analysis
Department of Community Affairs
CN 802
Trenton, NJ 08625
Fax No. (609) 633-6729

The agency proposal follows:

Summary

The Bureau of Water Allocation of the Department of Environmental Protection and Energy has brought to the Department of Community Affairs' attention a serious problem that can be most effectively and efficiently addressed through the construction code enforcement process. That problem involves the potential for contamination of groundwater that exists whenever a well is abandoned but is not properly sealed. Since the well leads directly into the aquifer, it provides a pathway by which pollutants can enter the aquifer and make the water unsafe for human consumption.

The Bureau of Water Allocation (BWA) has established requirements for the sealing of abandoned wells. These are codified at N.J.A.C. 7:9-9.1. BWA has had a problem, however, in that it is not able to enforce its rules unless it is advised that there is a well that is unsealed and is being abandoned. Since construction permits are required both for demolition and for connection to public water lines, the two situations in which wells are most likely to be abandoned, the officials who enforce the Uniform Construction Code are in an excellent position to assist BWA in its enforcement efforts.

The intent of these amendments is to establish a procedure whereby construction officials can provide the assistance that BWA requires. Assurance of compliance of abandoned wells with the BWA rules is made a prior approval that is a precondition to the issuance of a construction permit or certificate of occupancy or approval, as the case may be. (Other changes are also made to the prior approval list to update terminology and include a reference to Pinelands review.)

The construction official is required to notify BWA any time that an application is made for a certificate of occupancy or approval for connection to a public water supply for a property currently or previously served by a well that has not been certified by a licensed well driller as having been properly sealed within 15 days of application for the certificate of occupancy or approval or actual connection, whichever comes first. Construction officials are also required to notify BWA any other time they become aware of an abandoned well that has not been properly sealed. Additionally, no permit will be issued for demolition of a structure currently or previously served by a well until such a certification is obtained from a licensed well driller.

Social Impact

These amendments will have a positive social impact in that they will provide a procedure whereby construction officials will assist BWA in preventing groundwater contamination, thereby protecting the health, safety and welfare of that portion of the public that is dependent upon groundwater.

Economic Impact

The amendments do not impose any requirement upon property owners that does not already exist under BWA rules. However, with these amendments, the likelihood of effective enforcement is enhanced, thereby making it more likely that property owners who would prefer to save money by not sealing their wells properly will now have to contend with local construction code officials and inspectors who provide information to BWA that it might not otherwise be able to obtain and who make sure that BWA requirements are met.

Regulatory Flexibility Statement

Creating a more effective enforcement system through interdepartmental cooperation will result in greater success in securing the sealing of abandoned wells, whether owned by small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., or by other owners. The requirements imposed upon owners are unchanged; they are just more likely to be enforced. In the interest of public health, safety and welfare, it is necessary that this improved enforcement apply to all unsealed wells equally, regardless of the size or form of business organization of the owner.

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

5:23-1.4 Definitions

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

...

"Prior approvals" means the necessary certifications or approvals [of] **issued or authorized by** any Federal or State agency, or any political subdivision of the State, which are not inconsistent with this chapter[,] and which are conditions precedent to the issuance of a construction permit or a certificate of occupancy **or approval, as the case may be,** which shall include, but not be limited to, the following:

1. Zoning;
2. Soil erosion and sediment control;
3. Highway curb cuts;
4. Water and sewer [service extension permits; and] **treatment works approvals;**
5. Coastal areas facilities review; [and]
6. Compliance of underground storage tank systems with N.J.A.C. 7:14B[.];

i. An approval granted by either the Department of Environmental Protection **and Energy** or the construction official by authority of N.J.A.C. 7:14B shall be deemed to be a prior approval[.];

7. Pinelands review; and

8. Compliance of abandoned wells with N.J.A.C. 7:9-9.

i. Compliance with N.J.A.C. 7:9-9.1 shall be evidenced by a certification issued by a well driller licensed by the Department of Environmental Protection and Energy.

...

5:23-2.16 Construction permits—procedure

(a)-(j) (No change.)

(k) Notice regarding wells: In the event that an application is made for a certificate of occupancy or certificate of approval for

connection to a public water supply for a property either currently or previously served by a well not certified by a licensed well driller as having been sealed in accordance with N.J.A.C. 7:9-9, the construction official shall not issue the certificate until the certification by the licensed well driller has been submitted. In the event that no such certification is submitted to the construction official within 15 days following either application for the certificate of occupany or approval or connection to the public water supply, whichever comes first, the construction official shall give notice of the absence of a certification to the Bureau of Water Allocation, New Jersey Department of Environmental Protection and Energy, CN 029, Trenton, NJ 08625. Notice shall also be given by the construction official to the Bureau of Water Allocation in the event of any demolition activity found to have been undertaken without a permit at a building or premises currently or previously served by a well and in any other case in which no permit application for demolition has been made but the construction official becomes aware that a well has been or is about to be abandoned without having been sealed by a licensed well driller.

5:23-2.17 Demolition or removal of structures

(a) Service connections: Before a structure can be demolished or removed, the owner or agent shall notify all utilities having service connections within the structure, such as water, electric, gas, sewer and other connections. A permit to demolish or remove a structure shall not be issued until [a release is] **releases are** obtained from [the] **all** utilities **that provided service to the property,** stating that their respective service connections and appurtenant equipment, such as[,] meters and regulators, have been removed or sealed or plugged in a safe manner.

1. In the event that there is a well on the property that has been abandoned, or that will be abandoned in conjunction with the proposed demolition, a permit to demolish or remove a structure on that property shall not be issued until a certification has been obtained from a well driller licensed by the Department of Environmental Protection and Energy indicating that the well has been sealed in accordance with N.J.A.C. 7:9-9. If such certification is not presented within 15 days of the application for the permit, the construction official shall give notice of the absence of such certification to the Bureau of Water Allocation.

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

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Uniform Construction Code Interpretations Ordinary Repairs

Proposed Amendment: N.J.A.C. 5:23-2.7
Proposed New Rule: N.J.A.C. 5:23-9.3

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

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

Proposal Number: PRN 1993-309.

Submit comments by July 7, 1993 to:

Michael L. Ticktin, Esq.
Chief, Legislative Analysis
Department of Community Affairs
CN 802
Trenton, New Jersey 08625-0802
Fax No. (609) 633-6729

The agency proposal follows:

Summary

Since April 4, 1981, the Department has had in effect an interpretation on ordinary repairs. This interpretation, formerly designated as "#8," explained that certain work that is routine or usual in nature does not require a permit under the Uniform Construction Code. The interpretation listed specific tasks that were required to be considered ordinary repairs by all enforcing agencies.

The proposed amendment and new rule update this interpretation by adding types of work that were not previously covered by the interpretation, while deleting or amending others. The items added include: ordinary elevator repairs, added pursuant to the adoption of the Elevator Subcode; more specific listing of plumbing ordinary repairs, including replacement of fixtures in single-family dwellings and replacement of traps, ballcocks and hose bib-valves; and a limited exemption for communication wiring, added because the power limitation of such wiring in most cases provides acceptable protection from fire initiation hazards and electrical shock in the listed exempt areas.

The proposed new rule also provides that replacement of more than 25 percent of the drywall in any room requires a permit. This change is being made because the opening of the walls makes it possible for dangerous electrical or plumbing situations to be detected. The replacement of receptacles in areas that are required to be ground-fault protected will also no longer be an ordinary repair. The reason for this is that there are special safety concerns associated with locations where these devices are required. Finally, repair to all air conditioning equipment will now be considered an ordinary repair. This, however, does not include the replacement of packaged systems. This change is being made because of the ambiguity of the reference to "same capacity" and a concern about electrical compatibility between existing and replacement units.

Social Impact

Because the majority of the items on the list have been exempted from permits by the interpretation that is being updated, the proposed amendment and new rule will have a minimal social impact. The new items to be exempted, such as replacement of certain plumbing fixtures in single family dwelling units, have minimal safety implications, so the health and safety of the public at large will not be compromised. The items being deleted from the previous interpretation, such as replacement of packaged air conditioning units, are thought to be inappropriately classified as ordinary repairs because of the safety concerns associated with them and their inclusion will therefore be in the interest of public safety.

Economic Impact

The proposed new rule reaffirms the Department's commitment to exempt from the Uniform Construction Code permit requirements those types of repairs that pose a minimal threat to public health and safety. These exemptions save time and money for potential applicants and code officials. The former are able to understand precisely what requires permits under the code; the latter need not concern themselves with such minor repairs.

Regulatory Flexibility Analysis

The proposed new rule exempts all businesses from permits for routine repairs. No differentiation is made based on business size. Thus, the rule will benefit all businesses by allowing them to perform ordinary repairs without going through the time and expense of applying for a permit.

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

5:23-2.7 Ordinary repairs

Ordinary repairs to structures may be made without application or notice to the construction official, but such repairs shall not include the cutting away of any wall, partition of portion thereof, the removal or cutting of any structural beam or bearing support, or the removal or change of any required means of egress, or rearrangement of parts of a structure affecting the exitway requirements, or any work affecting structural or fire safety, or any work which will increase the nonconformity of any existing building or structure with the requirements of the regulations; nor shall ordinary repairs include addition to, alteration of, replacement or relocation of any standpipe, water supply, sewer, drainage, [drain leader,] gas, soil, waste, vent or similar piping, electric wiring or mechanical or other work affecting public health or general safety.

5:23-9.3 Interpretation: ordinary repairs

(a) The following items are ordinary repairs and shall be treated as such by every enforcing agency. No permits for, inspections of, or notice to the enforcing agency of ordinary repairs shall be required. This is not an all-inclusive listing of ordinary repairs.

1. Ordinary building repairs include:

i. Exterior and interior painting;

ii. Installation, repair or replacement of any interior finishes of less than 25 percent of the wall area in any given room, in a one or two family dwelling. This shall include plastering and drywall installation;

(1) Vinyl wall covering of any amount is an ordinary repair;

(2) Paneling shall not be considered an ordinary repair;

iii. Wall papering at any location;

iv. The replacement of glass in any window or door. However, the replacement glass shall be of a type and quality that complies with the minimum requirements of the code;

v. The installation and replacement of any window or door, including garage doors, in the same opening without altering the dimensions or framing of the original opening. This shall include storm windows and storm doors. Any new window or door shall be of the same type and operation as the existing window or door and conform to the requirements of the code regarding means of egress and emergency escape;

vi. The repair of any non-structural member such as a railing;

vii. The repair or replacement of any interior or exterior trim, decoration or moldings;

viii. The replacement or installation of any flooring material, except carpeting, with a new material. However, installation of carpeting in one and two family dwellings will be permitted under ordinary repairs;

ix. The repair of existing roofing material not exceeding 25 percent of the total roof area within any 12 month period;

x. The repair of existing siding with like material not exceeding 25 percent of the total building exterior wall area within any 12 month period;

xi. The repair or replacement of any part of a porch or stoop which does not structurally support a roof above;

xii. The replacement or installation of screens;

xiii. The installation of any roll or batt insulation when installed adjacent to or not more than one and a half inches from an interior finish; and

xiv. Replacement of exterior rain water gutters and leaders.

2. Ordinary plumbing repairs include:

i. Replacement of hose bib valves in single family dwellings;

ii. Refinishing of existing fixtures. Relining of fixtures shall not be considered to be an ordinary repair;

iii. Replacement of ball cocks;

iv. Repair of leaks involving the replacement of piping between two adjacent joints only;

v. Clearance of stoppages;

vi. Replacements of faucets or working parts of faucets;

vii. Replacements of working parts of valves;

viii. Replacement of traps except for traps on culinary sinks in food handling establishments; and

ix. Replacement of a water closet or lavatory or kitchen sink in a single family dwelling with an approved similar fixture provided that no change in the piping arrangement is made.

3. Ordinary electrical repairs include:

i. The replacement of any receptacle, switch, or lighting fixture rated at 20 amps or less and operating at less than 150 volts to ground with a like or similar item. Replacement of receptacles in locations where ground-fault circuit interrupter protection is required in the electrical subcode, shall not be considered ordinary electrical repairs;

ii. Repairs to any installed electrically operated equipment such as doorbells, communication systems, and any motor operated device. Provided, however, that if fire protection systems are interrupted for repairs the fire official shall be notified in accordance with the building subcode; and

iii. Installation of communications wiring as covered by article 800 of the electrical subcode in one and two family dwellings, or the alteration/rearrangement of existing communications wiring in other occupancies provided however that the rearrangement does not involve penetration of a fire rated assembly and is not in a hazardous location as defined in chapter 5 of the electrical subcode.

4. Ordinary fire protection repairs include:

i. The replacement of any sprinkler or smoke detector or heat detector head with a like device; and

ii. The repair or replacement of any component of a fire alarm or smoke and heat detection equipment.

5. Ordinary heating ventilation and air conditioning repairs shall include:

i. Replacement of motors, pumps and fans of the same capacity;

ii. Repair and replacement of heating, supply and return piping and radiation elements, which does not require rearrangement of the piping system;

iii. Repair and replacement of duct work;

iv. Repair of air conditioning equipment and systems; and

v. Repair or replacement of control devices for heating and air conditioning equipment.

6. Ordinary elevator repairs include:

i. The following work on elevator brakes:

(1) Installation of new linings;

(2) Replacement of brake switches, brake stand pivot bushings, and bearings or the reaming out and use of oversized pins. Replacement or repair of brake magnets, magnet coils and/or core sleeves;

(3) Renewal of phase splitting coils; and

(4) Re-babbitting of brake pin holes (gearless), and realigning of brake stands to pulleys.

ii. The following controller/selector repairs:

(1) Installation of overload relays and potential switches, and installation or replacement of reverse phase relays;

(2) Replacement of damaged resistance tubes, grids, broken controller panel sections, main power or brake rectifiers, power and light transformers, and microprocessor printed circuit boards. Replacement or reconditioning of dash pots and retarders. Replacement of a controller with a like or with the state of the art controller when only those features which are available on the existing controller will be made functional;

(3) Renewal of switch bases, armatures, hinge pins, coils, contacts and shunt leads; and

(4) Adjustment of controller to original design specifications.

iii. The following work on motor generators:

(1) Installation of four stem brush rigging on exciter, installation or renewal of bearing oil gauges, and renewal of sleeve or ball bearings;

(2) Replacement of generator armatures, commutators, commutator brushes, and turning down and undercutting of commutators;

(3) Rewinding of generator armatures, stators and field controls;

(4) Removal for testing on a work bench, reinsulating, banding and reinstallation of motor generators; and

(5) Repair of solid state drives and adjustments of generator compounding.

iv. The following work on hoist motors:

(1) Installation or renewal of bearing oil gauges, renewal of sleeve or ball bearings, and re-babbitting of sleeve bearings (gearless);

(2) Replacement of motor armatures, rotors, motor collector rings, commutators, commutator brushes, and turning down and undercutting of commutators;

(3) Rewinding of stators, armatures, and field coils; and

(4) Removal for testing on a work bench, reinsulation, banding and reinstallation of hoist motors and realignment of motors to worm shafts.

v. The following work on machines:

(1) Installation of new demountable drive sheave rims, new drive shafts, new integral drive sheaves, split couplings;

(2) Replacement of worms, gears, worm shaft housings, thrust bearings, thrust housings, external ring gears and pinions, machine drums, solid drive sheaves with demountable drive sheaves, and sheave bearing. Replacement or repair of stop motion switches, slack cable switches, replacement of drive sheave linings. Regrooving of drive sheaves;

(3) Re-babbitting of main bearings, external gears and bearings, and worm shaft housings;

(4) Renewal of sleeve bearings, drum buffers, and drum shafts;

(5) Re-securing of loose brake pulleys and realignment of brake pulleys, with motor gear shaft; and

(6) Removal of bearing shims.

vi. The following work on hoist ropes, compensating ropes and compensating chains:

(1) Replacement or re-socketing of hoist ropes and replacement of compensating ropes or chains, governor ropes, and hitches; and

(2) Shortening of hoist ropes due to a rope stretch.

vii. The following work on governors:

(1) Re-calibration, sealing, and reconditioning of governors, or replacement of governors with like equipment; and

(2) Replacement or reconditioning of governor rope tension sheaves.

viii. The following work on overhead, deflector, car and counterweight sheaves:

(1) Replacement or repair of sheaves, sheave bearings and sheave shafts; and

(2) Re-babbitting of sheave bearings.

ix. The following work on hoistways:

(1) Replacement of traveling cables and other hoistway wiring;

(2) Repair of counterweights, hoistway switches, hydraulic pistons, oil lines in the pit, and repacking of packing glands; and

(3) Repair or replacement of hoistway door equipment, rollers relating cables, gibs, hall buttons, lanterns, position indicator stations, and all existing related equipment, selector tapes, cables, dust covers, toe guards and hoistway fascia, and repair or replacement of all existing pit equipment with like equipment.

x. The following work on rails and guides:

(1) Realignment or replacement of main or counterweight rail sections with like products; and

(2) Repair or replacement of guide shoe liners or car and counterweight guides with like product.

xi. The following work on cabs:

(1) Installation or replacement of main and auxiliary car operating panels, emergency lighting, communication devices, door protective and reopening devices, car position indicators, and in-car lanterns;

(2) Repair or replacement of operating station on top of cars, door operating devices, motors, linkages, hangers, etc., hoistway door drive mechanisms, clutches, etc., side emergency exit latching devices and electrical switches, floor leveling and selector drive devices, terminal slow down and limiting devices, load weighing devices (on top of car and under car isolation), keyless entry and security devices, top of car intrusion devices, closed-circuit TV surveillance devices, lighting fixtures in the car on top of the car and under the car; and

(3) Replacement of ceilings with code approved materials, and of door saddles, cab flooring, walls and panels with materials equivalent to those being replaced in respect to weight and fire resistance.

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Uniform Construction Code

Certificate of Occupancy Requirements

Proposed Amendment: N.J.A.C. 5:23-2.23

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

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

Proposal Number: PRN 1993-310.

Submit written comments by July 7, 1993 to:

Michael L. Ticktin, Esq.
Chief, Legislative Analysis
Department of Community Affairs
CN 802
Trenton, New Jersey 08625-0802
Fax No. (609) 633-6729

The agency proposal follows:

Summary

The proposed amendment would make it mandatory for building owners to have a test and balance report submitted after the building is completed but prior to a certificate of occupancy being issued. Such a test and balance report would insure that the building ventilation system is capable of meeting the requirements of ASHRAE 62-89. This standard is incorporated into the Uniform Construction Code and was adopted to help ensure that indoor air quality is maintained in the building.

The purpose of such tests is to provide assurance to building owners and occupants that the building's ventilation system is capable of performing adequately and delivering adequate amounts of outdoor air at the time of construction. These records would be instrumental to agencies and employers responding to indoor air quality complaints.

The proposed amendment would apply only to buildings in use groups E (educational) and B (business), since most indoor air quality complaints originate in such buildings.

Social Impact

The proposed amendment will help ensure a healthful working environment for occupants of newly-constructed or renovated buildings designed for educational and business uses. The amendment will also aid building owners in identifying causes of any indoor air quality problems that may arise.

Economic Impact

The proposed amendment would be applicable only to Class I and II buildings (larger buildings). It is already common practice for design professionals to include a test and balance report in the specifications for such buildings. Therefore, no significant additional costs are anticipated. On the other hand, to the extent that this requirement helps to ensure adequate ventilation in buildings that are subject to it, there will be an ongoing positive economic impact as a result of fewer employees being unable to work and becoming sick because of poor ventilation.

Regulatory Flexibility Analysis

The proposed amendments apply to Class I and II business and educational buildings of Use Groups B and E, some of which may be owned by small businesses, as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Buildings of this type are less likely, however, to be owned by such small businesses than by larger ones. The building owners would be required to have a test and balance report submitted to the enforcing agency after the building is completed, as a part of the application for a certificate of occupancy, in order to assure that the building ventilation system is capable of meeting the ASHRAE standards. The report may be submitted by a licensed engineer or by a test and balance professional certified by the Associated Air Balance Council or the National Environment Balancing Bureau. The costs are as delineated in the Economic Impact. Since the standards imposed by these rules are necessary for the maintenance of public health and safety, the Department has not differentiated between small and large businesses in the rules.

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

5:23-2.23 Certificate of Occupancy requirements

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

(f) Application: A written application for a certificate of occupancy shall be filed with the enforcing agency by the owner or his agent. The application shall include the following:

1.-5. (No change.)

6. A set of "as built" or amended drawings if the building or structure deviates from the approved plans filed with the construction permit application[.]; **and**

7. A test and balance report for mechanically ventilated Class I and II buildings of Use Groups B and E submitted by a licensed professional engineer or by a test and balance professional certified by the Associated Air Balance Council or the National Environmental Balancing Bureau. The signed report shall include:

i. Minimum quantity of outdoor air required by code;

ii. Minimum quantity of outdoor air specified in the design;

iii. Actual measured outdoor cubic feet/minute (CFM) or a derived quantity, if actual measurement is not possible; and

iv. Actual measured total CFM.

(g)-(l) (No change.)

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Uniform Construction Code
Private Enforcing Agencies

Proposed Amendments: N.J.A.C. 5:23-4.4, 4.5, 4.5A, 4.12, 4.14, 4.18 and 4.20

Authorized By: Stephanie R. Bush, Commissioner, Department of Community Affairs.
Authority: N.J.S.A. 52:27D-124.
Proposal Number: PRN 1993-296.

A **public hearing** on this proposal will be held on Tuesday, June 22, 1993, at 10:00 A.M., at:

William Ashby Department of Community Affairs Building
101 South Broad Street
Trenton, New Jersey

Submit written comments by July 7, 1993 to:

Michael L. Ticktin, Esq.
Chief, Legislative Analysis
Department of Community Affairs
CN 802
Trenton, New Jersey 08625
Fax No. (609) 633-6729

The agency proposal follows:

Summary

On February 18, 1993, Governor Florio signed P.L. 1993, c.47, which repealed the statutory requirement that fees charged by private on-site inspection agencies be identical to those charged by the Department of Community Affairs when it serves as a local enforcing agency. Instead, the Department is authorized to adopt rules setting the amounts of fees to be charged by the private agencies, subject only to the condition that such fees not be more than those charged by the Department.

These proposed amendments, which are intended, *inter alia,* to implement P.L. 1993, c.47, reintroduce the practice of having municipalities select private on-site inspection agencies by competitive bidding, subject only to determination by the governing body, after consultation with the construction official, that the agency would be able to effectively enforce the subcode(s) in the municipality. To make it possible for a municipality to determine which of several bidders is the low bidder, the proposed amendments require that the bid be expressed in terms of a percentage of the fees charged by the Department as enforcing agency. Since the statute requires that the private on-site agencies not charge higher fees than the Department, the percentage bid may not exceed 100 percent.

It should be noted that these proposed amendments, if adopted, will be prospective only, and that existing contracts will continue in effect, with fees the same as those charged by the Department, until the expiration date of the contract.

The Department recognizes that competitive pressures could conceivably result in excessive cost-cutting by private agencies, with consequent harm to the health, safety and welfare of the public. Accordingly, new workload, staffing and operational reporting requirements for private agencies are established at N.J.A.C. 5:23-4.12(f) and 4.14, so that the Department can ensure that the health, safety and welfare of the public are adequately protected.

In addition, the proposed amendments:

1. Make it clear that contracts between municipalities and private enforcing agencies may be for one, two or three years, at the option of the municipality.

2. Make it clear that municipalities must pay for inspections performed by private enforcing agencies, even if no inspection fee is received by the municipality.

3. Establish a uniform procedure for municipalities to make payments to private enforcing agencies;

4. Make it clear that the "designated representatives" of a private enforcing agency in a municipality must be the persons actually serving as subcode officials there;

5. Require monthly reports on an agency's average response time after inspection requests are made, workload per inspector, payments received from each municipality and the total amount billed to each municipality, as well as annual reports pertaining to the finances and organization of the agency;

6. Make it clear that the liability insurance that private enforcing agencies are required to carry must be general liability insurance;

7. Eliminate seemingly redundant language concerning administrative charges of municipalities;

8. Make employees of private enforcing agencies ineligible to serve as acting subcode officials;

9. Make explicit the requirement, which the Department believes to be implicit in the current rules, that no separate charge is to be made for a certificate of compliance after a successful periodic inspection. The main relevance of this is to elevator inspections;

10. Require construction officials to file copies of executed contracts between private enforcing agencies and their municipalities with the Department at least 10 days prior to the effective date of the contract;

11. Establish procedures and requirements for soliciting bids from, and awarding contracts to, private enforcing agencies;

12. Permit compensation of employees of private enforcing agencies, whether full-time or part-time, only on a salaried or hourly basis;

13. Prohibit all payments to private agencies other than the fees set forth in N.J.A.C. 5:23-4.20, multiplied by the percentage established by contract;

14. Allow municipalities that use private agencies to include in their fees, for the purpose of covering their administrative expenses, an amount not exceeding 15 percent of the amounts paid to the private agencies; and

15. Establish a procedure for allocation of revenue from minimum fees and fees for certificates of occupancy and approval among officials (including private agencies) enforcing the building, fire protection, plumbing and electrical subcodes.

Social Impact

By allowing private on-site agencies to charge lower fees than those charged by the Department, the proposed amendments will allow those agencies to compete more effectively for the business of municipalities that might otherwise hire subcode officials or have the Department serve as the enforcing agency.

The other amendments are intended to further uniformity in adherence to the rules, facilitate Department monitoring of private enforcing agencies, and otherwise ensure that procedures are followed that are in the public interest.

The elimination of the practice of compensating employees of private enforcing agencies on a piece-work basis will be particularly beneficial, since it will eliminate an obvious incentive to the inspector to do as many inspections as possible in the least amount of time. If inspections are rushed, they cannot be as thorough as is necessary in the interest of public safety.

Economic Impact

Property owners who undertake construction in municipalities that contract with private on-site agencies may pay reduced fees for construction code services, if the private agencies see fit to compete for the right to provide subcode services in those municipalities.

Private enforcing agencies will no longer be able to profit through the appointment, outside of the prescribed contract procedure, of their employees as acting subcode officials.

To the extent that private enforcing agencies may have been acting in the mistaken belief that it was necessary for them to obtain more expensive forms of insurance, they may now be able to reduce their insurance costs, in accordance with N.J.A.C. 5:23-4.14(e)5.

Since private enforcing agencies are required to use the Department's fee schedule, whether at 100 percent or at some lesser percentage, any separate charging for certificates of compliance after successful periodic inspections that they may be doing, without authorization under existing rules, will have to be discontinued.

Private enforcing agencies are likely to have to incur additional costs in order to comply with Department reporting requirements. The extent of such additional costs will depend on whether or not the agency already prepares reports for its own purposes that contain the required information.

Regulatory Flexibility Analysis

Private on-site agencies, which may or may not be "small businesses" as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., will be able to compete more effectively for business than they would be if their fees were the same as those of the Department, either by statute or by rule. The fees will be allowed to be set by each municipality, so long as the fees are less than those charged by the Department. Both small businesses and others will benefit from

this change, which will allow private on-site inspection agencies to be selected by competitive bidding. The new filing, bidding, reporting, recordkeeping and other obligations that are imposed on private on-site agencies are necessary in order to protect the public interest in the integrity of the code enforcement system, a matter directly related to public health, safety and welfare. The Department has determined that it is appropriate that these requirements be imposed uniformly, regardless of size or form of organization of the individual private enforcing agencies, and that no differentiation based upon business size be provided in these rules.

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

5:23-4.4 Municipal enforcing agencies—organization

(a) The municipality shall organize its enforcing agency in accordance with the ordinance adopted pursuant to N.J.A.C. 5:23-4.3 and to meet the following additional requirements:

1.-5. (No change.)

6. Acting appointments: A municipality shall appoint an acting construction official or subcode official any time the absence of such official [will] **would** impede orderly administration of the Uniform Construction Code and other duties mandated by the municipality[; but in no event may the time period exceed the statutory period of 20 business days]. Acting appointments shall be accomplished by any mechanism acceptable to the municipality; providing, however, that a written record shall be kept. Notice to the Department shall be provided within seven days any time an appointment is made for more than 30 days. Acting appointments may not be made for longer than 60 days, nor may they be extended or renewed beyond 60 days unless specific authority to do so is granted in writing by the [department] **Department.**

i. Only an individual licensed as a construction official may be appointed as an acting construction official and only an individual licensed as a subcode official in a particular subcode may be appointed as an acting subcode official for that subcode. The technical license level of an acting construction or subcode official shall be superior or parallel to the enforcing agency classification of the municipality or such municipal classification shall be downgraded to the technical license level of the acting official for the period of time in the position. Employees of private on-site inspection agencies shall not serve as acting construction officials **or acting subcode officials.**

ii.-iv. (No change.)

7.-8. (No change.)

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

5:23-4.5 Municipal enforcing agencies; administration and enforcement

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

(h) Duties of construction officials:

1. The construction official shall enforce the regulations and:

i.-xix. (No change.)

xx. Comply with any local procedures which may be established by the governing body to provide the municipal search officer with information concerning construction permits and certificates of occupancy[.]; **and**

xxi. File with the Department any executed contract with a private on-site inspection agency at least 10 days prior to the effective date of the contract.

2. (No change.)

(i)-(j) (No change.)

5:23-4.5A Selection of private on-site inspection and plan review agencies

(a) (No change.)

(b) Prior to the selection of an [onsite] **on-site** inspection agency, the local enforcing agency shall notify each private [onsite] **on-site** agency authorized by the Department to serve as a subcode official for the subcode(s) to be contracted. The notification, **which shall specify the term of the proposed contract,** shall be **delivered** by certified mail, return receipt requested. No other notice shall be required.

1. The notice shall specify that a written, sealed [proposal] **bid** is requested, [in accordance with] **together with a qualification statement containing the information set forth in** N.J.A.C. 5:23-4.5A**(d)**, shall identify the subcode(s) for which a [proposal] **bid** is requested, shall state the date and time by which [proposals] **bids and accompanying qualification statements** must be submitted, which shall not be less than 30 days following the date of mailing of the request for [proposals] **bids**, and shall state the name and address of the person to whom [proposals] **bids and accompanying qualification statements** shall be mailed or delivered.

2. All bids shall set forth the fees which the private on-site agency proposes to charge for work done by it in the municipality. Such fees shall be expressed as a uniform percentage, by subcode, which shall not exceed 100 percent, of the fees charged, as of the date on which the bids are opened, by the Department when it serves as an enforcing agency, which fees are set forth at N.J.A.C. 5:23-4.20.

3. The contract shall be awarded to the bidder that offers to charge the lowest percentage of the Department's fees and is determined by the governing body, after consultation with the construction official, to be able to effectively enforce the subcode(s) for which the bid was submitted.

4. The amounts to be charged by a private on-site agency awarded a contract pursuant to this section shall be the amounts set forth in N.J.A.C. 5:23-4.20 and/or 5:23-12.6(a) and (b) as of the date of the opening of the bids, multiplied by the percentage set forth in the bid. Such amounts shall be in effect for the entire contract period and shall not be affected by any subsequent increase in the fees set forth in N.J.A C. 5:23-4.20 or 5:23-12.6(a) and (b).

(c) Written, sealed [proposals] **bids, together with separately sealed qualification statements containing the information required by (d) below,** shall be submitted to the municipal officer responsible for receiving bids at or before the date and time established in the original notice of request for proposals. The said municipal officer shall forward all such [proposals] **qualification statements** received to the construction official, **who shall evaluate each qualification statement and advise the governing body, in writing, as to whether, in the construction official's judgment, each private agency submitting a proposal would be able to effectively enforce the subcode(s) for which the proposal is being submitted in the municipality.**

(d) All [proposals] **qualification statements** submitted by private [onsite] **on-site** inspection agencies to serve as subcode officials shall be in writing and shall contain all of the information required by this subsection. Any omission of required information shall allow the local governing body the option to automatically disqualify the proposal. No additional information shall be required. The required information is as follows:

1.-5. (No change.)

6. The manner in which the agency compensates each class of employees [(for example,], **which shall be one of the following only:** full-time salaried, part-time salaried, full-time hourly[,] **or** part-time hourly[, piece work]). Where employees of a given class are compensated in more than one way, a percentage breakdown shall be provided;

7.-13. (No change.)

(e) When considering [proposals] **qualification statements** submitted by authorized [onsite] **on-site** inspection agencies **seeking** to act as a subcode official, [local enforcing agencies] **construction officials** and governing bodies shall base their [selection] **determination as to whether an authorized on-site inspection agency would be able to effectively enforce the subcode** on the following criteria:

1.-6. (No change.)

(f) [It is recognized that the criteria set forth in (e) above are subjective and cannot be readily quantified. Inspection services being essentially technical and professional in nature, an agency cannot be chosen on a quantitative basis. These criteria are intended to set forth a framework within which the construction official can exercise his professional judgment and determine which among several agencies is most likely to provide the highest quality, and most responsive, code enforcement services.] **After the governing body, having consulted with the construction official, determines whether each private agency that has submitted a bid and qualifica-**

tion statement would be able to effectively enforce the subcode(s) for which code enforcement services are required in the municipality, it shall, at a regularly scheduled or special meeting, unseal and receive the bids of the private agencies that have been found to be able to effectively enforce such subcodes and shall accept the bid among such bids that sets forth the lowest percentage of the fees charged by the Department.

(g) [The construction official shall, within 15 days of receipt of the proposals, recommend to the governing body having jurisdiction the acceptance of one of the proposals. The recommendation shall be in writing.] **The governing body shall accept the successful low bid, or reject all bids, within 30 days of the bid opening and shall enter into a contract with any successful bidder not less than 30 days prior to the beginning of the contract period.**

(h) [If the governing body accepts the recommendation of the construction official, it shall enter into a contract with the agency that submitted the recommended proposal in the manner prescribed by law.] **The municipality shall have the option of entering into a contract for one year, two years or three years.**

(i) [If the governing body does not accept the recommendation of the construction official and decides instead to award the contract to another agency, then the governing body shall advise each agency that submitted a proposal of this decision and of the reasons for rejecting the construction official's recommendation. Each agency shall be given an opportunity to comment before the governing body at a public hearing. At least seven days' prior notice of this public hearing shall be given to each agency by certified mail. After the conclusion of the hearing, the governing body, if it does not choose to reconsider the matter, shall enter into a contract with the agency which it has selected in the manner prescribed by law.] **The contract shall set forth the specific amounts to be paid by the municipality to the private enforcing agency for each code enforcement service. Such amounts shall, in all cases, be the amounts set forth in N.J.A.C. 5:23-4.20, as of the date of the opening of the bids, times the percentage bid by the private agency. Such amounts shall continue in effect, without any change, for the duration of the contract.**

(j) The contract shall provide that amounts due to the private agency shall be paid as follows, if applicable, and shall be billed within 30 days of coming due and paid within 30 days of billing:

1. Twenty percent due upon issuance of the construction permit;

2. Sixty percent due within 30 days thereafter;

3. Twenty percent due upon completion, as evidenced by issuance of inspection sticker approval for the subcode;

4. Certificate of occupancy or certificate of approval charges due on issuance of the certificate; and

5. Elevator inspection charges due on issuance of certificate of compliance or notice of unsafe structure.

5:23-4.12 Private on-site inspection and plan review agencies; establishment

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

(f) Applications for reauthorization shall be filed with the Department at least 60 days prior to the scheduled expiration [for] **of** the current authorization from the Department.

1. The on-site inspection agency shall make current the information previously submitted to the Department.

2. The on-site inspection agency shall provide such additional information as the Department may request, **and in such detail as the Department may require in order to have a complete understanding of the operations of the agency and any related companies, including, without limitation, an audited financial statement for the preceding fiscal year of the agency, prepared and attested to by a New Jersey-licensed certified public accountant, including the following:**

i. A detailed income and expense statement, including, without limitation, a profit and loss statement, for all operations in New Jersey, with those operations subject to the Uniform Construction Code and those operations not so subject broken out separately;

ii. A detailed income and expense statement, including, without limitation, a profit and loss statement, for the entire operations of the company, both in and out of New Jersey;

iii. The same information as required in (f)2i and ii above for any subsidiary or parent company or any company in which an officer, partner or person with at least a 10 percent ownership interest in the agency is an officer, partner or holder of at least a 10 percent ownership interest;

iv. Detailed information on any distribution of profits, stock dividend or other removal of assets from the agency or from any subsidiary or parent company or any company in which an officer, partner or person with at least a 10 percent ownership interest in the agency is an officer, partner or holder of at least a 10 percent ownership interest;

v. Detailed information on any outstanding secured or unsecured debt of the agency or of any subsidiary or parent company or any company in which an officer, partner or person with at least a 10 percent ownership interest in the agency is an officer, partner or holder of at least a 10 percent ownership interest; and

vi. Detailed information on any outstanding loans or investments made by the agency or by any subsidiary or parent company or by any company in which an officer, partner or person with at least a 10 percent ownership interest in the agency is an officer, partner or holder of at least a 10 percent ownership interest.

3. The application shall be acccompanied by the fee established by [this chapter] **N.J.A.C. 5:23-4.21.**

4. The Department may conduct such additional investigations of the applicant as it may deem necessary.

Recodify existing 1. and 2. as **5. and 6.** (No change in text.)

5:23-4.14 Private enforcing agencies—administration and enforcement

(a) (No change.)

(b) The on-site inspection agency shall provide the Department with the following:

1. A copy of each executed contract and all amendments [pursuant to subparagraph iii of this paragraph.] **thereto, to be submitted at least 10 days prior to their effective date;**

2. A list of the municipalities served, and a current list of names, addresses and telephone numbers of the [agencies.] **agency's** designated representatives **actually serving as subcode officials** in each municipality, who may be contacted in connection with routine matters during normal working hours[;] and, in the event of emergency, during other than normal working hours[.];

3. A list of names, certification numbers, addresses and telephone numbers of all technical personnel employed[.]; **and**

4. Monthly reports, due on the 15th of every month covering the period of the previous month, setting forth the following:

i. The agency's median response time, defined as the elapsed time between the receipt of an inspection request by the construction official or subcode official, whichever occurs first, and the time at which the inspection is performed, expressed to the nearest whole hour. For purposes of this report, the 24 hour periods of Saturday, Sunday or any official holiday shall not be counted as elapsed time, but all other time shall be counted;

ii. The number of inspections performed in each municipality, and the number of inspections performed in each municipality more than 72 hours after the receipt of an inspection request by the construction official or the subcode official, whichever occurs first;

iii. The total number of inspections, broken down by subcode discipline, performed by the private agency during the reporting period and the total number of subcode officials and inspectors available during the reporting period, expressed as full-time equivalent (FTE). For purposes of this report, one FTE shall be the total number of subcode official and inspector hours worked during the reporting period divided by eight, times the number of working days in the reporting period. All days other than Saturdays, Sundays and official holidays shall be considered working days;

iv. The total payments received from each municipality during the reporting period; and

v. The total amount billed to each municipality during the reporting period.

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

(e) Each on-site inspection agency shall have the following responsibilities:

1.-4. (No change.)

5. To carry **general** liability insurance, at least in the amount of $1,000,000 for each person and each occurrence, to satisfy claims or judgments for property damage and/or personal injury arising out of the failure of its employees to properly discharge their duties and responsibilities.

6.-15. (No change.)

(f) (No change.)

(g) The amount charged to a municipality by a private agency for work subject to a minimum fee under N.J.A.C. 5:23-4.20(c)2 or for certificates of occupancy, certificates of approval and certificates of continued occupancy shall be the percentage set forth in a contract entered into in accordance with N.J.A.C. 5:23-4.5A, times the amount of the minimum fee or fee for a certificate of occupancy or certificate of approval, times the amount determined in accordance with this subsection.

1. In the case of work requiring inspections by four subcode officials or their designees, the allocation of the fee revenue shall be as follows:

i. Building subcode: 40 percent;

ii. Fire protection subcode: 20 percent;

iii. Plumbing subcode: 20 percent; and

iv. Electrical subcode: 20 percent.

2. In the case of work requiring inspections by fewer than four subcode officials or their designees, the allocation shall be among or between the subcodes involved in the proportions set forth in (g)1 above. (Thus, for example, in work involving only the building and plumbing subcodes, two-thirds of the fee (40/60) would be allocated to the building subcode and one-third of the fee (20/60) to the plumbing subcode.)

(h) Where plan review is performed more than one month before the construction permit is issued, or where a project does not go forward after a private on-site agency has performed plan review, then the municipality shall pay to the private agency 20 percent of the amount that would otherwise be due, which amount shall be determined by multiplying the relevant fee set forth in N.J.A.C. 5:23-4.20 by the percentage set forth in the contract between the municipality and the private agency entered into in accordance with N.J.A.C. 5:23-4.5A.

(i) Private on-site agencies shall bill for their services at least once monthly. Each bill shall specify the billing period and the amount currently due, amounts already paid, and any remaining balances, identified by permit number and totalled for the billing period.

(j) The private agency shall be paid for work performed even if the municipality receives no inspection fee for such work.

(k) Private enforcing agencies shall charge no fees other than the fees set forth in N.J.A.C. 5:23-4.20 multiplied by the percentage set forth in the contract between the private agency and the municipality. Private enforcing agencies shall furnish no services other than subcode enforcement services to municipalities and shall not receive any payments from municipalities for any other goods or services whatsoever.

5:23-4.18 Standards for municipal fees

(a)-(j) (No change.)

(k) Fees to be charged [to] **by** municipalities [by] **where** private [onsite] **on-site** inspection and plan review agencies [are as follows:

1. Where the local enforcing agency uses the services of a private onsite inspection and plan review agency to enforce one or more subcodes, then the fees charged to the municipality by the private onsite agency shall be identical to those charged by the Department pursuant to N.J.A.C. 5:23-4.20 and as provided in this paragraph.

i. Building subcode: Where a private onsite agency performs building subcode services, the fees charged to the municipality by the private agency shall be either the volume-based or cost-based fee, whichever type is appropriate, which are charged by the Department as set forth at N.J.A.C. 5:23-4.20.

ii. Plumbing subcode: Where a private onsite agency performs plumbing subcode services, the fees charged to the municipality by the private agency shall be the fees for plumbing fixtures and stacks which are charged by the Department as set forth at N.J.A.C. 5:23-4.20.

iii. Electrical subcode: Where a private onsite agency performs electrical subcode services, the fees charged to the municipality by the private agency shall be the fees for electrical fixtures and devices which are charged by the Department set forth at N.J.A.C. 5:23-4.20.

iv. Fire subcode: Where a private onsite agency performs fire subcode services, the fees charged to the municipality by the private agency shall be the sprinkler, standpipe, fire detector (smoke and heat), premanufactured fire suppression system, gas or oil fired appliances not connected to the plumbing system, kitchen exhaust system, incinerator and crematorium fees which are charged by the Department as set forth at N.J.A.C. 5:23-4.20.

v. Elevator safety subcode: Fees charged to the municipality when a private on-site agency performs inspections and witnesses tests shall be identical to the fees established by the Department at N.J.A.C. 5:23-12.6(a) and (b).

vi. Administrative surcharge: Municipalities using private onsite inspection and plan review agencies may add to the above fees an administrative surcharge of up to 15 percent of the relevant subcode(s) permit fee(s). The surcharge shall apply only to subcode areas for which the municipality has a contract with an onsite agency. In lieu of an administrative surcharge to fees charged by an onsite agency, a municipality may adjust its fee schedule up to 15 percent higher for this purpose.

2. Demolition and removal fees shall be charged as follows:

i. Where a private onsite agency performs one or more subcode services for demolitions or removals, the amount charged to the municipality by the private agency shall be a portion of the demolition or removal fees which are set forth at N.J.A.C. 5:23-4.20 as Departmental fees and which shall be as follows:

(1) Building subcode: 40 percent

(2) Fire subcode: 20 percent

(3) Plumbing subcode: 20 percent

(4) Electrical subcode: 20 percent

3. Sign fees shall be charged as follows:

i. Where a private onsite agency performs one or more subcode services for signs or billboards, the amount charged to the municipality by the private agency shall be as follows:

(1) Building subcode: The sign fees set forth at N.J.A.C. 5:23-4.20 as Departmental fees.

(2) Electrial subcode: The fees for electrical fixtures and devices set forth at N.J.A.C. 5:23-4.20 as Departmental fees.

4. Fees for certificates of occupancy and certificates of continued occupancy charged to the municipality by the private agency shall be the following portions of the fees for a certificate of occupancy and certificate of continued occupancy set forth at N.J.A.C. 5:23-4.20 as Departmental fees:

i. Building subcode: 40 percent;

ii. Fire subcode: 20 percent;

iii. Plumbing subcode: 20 percent; and

iv. Electrical subcode: 20 percent.

5. Where plan review is performed more than one month before the construction permit is issued, or where a project does not go forward after a private onsite inspection and plan review agency has performed plan review, then the municipality shall pay to the private agency 20 percent of the amount that would otherwise be due pursuant to this section.] **carry out subcode official responsibilities shall not exceed the amounts to be paid to those private agencies for those services, pursuant to the contract between the private agency and the municipality, by more than 15 percent.**

5:23-4.20 Departmental fees

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

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

1.-2. (No change.)

3. [Certificates] **Fees for certificates** and other permits[: The fees] are as follows:

i.-vi. (No change.)

vii. The fee for a certificate of approval or certificate of compliance certifying **that** the work done under a construction permit has been satisfactorily completed shall be $28.00, **except that there**

shall be no separate fee charged for a certificate of compliance issued after a successful periodic inspection.

viii.-ix. (No change.)

4.-9. (No change.)

ENVIRONMENTAL PROTECTION AND ENERGY

(a)

POLICY AND PLANNING

Environmental Hazardous Substances List and Industrial Survey List

Proposed Amendments: N.J.A.C. 7:1F-2.2 and Appendix A, and 7:1G-2.1 and 6.4

Authorized By: Scott A. Weiner, Commissioner, Department of Environmental Protection and Energy.

Authority: N.J.S.A. 13:1D-9, 34:5A-1 et seq. and 26:2C-1 et seq.

DEPE Docket Number: 33-93-04.

Proposal Number: PRN 1993-311.

Submit written comments by July 7, 1993 to:

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

The agency proposal follows:

Summary

The Department of Environmental Protection and Energy (Department) is proposing to delete three copper compounds from the reporting requirements of the Worker and Community Right to Know Regulations. N.J.A.C. 7:1G. These rules specify reporting requirements for inventories, transfers or releases of certain hazardous substances designated as Environmental Hazardous Substances (EHSs) in N.J.A.C. 7:1G-2.1. These reporting requirements apply to New Jersey businesses having Standard Industrial Classification codes specified in the Worker and Community Right to Know Act (hereafter, the Act), N.J.S.A. 34:5A-1 et seq.

On June 25, 1992, the Department received a petition from the Dry Color Manufacturers Association (DCMA), now known as the Color Pigments Manufacturers Association, to amend N.J.A.C. 7:1G-2.1 to delete three copper phthalocyanine compounds from the EHS list under the category "Copper and compounds." See 24 N.J.R. 2636(a). This exemption would eliminate the reporting requirements for these copper compounds under the Act. N.J.S.A. 34:5A-4.

The petition was sent to the Department in response to a June 24, 1991 decision by the United States Environmental Protection Agency (EPA) to delete these three copper compounds from the "Copper compounds" category list of toxic chemicals published pursuant to Title III of the Federal Superfund Amendments and Reauthorization Act (SARA) of 1986 because they were found to pose no threat to human health or the environment. The three compounds are: C.I. Pigment Blue 15, Phthalocyanine Blue, CAS No. 147-14-8; C.I. Pigment Green 7, Phthalocyanine Green, CAS No. 1328-53-6; and C.I. Pigment Green 36, Phthalocyanine Green CAS No. 14302-13-7.

The decision to delete the three copper compounds, published in the Federal Register at 56 Fed. Reg. 23,650, was based upon EPA's investigation that concluded that the copper ion cannot reasonably be anticipated to become available from any of the pigments at a level which induces toxicity. EPA also determined that there is no evidence that the three copper pigments cause or can reasonably be anticipated to cause environmental effects as specified under Section 313(d) of the Federal SARA. The EPA based its decision on the evaluation of all chemical and biological transformation processes that may generate copper ion from the phthalocyanine pigments. These included, but were not limited to hydrolysis, photolysis, abiotic and biotic degradations, abiotic and biotic anaerobic degradations, bioavailability of the ion when the compounds are ingested or inhaled, and bioaccumulation.

The Department reviewed the information submitted by the DCMA and applied the EPA's analysis indicating that the levels at which copper ion exhibits toxicity far exceed the expected limited availability of copper ion for the phthalocyanine pigments, and thus warranting, as EPA concluded, a low level of concern about the pigments' potential toxicity. With the removal of these compounds from the SARA Section 313 list, the Department has decided that the three phthalocyanine pigments should be expressly exempted under the category "Copper and compounds" from the EHS list. Amendments to the New Jersey Worker and Community Right to Know Act were passed in August 1991 (see N.J.S.A. 34:5A-4(a)) to incorporate the Federal SARA 313 list into the State's EHS list. At the same time, the Act was amended to require that the EHS list include all substances on the list developed and used by the Department in connection with the Industrial Survey Project. (See N.J.A.C. 7:1F, Appendix A.) This list includes copper and all chemical compounds and/or complexes containing copper. Therefore, in order to delete the phthalocyanine pigments from the EHS list, the Department is also proposing to delete these pigments from the Industrial Survey Project list.

On September 21, 1992, at 24 N.J.R. 3440(c), the Department published a notice in the New Jersey Register acknowledging its decision to grant DCMA's petition for rulemaking to delete the three copper pigments from the EHS list of chemicals subject to Right to Know reporting requirements. To reflect the August 1991 amendments to the Act concerning the EHS list, the Department is proposing to delete the three copper compounds from both the list of EHSs at N.J.A.C. 7:1G-2.1 and from the Industrial Survey list found in Appendix A of N.J.A.C. 7:1F. The Department is proposing to amend N.J.A.C. 7:1F-2.2 to clarify that if a substance is deleted from Appendix A, all confidential information pertaining to that substance that has been submitted to the Department shall continue to remain subject to the confidentiality rules at N.J.A.C. 7:1F-2. The Department is also proposing to add a similar requirement to N.J.A.C. 7:1G-6.4(a) to continue the confidentiality of Right to Know information submitted for substances which have been deleted from the EHS list.

Social Impact

The proposed amendments will have a negligible social impact. The elimination of reporting requirements for these pigments will not affect the general public since the three copper pigments pose no risk to human health or the environment.

Economic Impact

The proposed amendments will have a positive economic impact for companies using, storing or manufacturing these three compounds. These businesses will benefit from the reduction in costs associated with completing the reporting forms required by the Department. The public may benefit if these businesses pass on any such cost savings in the final cost to consumers of end-products.

Environmental Impact

The proposed amendments are expected to have neither beneficial nor adverse environmental impacts. Due to the nature of the three phthalocyanine compounds, there is no evidence of adverse effects to human health or to the environment. Therefore, the Department concludes that exempting the three compounds from the Department's reporting requirements will have no environmental impact.

Regulatory Flexibility Analysis

The proposed amendments will apply to all businesses covered under the Worker and Community Right to Know Act, many of which are small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendments will decrease reporting and recordkeeping requirements for companies using these compounds. Because these amendments will reduce recordkeeping and reporting requirements for all businesses using these compounds, less stringent requirements for small businesses are not necessary.

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

7:1F-2.2 Access to information; non-disclosure; hearing before disclosure

(a) (No change.)

(b) Information for which a confidentiality claim has been asserted shall remain subject to the confidentiality requirements of this subchapter if the substance for which the claim was asserted is subsequently deleted from Appendix A of this chapter.

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

[(c)](d) A request for an adjudicatory hearing under [(b)](c) above shall contain the following information:

1.-4. (No change.)

[(d)](e) The Department may deny a request for an adjudicatory hearing under [(b)](c) above if:

1.-4. (No change.)

Recodify existing (e) to (g) as (f) to (h) (No change in text.)

APPENDIX A
TABLE 1. SELECTED SUBSTANCES

All chemical compounds and/or complexes containing a selected substance (including organic, inorganic and organo-metallics) are to be reported under the given CAS code number and identified on the survey form.

...

CAS NO.	INORGANICS (INCLUDE SALTS OF THESE COMPOUNDS)
...	
7440-50-8	Copper, **except compounds:** **C.I. Pigment Blue 15,** **Phthalocyanine Blue (CAS No. 147-14-8)** **C.I. Pigment Green 7,** **Phthalocyanine Green (CAS No. 1328-53-6)** **C.I. Pigment Green 36,** **Phthalocyanine Green (CAS No. 14302-13-7)**

...

7:1G-2.1 Designation of substances

The following substances and corresponding Chemical Abstract Services (CAS) numbers are designated as Environmental Hazardous Substances pursuant to the Act. Each substance has further been identified according to the classifications, in N.J.A.C. 7:1G-2.2. Substances may have numerous synonyms which are not included herein.

Chemical	CAS Number	Group Number
...		
COPPER AND COMPOUNDS		
except:	7440-50-8	19
C.I. Pigment Blue 15,		
Phthalocyanine Blue	**147-14-8**	
C.I. Pigment Green 7,		
Phthalocyanine Green	**1328-53-6**	
C.I. Pigment Green 36,		
Phthalocyanine Green	**14302-13-7**	

...

7:1G-6.4 General provisions

(a) Exept as provided in N.J.A.C. 7:1G-6.15, the [department] **Department** shall not disclose any trade secret claim and supporting information, that is pending or has been approved. **This non-disclosure requirement shall apply to trade secret claims for substances which were subsequently deleted from the environmental hazardous substances list.**

(b)-(k) (No change.)

(a)

DIVISION OF FISH, GAME AND WILDLIFE

Marine Fisheries

Summer Flounder

Proposed Amendments: N.J.A.C. 7:25-18.1 and 18.14

Authorized By: Scott A. Weiner, Commissioner, Department of Environmental Protection and Energy.

Authority: N.J.S.A. 23:2B-6 and 23:2B-14.

DEPE Docket Number: 34-93-05.

Proposal Number: PRN 1993-325.

Submit written comments by July 7, 1993 to:

Richard McManus, Director
Office of Legal Affairs
CN 402
Trenton, NJ 08625

The agency proposal follows:

Summary

The purpose of these proposed amendments is to restrict the gear type used by commercial fishermen holding a New Jersey Summer Flounder Permit to the specific gear used to qualify for the permit, establish a hook and line commercial fishery for summer flounder, modify how the commercial quota will be adjusted if the seasonal quota for the first two seasons is exceeded, and institute New Jersey Summer Flounder Permit suspension or revocation for failure to submit timely and accurate monthly reports of harvest.

Currently a commercial quota system is in effect whereby all vessels engaged in a directed summer flounder fishery must possess a New Jersey Summer Flounder Permit to land more than 100 pounds of summer flounder in New Jersey. To be eligible for a New Jersey Summer Flounder Permit, a vessel must have landed at least 1,000 pounds of summer flounder in New Jersey in each of two years during the period of 1985 to 1992. In addition, during years when Federal summer flounder permits were issued (after November 2, 1988), a vessel must have possessed a valid Federal summer flounder permit or a valid New Jersey otter trawl, pound net or gill net license during each of the two years the vessel landed at least 1,000 pounds of summer flounder. The Department established a quota system requiring past participation in the fishery, in part, to protect those fishermen having made substantial investments in the fishery in terms of time, effort, and vessel and fishing gear expenses by providing them with an opportunity to harvest and land summer flounder. The intent of the permit system, however, was to limit permit holders to those types of gears (otter trawls, gill nets, pound nets) originally used to qualify for the permit. The Department inadvertently omitted this requirement when establishing the New Jersey Summer Flounder Permit system and is therefore proposing to issue all New Jersey Summer Flounder Permits in the name of the vessel and the owner, and for the specific gear type used to qualify for the permit.

The Department is also proposing to establish a commercial hook and line fishery for summer flounder. When the New Jersey Summer Flounder Permit and quota system were originally proposed, the Department received public comments that the permit and quota system should provide for the commercial harvest of summer flounder by hook and line. The Department agreed with the commenters but could not incorporate a commercial hook and line category into the proposal without requiring additional public comment with an associated delay in adoption of the entire rule. The Department is now proposing to allow for the commercial harvest of summer flounder by hook and line. In order to participate in this fishery, a vessel's owner must possess a New Jersey Summer Flounder Permit. Applicants for a New Jersey Summer Flounder Permit under the hook and line category must complete an application provided by the Department and submit the application so it is received by the Department no later than December 31, 1993. To be eligible for a permit, the vessel must have harvested by hook and line, landed and sold at least 1,000 pounds of summer flounder in New Jersey in each of two years during the period of 1985 to 1992. Applicants must provide weigh out slips to document the amount of summer flounder landed. In addition, vessels operating under a valid New Jersey Summer Flounder Permit to commercially harvest summer flounder by hook and line shall be limited to a crew size of no more than five persons, including the captain, and shall not carry any passengers for hire.

Currently, the rules provide that any overharvest of a season quota be deducted from the following season. This provision is proposed for amendment to require that any overharvest during the first two seasons be deducted from the third season. This amendment will more equitably distribute New Jersey's annual quota among those fishermen eligible to land summer flounder in New Jersey.

The Department is also proposing to implement New Jersey Summer Flounder Permit suspensions or revocations for failure to submit timely and accurate monthly reports of harvest. A provision requiring permit suspension or revocation has already been adopted for permittees landing summer flounder after the quota has been harvested and the season has been closed. In order to track the harvest and administer the quota, the Department requires that all holders of New Jersey Summer Flounder Permits provide monthly reports of harvest that must be

received by the Department no later than five working days following the end of the reported month. If a permit holder fails to submit timely and accurate monthly reports, the Department is proposing permit suspension or revocation according to the following schedule: first offense—60 days suspension, second offense—120 days suspension, third offense—permanent revocation. It is essential that fishermen provide accurate and timely reports in order to verify the landings of summer flounder reported by federally licensed dealers. Thus, the suspension of the violator's summer flounder permit should act as a deterrent and ensure accurate and timely reports.

Social Impact

An overall positive social impact should occur as a result of these proposed amendments. Issuing New Jersey Summer Flounder Permits for specific gear types will not restrict fishermen who have a history in the fishery from continuing to harvest summer flounder with the gear used to qualify for the permit. Establishing a hook and line commercial fishery will allow commercial hook and line fishermen to continue to participate in the fishery provided they are eligible and apply for a New Jersey Summer Flounder Permit. Submission of monthly reports of harvest is already required under N.J.A.C. 7:25-18.14 and violators are subject to penalties prescribed in N.J.S.A. 23:2B-14. These amendments extend penalties to include permit suspensions and revocations but do not require additional reporting requirements or further restrict anyone's opportunity to participate in the summer flounder fishery. The more stringent penalty associated with the failure to submit monthly reports is designed to act as a deterrent and will, hopefully, ensure timely and accurate reporting. Timely receipt of fishermen reports is essential to verify the landings reported by federally licensed dealers.

Modifying how the season quotas will be adjusted in the event the quota of either of the first two seasons is exceeded should result in a positive social impact. The first season (January-April) is primarily an offshore fishery with larger vessels while the second season (May-August) is an inshore fishery with smaller vessels. The third season (September-December) is a mix of both small and large vessels fishing both inshore and offshore as the fish migrate. Under the current rules, should the first season's quota be exceeded, it is deducted from the second season thus penalizing the smaller inshore vessels which are not capable of fishing offshore during the winter. The potential for significant impact that would be created by a reduced second season quota is exacerbated by the fact that it is the smallest of the three quotas, representing less than half of the quota in either the first or third season. Since both large and small vessels fish during the third season, it is more equitable to deduct any overharvest from the first two seasons from the third.

Economic Impact

Positive economic impacts should occur as a result of these proposed amendments. A commercial hook and line fishery has existed in New Jersey and has contributed to New Jersey commercial landings in the past. However, a commercial hook and line category was not incorporated into the adoption of the New Jersey Summer Flounder Permit and commercial quota, effectively eliminating this section of the fishery. These amendments establish a commercial hook and line fishery for summer flounder and will allow for continued economic gains by those fishermen who are eligible and apply for a New Jersey Summer Flounder Permit. Submission of monthly reports of harvest is already required under N.J.A.C. 7:25-18.14 and extension of penalties to include permit suspensions or revocations will not result in any economic impacts to those fishermen filing timely, accurate monthly reports. Issuing New Jersey Summer Flounder Permits for specific gear types will not cause any adverse economic impact for fishermen with a history in the fishery who can continue to harvest summer flounder with the gear used to qualify for the permit.

The provision to take any overharvest during the first two seasons out of the third will have an economic impact. There may be a slight negative economic impact to those vessels currently fishing during the first season if they exceed the season quota. If the Department is unable to accurately project when the quota will be taken because of a delay in reporting, it is possible that the target level could be overharvested before the season is closed. However, the amendment will reduce or eliminate potential negative economic impacts for vessels fishing during the second season. Although a potential economic gain or loss from the amendment may occur, it will be a more equitable way to administer the season quotas. This proposed provision would penalize both large and small vessels alike for any overharvest during the first two seasons without unfairly impacting any one group. Therefore, any associated negative economic impacts of the proposal are minimized.

Environmental Impact

The Department has recognized in previously adopting a commercial quota and establishing the New Jersey Summer Flounder Permit system that restricting catches of summer flounder will have positive environmental impacts on the summer flounder resource. In order to effectively administer the commercial quota, it is imperative that the Department receives timely and accurate monthly reports of harvest. The Department believes that instituting permit suspensions and revocations for failing to submit monthly harvest reports will result in a higher compliance rate. An accurate and timely record of total harvest is necessary to present harvesting of summer flounder over and above the commercial quota and as a check on federally mandated dealer reports.

Harvest of summer flounder by a commercial hook and line fishery will not result in any negative environmental impacts or subject summer flounder stocks to additional harvest. A total commercial quota has already been established whereby all commercial harvest under the New Jersey Summer Flounder Permit system must be discontinued once the quota is harvested. Establishing a commercial hook and line fishery will not result in an increase in the commercial quota and therefore will not result in an increase in the amount of summer flounder allowed to be harvested.

Issuing New Jersey Summer Flounder Permits for specific gear types used to qualify for the permit will not change any fisherman's eligibility to receive a permit or result in any changes in the harvest of summer flounder; therefore, no environmental impacts are expected.

Modification of how potential overharvest of the first two seasons will be addressed should have no environmental impact. The overall objective is to not exceed New Jersey's annual summer flounder quota as assigned by the National Marine Fisheries Service.

Regulatory Flexibility Analysis

The proposed amendments apply to all commercial fishermen applying for or in possession of a New Jersey Summer Flounder Permit. Most of the commercial fishermen would be considered small businesses as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Although these small businesses must comply with the proposed amendments as described in the Summary above, there will be no need for additional recordkeeping, professional services or increased capital costs of any significance for compliance. Therefore, no exceptions or lesser requirements are provided based on business size.

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

7:25-18.1 Size and possession limits

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

(c) A person angling with a hand line or with rod and line or spearfishing shall not possess any summer flounder or summer flounder parts beginning October 10 through May 23 nor shall any person angling with a hand line or with rod and line or spearfishing possess more than six summer flounder at any time during the period beginning May 24 through Octoer 9, **except as provided in N.J.A.C. 7:25-18.14**. The Commissioner, after consultation with the Marine Fisheries Council, may modify the possession limit of summer flounder during the open season (May 24 through October 9) by notice, to be consistent with the possession limit of summer flounder established by the Northeast Regional Director of the National Marine Fisheries Service. The possession limit shall be set from a range of 0 to 15. The Department shall provide notice of any change by filing and publishing in the New Jersey Register. All such notices shall be effective when the Department files notice with the Office of Administrative Law or as specified otherwise in the notice.

(d)-(q) (No change.)

7:25-18.14 Otter and beam trawls

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

(i) Special provisions applicable to the commercial harvest of summer flounder are as follows:

1.-3. (No change.)

4. A vessel shall not land more than 100 pounds of summer flounder in New Jersey on any one trip, after March 5, 1993, unless said vessel is in possession of its valid New Jersey Summer Flounder Permit to participate in a directed fishery for summer flounder. **The**

permit shall be issued in the name of the vessel and the owner and for the specific gear type used to qualify for the permit.

i. Applicants for a New Jersey Summer Flounder Permit shall complete an application provided by the Department and submit the application so it is received by the Department no later than June 30, 1993 **for applicants applying to use otter trawls, pound nets, gill nets or scallop dredges and no later than December 31, 1993 for applicants applying to use hook and line.** Applications for a New Jersey Summer Flounder Permit received after [June 30, 1993] **the above dates** shall be denied.

ii. To be eligible for a New Jersey Summer Flounder Permit the vessel's owner shall meet the following criteria:

(1) The vessel shall have landed **and sold** at least 1,000 pounds of summer flounder in New Jersey in each of two years during the period of 1985-1992;

(2) The vessel shall have possessed a valid New Jersey otter trawl, pound net, or gill net license or a valid Federal summer flounder permit during each of the two years it qualified based upon the pounds of summer flounder landed **and sold** in [(i)4i(1)] **(i)4ii(1)** above. Vessels providing documentation regarding the amount of summer flounder landed for two years between January 1, 1985 to November 2, 1988 **or vessels providing documentation of harvest by hook and line** are exempt from this requirement; and

(3) (No change.)

iii. (No change.)

iv. A vessel possessing a New Jersey Summer Flounder Permit to commercially harvest summer flounder by angling or hook and line and when operating under the permit shall be subject to the following:

(1) Crew size shall be limited to no more than five persons, including the captain;

(2) The vessel shall not carry any passengers for hire. When carrying passengers for hire the New Jersey Summer Flounder Permit is not valid and the recreational size and possession limits and seasonal restrictions as specified in N.J.A.C. 7:25-18.1 apply.

[iv.]**v.** A vessel that does not qualify for a New Jersey Summer Flounder Permit shall be permitted to land not more than 100 pounds of summer flounder on any trip, **except that vessels taking summer flounder by angling or hook and line shall be subject to the possession limits established in N.J.A.C. 7:25-18.1.**

5. The annual summer flounder harvest quota for New Jersey shall be determined by the Mid-Atlantic Fishery Management Council as implemented by the National Marine Fisheries Service. All landings of summer flounder in New Jersey shall be applied to the New Jersey annual summer flounder quota.

i.-v. (No change.)

vi. If the quota for [a particular] **either of the first two** seasons is exceeded, the amount overharvested shall be deducted from the [following] **third** season.

vii.-ix. (No change.)

6. Any person violating the provisions of this section shall be subject to the penalties prescribed in N.J.S.A. 23:2B-14 in addition to the following:

i. Failure to submit the application by June 30, 1993 **for use of otter trawls, pound nets, gill nets or scallop dredges or by December 31, 1993 for use of hook and line** or to attach the required documentation to the application shall result in the denial of the permit.

ii. (No change.)

iii. Failure to comply with the provisions of (i)5iii above, landing summer flounder after the season has been closed, **or (i)5ix above, failure to submit accurate and timely monthly reorts,** shall result in the suspension or revocation of the vessel's New Jersey Summer Flounder Permit according to the following schedule:

(1)-(3) (No change.)

iv. (No change.)

(j) (No change.)

HEALTH

(a)

OFFICE OF THE COMMISSIONER

Catastrophic Illness in Children Relief Fund Program

Proposed Amendments: N.J.A.C. 8:18

Authorized By: Catastrophic Illness in Children Relief Fund Commission, Bruce Siegel, M.D., M.P.H., Chairman and Commissioner of Health, Department of Health.

Authority: N.J.S.A. 26:2-148 et seq., specifically 26:2-154i.

Proposal Number: PRN 1993-313.

Submit written comments by July 7, 1993 to:

Mary Ann Whiteman, Executive Director
Catastrophic Illness in Children Relief Fund Commission
New Jersey Department of Health
CN 360
Trenton, NJ 08625-0360

The agency proposal follows:

Summary

The proposed amendments to N.J.A.C. 8:18 reflect the recent legislative changes to the Catastrophic Illness in Children Relief Fund Commission as required by P.L. 1993, c.130 which amends the enabling statute. This legislative change will expand access to the Program significantly by lowering the eligibility threshold, increasing the age of a child and reducing the residency requirement.

In its experience in reviewing applications, the Commission realized that there are many families who are suffering financially as a result of their children's medical bills and are not able to meet the original 30/40 percent requirement for financial assistance. The Commission believes that the amendments in P.L. 1993, c.130 will provide a benefit for families with extraordinarily high expenses incurred in the care of their child and will improve access to the Catastrophic Illness in Children Relief Fund.

Lowering the threshold to 15 percent of annual income at or below $100,000 is a change the Commission has supported which would make the Program more accessible for New Jersey residents. Additionally, families whose annual income is greater than $100,000 will be able to meet the eligibility criteria more equitably. Instead of having to incur 40 percent of out-of-pocket expenses, these households will have to incur expenses equal to the basic 15 percent of the first $100,000 in income, plus 20 percent of any excess income over $100,000. This incremental eligibility requirement will be more accessible rather than the previous fixed two-tiered eligibility requirement.

Through this approach, the Commission recognizes that medical indigency and extraordinary medical debt can occur at any income level. The Commission will be able to approve applications and authorize financial relief to families in need who qualify under these amendments.

Access to the Program is also expanded by amending the age and residency requirement. The Program will now review applications for children who are 18 and under and for families who have lived in New Jersey for three months prior to submitting an application. Adding an extra year and reducing the residency requirement to three months will encourage many eligible families to apply for assistance.

The Commission's membership is expanded by an additional two members. These two new members will be public members. Expanding the Commission membership will assist in broadening the backgroun and experience of the Commission membership and will help to bette serve families.

A new provision is added that authorizes the Commission to negotiate or settle recovery of claims due to settlement of lawsuits. Currently, the Commission has only the authority to recover claims, not to negotiate the amount of recovery. This will benefit the Program in that in some circumstances a partial recovery of funds may be effected more reasonably than full recovery. Families will benefit in that resolution of such claims may be settled in consideration of individual family need.

Additional changes in the proposed amendments pertain to clarification of the current rules. One clarification pertains to eligible health services. The Program reviews all health expenses incurred in the care of a child; however, all such eligible expenses must be medically-authorized. Identifying this as a specific reference to all eligible health expenses that are incurred in the care of an child with an illness or

condition will clarify this provision. Additionally, the Program reviews expenses that are health-related and which do not require medical authorization, such as travel-related expenses.

To protect the integrity of the fund for the purpose for which it is intended, that is, assisting families whose children have incurred medical expenses as a result of a diagnosis or condition, the Program will also consider as health-related those expenses for 50 percent of a health insurance premium paid by a family provided that there are other eligible expenses.

The Program will consider applications for uncovered expenses identified as experimental medical treatment and/or pharmaceuticals. Experimental services require additional supporting documentation. Clarification is provided in that providers of experimental care must be licensed and the treatment and/or pharmaceuticals administered or prescribed must be recognized by Federal or State agencies.

Other technical amendments pertain to the administration of payments. Payments are currently made directly to families who have demonstrated that they have paid for their eligible out-of-pocket expenses. Reimbursement occurs after a family has met the eligibility criteria. Reimbursement include those expenses above the family responsibility and below the cap. The footnotes to the Appendix have been amended to reflect the current $100,000 cap and to delete the second footnote, which is no longer necessary.

Social Impact

The proposed amendments would have a positive social impact on all eligible New Jersey residents with children 18 years and under. As in previous programmatic changes, the Commission is solely dedicated to assisting as many New Jersey families in need as possible. In an effort to expand access to the Program, the lowering of the eligibility criteria will serve to meet this goal.

Families trying to deal with the double burden of caring for an ill child while struggling with overwhelming uncovered health costs and the financial complexities of the healthcare delivery system will continue to benefit by implementation of these changes. In relieving families of previously incurred medical debt, this improved access to the Program will assist in preserving the integrity of the family and the family's ability to cope with the responsibilities which accompany significant health problems in children.

Economic Impact

The reduction of the threshold, specifically lowering the eligibility requirement for families, may be expected to impact the Catastrophic Illness in Children Relief Fund. Eliminating the fixed two-tiered eligibility criteria will encourage more families in need to apply for assistance. Adequate funds exist to assist families with their extraordinary uncovered medical debt. All changes proposed would have a positive impact on the public and improve the distribution of funds for eligible families. The purpose of this dedicated trust fund is to assist families experiencing financial hardship and these proposals would work towards that end.

Allowing the Commission to negotiate or settle the recovery of claims will enable the Commission to reconcile accounts involving families who have already received assistance from the Fund. The Fund would be reimbursed the amount of the family's award, less the family's expense of the recovery. This will also serve to protect the Fund by reimbursing it for expenses that were paid by another source after an award has been made.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the proposed amendments do not impose reporting, recordkeeping or other compliance requirements on small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rulemaking does not impact on small businesses because the proposed amendments pertain to the processing of applications and the amount of assistance a family may receive under N.J.A.C. 8:18.

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

8:18-1.2 Definitions

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

. . .

"Catastrophic Illness" means any illness or condition for which the incurred medical expenses not covered by any other State or Federal program or any other insurance contract exceed [30 percent of the income of a family whose income is $100,000 or less per year or 40 percent of the income of a family whose income is over $100,000 per year] **15 percent of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000.**

"Child" means a person under [18] **19** years of age.

"Commission" means to the [nine] **11** member Catastrophic Illness in Children Relief Fund Commission created by the Act and appointed by the Governor to administer the Fund. The Commission, chaired by the Commissioner of Health, is "in but not of" the Department of Health.

. . .

"Eligibility standard" means that dollar amount equal to [30 percent or 40 percent of family income] **15 percent of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000.**

. . .

"Threshold" means the point at which a child's out-of-pocket medical expenses exceed [the 30 percent of income for a family whose income is $100,000 or less or 40 percent of income for a family whose income is more than $100,000] **15 percent of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000.** After the child's medical expenses reach this threshold, a child has passed the initial screen for eligibility for assistance from the Fund.

8:18-1.3 General requirements

(a) Pursuant to the Act, the Fund will provide assistance to families having a child with a catastrophic illness. A child shall have passed the initial screen for eligibility for the Fund's assistance when a child's incurred medical expenses (not covered by private insurance or other public programs) for a [year] **prior consecutive 12 month period** exceed the amount represented by [either 30 percent or 40 percent of family's income] **15 percent of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000.**

1. [Thirty] **Fifteen** percent shall be the screen used for families whose income is $100,000 or less.

2. [Forty] **Fifteen** percent **of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000** shall be the screen used for families whose income is more than $100,000.

(b) (No change.)

(c) To be eligible for assistance, a child must be a resident of the State of New Jersey. Resident means a person legally domiciled in New Jersey for a period of [six] **three** months immediately preceeding the initial date of application for assistance to the Fund.

1.-4. (No change.)

8:18-1.6 Eligibility standard

Incurred, out-of-pocket medical expenses up to the [30 percent or 40 percent] **15 percent of the first $100,000 of annual income for a family plus 20 percent of the excess income over $100,000** threshold shall be required for eligibility consideration. Those expenses above the family responsibility and [below the 30 percent or 40 percent threshold] **up to the cap** shall be considered for reimbursement after the eligibility standard is determined and met (see examples in Appendix I).

8:18-1.11 State Office responsibilities

(a) The State Office shall:

1. Screen applications to determine whether a child's medical expenses exceed [30 percent of family's income with income of $100,000 or less, or 40 percent of family income greater than $100,000] **15 percent of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000;**

2.-7. (No change.)

8:18-1.12 Commission responsibilities

(a) The Catastrophic Illness in Children Relief Fund Commission shall be responsible to:

1. Develop policies and procedures for operation of the Fund; [and]

2. Meet to review and make decisions on applications of families for financial assistance in regularly scheduled cycles[.]; **and**

3. Negotiate or settle the recovery of funds disbursed in accordance wih the provisions of this chapter.

8:18-1.14 Eligible health services

(a) Categories of incurred health [and health-related] expenses **which are medically-authorized in the care of a child with an illness or condition** eligible for consideration in assessing whether a family has reached its [30 percent/40 percent] eligibility threshold **of 15 percent of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000** include, but are not limited to, the following:

1. (No change.)

2. Specialized pediatric ambulatory care, including physician-authorized rehabilitative therapies (for example, speech, occupational, and physical), physician-authorized care for treatment of addiction disorders and mental health care, dental care, eye care, chiropractic care;

3.-11. (No change.)

[12. Family transportation and travel-related expenses including, but not limited to, mileage allowance, tolls, parking receipts, temporary shelter costs and telephone calls related to medical condition;

13. Fifty percent of a health insurance premium including supplemental and dependent coverage that is paid by a family;]

Recodify existing 14.-15. as 12.-13. (No change.)

[16.]**14.** Experimental medical treatment/experimental drugs which are recognized by Federal [and] **or** State agencies [or] **and provided by** licensed health care providers. Applications involving experimental treatment may require additional review.

(b) Categories of incurred health-related expenses are eligible for consideration in assessing whether a family has reached its eligibility threshold of 15 percent of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000 include:

1. Family transportation and travel-related expenses including, but not limited to, mileage allowance, tolls, parking receipts, temporary shelter costs and telephone calls related to medical condition.

(c) Fifty percent of a health insurance premium including supplemental and dependent coverage that is paid by a family when accompanied by any other eligible expenses in (a) or (b) above.

8:18-1.15 Ineligible health services

(a) Categories of health and health-related expenses which are not eligible for consideration in assessing whether a family has reached its [30 percent/40 percent] eligibility threshold **of 15 percent of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000** shall include, but are not limited to, the following:

1. (No change.)

2. Elective cosmetic surgery[;].

8:18-1.16 Administration of payments

(a) The State Office shall oversee processing of payments from the Fund. Though in general payments shall be made directly to providers and vendors, consideration shall be given to making payments directly to families [in special cases (that is, in the instance in which a family has already paid out-of-pocket for medical expenses in an amount which exceeds its 30 or 40 percent of income threshold)].

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

8:18-1.18 Special cases

(a) Special cases shall be referred to the Commission for its review and consideration. Special cases shall include, but are not limited to, the following:

1. In special cases in which a family has more than one child, with a catastrophic illness (as defined by expenses in excess of the [30 or 40 percent] **15 percent of the first $100,000 of annual income of a family plus 20 percent of the excess income over $100,000** threshold for each child), consideration shall be given to waiving the family responsibility as outlined in N.J.A.C. 8:18-1.2 for the other child/children given that the family would have already met the family responsibility for the first child.

2.-3. (No change.)

8:18-1.20 Recovery of Commission expenses

(a) If a family receives assistance from the Fund for a child, in accordance with this chapter, and subsequently recovers damages or a financial award for the child's medical expenses, pursuant to a settlement or judgment in a legal action, the family shall reimburse the Fund for either:

1. The amount of assistance received from the Fund; or

2. The portion of assistance received for the injury, illness or condition covered by the damage or judgment, less the family's expenses of recovery.

(b) The Commission may negotiate or settle the recovery of such claims, for cause presented by the family to the Commission.

APPENDIX I

Examples of Catastrophic Illness in Children Relief Fund Program

The examples below illustrate the extent which the Fund would assist [two] **three** families with different income levels.

FAMILY #1 (with income of $30,000)	
Family Income:	$30,000
Eligibility Standard ([30%] **15%** of income):	[9,000] **4,500**
Amount of Eligible Medical Expenses Not Covered by Insurance:	15,000
Family Responsibility (10% of Family Income):	3,000
Amount of Fund's Financial Assistance to Family:	12,000
Amount for which Family remains responsible:	3,000
FAMILY #2 (with income of $80,000)	
Family Income:	$80,000
Eligibility Standard ([30%] **15%** of income):	[24,000] **12,000**
Amount of Eligible Medical Expenses Not Covered by Insurance:	15,000
Family Responsibility (10% of Family Income):	8,000
Amount of Fund's Financial Assistance to Family[‡]:	[0] **7,000**
Amount for which Family remains responsible:	[15,000] **8,000**
FAMILY #3 (with income of $120,000)	
Family Income:	**$120,000**
Eligibility Standard:	**$19,000**
15% of the first $100,000, or 15,000	
20% of the excess over $100,000, or 4,000	
Amount of Eligible Medical Expenses Not Covered by Insurance:	**$30,000**
Family Responsibility (10% of Family Income):	**$12,000**
Amount of Fund's Financial Assistance to Family:	**$18,000**
Amount for which Family remains responsible:	**$12,000**

†Assuming: an annual [$25,000] **$100,000** cap; adequate monies available in fund obviating need for additional restrictions and cost-sharing; all expenses are reasonable and customary; and none of the cases are in the "special" category.

[‡None: The eligibility standard is not met; expenses were not in excess of 30 percent of income; therefore, expenses cannot be considered for reimbursement.]

(a)

DIVISION OF HEALTH CARE PLANNING, FINANCING AND INFORMATION SERVICES

Certificate of Need

Application and Review Process

Proposed Amendments: N.J.A.C. 8:33

Proposed Repeals: N.J.A.C. 8:33-6 and 8:33, Exhibits 1, 2, 3A, 3B

Proposed Recodification with Amendments: N.J.A.C. 8:33-5, Appendix, Exhibits 1, 2 and 3 as N.J.A.C. 8:33 Appendix Exhibits 1, 2, 3.

Authorized By: Bruce Siegel, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).
Authority: N.J.S.A. 26:2H-1 et seq.
Proposal Number: PRN 1993-279.

Submit written comments by July 7, 1993 to:
Mary Lou Holl, Chief
Certificate of Need Review Services, Room 604
New Jersey State Department of Health
CN 360
Trenton, NJ 08625-0360

The agency proposal follows:

Summary

Following enactment of the Health Care Cost Reduction Act of 1991 (P.L. 1991, c.187) on July 31, 1991, the Health Care Administration Board adopted new rules, N.J.A.C. 8:33, identifying the policies and procedures that would apply to the application and review processes for certificates of need. These new rules, which became effective on September 8, 1992, brought the certificate of need process into compliance with the new statutory provisions reflected in the 1991 law and incorporated many of the recommendations for improving and streamlining the certificate of need process in the State recommended by the Governor's Commission on Health Care Costs. The new rules became effective on September 8, 1992.

Subsequently, the New Jersey Legislature passed, and the Governor signed on November 30, 1992, the Health Care Reform Act of 1992 (P.L. 1992, c.160), which made additional statutory changes related to certificate of need activities in the State. The amendments to N.J.A.C. 8:33 proposed herein are necessary to bring the referenced rules concerning the certificate of need application and review process into conformance with the new statutory provisions.

In summary, these rule changes implement provisions of the law which exempt certain types of health care services from the requirement of obtaining a certificate of need before initiating the service. For example, pursuant to the statute, the following types of health care services and activities are now exempted from the certificate of need requirement:

1. Community-based primary care centers;
2. Outpatient drug and alcohol services;
3. Ambulance and invalid coach services;
4. Mental health services which are non-bed related outpatient services;
5. Changes in residential health care facility services (while the initiation of a new residential health care facility will continue to require a certificate of need, changes in the bed complement of licensed residential health care facilities can be made without certificate of need approval);
6. Mandatory renovations to existing facilities;
7. Mandatory replacement of fixed or moveable equipment;
8. The transfer of an ownership interest in a licensed health care facility except in the case of an acute care hospital or a long-term care facility in which the owner does not satisfy the Department of Health's review of the owner's prior operating experience as well as any requirements established by the Federal government pursuant to Titles XVIII or XIX of the Social Security Act (in these instances, the transfers will continue to require certificate of need);
9. The change of site for approved certificate of need within the same county;
10. The relocation or replacement of a health care facility within the same county, except for an acute care hospital (if the provider proposes at the new facility either to add beds within a health planning category or to add beds to the total inventory beyond those on the current license or to add any new health care services not specifically exempted from certificate of need herein, that applicant will be required to obtain a certificate of need for the new beds or services, as has been the case in the past);
11. Continuing care retirement communities authorized pursuant to P.L. 1986 c.103 (N.J.S.A. 52:27D-330 et seq.);
12. The acquisition by a hospital of a magnetic resonance imager that is already in operation in the State by another health care provider or entity;
13. Adult day health care facilities;
14. Pediatric day health care facilities; and
15. Chronic renal dialysis facilities.

Unless specifically limited in the statute and these rules, these exemptions to the requirement for obtaining a certificate of need apply to everyone, hospitals, physicians, existing providers, and non-providers. For example, community-based primary care centers, as described herein, no longer require a certificate of need. That is, whether a hospital or anyone else wants to initiate a new community-based primary care center or relocate or expand an existing one, a certificate of need will no longer be required. Similarly, anyone can initiate or expand or relocate a chronic renal dialysis facility without obtaining a certificate of need.

In accordance with Section 20 of P.L. 1992, c.160, the rule changes proposed herein also raise the certificate of need thresholds for certain hospital activities. More specifically, notwithstanding the provisions of section 7 of P.L. 1971, c.136 (N.J.S.A. 26:2H-7) to the contrary, a hospital shall be exempt from the certificate of need requirement if the total project or purchase costs does not exceed five percent of that hospital's operating revenues for the year in which the project or purchase is undertaken. Except that, this exemption shall not apply to the initiation or expansion of any health care service as provided for in section 2 of P.L. 1971, c.136 (N.J.S.A. 26:2H-2), which includes any of the health care services identified in the Appendix, Exhibit 2 herein. Furthermore, it shall not apply to the expansion of a hospital's physical plant or the construction of a new health care facility.

Subchapter 1 delineates the purpose, scope and definitions used in the chapter. N.J.A.C. 8:33-1.3 defines each of the health care facilities and services which are exempted from certificate of need requirements pursuant to the Health Care Reform Act, P.L. 1992, c.160 and cited at N.J.A.C. 8:33-6.1. This section also includes definitions for "project," "operating revenues," and "purchase cost" for purposes of clarifying how the new certificate of need threshold for hospital projects, prescribed at Section 20 of P.L. 1992, c.160 will be applied to the review process. In addition, this section defines the term, "subject to a health planning regulation," to clarify what services are the subject of health planning regulations, as the term is used throughout the rules. This section specifies that all health care services identified in Appendix, Exhibit 2 will require a certificate of need. This identification does not change the scope of coverage from the existing rule. Rather, it is offered to provide clarification to potential applicants as to what is subject to certificate of need requirements. Finally, the term "satellite" is defined in this section.

Subchapter 2 is amended slightly to incorporate the definition of "subject to a health planning regulation," as discussed above, to clarify the instances in which petition for waivers may be submitted because they involve health care services and/or facilities whch are the subject of a health planning regulation.

The only change proposed at N.J.A.C. 8:33-3.1 concerning the initiation of a health care service is to reference the exemption to certificate of need requirements mandated by P.L. 1992, c.160. The proposed amendments specified at N.J.A.C. 8:33-3.2(d) would generally eliminate the requirement for obtaining a certificate of need for the discontinuance of a component service of a health care facility. The change would require notification to the Department of Health of plans to discontinue a component service of a health care facility and would allow the Commissioner to require a certificate of need if he or she believes that the service proposed for discontinuance is a required component of an in-patient facility or where he or she believes that discontinuance may represent access barrier to persons historically served. Historically, many providers submitted a certificate of need for the closure of a service only after they actually closed the service. Under this situation, a denial of the certificate had no practical public benefit because the service was already discontinued by the time the determination was rendered. The change is being proposed to insure notification to the Department in advance of discontinuance of a service and to eliminate the requirement for a certificate of need, thereby saving providers the costs of filing applications, except in those instances where the Commissioner has reason to believe that discontinuance may negatively impact on access to care.

Section 19 of P.L. 1992, c.160 has generally eliminated the requirement to obtain a certificate of need for the transfer of an ownership interest in a health care facility except in the case of an acute care hospital or a long-term care facility in which the owner does not satisfy the Department of Health's review of the owner's prior operating experience as well as any requirements established by the Federal government pursuant to Titles XVIII and XIX of the Social Security Act. N.J.A.C. 8:33-3.3 modifies existing policy concerning transfers of ownership to comport with this statutory change and specifies the limited instances in which certificates of need will be required for a transfer of ownership because the situations represent instances in which the statute has not exempted

the requirement. N.J.A.C. 8:33-6.1(a)8 also contains such a specification regarding the transfer of ownership.

The changes proposed at N.J.A.C. 8:33-3.4(a)ii concerning residential health care beds are necessitated by the fact that, while Section 19 of P.L. 1992, c.160 has eliminated the need to obtain a certificate of need for changes in the bed complements of residential health care facilities, it has not eliminated the need to obtain a certificate of need for the establishment of a residential health care facility. Accordingly, the proposed change would comport with this statutory requirement and eliminate the certificate of need requirement for changes in the bed complement of residential health care facilities. Similarly, N.J.A.C. 8:33-3.4(b) would eliminate the requirement to obtain a certificate of need for either the establishment of an adult or pediatric medical day care service or for any changes in the capacity of existing adult or pediatric medical day care programs as is mandated in Section 19 of P.L. 1992, c.160.

Changes are proposed at N.J.A.C. 8:33-3.5 to comport with statutory requirements reflected at Section 19 of the Health Care Reform Act of 1992 which eliminate the certificate of need requirement for certain types of health care facilities, including community-based primary care centers, outpatient drug and alcohol services, adult and pediatric day health care facilities, and chronic renal dialysis facilities, and for the replacement or relocation of an existing health care facility, except for an acute care facility, within the same county. The certificate of need requirement will be maintained for the replacement of an acute care hospital and for the replacement of a facility, where the replacement facility includes additional beds or services beyond those offered in the facility it is replacing. The proposed changes would eliminate the requirement for a certificate of need for the establishment of a satellite location for a primary care center because the statute eliminates the certificate of need requirement for community-based primary care centers. As reflected in the definitions, "satellite" will refer exclusively to a community-based primary care center which is an affiliate of a separately licensed ambulatory care facility (N.J.A.C. 8:33-1.3). N.J.A.C. 8:33-3.5(a)3 requires that anyone proposing to establish such a satellite notify the Department of Health in advance for a determination as to whether the proposed new facility will be deemed the establishment of a satellite location for a primary care center and be exempted from certificate of need or whether the proposal constitutes the establishment of a new health care facility subject to certificate of need requirements.

N.J.A.C. 8:33-3.6(c) and N.J.A.C. 8:33-3.7(e) eliminate the certificate of need requirement for the mandatory replacement of fixed equipment and/or mandatory renovations to facilities in excess of the monetary thresholds for equipment replacement and renovations to comply with Section 19 of P.L. 1992, c.160. The current policies of requiring certificate of need for optional replacement of equipment and optional renovations to facilities beyond the certificate of need thresholds will be maintained. The Commissioner will render a final agency decision on whether proposed equipment replacements and renovations are mandatory and therefore exempted from certificates of need or optional and the subject of certificate of need review where the costs exceed the thresholds.

Certificate of need policies concerning major moveable equipment are proposed for modification based on changes in the law. These changes are reflected at N.J.A.C. 8:33-3.7 and eliminate the certificate of need requirement for a hospital's acquisition of a magnetic resonance imager that is already in operation in the State by another health care provider or entity, as is mandated by Section 19 of P.L. 1992, c.160. In addition, the certificate of need threshold for replacement of equipment by a general acute care hospital has been raised in accordance with the requirements of Section 20 of the Health Care Reform Act of 1992 and is referred to throughout the document. The statute and this companion rule specify that a hospital shall be exempt from the certificate of need requirement if the total project or purchase cost does not exceed five percent of that hospital's operating revenues for the year in which the project or purchase is undertaken. Again, in compliance with Section 20 of the law, this exemption shall not apply to the initiation or expansion of any health care service as provided in section 2 of P.L. 1971, c.136 (N.J.S.A. 26:2H-2), which includes a health care service that is the subject of a health planning regulation adopted by the Department of Health; the expansion of a hospital's physical plant; or the construction of a new health care facility. This new threshold for acute care hospital projects is mandated by statute and proposed at N.J.A.C. 8:33-6.1(b).

As proposed, N.J.A.C. 8:33-3.7(f) states that even where the acquisition of major moveable equipment is exempted from certificate of need requirements, it will still be necessary to receive approval from the Department's Health Facilities Construction Services prior to building construction or renovations and approval from the Department's Licensing Program in the Division of Health Facilities Evaluation prior to operation of the service. This is necessary to insure that the installation is in compliance with licensing requirements put in place to protect the health and safety of patients and staff.

The reference to the Hospital Rate Setting Commission at N.J.A.C. 8:33-3.8 and elsewhere throughout the rules has been deleted because the Health Care Reform Act of 1992, P.L. 1992, c.160, has eliminated the historical practice of setting rates for services at acute care hospitals and has, therefore, resulted in disbanding of the Hospital Rate Setting Commission.

Section 19 of the Health Care Reform Act of 1992 eliminated the certificate of need requirement for a change of site for approved certificate of need within the same county. Therefore, N.J.A.C. 8:33-3.9 as proposed reflects this statutory provision.

A change is proposed at N.J.A.C. 8:33-3.10 concerning the duration of a certificate of need approved after the effective date of the current rule, which was September 8, 1992. The current policy of generally assigning a life of five years from the date of approval for the complete implementation of a certificate of need remains unchanged. What is proposed for change is that any applicant, not just a hospital, may petition the Commissioner at the time of initial application for a certificate of need life longer than five years. If the Commissioner, upon reviewing the proposed schedule for implementing the project, finds exceptional circumstances, he or she cold assign a longer life to the certificate of need at the time of initial issuance. Since there are occasions when non-hospital projects present unique complications, including the need to phase in components of a complex project, the Department believes that non-hospital applicants should be given the same opportunity that hospital applicants are offered in the existing rule to make a case to the Commissioner for a longer period of time to implement a complex project it is proposing for a certificate of need.

N.J.A.C. 8:33-4.9 has been amended to eliminate the reference to the State Health Plan, which was invalidated as a regulatory requirement by a court decision *(In the Matter of the State Health Plan, N.J.A.C. 8:100)*, Dkt. No. A-6581-91T1F (App. Div. February 10, 1993) *certif. granted* _____ N.J. _____ (May 14, 1993).

Changes are proposed at N.J.A.C. 8:33-4.10 to strengthen the review of certificate of need applicants' prior licensure track records where applicants have or have had an ownership or operational interest in health care facilities in this or any other state prior to or at the time of submitting a certificate of need application. The rule amendments are consistent with those identified at N.J.A.C. 8:33H-1.14, the Policy Manual for Planning and Certificate of Need Reviews of Long-Term Care Facilities and Services, and would apply to all applicants, not just applicants for long-term care facilities and services. The rule continues to mandate that applicants demonstrate the capacity to provide a quality of care which meets or surpasses the requirements contained in the applicable licensing standards for the facility-type which the applicant owns or operates. The amendments propose a denial of any certificate of need submitted by an applicant who was cited for any State licensing or Federal certification deficiency during a period beginning 12 months prior to submission of the certificate of need application and continuing to the time the Commissioner renders a decision on the application, which represented an inappropriate discharge or denial of admission or a serious risk to life, safety, or quality of care of patients or residents as prescribed in the section. In addition, the rule changes would give the Commissioner discretion to deny a certificate of need to an applicant where the applicant has not demonstrated a capacity to operate a health care facility in a safe and effective manner by evidence from the licensure track record review that the applicant allowed violations of licensure requirements to continue without correction over time or where the review provides evidence of a pattern of violations of State licensing standards or Federal certification standards at any health care facility in which the applicant has or has had an ownership or managerial interest. These changes are necessary to clarify instances where it is not in the public interest (as recently reflected by Health Care Administration Board contested case decisions) to allow an operator with certain licensure deficiencies to obtain a certificate of need to expand or to concentrate his resources on anything other than correcting the cited licensure deficiencies. They are also needed to protect patients from applicants with a history of serious licensure violations at other facilities or where the licensure review shows that the applicant has failed to demonstrate the capacity to operate health care facilities in a safe and

effective manner. Given the unsatisfactory historical performance of such applicants, it is not in the public interest to allow them franchises which would expand their health care investments and for that reason the Department proposes the changes noted in the section.

Amendments are proposed at N.J.A.C. 8:33-5.1 to remove from the list of services that are subject to expedited review procedures in the existing rule those services for which the certificate of need requirement has been exempted pursuant to Section 19 of P.L. 1992, c.160. This change is necessary to bring this section into compliance with the existing statute. In addition, the review of applications for personal care homes is proposed to be processed via expedited review procedures in order to allow for the processing of such applications throughout the year, thereby streamlining the process for their development. Changes are proposed at N.J.A.C. 8:33-5.4 to remove those services no longer subject to certificate of need requirements as referenced above and at N.J.A.C. 8:33-6.1 to list each of the services and health care activities that are now exempted from certificate of need pursuant to the Health Care Reform Act of 1992. N.J.A.C. 8:33-5.5 has been eliminated, since the referenced services are no longer subject to certificate of need requirements. These changes are necessary to bring the rule into compliance with the enacted amendments to the Health Care Facilities Planning Act (N.J.S.A. 26:2H-1 et seq.). N.J.A.C. 8:33-6.2 identifies requirements that must be satisfied by proposed projects exempted from the certificate of need requirement. As noted above, they include the need to have plans reviewed and approved by the Department's Health Facilities Construction Services prior to initiating building construction or renovation and the need to be issued a license by the Department of Health prior to initiating operations. As noted above, these review and licensure requirements are imposed upon the providers of health care facilities and services by the referenced Health Facilities Planning Act and are necessary to protect the health and welfare of patients.

The current N.J.A.C. 8:33-6.1 is being repealed since the moratorium which was the subject of this subsection expired December 31, 1992.

Due to a technical error, the old Appendix, Exhibits 1, 2, 3A and 3B were not repealed when the new rules were adopted effective September 8, 1992. This resulted in the new Appendix, Exhibits 1, 2, 2a and 3 being adopted as N.J.A.C. 8:33-5 Appendix. Therefore, the old Appendix, Exhibits 1, 2, 3A and 3B are being repealed and the new Appendix, Exhibits 1, 2, 2a and 3 are being recodified at this time.

Social Impact

N.J.S.A. 26:2H-1 (as amended) recognizes as "public policy of the State that hospitals and related health care services of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost are of vital concern to the public health. In order to provide for the protection and promotion of the health of inhabitants of the State, the State Department of Health shall have the central responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services and health care facility cost containment programs ..."

New Jersey's Certificate of Need Program has been in operation since 1971 when the Health Care Facilities Planning Act was enacted into law. Entirely new rules setting forth the policies and procedures that would govern the Certificate of Need application and review process were adopted by the Health Care Administration Board on August 13, 1992 and became effective on September 8, 1992. That new rules, codified at N.J.A.C. 8:33, implemented the recommendations of the Governor's Commission on Health Care Costs to streamline various aspects of the certificate of need process and implemented the statutory requirements of P.L. 1991, c.187, the Health Care Cost Reduction Act of 1991. The amendments proposed herein implement the statutory provisions of P.L. 1992, c.160, principally by exempting from certificate of need requirements a number of categories of health care facilities and services specifically exempted pursuant to Section 19 of the law and by raising the thresholds at which hospitals must apply for certificates of need.

The types of health care facilities and services which no longer require a certificate of need are listed in the summary of this proposal. The exemptions from the certificate of need process, made by P.L. 1992, c.160, are consistent with Department of Health's efforts to expedite the process of bringing certain health care services on line. Most of the projects that are now exempted were historically not batched, were put through an expedited review, and represented either projects involving minimal costs or minor change.

Those exempted from the certificate of need process will be subject to the licensing rules of the Department of Health. However, they will be relieved of the effort and expense involved in complying with the certificate of need process. It is therefore expected that these entities will react favorably to this proposal.

It is expected that there will be favorable reaction to this proposal on the part of the general public. This amendment proposes to strengthen the track record review for those projects not exempted from the certificate of need process and this will afford greater protection to patients in New Jersey. There will be greater certainty that those entities now granted a certificate of need have a record of providing good health care.

Economic Impact

The proposed amendments incorporate the provisions of P.L. 1992, c.160. They delete the certificate of need requirement for specific types of health care services and facilities, and in so doing will serve to relieve these current and future health care providers from the economic burden of filing certificate of need applications for these specific types of projects. In addition, the proposed amendments implement that portion of the new law which increases the monetary thresholds for hospitals, which determines whether or not a certificate of need is necessary for certain kinds of hospital projects. Where appropriate projects can be accomplished at a total cost below the thresholds identified in the law and articulated in these rules, hospitals will be able to move forward with the projects without the additional filing fees and application development costs associated with obtaining a certificate of need.

The application fee for a certificate of need is between $5,000 and $100,000 and there is additional cost associated with the preparation and submission of the application. Health care facilities and services, now exempted from the certificate of need process, will be relieved of this expense. Based on previous years, it would be expected that amount of applications will be reduced by approximately 75 per year.

The proposed amendments may have an economic effect on the general public, but there is no way of knowing the effect, if any. It was the intent of the legislature to favorably impact the citizens of New Jersey by enacting P.L. 1992, c.160, and it is the intent of this proposal to implement the statutory provisions of that law.

Regulatory Flexibility Analysis

The proposed amendments eliminate many of the reporting, recordkeeping and other compliance requirements on entities, including small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., which wish to provide certain types of health care services or establish specific types of health care facilities, now exempted from the requirements to obtain a certificate of need pursuant to P.L. 1992, c.160 and articulated in these proposed amendments. Therefore, no exemptions or differentiation in requirements based on business size are necessary.

Full text of the proposed repeals may be found in The New Jersey Administrative Code at N.J.A.C. 8:33-6, and N.J.A.C. 8:33, Exhibits 1, 2, 3A and 3B.

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

8:33-1.1 Purpose; scope

(a) The purpose of these rules is to implement the provisions of the Health Care Facilities Planning Act, P.L. 1971, c.136, as amended by P.L. 1978, c.83 [and], the Health Care Cost Reduction Act, P.L. 1991, c.187, **and the Health Care Reform Act, P.L. 1992, c.160**. These rules may be amended as necessary to best implement the statutory provisions and to reflect changing economic and systemic conditions within the health care system.

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

(d) In addition, before filing a certificate of need application, prospective applicants are encouraged to contact the Local Advisory Board (LAB) in the service area(s) in which their proposed health care service(s) or facility is planned to examine the relationship of the proposed project with the LAB's plans, [and] the State Health Plan, **and appropriate regulations**. If the proposed service area overlaps more than one planning region, the applicant should consult with each of the affected LABS.

8:33-1.3 Definitions

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

...

"Adult day health care facilities" means a facility which is licensed by the Department of Health to provide preventive, diagnostic, therapeutic, and rehabilitative services under medical supervision to meet the needs of functionally impaired adult patients exclusively on an outpatient basis.

"Ambulance service" means the provision of emergency or non-emergency medical care and transportation by certified personnel in a vehicle, which is designed and equipped to provide medical care at the scene and while transporting sick and/or injured persons to or from a medical care facility or provider.

...

"Chronic renal dialysis facilities" means a facility in which dialysis is rendered to a patient with end stage renal disease for whom recovery of renal function is not expected.

...

"Community-based primary care center" means a health care facility which provides preventive, diagnostic, treatment, management and reassessment services to individuals with acute or chronic illness exclusively on an outpatient basis. The term is used in reference to facilities providing family practice, general internal medicine, general pediatrics, obstetrics, gynecology, and/or clinical preventive services, including community health centers providing comprehensive primary care. Comprehensive primary care may include the provision of sick and well care to all age groups, from perinatal and pediatric care to geriatric care. For the purposes of this rule, services identified in the Appendix, Exhibit 2, incorporated herein by reference, are not community-based primary care services and, therefore, are subject to the certificate of need requirement.

...

"Continuing care retirement community" means the provision of lodging and nursing, medical or other health related services at the same or another location to an individual pursuant to an agreement effective for the life of the individual or for a period greater than one year, including mutually terminable contracts, and in consideration of the payment of an entrance fee with or without other periodic charges. A fee which is less than the sum of the regular periodic charges for one year of residency is not considered an entrance fee.

...

"Health care service" means the preadmission, outpatient, inpatient, and postdischarge care provided in or by a health care facility, and such other items or service as are necessary for such care, which are provided by or under the supervision of a physician for the purpose of health maintenance or diagnosis or treatment of human disease, pain, injury, disability, deformity, or physician condition, including, but not limited to, nursing service, home care nursing and other paramedical service, ambulance service, service provided by an intern, resident in training or physician whose compensation is provided through agreement with a health care facility, laboratory service, medical social service, drugs, biologicals, supplies, appliances, equipment, bed and board, but excluding services provided by a physician in his or her private practice, unless the service is the subject of a health planning regulation, **as defined in this section adopted by the Department of Health or involves the acquisition of major moveable equipment as specified herein, and services provided by volunteer first aid, rescue and ambulance squads as defined in the New Jersey Highway Safety Act of 1971, P.L. 1971, c.351.**

...

"Invalid coach service" means the provision of non-emergency health care transportation, by certified personnel, for sick, infirm or otherwise disabled persons who are under the care and supervision of a physician and whose medical condition is not of sufficient magnitude or gravity to require transportation by ambulance, but does require transportation from place to place for medical care, and whose use of an alternate form of transportation, such as taxicab, bus, other public conveyance or private vehicle, may create a serious risk to life and health.

"Major moveable equipment" means equipment, including installation and renovation, which is the subject of a health planning [rule] **regulation** or which is proposed by the Commissioner to be the subject of a health planning [rule] **regulation as defined in this section**. For purposes of this chapter, major moveable equipment shall include all equipment which receives pre-marketing approval from the U.S. Food and Drug Administration unless the Health Care Administration Board explicitly excludes a specific piece of equipment or a specific technology from the classification of major moveable equipment. Examples of major moveable equipment are identified in the chapter Appendix, Exhibit 3, incorporated herein by reference.

...

"Nonbed related outpatient psychiatric care" means the following, which, to be considered a health care service, must meet standards as prescribed by the rules governing community mental health services and State aid under the Community Mental Health Services Act (N.J.A.C. 10:37):

1. Outpatient care: A setting that provides treatment and related services to people who are not in an immediate crisis. Such persons need services that are longer term than those provided by Emergency/Screening. Yet, such services are also less structured than daily or semi-daily involvement in a partial care program;

2. Partial care: A setting that provides three or more hours daily of program involvement to maximize a client's independence and community living skills. Partial care programs provide or arrange for a full range of services necessary to meet the comprehensive needs of individual clients; and

3. Emergency screening: The provision of 24-hour service, seven days a week, to people in crisis. Emergency/screening offers immediate crisis-intervention and service procurement to relieve client distress and maintain or recover his or her level of functioning. Emphasis is on stabilization, so that the client can actively participate in a needs assessment and in service planning.

...

"Operating revenues" means total operating revenues from the hospital's most recent year audited financial statements, which will be inflated using a global economic factor, as defined in N.J.A.C. 8:31B, which measures the change in the prices of goods and services used by New Jersey hospitals.

...

"Outpatient alcoholism service" means the provision of scheduled, or non-scheduled, non-residential diagnostic and primary alcoholism treatment services.

"Outpatient drug service" means the provision of non-residential drug abuse treatment modalities, including methadone maintenance, drug free outpatient and day care services.

"Pediatric day health care facilities" means a facility which is licensed by the Department of Health to provide preventive, diagnostic, therapeutic, and rehabilitative services under medical supervision to meet the needs of chronically ill and medically fragile children exclusively on an outpatient basis.

...

"Project" means the compilation, during a single calendar year, of architectural, engineering and/or construction services for renovation provided by individuals or firms which are not employees of the hospital and for which financing is required to fund the project. If the hospital incurs capital expenditures without use of the external services as described above, then each planned renovation of any discrete area or unit of the hospital shall be considered a separate project.

...

"Purchase cost" means the cost of acquisition of a single unit of fixed or major moveable equipment including installation and renovation.

...

"Satellite" means a community-based primary care center which is an affiliate of a separately licensed ambulatory care facility. A satellite is located at a site distinct from that of the separately licensed ambulatory care facility, but shares the same governing authority and provides the same principal service as the separately licensed ambulatory care facility.

...

"Subject of a health planning regulation" means any health care service identified in the Appendix, Exhibit 2.

...

8:33-2.3 Waivers to certificate of need requirements for physicians

(a) A physician who initiates a health care service which is the subject of a health planning [requirement] **regulation, as defined at N.J.A.C. 8:33-1.3,** or purchases major moveable equipment whose total cost is over $1,000,000, **is subject to the certificate of need requirement. However, a physician** may apply to the Commissioner for a waiver of the certificate of need requirement.

(b) The application by a physician for a waiver of the certificate of need requirement [may be made if] **will be considered pursuant to** the following criteria [are met]:

1.-2. (No change.)

3. The health care service or equipment is not otherwise available and accessible to patients pursuant to standards identified in the State Health Plan or in specific health planning regulations guiding the review of the proposed service or equipment. However, where these standards are not identified in either the State Health Plan or the relevant health planning [rules] **regulations**, a physician may satisfy this criteria by documenting to the satisfaction of the Commissioner, that the proposed service or equipment is not otherwise available or accessible for geographic, financial or other reasons to patients at a health care facility which has received certificate of need approval for the health care service or equipment within 30 minutes travel time of the physician's proposed site for the planned service or equipment.

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

8:33-2.4 Waivers to certificate of need requirements for health maintenance organizations

(a) A health maintenance organization which furnishes at least basic comprehensive care health services on a prepaid basis to enrollees either through providers employed by the health maintenance organization or through a medical group or groups which contract directly with the health maintenance organization may apply to the Commissioner for a waiver of certificate of need requirements for:

1. (No change.)

2. The initiation by any person of a health care service which is the subject of a health planning regulation adopted by the Department **as defined at N.J.S.A. 8:33-1.3**;

3. (No change.)

4. The modernization, renovation or construction of a facility by any person, whose total project cost exceeds $1,000,000, if the facility-type is the subject of a health planning regulation [adopted by the Department] as **defined at N.J.A.C. 8:33-1.3**.

(b)-(e) (No change.)

8:33-3.1 Initiation of health care service

[Initiation] **Establishment** of any of the specified standard categories of health care services **as referenced in N.J.S.A. 26:2H-1 et seq., as amended and/or as** identified in the chapter Appendix, Exhibit 2, incorporated herein by reference, or the modification, replacement or expansion of any health care service or facility, regardless of the amount of capital or operating expenditures requires a certificate of need **except as exempted by P.L. 1992, c.160 as stated in this chapter**.

8:33-3.2 Termination of service and reduction of bed capacity

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

(d) Discontinuance of a component service of a [hospital requires a certificate and shall follow the full review process. Discontinuance of a component service of any other] health care facility [requires] **shall not require** a certificate of need [and shall follow the expedited review process.] **where the discontinuance will not result in problems of access to populations historically served and is not a service which is required to be a component of an in-patient health care facility. In these instances, the licensed entity shall notify the Department's Certificate of Need Program in writing 60 days prior to discontinuance of the service. The Department will notify the provider whether the proposed discontinuance requires a certificate of need which shall follow the expedited review process set forth at N.J.A.C. 8:33-4.1(b).**

8:33-3.3 Transfer of a health care service/facility

(a) [A certificate of need is required for a transfer of ownership of operating health care facilities, beds, services, or equipment, that are the subject of health planning regulation according to the rules in this chapter. Applications for transfer of ownership shall follow the expedited review process, except for those involving general acute hospital facilities or services, which shall follow the full review process.] **A certificate of need is required for a transfer of ownership of the following:**

1. An entire acute care hospital. Applications for such shall follow the full review process set forth at N.J.A.C. 8:33-4.1(a);

2. A transfer which will result in a new provider number for the hospitals involved in the transfer. Applications for such shall follow the full review process set forth at N.J.A.C. 8:33-4.1(a);

3. An acute care service owned and/or operated by an acute care hospital. The corporate unbundling of an acute care service identified in the Appendix, Exhibit 2 owned and/or operated by an acute care hospital shall require a certificate of need. Corporate unbundling refers to the transfer of ownership of an acute care service owned or operated by an acute care hospital and the establishment of that service under a new corporation and under a separate license from the acute care hospital's license. Applications for such shall follow the expedited review process set forth at N.J.A.C. 8:33-4.1(b); and

4. A long-term care facility in which the proposed owner does not satisfy the Department of Health's review of the proposed owner's prior operating experience in accordance with the criteria identified in this chapter and N.J.A.C. 8:33H, as well as any requirements established by the Federal government pursuant to Titles XVIII and XIX of the Social Security Act U.S.C. 483.1 through 483.158. Applications shall follow the expedited review process set forth at N.J.A.C. 8:33-4.1(b).

(b) A certificate of need is not required for transfer of ownership of all other operating health care facilities, beds, services or equipment not specified in (a) above. Where a certificate of need is not required pursuant to this section, application for a license on forms prescribed by the Department shall be filed with the Department's Licensing Program in the Division of Health Facilities Evaluation and Licensing, in accordance with this chapter and the Department's licensing rules.

Recodify existing (b)-(d)] as **(c)-(e)** (No change in text.)

[(e)]**(f)** These rules apply to ownership by any individual, partnership, corporation, or other entity in any entity which is the licensed operator of a facility or which owns the facility's real property. Except as otherwise provided in [(g)]**(h)** below, a transfer of ownership which requires a certificate of need is defined as an acquisition or transfer which will increase or establish an ownership interest in a health care facility, as defined in N.J.A.C. 8:33-1.3, through purchase, lease, purchase or lease option, gift, donation, exchange, or by any other means. Types of ownership interests to which these rules apply include, but are not limited to, the following:

1.-4. (No change.)

Recodify (f)-(h) as **(g)-(i)** (No change in text.)

[(i)]**(j)** Except as otherwise provided in [(j)]**(k)** below, the transfer of approved certificates of need prior to licensure is prohibited. Proceeding with any such transfer shall nullify the certificate of need and preclude licensure as a health care facility.

[(j)]**(k)** At the discretion of the Department, an exception to the prohibition, at [(i)]**(j)** above, on the sale of certificates of need prior to licensure may be permitted and the certificate of need process for transfer of ownership may be allowed to proceed on an unimplemented certificate of need if the types of changes set forth at **(h)**1 through 6 above apply. Applicants for transfers of unimplemented certificates of need shall demonstrate in the application that the transfer will not adversely affect the financial feasibility of the project.

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

[(l)]**(m)** If the facility being transferred has any partially implemented or unimplemented certificate of need approvals, an application for [transfer of ownership will not be accepted for processing until the unimplemented components of the certificate of need have been completed.] **a license to own and/or operate the facility by the**

new owner will not be accepted by the Licensing Program unless the current owner/operator surrenders to the Department the unimplemented certificate of need approvals. The Commissioner can waive this requirement where he or she determines [it is consistent with the needs of the health care system reflected in the State Health Plan] **that the project has been substantially completed and that completion of the project is in the public interest, consistent with the principles set forth at N.J.A.C. 8:33-1.2.**

[(m) Applications for transfer of ownership of home health agencies will be processed according to the rules in this chapter and must meet the criteria identified at N.J.A.C. 8:33L-2.6.]

1. The grandfathered or waivered status of a service is not transferable. A physician or health maintenance organization who initiates a service pursuant to either the grandfathering or waiver provisions of P.L. 1991, c.187 may not transfer the service without going through the certificate of need process and shall follow the full review process set forth at N.J.A.C. 8:33-4.1(a).

8:33-3.4 Bed capacity, medical day care slot capacity

(a) The following criteria apply to changes in bed capacity.

1. Any increase in the number of licensed beds by licensure and/or health planning category requires a certificate of need and shall follow the full review process, except as follows:

i. (No change.)

ii. [Any increase in the total number of residential health care beds requires a certificate of need and shall follow the expedited review process.] **Establishment of a residential health care facility requires a certificate of need and shall follow the expedited review process set forth in N.J.A.C. 8:33-4.1(b). Any increase or decrease in the bed complement of an existing licensed residential health care facility and any capital expenditures exclusively associated with the bed changes are exempt from the certificate of need requirement. However, approval from the Department's Health Facilities Construction Services prior to building construction or renovations, and approval from the Department's Licensing Program in the Division of Health Facilities Evaluation prior to implementation of the bed changes are required, in accordance with this chapter and the Department's licensing rules.**

2. Any decrease in the number of licensed beds by licensure and/or health planning category requires a certificate of need and shall follow the full review procedure where the reduction in the licensed beds will result in a capital expenditure greater than the monetary threshold specified in N.J.A.C. 8:33-3.6 or where the bed reduction would violate a condition of certificate of need approval imposed upon the provider, as determined by the Commissioner. A certificate of need will not be required for any decrease in the number of licensed beds by licensure and health planning category where the reduction can be accomplished at a total capital expenditure less than the monetary threshold specified in N.J.A.C. 8:33-3.6 and where the reduction will not violate a condition of approval of a certificate of need provided to or on behalf of the provider or the organization of which the provider entity is a part. In these instances the licensed entity will be required to notify in writing by certified mail the Certificate of Need Program and the Division of Health Facilities Evaluation in the State Department of Health at least 120 days prior to the effective date of the bed reduction identifying by number and licensure and/or health planning category the beds to be removed from the facility's license and shall specify both the total capital costs associated with the planned reduction of licensed beds and the specific plans the provider has made to relocate any and all patients occupying the beds proposed for closure. The Department will notify the provider in writing within 20 days of receipt of written notification of the proposed bed reduction whether the proposed reduction shall require a certificate of need. The provisions of this subsection shall apply exclusively to a reduction of licensed beds which results in the permanent closure of the subject beds and their removal from the facility's license. The provisions of this subsection do not apply in the case of an applicant proposing the reduction or elimination of residential health care beds or the closure of a residential health care facility. [The rules guiding such bed reductions or residential health care facility closures are set forth at N.J.A.C. 8:33H-1.12.] Conversions of licensed beds to other uses shall be treated as increases in the number of beds by licensure or health planning category and the provisions of (a)1 above shall apply.

(b) The following criteria apply to [medical] day **health** care [slots] **facilities**:

[1. The establishment or expansion of an adult day health care facility requires a certificate of need and shall follow the full review process]. **The establishment of, or an increase or decrease in the capacity of, an adult or pediatric day health care facility does not require a certificate of need. However, approval from the Department's Health Facilities Construction Services prior to building construction or renovations and approval from the Department's Licensing Program in the Division of Health Facilities Evaluation prior to implementation of, or changes to, adult day health care facilities/services is required, in accordance with this chapter and the Department's licensing rules.**

[2. The reduction of adult day health care slots from an existing facility requires a certificate of need and shall follow the expedited review process.

3. The establishment of or change in the number of pediatric day care slots requires a certificate of need and shall follow the expedited review process.]

8:33-3.5 Buildings

(a) The following criteria apply to buildings:

1. Regardless of cost, a certificate of need is required for the establishment of a new health care facility and shall follow the full review process **unless the facility type is specifically exempted from the certificate of need requirement pursuant to P.L.1992, c.160, section 19 (N.J.S.A. 26:2H-7a) or otherwise exempted pursuant to this chapter;**

2. Replacement at the same site of an existing health care facility [which exceeds the dollar threshold set forth at N.J.A.C. 8:33-3.6 requires a certificate of need and shall follow the expedited review process,] **or relocation to a new site within the same county as the existing health care facility is exempt from the certificate of need requirement** providing it meets the following criteria:

i. The facility proposed for replacement **or relocation** is not licensed as a general acute care hospital [or subject to the capital cost restrictions noted at N.J.A.C. 8:33-4.9(e)];

ii. The existing facility proposed for replacement **or relocation** is not adding beds to its total licensed bed inventory [and], is not adding beds within any licensure and/or health planning category at the proposed replacement or relocated facility [beyond those identified on its license at the time the certificate of need application is submitted], **and is not adding any proposed new service not previously offered by the applicant at the existing facility already approved by the Department's Licensing Program in the Division of Health Facilities Evaluation;**

iii. (No change.)

iv. The replacement facility shall be located at the existing site or at a new site [either within the same municipality or] within the same county as the existing facility. Where the new site is in a county other than the county in which the existing facility is located, a certificate of need will be required and will follow the full review process.

[3. Replacement at the same site of an existing health care facility which does not meet the criteria set forth above requires a certificate of need and shall follow the full review process;

4. Relocation or replacement of an existing health care facility to a new site within the same county in which it is located shall follow the expedited review process. A relocation or replacement of an existing health care facility within the same municipality which does not exceed the dollar threshold set forth at N.J.A.C. 8:33-3.6 will not require a certificate of need. However, notification of the change must be submitted to the Certificate of Need Program. If the facility's plan for relocation or replacement includes any proposed new service not previously offered by the applicant at the existing location or involves a relocation to a county other than the one in which the facility to be relocated or replaced is located at the time the certificate of need application for relocation or replacement is submitted to the Department, the application shall follow the full-review process. In addition, if the relocated or replacement

facility is a licensed general acute care hospital or is subject to the capital requirements noted at N.J.A.C. 8:33-4.9(e), the certificate of need application shall follow the full review process in the appropriate batch];

[5.]**3.** Establishment of a satellite location **for a primary care center** by an existing health care facility [requires] **does not require** a certificate of need. [and shall be subject to full-review requirements set forth at N.J.A.C. 8:33-4.1(a); and] **In these instances the licensed entity will be required to notify the Department's Certificate of Need Program in writing prior to establishment of a satellite location. The Department will notify the provider whether the facility requires a certificate of need which shall follow the full review process. The Department's final determination regarding whether a proposed facility qualifies as a satellite location in accordance with N.J.A.C. 8:25, or the establishment of a new health care facility will be a final agency decision.**

4. Establishment of a new health care facility, satellite or replacement or relocation of an existing facility which is exempt from the certificate of need requirement requires approval from the Department's Health Facilities Construction Services, in accordance with the Department's licensing rules, prior to building construction or renovations and approval from the Department's Licensing Program in the Division of Health Facilities Evaluation, in accordance with the Department's rules, prior to operation and occupancy of the beds, service or facility; and

[6.]**5.** Relocation and replacement of a component service of an existing health care facility [shall follow the expedited review procedure noted at N.J.A.C. 8:33-5.1 unless the service is a component of an acute care hospital in which case the application shall be processed via full review procedures in the appropriate batch.] **will not require a certificate of need where the relocation will not result in problems of access to populations historically served and the service is not a service which is required to be a component of an in-patient health care facility. In these instances, the licensed entity shall notify the Department's Certificate of Need Program in writing prior to relocation of the service. The Department will notify the provider whether the proposed relocation requires a certificate of need, which shall follow the expedited review process in accordance with N.J.A.C. 8:33-4.1.**

8:33-3.6 New construction/modernization/renovation

(a) Acquisition of a building and/or new construction, modernization or renovation of a health care facility which under generally accepted accounting principles, results in cumulative total project costs for all projects within a fiscal year in excess of $1,000,000, requires a certificate of need and shall follow the full review process **unless specifically exempted from the certificate of need requirement pursuant to P.L.1992, c.160, sections 19 and 20 (N.J.S.A. 26:2H-7a and 7b).** If the new construction, modernization or renovation is for a facility **which provides a health care service** which is the subject of a health planning regulation adopted by the Department, **as defined at N.J.A.C. 8:33-1.3,** then any person, including a physician or group of physicians, [must also] **shall** obtain a certificate of need **prior to the initiation of the construction, modernization or renovation.**

(b) (No change.)

(c) Mandatory replacement of fixed equipment and/or mandatory renovations to facilities in excess of the monetary thresholds for equipment replacement or renovations [requires a certificate of need and shall follow the expedited review process.] **is exempt from the certificate of need requirement. The determination of whether the replacement of fixed equipment or renovations is mandatory as defined herein shall be made by the Commissioner. If the equipment replacement or renovations are not mandatory, a certificate of need will be required and the applicant shall follow the full review process.**

(d) Regardless of capital cost, a certificate of need is not required for new construction, modernization or renovation of a medical arts building or parking garage.

[1. The costs of purchase, construction, renovation, expansion and operation of the proposed parking garage shall be fully underwritten by charges to users, as the costs will not be financed, directly or indirectly, in whole or in part, by charges to patients. An exception may be made for components of cost which are reasonable and necessary and conform to the reimbursement definitions and procedures for employee benefits related to patient care set forth in reimbursement regulations.

2. The costs of the purchase, construction, renovation, expansion and operation of a proposed medical arts building shall be wholly underwritten by charges to users. An exception can be made when documentation is provided and the Department determines that it is cost effective to locate health care services in the building.]

(e) Acquisition of a building; new construction, modernization or renovation of a health care facility; or acquisition of fixed equipment which is exempt from the certificate of need requirement requires approval from the Department's Health Facilities Construction Services prior to building construction or renovations and approval from the Department's Licensing Program in the Division of Health Facilities Evaluation prior to operation and occupancy of the beds, service or facility, in accordance with this chapter and the Department's licensing rules.

8:33-3.7 Major moveable equipment

(a) Acquisition, replacement, expansion, or transfer by any person, including a physician, of major moveable equipment whose total cost exceeds $1,000,000, as well as any major moveable equipment for the provision of a service which is the subject of a health planning regulation or which is proposed by the Commissioner to be the subject of a health planning regulation, **as defined at N.J.A.C. 8:33-1.3, requires a certificate of need except as follows:**

1. [where] **Where** the Commissioner has granted a waiver to a physician or to a Health Maintenance Organization pursuant to section 30 of P.L.1991, c.187[.];

2. Where a hospital acquires a magnetic resonance imager that is already in operation in the State by another health care provider or entity; or

3. Where the purchase cost for replacement of fixed or major moveable equipment by a general acute care hospital meets the criteria set forth at N.J.A.C. 8:33-6.1(b).

(b) Acquisition of an equipment unit that is part of an equipment system, through purchase, lease, or donation, if the system's cost or value, including installation and renovation under generally accepted accounting principles, results in a cumulative total project cost or value of $1,000,000 or more or is expected to be $1,000,000 or more, within a fiscal year, requires a certificate of need and shall follow the full review process in the appropriate batch, **except as provided for at N.J.A.C. 8:33-6.1(b).**

(c) (No change.)

(d) Optional replacement of existing major moveable equipment with the same equipment which exceeds the dollar threshold or which is the subject of a health planning regulation requires a certificate of need and shall follow the full review process in the appropriate batch, **except as provided for at N.J.A.C. 8:33-6.1(b).**

(e) Mandatory replacement of major moveable equipment as defined at N.J.A.C. 8:33-1.1, [which exceeds $1,000,000 or which is the subject of a health planning regulation requires a certificate of need and shall follow the expedited review process] **is exempt from the certificate of need requirement. The determination of whether the replacement equipment is mandatory as defined herein shall be made by the Commissioner. If the equipment replacement is not mandatory, a certificate of need will be required and shall follow the full review process, in accordance with N.J.A.C. 8:33-6.1.**

(f) Acquisition, replacement, expansion, or transfer of major moveable equipment which is exempt from the certificate of need requirement requires approval from the Department's Health Facilities Construction Services prior to building construction or renovations and approval from the Department's Licensing Program in the Division of Health Facilities Evaluation prior to operation of the service, in accordance with this chapter and the Department's licensing rules.

8:33-3.8 Minor moveable equipment

Regardless of capital cost, a certificate of need shall not be required for the acquisition, replacement, expansion or transfer by

any person, including a physician, of minor moveable equipment. [The Department will not support any appeal to the Hospital Rate Setting Commission for additional reimbursement in the schedule of rates as a result of the acquisition of minor moveable equipment by general acute care hospitals.]

8:33-3.9 Changes in cost/scope/financing

(a) Any proposed change in the cost of an approved project shall require a change of cost review and shall follow the expedited review process outlined in N.J.A.C. 8:33-5, except as follows:

1. A certificate of need for change in the cost for an original certificate of need approval issued after September 8, 1992 may not exceed 10 percent of the approved capital cost plus any construction cost factor calculated by the Department for the life of the certificate of need. Any certificate of need application for change in cost which exceeds 10 percent will not be accepted for processing. [Any cost in excess of the approved certificate of need will not be eligible for reimbursement.]

2.-3. (No change.)

(b) The following criteria apply to a proposed change in the location of an approved, but unimplemented, certificate of need project:

1. Relocation of the proposed project within the same [municipality] **county** does not require a certificate of need review. The applicant shall submit written notification to the Certificate of Need Program **and the Division of Health Facilities Evaluation** with appropriate documentation of site control. **Relocation of a proposed project which is exempt from the certificate of need requirement requires approval from the Department's Health Facilities Construction Services prior to building construction or renovations and approval from the Department's Licensing Program in the Division of Health Facilities Evaluation prior to operation and occupancy of the beds, service or facility, in accordance with this chapter and the Department's licensing rules.**

[2. Relocation of the proposed project within the same county requires a certificate of need and shall follow the expedited review process.]

[3.]**2.** Relocation of the proposed project outside the approved county will not be accepted for processing. Failure of the applicant to implement the project within the same county will result in nullification of the approved certificate of need.

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

(g) Any change in financing or change in the method of financing[,] which will result in an increase in capital-related operating costs of 10 percent or more shall be considered a change in financing and shall follow the expedited review process. Wherever the refinancing will not result in an increase in capital-related operating costs of 10 percent or more [and, in the case of general acute care hospitals, will not cause a hospital to exceed its maximum capital cost per admission allowance under the State's hospital reimbursement system), no certificate of need for a change in financing shall be required. The Department will, however, require written notification from the approved applicant of the change that was effectuated through an approved refinancing within 30 calendar days of securing the refinancing.

(h) (No change.)

8:33-3.10 Duration of certificate of need

(a) The following criteria apply to the duration of a certificate of need:

1. For a certificate of need approved after [the effective date of this rule] **September 8, 1992**, the certificate of need shall be valid for a period of five years from the date of approval[,]. [unless the State Health Plan specifies a different period of time for which a certificate of need for that service shall be valid or **under exceptional circumstances,** the Commissioner **may** grant[s] additional time in the initial certificate of need approval **letter for completion of a project** [for complex projects submitted by hospitals which can only be completed in phases]. [For complex hospital projects, the] **The** applicant will be required to petition for the extended period of time in its application, providing a detailed schedule for project implementation and identifying a specific time frame for project completion.

i. (No change.)

2. For a certificate of need approved prior to [the effective date of this rule,] **September 8, 1992,** the certificate of need approval shall remain valid until the expiration date noted in the most recent extension of time. The applicant will be required to file for an extension of time 60 days prior to the current expiration and to propose a detailed time frame identifying the remaining time needed to complete the approved subject. Where the Commissioner determines that the approval should be extended for an additional period of time beyond its current expiration date, he or she will assign a final expiration date.

8:33-3.11 Demonstration and research projects

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

(c) At the conclusion of the research project, the health care services and equipment provided in the course of the research will no longer have certificate of need exemption status. At that time, if the services and equipment used are to be continued such that they will be provided to the general population or where billings for such services or equipment shall occur or reimbursement received, a certificate of need must be obtained in accordance with the provisions of this chapter and all other applicable health planning [rules] **regulations.**

8:33-4.1 Request for certificate of need applications

(a) The full review process involves the review of a certificate of need application by the local advisory board(s) and the State Health Planning Board, as well as the Department of Health. The full review process for certificate of need applications will be activated upon notice by the Commissioner inviting certificate of need applications [in consideration of the specific needs identified in the State Health Plan] **for specific services.** The notice shall become effective upon the date of publication in major newspapers of general circulation in the State. The notice will also be distributed to health care associations on file with the Department, filed with the Office of Administrative Law and published in the New Jersey Register. Beginning in calendar year 1993 the Commissioner shall publish in the New Jersey Register in February of each year an anticipated schedule for receipt of certificate of need applications subject to full review procedures during the current calendar year. The Commissioner may announce additional or special calls for certificate of need applications beyond those identified in the yearly notice or may delete announced calls from the yearly notice. Wherever practical, the Commissioner shall provide notice in accordance with this section to allow for a minimum of 90 days between the date of publication of the Commissioner's notice inviting certificate of need applications and the date for submission of applications in response to the notice(s). The notice will identify the needed service(s), proposed geographic area(s) to be served, the date the application is due, the date the application is deemed complete for processing, the date the local advisory board must submit its recommendation to the Commissioner and the date that the State Health Planning Board must submit its recommendation to the Commissioner. The local advisory board(s) shall forward recommendations to the State Health Planning Board and Commissioner within 45 days after the application is deemed complete for processing and the State Health Planning Board shall forward recommendations to the Commissioner within 90 days after the application is deemed complete for processing unless a fair hearing is requested by an applicant in accordance with the procedures identified at N.J.A.C. 8:33-4.14. A decision should generally be rendered by the Commissioner approximately three months after the application is deemed complete for processing.

(b) (No change.)

8:33-4.9 General criteria for review

(a) The State Health Planning Board shall prepare and revise annually[,] a State Health Plan. The State Health Plan shall identify the unmet health care needs in an area by service and location and it shall serve as an advisory document which may be considered when certificate of need applications are reviewed for approval. The State Health Planning Board shall consider the recommendations of the local advisory boards in preparing and revising the plan to in-

corporate specific regional and geographic considerations of access to, and delivery of, health care services at a reasonable cost. The State Health Planning Board shall incorporate the recommendations of the local advisory boards into the plan unless the recommendations are in conflict with the best interests of Statewide health planning. If any recommendations of the local advisory boards are not incorporated into the plan, the State Health Planning Board shall identify those recommendations, which shall be listed separately for each local health planning region, in an addendum to the plan and shall state the specific reason that each recommendation is in conflict with the best interests of Statewide health planning.

(b) No certificate of need shall be issued unless the action proposed in the application for such certificate is [consistent with the health care needs identified in the State Health Plan and the action is] necessary to provide required health care in the area to be served, can be economically accomplished and maintained, will not have an adverse economic or financial impact on the delivery of health care services in the region or Statewide, and will contribute to the orderly development of adequate and effective health care services. In making such determinations there shall be taken into consideration:

1.-6. (No change.)

(c) It shall be the responsibility of the applicant to adequately and appropriately demonstrate that the proposed project meets the [health care needs identified in the State Health Plan, other State plans and policies, and State health planning rules, the need that the population served or to be served has for the services proposed and the relationship of the services proposed to be provided to the existing health care system of the area in which the services are proposed to be provided] **standards set forth in (b) above.** It is not incumbent upon the reviewing [process] **agencies** to demonstrate lack of need.

(d) (No change.)

(e) For the three-year period beginning January 1, 1992 through December 31, 1994, the Commissioner shall limit approval of certificates of need for hospitals for capital construction projects that would be financed by the New Jersey Health Care Facilities Financing Authority to a Statewide total of $225,000,000 per year for all projects, exclusive of the refinancing of approved projects.

1. (No change.)

2. The annual cap shall include the total project cost of each approved certificate of need for acute care hospitals including the following:

i.-iii. (No change.)

iv. The cap shall not apply to a certificate of need application which is funded totally by cash equity [and will not result in any future increase in capital reimbursement under Chapter 83].

3.-4. (No change.)

8:33-4.10 Specific criteria for review

(a) Each applicant for a certificate of need must show how the proposed project will promote access to low income persons, racial and ethnic minorities, women, disabled persons, the elderly, and persons with HIV infections and other persons who are unable to obtain care. In determining the extent to which the proposed service promotes access and availability to the aforementioned populations, the applicant, where appropriate, shall address in writing the following:

1. The contribution of the proposed service in meeting the health related needs of members of medically underserved groups as may be identified in the applicable local health plan and State [Health] **health** planning [rules] **regulations** as deserving of priority;

2.-9. (No change.)

(b) Each applicant for certificate of need [must] **shall** demonstrate that the proposed project can be economically accomplished and maintained; that it will address otherwise unmet needs in a particular municipality, county, and/or regional health planning area; that it will not have an adverse economic or financial impact on the delivery of health care services; and that projected volume is reasonable. Evaluation of the applications will include a review of:

1.-5. (No change.)

6. The immediate and long-term financial impact on the institution this review will assess:

i.-vi. (No change.)

vii. The feasibility of refinancing both new and existing debt. When it is economically feasible, the applicant must agree to refinance; **and**

[viii. For acute care hospitals, compliance with the reimbursement rules in N.J.A.C. 8:31B, and substantiation that capital reimbursement will be sufficient to meet capital costs under the Department's policy guidelines for capital; and]

[ix.]**viii.** The ability of acute care hospitals to meet the operating costs associated with the project[, based on payment as defined in N.J.A.C. 8:31B]; and

7. (No change.)

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

(e) Each applicant for certificate of need shall demonstrate character and competence, qualify of care, and an acceptable track record of past and current compliance with State licensure requirements, applicable Federal requirements, and State certificate of need requirements, including, but not limited to, the following:

1. (No change.)

2. Applicants shall demonstrate the capacity to provide a quality of care which meets or surpasses the requirements contained in the applicable licensing standards for the facility. Evidence of the capacity to provide high quality care shall include (e)2i below and may if applicable, also include (e)2ii-iv below:

i. A satisfactory record of compliance with licensure standards in existing health care facilities which are owned, operated, or managed, in whole or part, by the applicant. This may include reports issued by licensing agencies from other states, as well as from the Department;

ii. Narrative descriptions or listings within the application of services, staffing patterns, policies and protocols addressing delivery of nursing, medical, pharmacy, dietary, and other services affecting residents' quality of care;

iii. Documentation of compliance with the standards of accreditation of nationally-recognized professional bodies; and

iv. Where applicable, a recommendation by the State Department of Human Services' Division of Medical Assistance and Health Services and Division of Mental Health and Hospitals regarding the quality of and access to services provided by the applicant to Medicaid patients and patients who have been discharged from State and county psychiatric hospitals;

3. The Department shall examine and evaluate the licensing track record of each applicant for the period beginning 12 months preceding submission of the certificate of need extending to the date the Commissioner issues a final decision, for the purpose of determining the capacity of an applicant to operate a health care facility in a safe and effective manner in accordance with State and Federal requirements. A certificate of need application may be denied where an applicant has not demonstrated such capacity, by evidence of any continuing violation or a pattern of violations of State licensing standards or Federal certification standards at any health care facility in which the applicant has or has had an ownership or managerial interest. An applicant, for purposes of this Chapter, includes any person, partner, and/or corporation which is an owner, principal, operator or manager of the proposed or existing licensed health care facility which is seeking certificate of need approval;

4. A certificate of need submitted by an applicant who was cited for any State licensing or Federal certification deficiency during the period identified in (e)3 above, which represented an inappropriate discharge or denial of admission or a serious risk to the life, safety, or quality of care of the facility's patients or residents, shall be denied. A serious risk to life, safety, or quality of care of patients or residents includes, but is not limited to, any deficiency in State licensure or Federal certification requirements in the areas of nursing, patient rights, patient assessment of care plan, dietary services, infection control and sanitation, or pharmacy. In no case shall a certificate of need be approved if the State licensing or Federal certification action results in:

i. An action by a State or Federal agency to curtail or temporarily suspend admissions to a facility; or

ii. In the case of long term care, a finding of two or more Level A violations as a result of one survey, or one or more Level A violations of the same type on consecutive surveys;

5. In evaluating track record pursuant to (e)3 or 4 above, the Department may consider any evidence of noncompliance with applicable licensure requirements provided by an official state licensing agency in any state outside of New Jersey, or any official records from any agency of the State of New Jersey indicating the applicant's non-compliance with the agency's licensure or certification requirements in a facility the applicant owned, operated, or managed in whole or in part.

Recodify existing 2.-3. as **6.-7.** (No change in text.)

8:33-4.12 Functions of local advisory boards

(a) (No change.)

(b) The local advisory board shall review certificate of need applications for proposed projects in its region and make recommendations to the Commissioner [consistent with] **in consideration of** the State Health Plan and **consistent with** all appropriate health planning [rules] **regulations.**

(c) (No change.)

(d) The local advisory board shall be responsible for the following activities:

1. (No change.)

2. Written notification to its service area public of the beginning of a review, which shall include notification of the proposed schedule for the review, the public comment period for persons directly affected by the review, and the manner in which [notification will be provided of the time and place for] public comment **will be received, that is, through written comment or oral testimony; and**

[3. Provision for public comment in the course of agency review if requested by one or more persons directly affected by the proposed project; and]

[4.]**3.** Evaluation of the public need for each proposal in [accordance with] **consideration of** the State Health Plan, the criteria for review identified in N.J.A.C. 8:33-4.9 and 4.10 and in accordance with the requirements of applicable State health planning [rules] **regulations.**

(e) (No change.)

8:33-4.13 Role of the State Health Planning Board

(a) The State Health Planning Board shall review applications for certificates of need and make recommendations to the Commissioner in [accordance with] **consideration of** the State Health Plan and **in accordance with** all applicable health planning [rules] **regulations.**

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

8:33-4.16 Conditions on approval/monitoring

(a) (No change.)

(b) Any conditions placed on a certificate of need approval shall become part of the licensure requirements of the approved facility. Failure to comply with approved certificate of need conditions may result in licensure [or rate] action by the Department and may constitute an adequate basis for denying certificate of need applications by an applicant who is out of compliance with conditions on previous approvals. The applicant must contest any condition, if at all, within 30 days of receipt of notice. The applicant will vacate his right to oppose said condition(s) if he fails to submit written notice that he contests any condition to the Department within this time. If the applicant contests a condition, the Commissioner will suspend his or her approval of the certificate of need in order to consider the objection. Furthermore, the Commissioner has the right to nullify the approval of the certificate of need. The Commissioner may, at his or her discretion, consult with the State Health Planning Board to obtain its recommendation on the contested condition(s).

(c) When conditions are included in the Commissioner's approval letter, the applicant shall file a progress report on meeting such conditions with the Certificate of Need Program at least 12 months from the date of approval and annually for the first two years after project implementation and at any other time requested by the Department in writing. Failure to file such reports may result in the nullification of the approved certificate of need, fines and penalties imposed through licensure [or rate] action and/or taken into consideration in the review of subsequent certificate of need applications.

(d) (No change.)

8:33-5.1 Statement of purpose

(a) The expedited review process shall be used for the following specific applications:

[1. Community-based primary care centers;

2. Outpatient drug/alcohol counseling;

3. Basic life support ambulance and invalid coach;

4. Mental health services which are exclusively out-patient and, therefore, non-bed related;]

[5.]**1.** Establishment of [or changes to] residential health care [bed capacity] **facilities;**

[6. Mandatory renovations;

7. Mandatory replacement of fixed or major moveable equipment in excess of the threshold;

8. Transfer of ownership of all health care facilities and components thereof except general acute hospitals;

9. Change in site of an approved but unimplemented certificate of need project within the same county. A change in site within the same municipality will not require a certificate of need. However, notification of the change must be submitted to the Certificate of Need Program;

10. Relocation or replacement of an existing health care facility within the same county providing the relocation or replacement complies with N.J.A.C. 8:33-3.5;

11. Replacement at the same site of an existing health care facility which exceeds the dollar threshold set forth at N.J.A.C. 8:33-3.6 providing the replacement complies with N.J.A.C. 8:33-3.5.

12. Establishment of a new continuing care retirement community (CCRC) with a health care facility component or the change in bed capacity of a health care facility component serving a CCRC facility;]

[13.]**2.** Establishment of a restricted admissions facility or change in bed capacity of a restricted admissions facility [as articulated in the Long-Term Care chapter of the State Health Plan and specific health planning rules related to long-term care];

[14.]**3.** Change in cost to an original certificate of need issued after [the effective date of these rules] **September 8, 1992** which is 10 percent or less of the approved capital cost including an inflation factor;

[15.]**4.** Change in cost to an original certificate of need issued prior to [the effective date of these rules] **September 8, 1992; and**

5. Establishment of or changes in the capacity of comprehensive personal care homes, in accordance with the requirements of this chapter and the Department's licensing rules;

[16. Establishment of or changes in the capacity of a pediatric day health care facility; or

17. Decrease in the capacity of an adult day health care facility.]

(b) (No change.)

8:33-5.4 Specific requirements

(a) In addition to the requirements of N.J.A.C. 8:33, the following information shall be provided, as appropriate, for all expedited review projects:

[1. For mandatory replacement or renovation, an explanation of mandatory nature, including written opinion regarding hazards and safety effects upon patient care by experienced professionals, or from Federal, State, county or municipal governmental agencies.]

Recodify existing 2.-4. as **1.-3.** (No change in text.)

8:33-5.5 [Required commitments for the medically underserved] **(Reserved)**

[(a) The applicant shall make at least a minimum commitment to provide care to the medically underserved population as follows:

1. Community-based primary care centers: the applicant must provide a minimum of 10 percent of total visits to the medically underserved.

2. Outpatient drug/alcohol counseling: The applicant must provide a minimum of 10 percent of total visits to the medically underserved.

3. Ambulance/invalid coach: The applicant must agree to become a Medicaid provider.]

SUBCHAPTER 6. CERTIFICATE OF NEED EXEMPTIONS

8:33-6.1 Statement of purpose

(a) In accordance with the provisions of the Health Care Reform Act, P.L. 1992, c.160, the following specific health care services or projects are exempt from the certificate of need requirement:

1. Community-based primary care centers, as defined at N.J.A.C. 8:33-1.3, which provide preventive, diagnostic, treatment, management, and reassessment services exclusively on an outpatient basis to individuals with acute or chronic illnesses in a location and manner that is accessible to individuals;

2. Outpatient drug and alcohol services which include drug-free and methadone maintenance services and day treatment alcohol services;

3. Ambulance and invalid coach services excluding mobile intensive care unit services;

4. Mental health services which are non-bed related outpatient services including outpatient centers, partial hospitalization programs and case management programs;

5. Increases or decreases in the bed capacity of residential health care facilities;

6. Mandatory renovations to existing facilities;

7. Mandatory replacement of fixed or moveable equipment;

8. Transfer of ownership interest, except in the case of a general acute care hospital, or a long-term care facility in which the owner does not satisfy the Department of Health's review of the owner's prior operating experience in accordance with the criteria identified at N.J.A.C. 8:33-4.10 and N.J.A.C. 8:33H, as well as any requirements established by the Federal government pursuant to Titles XVIII and XIX of the Social Security Act (USC 483.1 through 483.158).

9. Change of site for an approved certificate of need within the same county;

10. Relocation or replacement of a health care facility within the same county, except for a general acute care hospital;

11. Continuing care retirement communities authorized pursuant to P.L. 1986, c.103 (N.J.S.A. 52:27D-330 et seq.) which contain a minimum of four independent living units for every one long-term care bed;

12. Acquisition by a general acute care hospital of a magnetic resonance imager that is already in operation in the State by another health care provider or entity;

13. Adult day health care facilities;

14. Pediatric day health care facilities; and

15. Chronic renal dialysis facilities.

(b) In accordance with the provisions of the Health Care Reform Act, P.L. 1992, c.160, section 20 (N.J.S.A. 26:2H-7b), modernization, renovation, and/or replacement of fixed or major moveable equipment by a general acute care hospital shall be exempt from the certificate of need requirement providing it meets the following criteria:

1. Where the total project or purchase cost does not exceed five percent of that hospital's operating revenues for the year in which the project or purchase is undertaken, a certificate of need is not required.

i. For purposes of this subsection the total project is defined as the compilation, during a single calendar year, of architectural, engineering and/or construction services for renovations provided by individuals or firms which are not employees of the hospital and for which financing is required to fund the project.

ii. For purposes of this subsection, if the hospital incurs capital expenditures without use of the external services as described above, then each planned renovation of any discrete area or unit of the hospital shall be considered a separate project.

iii. For purposes of this subsection, purchase cost is defined as the cost of acquisition of a single unit of fixed or major moveable equipment, including installation and renovation.

iv. For purposes of this subsection, operating revenues will be defined as total operating revenues from the hospital's most recent year audited financial statements, which will be inflated using a global economic factor which measures the change in the prices of goods and services used by New Jersey hospitals.

2. This exemption shall not apply to the initiation or expansion of any health care service as provided in section 2 of P.L. 1971, c.136 (N.J.S.A. 26:2H-2), as amended, which includes a health care service that is identified in the Appendix, Exhibit 2, the expansion of a hospital's physical plant; or the construction of a new health care facility.

8:33-6.2 Process

(a) This section shall apply to projects which are exempt from the certificate of need requirement.

(b) For mandatory replacement of fixed or major moveable equipment or mandatory renovations to existing facilities, an explanation of the mandatory nature, including a written opinion regarding hazards and safety effects upon patient care by experienced professionals, or from Federal, State, county or municipal governmental agencies shall be submitted to the Commissioner of Health for a determination prior to proceeding with the replacement or renovations.

(c) For community-based primary care centers not specifically identified herein, a description of the proposal, including services to be offered, staffing, population to be served and anticipated revenue sources, shall be submitted to the Commissioner of Health for a determination regarding certificate of need requirements prior to proceeding with initiation of services at the proposed facility, in accordance with the provisions of this chapter.

(d) For continuing care retirement communities, a certificate of authority from the Department of Community Affairs for the operation of a continuing care retirement community shall be submitted to the Department of Health prior to licensure of the long-term care beds.

(e) Written notification and architectural plans shall be submitted to the Department's Health Facilities Construction Services for approval prior to initiating building construction or renovations, in accordance with this chapter and the Department's licensing rules.

(f) Written notification shall be submitted to the Department's Licensing Program in the Division of Health Facilities Evaluation for approval prior to operation and occupancy of the beds, service or facility in accordance with this chapter and the Department's licensing rules.

(g) Application for a license on forms prescribed by the Department shall be filed with the Department's Licensing Program in the Division of Health Facilities Evaluation for approval prior to any transfer of ownership of beds, service or facility, in accordance with this chapter and the Department's licensing rule.

APPENDIX

EXHIBIT 1 (No change)

EXHIBIT 2

[STANDARD CATEGORIES OF] HEALTH CARE SERVICES

[Note: The installation or implementation of any of the specified health care services as shown below, which have not been previously provided by the health care facility will require a certificate of need.]

A. Bed-related

1. Medical/Surgical
2. Obstetrics, gynecology
3. Pediatric
4. Adult and pediatric intensive **or critical** [(ICU)] care
5. Cardiac care [(CCU)]
6. Comprehensive rehabilitation
7. Long-term care **and specialized long-term care**
8. Residential health care
9. Adult acute psychiatric **(open and closed)**
10. Adult intermediate and special psychiatric
11. Child and adolescent acute psychiatric
12. Child and adolescent intermediate psychiatric
13. Alcohol detoxification
14. Alcohol residential treatment
15. Drug free residential [(therapeutic community)]
16. **Orthopedic**

B. Non-bed related
[1. Outpatient and clinic services]
[2.]**1.** Home health agency
[3. Drug rehabilitation-outpatient drug free
4. Alcohol rehabilitation
5. Outpatient mental health care
6. Partial hospitalization
7. Mental health emergency/screening
8. Drug rehabilitation-detoxification/maintenance]
[9.]**2.** Comprehensive outpatient rehabilitation facility
[10. Adult day health care
11. Pediatric day health care]
3. Surgical facility
4. Special child health clinics providing tertiary services

C. Special Services
1. [Renal] **Acute renal** dialysis
2. Invasive cardiac diagnostic services
3. Burn center, unit or program
4. Cardiac surgical services
5. Organ transplant/organ procurement
6. Megavoltage radiation oncology
7. Organ bank
8. Perinatal services including neonatal intensive or intermediate services **and maternal and child health consortia**
[9. Hospice program]
[10.]**9.** Mobile intensive care or advanced life support services
[11. Medical day care]
[12.]**10.** Position emission tomography services
[13.]**11.** Magnetic resonance imaging **and nuclear magnetic resonance** services
[14.]**12.** Extracorporeal shock wave lithotripsey services
13. Birthing centers
14. Abortion services
15. Comprehensive personal care home
16. Assisted living residence
17. Bone marrow transplant/harvesting
18. Trauma services
19. Children's hospitals
20. Hyperbaric chambers
21. Emergency medical service helicopters
22. Central service agency
[15.]**23.** Any service for which regionalization criteria or health planning regulations have been developed.
[16.]**24.** Other new health/medical care technologies including any medical equipment which has received FDA pre-marketing approvals.

[EXHIBIT 2a
HEALTH CARE SERVICES
WITHIN THE STANDARD CATEGORIES

Note: Within some of the STANDARD CATEGORIES OF HEALTH CARE SERVICES are those component services which are considered to be sub-elements of such CATEGORIES. The component services are listed below and shown within the appropriate STANDARD CATEGORY. If any health facility or organization is currently providing one or more competent services within a STANDARD CATEGORY the implementation of additional component services within that STANDARD CATEGORY shall not be regarded as the institution of a new health care service. Thus, the addition of a component service within a previously existent STANDARD CATEGORY shall not require a Certificate of Need application provided that the institution of the service does not exceed the monetary limits as stated in N.J.A.C. 8:33.

A. Bed-related
1. Medical/Surgical
2. Obstetrics, gynecology
3. Pediatric
4. Adult and pediatric intensive care (ICU)
5. Cardiac care (CCU)
6. Comprehensive rehabilitation
7. Long-term care
8. Residential health care
9. Acute adult psychiatric
10. Adult intermediate and special psychiatric
11. Child and adolescent acute psychiatric
12. Child and adolescent intermediate psychiatric
13. Alcohol detoxification
14. Alcohol residential treatment
15. Drug free residential (therapeutic community)

B. Non-bed related
1. Outpatient and clinic services

Component Services

Allergy	Inoculation
Arthritis	Medical
Cardio-vascular	Muscular Dystrophy
Cerebral Palsy	Neurology
Cystic Fibrosis	Obstetrics
Dermatology	Parsitology
Diabetes	Pediatrics
Diagnostic and Preventive Medicine	Podiatry
	Proctology
Employee Health	Psychiatric
Endocrinology	Sickle Cell Anemia
Eye, Ear, Nose, Throat	Speech
Family Planning	Stress testing
Genito-Urinary	Surgical
Glaucoma	Thoracic
Gynecology	Toxemia
Hearing	Tuberculosis
Hypertension	Tumor Cancer
	Venereal disease

2. Home health agency
3. Drug rehabilitation-outpatient drug free
4. Alcohol rehabilitation
5. Outpatient mental health care
6. Partial hospitalization
7. Mental health emergency/screening
8. Drug rehabilitation-detoxification/maintenance
9. Comprehensive outpatient rehabilitation facility
10. Adult day health care
11. Pediatric day health care

C. Special Services
1. Renal dialysis
2. Invasive cardiac diagnostic services
3. Burn center, unit or program
4. Cardiac surgical services
5. Organ transplant/organ procurement
6. Megavoltage radiation oncology
7. Organ bank
8. Perinatal services including neonatal intensive or intermediate services
9. Hospice program
10. Mobile intensive care or advanced life support services
11. Medical day care
12. Position emission tomography services
13. Magnetic resonance imaging services
14. Extracorporeal shock wave lithotripsey services
15. Any service for which regionalization criteria or health planning regulations have been developed.
16. Other new health/medical care technologies including any medical equipment which has received FDA pre-marketing approvals.]

EXHIBIT 3. (No change.)

(a)

PUBLIC HEALTH COUNCIL

Clinical Laboratory Licensure Regulations HIV Testing

Proposed Amendment: N.J.A.C. 8:44-2.1 Proposed New Rule: N.J.A.C. 8:44-2.14

Authorized By: Public Health Council, William Frascella, Jr., O.D., Chairperson.
Authority: N.J.S.A. 45:9-42.34.
Proposal Number: PRN 1993-323.

A **public hearing** concerning this proposal will be held on Monday, June 14, 1993 at 1:00 P.M. at the following address:

Department of Health
Room 106 (Auditorium)
Health-Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625-0360

Submit written comments by July 7, 1993 to:

Samuel Thompson, Ph.D.
Director, Clinical Laboratory Improvement Services
New Jersey Department of Health
CN 361
Trenton, New Jersey 08625-0361
609-530-6150

The agency proposal follows:

Summary

In March 1985, the FDA licensed the first laboratory tests to detect HIV antibody in blood samples. As HIV antibody had been linked to AIDS and it was determined that AIDS could be transmitted through blood, FDA approval was expedited to provide a means of screening the nation's blood supply to prevent transfusion related AIDS. At that time, because of insufficient information regarding the significance of test results in the diagnosis of AIDS, the Department adopted an interim policy prohibiting clinical laboratories from performing this test for diagnostic purposes.

The Department rescinded the interim policy in January of 1986, and replaced it with "Guidelines" for performance of the test. Laboratories, wishing to perform HIV antibody testing, were granted approval to perform the test if they applied to the Clinical Laboratory Improvement Service and their policies and procedures adhered to the "Guidelines." The "Guidelines" were revised in 1988. Revisions are again necessary for the "Guidelines" to coincide with current Consensus on Testing for Human Retroviruses recommendations, the use of new FDA licensed methodologies and to prohibit the use of unlicensed FDA methodologies for screening purposes. The Department has reviewed the goals of the existing "Guidelines," which were to ensure that New Jersey laboratories perform HIV testing accurately, safely, confidentially and use a consistent report format, and has determined them to be necessary, reasonable and proper for the purpose for which the policy was originally developed. However, upon review of the existing policy, it became apparent that if this approval procedure were to continue, it would be more appropriate to implement it through the regulatory process and, therefore, new rules are being promulgated.

The new rules encompass some major differences from the existing "Guidelines" issued by the Department. In general they coincide with the recommendations of the Consensus Conference on Testing for Human Retroviruses and with State confidentiality statutes (N.J.S.A. 26:5C-5 et seq.). The rules have been expanded to include an approval process for supplemental confirmatory tests. Tests used for screening must be FDA licensed and the laboratory must follow the manufacturer's product insert.

Reactive screening tests can not be reported without a more specific supplemental test such as the Western blot or Immunofluorescent Antibody tests. Specific terminology and report format, including a summary report of the laboratory outcome of all tests performed in the testing algorithm, must be used in reporting test results. This will require that laboratories that only perform the screening test (presently 25) send reactive specimens to a reference lab for confirmation, ensure that screening results are not reported until the confirmatory test is performed, and develop a summary report if the reference lab does not provide one. If tests other than screening tests for HIV 1/HIV 2 antibodies, Western blot and Indirect Fluorescent Antibody are designated by the Department to require approval for HIV testing, current Association of State and Territorial Public Health Laboratory Directors (ASTPHLD)/Centers for Disease Control (CDC) recommendations shall apply.

Prior to approval, laboratories must perform proficiency testing and achieve satisfactory performance in one testing event or for two of the last three testing events if one unsatisfactory performance is obtained.

Other requirements, that were previously implemented through the existing "Guidelines," include the application process and submission of policies and procedures required by the rules to the Clinical Laboratory Improvement Service (CLIS) for approval.

Laboratories referring specimens for these tests must comply with all applicable components of the new rule. This will require these facilities to: comply with confidentiality requirements, report positive test results to the AIDS Division, New Jersey State Department of Health if testing is referred to out-of-State laboratories and to ensure that the reference lab that they use complies with final report requirements outlined in these rules. Laboratories that have been approved to perform the test prior to these rules will be required to revise their policies and procedures to coincide with the amendment and new rule.

Social Impact

HIV testing results, because they are associated with the disease "AIDS," can have social and psychological consequences. People with positive test results can experience social stigma and psychological trauma. Incorrect results, results that are interpreted incorrectly, or results that are released to individuals without further counseling or to unauthorized individuals can exacerbate these consequences.

It is anticipated that generally the amendment and new rule will have a beneficial effect because by standardizing the procedures that facilities that perform or refer this test use, the quality and integrity of the test should improve. One negative consequence, that could occur is a delay in the reporting of positive test results. This negative outcome should be counterbalanced by the increased reliability of positive test results.

Economic Impact

The proposed amendment and new rule will affect all laboratories that wish to initiate, presently perform or refer HIV analyses. The economic impact of the amendment and rule will be dependent upon the services that a facility performs related to HIV testing. Currently in New Jersey, 30 facilities are approved to perform HIV testing. Of these, five facilities perform both HIV screening and supplemental tests and 25 facilities perform the screening test and refer the supplemental test. These facilities will be responsible for revising existing policies, procedures and report formats to coincide with the new requirements and training their personnel in confidentiality requirements. Facilities that refer supplemental tests will also be required to develop a final report that includes the result of the supplemental test and a summary of the laboratory outcome of all tests performed in the algorithm, and if this reference laboratory is out-of-State, report positive test results to the AIDS Division, Department of Health. Approximately 200 facilities refer testing. These facilities will be required to: comply with confidentiality requirements, report positive test results to the AIDS Division, New Jersey State Department of Health if testing is referred to out-of-State laboratories and ensure that the reference lab that they use complies with final report requirements outlined in these rules.

Facilities wishing to initiate the test will need to comply with all these requirements. However, it is anticipated that the amendment and new rule will have no greater impact on laboratories that are initiating testing than the current procedure now in place. It is anticipated that the major economic impact on all these facilities will be due to the need to develop the systems necessary to implement the new rules and the time needed to perform additional recordkeeping requirements. Actual expenditures incurred by a facility will depend upon whether their existing staff can absorb the additional requirements into their workload.

Regulatory Flexibility Analysis

The proposed amendment and new rule are applicable to hospitals, clinical laboratories, collection sites and physician offices. As such, the rules affect both organizations having over 100 employees and those that are defined as small businesses under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The new rules do impose recordkeeping and compliance requirements on these small businesses, as described in the Summary above. Small businesses may need additional personnel or incur other costs, such as for revision of recordkeeping systems, to comply

with these rules. However, it is unlikely that increased capital costs or a need for outside professional services will arise from the rules. No exemptions from the rules or lesser requirements can be provided to small businesses due to the need for the establishment of minimum standards under which facilities must provide HIV analyses.

Full text of the proposal follows (additions indicated in boldface **thus**):

8:44-2.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise. All terms not defined herein shall have the meaning given them in the New Jersey Clinical Laboratory Improvement Act, N.J.S.A. 45:9-42.26 et seq.

...

"HIV (Human Immunodeficiency Virus)" means HIV 1 or HIV 2.

...

"Screening test" means the test method used to screen for the presence of HIV.

...

8:44-2.14 HIV testing

(a) Laboratories planning to perform HIV analyses shall apply in writing to the New Jersey Department of Health and receive written approval before initiating these procedures. Testing that shall require approval includes: any HIV analysis, such as screening tests for HIV 1/HIV 2 antibodies, Western blot and Indirect Fluorescent Antibody.

(b) Approval shall be granted provided:

1. The laboratory is licensed or requests licensure in the appropriate specialty;

2. The laboratory uses FDA licensed screening tests and follows the manufacturer's product insert;

3. The laboratory submits:

i. Sample handling protocols that include a method to assign a laboratory identifier before testing occurs so that test results do not appear with the patient's name in the laboratory's work record;

ii. Analytical procedures with equipment specifications and formulas used to determine required test calculations including examples of actual calculations;

iii. Manufacturer's product insert and/or pertinent literature references;

iv. A protocol for documented review by a second responsible individual of all original test results and/or unedited machine printouts and interpretation of these results to confirm that established protocols are being followed before the final report is issued;

v. Testing algorithms;

vi. A protocol for reporting test results with examples of all possible combinations of reports issued;

vii. A protocol for confidentiality including procedures for: training personnel responsible for linking HIV results to patient identity, for reporting positive results to the Department, and for training personnel about the laws regarding confidentiality; and

viii. Safety measures that adhere to OSHA Bloodborne Pathogens Standard (See 29 CFR 1910.1030), incorporated herein by reference.

4. Items submitted in (b)3 above are deemed acceptable by the Department;

5. The laboratory submits evidence of enrollment and satisfactory performance in a State-approved HIV testing proficiency program for one testing event or for two of the last three testing events if an unsatisfactory performance is obtained; and

6. The laboratory complies with all applicable sections of this chapter.

(c) FDA licensed screening tests interpreted to be reactive by the manufacturer's product insert for HIV antibodies shall not be reported without a more specific supplemental test approved by the Department. Laboratories performing only screening tests shall ensure that:

1. Specimens interpreted to be reactive by the manufacturer's product insert are sent to a reference laboratory for Western blot (WB) or Immunofluorescent Antibody (IFA) testing or other supplemental tests approved by the Department in accordance with this rule;

2. Supplemental tests are performed and the results received in a timely manner (within seven to 14 days);

3. Screening results are not reported until the supplemental test results are available;

4. Test results are reported as outlined in (d) below;

5. Final reports state the name and address of the reference laboratory performing the supplemental test; and

6. A copy of the reference laboratory report is attached to the final summary report.

(d) HIV test results shall be reported:

1. Using the correct nomenclature in use at the time of reporting for the retrovirus, according to the International Committee on the Taxonomy of Viruses, as published in the Morbidity and Mortality Weekly Review, May 23, 1986; incorporated herein by reference;

2. With a notation concerning specimens of doubtful quality;

3. Using reactive, non-reactive or indeterminate for Western blot results;

4. Using reactive, non-reactive or non-specific for Immunofluorescent antibody (IFA) results;

5. Specifying the method and result of each individual test;

6. With a summary of the laboratory outcome of all tests performed in the algorithm. The summary shall be clearly separated from the results of the individual tests and it shall use positive, negative or inconclusive as a single word laboratory interpretation;

7. With a clear, concise narrative laboratory interpretation. Information regarding infection status shall state that the result is consistent, is not consistent or inconclusive with regard to HIV infection;

8. With a request for a second specimen on the initial report of an inconclusive result;

9. With a statement concerning a window period of infection for all negative reports. This statement shall not appear on positive reports;

10. With the follow verbatim statements:

i. Disclosure of this test result is prohibited except as specified by statute in N.J.S.A. 26:5C-5 et seq.

ii. Tests results shall be relayed to the patient by a health care provider in a manner consistent with United States Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS, as published in Mortality and Morbidity Weekly, 1987, Vol. 36. p 509.

11. Without laboratory derived EIA ratios unless specifically requested by the physician;

12. Without statements regarding the sensitivity and/or specificity of test results;

13. Without statements regarding AIDS; and

14. Without statements regarding normal or reference ranges.

(e) The reporting requirements outlined in (d) above do not apply when testing is performed on blood donors. N.J.A.C. 8:8 shall apply.

(f) Laboratories referring specimens for testing in (a) above shall comply with confidentiality requirements, report positive test results to the AIDS Division, New Jersey State Department of Health if testing is referred to out-of-State laboratories and ensure that the reference lab that they use complies with final report requirements outlined in this section.

(g) Positive HIV results shall be reported to the Department according to N.J.A.C. 8:57-2, Reporting of Acquired Immune Deficiency Syndrome and Infection With Human Immunodeficiency Virus.

(h) Confidentiality shall be maintained in compliance with N.J.S.A. 26:5C-5 et seq., "Acquired Immune Deficiency Syndrome."

(i) Requests for results of HIV testing shall not be given orally by telephone.

(j) Laboratories that have received approval to perform HIV testing prior to the promulgation of these rules shall comply with all requirements listed in (a) through (i) above.

(k) Association of State and Territorial Public Health Laboratory Directors (ASTPHLD)/Centers for Disease Control (CDC) recom-

mendations in effect at the time of testing, incorporated herein by reference, shall apply when tests other than screening tests for HIV 1/HIV 2 antibodies, Western blot and Indirect Fluorescent Antibody are designated by the Department to require approval. A copy of the recommendations can be obtained from:

ASTPHLD
1211 Connecticut Ave NW
Suite 608
Washington, DC 20036

Centers for Disease Control
1600 Clifton Road NE
Atlanta, GA 30333

(a)

DIVISION OF EPIDEMIOLOGY, ENVIRONMENTAL AND OCCUPATIONAL HEALTH SERVICES

Reporting of Occupational and Environmental Diseases and Injuries by Physicians

Proposed Amendment: N.J.A.C. 8:57-3.2

Authorized By: Public Health Council, William Frascella, Jr., O.D., Chairperson.

Authority: N.J.S.A. 26:1A-7.

Proposal Number: PRN 1993-324.

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

Monday, June 14, 1993 at 2:00 P.M.
Department of Health
Room 106 (Auditorium)
Health-Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

Submit written comments by July 7, 1993 to:

Martha Stanbury, Manager
Surveillance Program
Occupational Health Service
New Jersey Department of Health
CN 360, Room 701
Trenton, NJ 08625-0360

The agency proposal follows:

Summary

The proposed amendments to N.J.A.C. 8:57-3.2 represent the product of the Department of Health's experience since implementation of the rule in 1990. In its experience, current physician reporting requirements only capture some health consequences of occupational and environmental hazards. The current rule is limited to reporting of asbestosis, silicosis, other pneumoconiosis, extrinsic allergic alveolitis, occupational asthma, and lead poisoning in adults. The proposed amendments will update the list of reportable conditions and clarify reporting requirements for lead poisoning. Amended N.J.A.C. 8:57-3.2 pertains to the addition of reporting for the following diagnoses by physicians: adult arsenic, mercury, and cadmium toxicity; pesticide toxicity; work-related injuries in children; and work-related fatal injuries. Amended N.J.A.C. 8:57-3.2 also redefines the reporting requirement for lead intoxication from "lead poisoning" to "lead toxicity."

The occupational and environmental causes of these diseases and injuries are well recognized, and constitute significant threats to the public's health in New Jersey. The addition of new reporting requirements recognizes the need for timely identification of these preventable conditions and allows the Department of Health to respond promptly with public health interventions. Since implementation of the rule in 1990, the Department has developed the capability and expertise to respond to these additional conditions. An amendment to the language for reporting of lead, from "lead poisoning" to "lead toxicity," will result in physicians reporting of lead intoxication based only on a blood or urine lead level, even in the absence of overt symptoms of lead poisoning. These reports will be included in the Department's well established occupational lead surveillance project.

Social Impact

Occupational and environmental diseases and injuries are continually occurring to persons exposed to hazardous substances in the workplace and the environment. Pain and suffering and medical costs are incurred by those who contract such diseases. Since the implementation of the rule in 1990, the State Department of Health has received over 1,000 disease reports from physicians. This information has allowed the Department to initiate (1) industrial hygiene investigations to evaluate existing controls and to provide recommendations for improving controls, (2) referrals to other governmental agencies such as local health departments, OSHA, OSHA Consultative Services in the New Jersey State Department of Labor or the New Jersey Department of Environmental Protection, (3) epidemiologic investigations of populations of workers exposed to toxic substances, and (4) education programs targeted at the worker and the medical provider.

With the addition of mercury, arsenic, cadmium, and pesticide toxicity, and selected injuries, there will be more complete identification of the persons with these preventable conditions and, therefore, better data with which to target prevention and control activities. All physicians in New Jersey are covered under this amended rule.

The social conditions precipitating the proposed amendments to this rule are based on the increased concern by the public about environmental hazards, many of which emanate from worksites. There is increased need to identify the specific locations of these hazards and to take actions to reduce occupational and environmental exposures to them. Reporting of individuals already sick or injured from these exposures provides information that leads back to the sources of exposure and thus initiates appropriate public health actions.

These amendments will impact primarily on four functional groups in society: citizens environmentally exposed to the hazards causing heavy metals and pesticide toxicity; employees exposed to heavy metals, pesticides and unsafe working conditions; their employers; and physicians providing medical care to individuals who suffer adverse health effects from these hazards. Pregnant women and children, who are particularly vulnerable to the health effects of these hazards, are included in the first two groups. The impact of these amendments on exposed individuals will be positive, because reports of reporting of sick or injured individuals will result in public health actions to identify and then to prevent or control hazardous conditions posed to others. Employers will benefit from public health follow-up to physicians reports because the identification and control of hazards will help ensure a healthy workforce and reduced insurance costs. The social impact on physicians will include heightened awareness of these hazards and their potential impact on the health status of physicians' patients. Additionally, reporting provides a mechanism and a resource for the physicians who wish to be involved with primary prevention in addition to disease treatment of individual patients.

Economic Impact

Most physicians likely to be seeing patients with any of the diseases or injuries listed see no more than five to 10 patients with these conditions in a single year. Thus, the economic impact on physicians of the amended rule is minimal. The very minimal costs to physicians can be viewed against the economic benefits from reducing occupational and environmental diseases and injuries in the State. Such benefits are significant not only to those affected persons but to employers who must compensate injured persons. Costs from lost wages, worker's compensation, medical expenses, etc., will be reduced by a decrease in the incidence of occupational and environmental diseases and injuries.

The economic effect on the Department of Health or other agencies also is minimal. The Department already has staff and programs experienced in the management and follow-up of these types of reports.

Regulatory Flexibility Analysis

Amended rule N.J.A.C. 8:57-3.2 applies to those physicians who are small businesses by virtue of being in solo practice or in group practices of less than 100 employees. Most physicians are in small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

The reporting requirement for N.J.A.C. 8:57-3.2 is simple and can be done by filling in a one-page form. No other recordkeeping or compliance requirements are involved. There are no initial capital costs. The only cost to the business is a stamp for the envelope and minimal staff time to fill out the form, for an estimated ten mailings per year, per physician. In order to promote the public health as described in the Social Impact above, no exceptions or lesser requirements based upon business size can be provided.

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

8:57-3.2 Reporting of occupational and environmental diseases and [poisonings] **injuries** by physicians:

(a) The physician attending any person who is ill or diagnosed with any of the diseases or [poisoning] **injuries** listed in (b) below shall, within 30 days after such [disease or poisoning] **condition** has been diagnosed or treated, report such [disease or poisoning] **condition** to the State Department of Health.

(b) The following diseases and [poisonings] **injuries** are declared to be reportable to the State Department of Health for purposes of this section. All [diseases] conditions listed herein are to be reported in the manner prescribed by (c) below:

1.-4. (No change.)

5. Extrinsic Allergic Alveolitis; [and]

6. Lead [poisoning] **toxicity**, adult **(defined as** blood lead ≥ 25 micrograms per deciliter; urine lead ≥ 80 micrograms per liter)[.];

7. Arsenic toxicity, adult (defined as blood arsenic ≥ .07 micrograms per milliliter; urine arsenic ≥ 100 micrograms per liter;

8. Mercury toxicity, adult (defined as blood mercury ≥ 2.8 micrograms per deciliter; urine mercury ≥ 20 micrograms per liter);

9. Cadmium toxicity, adult (defined as blood cadmium ≥ five micrograms per liter; urine cadmium ≥ three micrograms per gram creatinine);

10. Pesticide toxicity;

11. Work-related injuries in children (under age 18); and

12. Work-related fatal injuries.

(c) The report required by (a) above shall state the name of the disease or [poisoning] **injury** and the name of the reporting physician. The following information on the person ill or diagnosed with such condition shall also be furnished: name, year of birth, sex, home address, telephone number, name and address of employer at the time of exposure **or injury**, and the date of onset of illness **or injury. Additional information may be required by the Department after receipt of a specific report.**

HIGHER EDUCATION

(a)

NEW JERSEY HIGHER EDUCATION ASSISTANCE AUTHORITY (NJHEAA)

Student Loans: Procedures and Policies

Proposed Readoption with Amendments: N.J.A.C. 9:9

Authorized By: New Jersey Higher Education Assistance Authority, Philip Koebig, Chairman.

Authority: N.J.S.A. 18A:72-10.

Proposal Number: PRN 1993-312.

Submit written comments by July 7, 1993 to:

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

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), N.J.A.C. 9:9, Student Loans: Procedures and Policies, expires on October 3, 1993. The New Jersey Higher Education Assistance Authority has reviewed these rules and, with the exception of the amendments described below, has determined them to be necessary, reasonable and proper for the purposes for which they were originally promulgated and is, therefore, proposing them for readoption at this time.

The rules were first promulgated in 1969, following the statutory creation of the New Jersey Higher Education Assistance Authority in 1968. Amendments of the rules between 1973 and 1980 were made in response to Federal regulatory changes in student loan programs. Subchapter 9 was added in 1983 to reflect the Federal establishment of Direct PLUS/SLS loans. The rules were readopted with amendments and recodification in 1983 pursuant to Executive Order No. 66(1978). Further revisions in the rule were made between 1984 and 1987 in response to changes in Federal regulations. The rules were readopted with amendments in 1988 pursuant to Executive Order No. 66(1978). In 1991, subchapter 7 was adopted to implement the new State loan program, New Jersey College Loans to Assist State Students (NJCLASS). Since they were first promulgated, the rules have served well in enabling appropriate administration of student loan programs in the State.

A summary of the subchapters of N.J.A.C. 9:9 follows:

N.J.A.C. 9:9-1 establishes loan amounts which may be borrowed by students, describes rules governing disbursement of loan proceeds, and sets insurance and origination fees that borrowers must pay.

N.J.A.C. 9:9-2 incorporates Federal rules and statutes by reference.

N.J.A.C. 9:9-3 describes eligibility, fees, and interest for Federal Plus and SLS loans.

N.J.A.C. 9:9-4 provides rules for direct guaranteed student loans including eligibility, loan amounts and loan terms.

N.J.A.C. 9:9-5 describes eligibility, loan amounts, loan terms and repayment for graduate insured loans.

N.J.A.C. 9:9-6 establishes rules for the sale, consolidation and refinancing of student loans guaranteed by the New Jersey Higher Education Assistance Authority.

N.J.A.C. 9:9-7 describes eligibility, loan amounts, application procedures, fees, interest, repayment, deferments and forebearance, and default for New Jersey College Loans to Assist State Students.

N.J.A.C. 9:9-8 provides rules and policy concerning the institution of the Higher Education Educational Loan Act.

N.J.A.C. 9:9-9 provides eligibility, loan prerequisites, loan amounts, application procedures, interest and repayment for Federal Direct PLUS/SLS loans.

N.J.A.C. 9:9-11 concerns institutional compliance with the Stafford loan program including standards and audit procedures, and corrective measures including sanctions and an appeal procedure.

Program changes resulting from the recently enacted Federal Higher Education Amendments Act (Reauthorization) and the recent issuance of the new Federal student loan regulations are the impetus for many of the proposed amendments.

Specifically, a definition of "Federal Family Education Loan Program" is being added to N.J.A.C. 9:9-1.1. Recent Federal regulations mandate the name change which incorporates the Federal Stafford Loan, Federal Supplemental Loans for Students, Federal PLUS Loan, and Federal Consolidation Loan collectively into one program.

The definition of "Federal Stafford Loan" is being added to N.J.A.C. 9:9-1.1; recent Federal regulations mandate that Stafford Loan and Unsubsidized Federal Stafford Loans for Middle-Income Borrowers be incorporated in this one program.

The proposed change in the definition of the "PLUS" program is being made because it is no longer a separate loan program, but is now incorporated in the Federal Family Education Loan Program.

The proposed change in the definition of the "SLS" program is being made because it is no longer a separate loan program, but is now incorporated in the Federal Family Education Loan Program.

The additions of the definitions of "Federal PLUS Loan" and "Federal SLS Loan" will provide clarification.

The proposed deletion of the definition of the "Guaranteed Student Loan Program" is being made because it is no longer a separate loan program, but is now incorporated in the Federal Family Education Loan Program.

The definitions of "servicer" and "delinquency" have been added to N.J.A.C. 9:9-1.1 to provide clarification.

The proposed addition to N.J.A.C. 9:9-1.2 reflects recent Federal regulations (34 C.F.R. 682.204) which mandate specific annual and aggregate loan amounts for each of the programs incorporated in the Federal Family Education Loan Programs.

The minimum amounts the Authority will guaranty will be deleted because the Federal regulations do not set a minimum amount that is eligible to be guaranteed. If the Authority were to set a minimum amount that it is willing to guaranty, it could be construed as an unfair restriction for some students.

The requirement in N.J.A.C. 9:9-1.5 that a new lender be requested to purchase prior loans has met with very little success and became an unrealistic option for lenders and borrowers. This condition has been further compounded with the intervention of third party servicers. Moreover, the requirement that the original lender submit a letter stating

unwillingness to process an application, and the requirement that the borrower submit a letter requesting a change of lender has created additional paper flow without positive results. Therefore, these provisions will be deleted.

Federal policy requires guaranty agencies to encourage students to obtain loans from the same lender. In the event the student cannot do so, the guaranty agency must provide the student with alternative application processing. The addition in N.J.A.C. 9:9-1.5 will comply with Federal requirements.

NJHEAA currently charges a one percent insurance fee, but Federal regulations permit charging up to three percent. The proposed modification of N.J.A.C. 9:9-1.6 permitting the Authority to charge three percent of the principal balance on loans, consistent with Federal regulations, will assist the Authority in maintaining Federally mandated reserve levels. References to the Federal regulations have been added to N.J.A.C. 9:9-1.6 for clarity and precision.

The proposed modification in N.J.A.C. 9:9-1.6(c) reflects that the Guaranteed Student Loan, PLUS, or SLS loans are no longer three separate programs, but all are now incorporated in the Federal Family Education Loan programs.

Recent Federal regulations mandate the collection of a combined origination fee and insurance premium on Unsubsidized Federal Stafford Loans for Middle-Income Borrowers, based on the principal amount guaranteed and at a rate established by the Federal regulations. The proposed addition in N.J.A.C. 9:9-1.6(d) conforms to Federal requirements.

In N.J.A.C. 9:9-1.8 the proposed addition requires lenders to adhere to Federally prescribed provisions. The requirement that disbursements shall not be made more than 30 days prior to the beginning of the academic year has been deleted from N.J.A.C. 9:9-1.9 because it is no longer mandated for any of the programs incorporated in the Federal Family Education Loan Programs.

The requirement that the loan must be disbursed by check is no longer the only option; it is now Federally permissible for the lender to electronically funds transfer directly to a school if authorized by the guaranty agency. The proposed addition in N.J.A.C. 9:9-1.9 authorizes electronic funds transfer. Additionally, disbursement for students attending a foreign school are mandated in Federal regulations; therefore the provision is being deleted.

The specific requirements for multiple disbursements are currently mandated in Federal regulations. Deletion of N.J.A.C. 9:9-1.9(a) will avoid the necessity of future changes to the New Jersey Administrative Code, should Federal requirements change.

The requirements for the lender's disclosure prior to disbursement are currently mandated in detail in Federal regulations, making State regulation on this matter unnecessary.

In N.J.A.C. 9:9-1.10 the proposed addition clarifies that either oral or written notification by the applicant to cancel a loan application is sufficient.

Under Federal regulation, the addition of interest to the unpaid principal is no longer the option of the holder, but must be with the consent of the borrower. The Federal regulation is very specific as to the calculation of interest, and the responsibility for repayment of that interest. The proposed deletions and addition in N.J.A.C. 9:9-1.11 conform to Federal requirements.

The proposed deletion and addition in N.J.A.C. 9:9-1.12 reflect recent Federal regulations that mandate specific details when a borrower is to make arrangements for repayment, and prescribes different procedures for each loan incorporated in the Federal Family Education Loan Programs.

Recent Federal regulations mandate alternative handling of nonpayment of unsubsidized interest to prevent delinquency and defaults in each of the Federal Family Education Loan Programs. The proposed deletions and addition in N.J.A.C. 9:9-1.13 will conform to Federal requirements.

The proposed addition in N.J.A.C. 9:9-1.14 clarifies that late charges are not permitted unless specific exceptions authorized by Federal regulation apply.

The proposed addition in N.J.A.C. 9:9-1.15 conforms to a recent Federal regulation that mandates a lender to submit a claim immediately on all bankruptcies. The deletion is being made because the Authority is now responsible for legal proceedings rather than the lender.

The proposed addition in N.J.A.C. 9:9-1.16(b) clarifies that loans may be combined only if they are the same type. Language in N.J.A.C. 9:9-1.16 regarding defaulted loans is being modified to provide clarity. Also, the requirement for a lender to request a claim form is being deleted. The Authority will provide the lenders with a supply of claims that may be filed when the account becomes eligible for default.

The proposed addition to N.J.A.C. 9:9-1.19 clarifies that it is the lender who must take steps to verify data.

The proposed new rule at N.J.A.C. 9:9-1.22 implements the requirement in 34 C.F.R. 414(a)(3) that a guarantee agency shall require that the lender give the guarantee agency access to lender and servicer records to verify the accuracy of information provided by the lender and the right of the lender to receive or make payments.

In Subchapters 2 and 3, recent Federal regulation mandates the change of the name of the program. Similarly, the proposed changes to N.J.A.C. 9:9-2.1, and N.J.A.C. 9:9-3.1 reflect changes in the references to Federal regulations, as well as changes in the effective dates.

Recent Federal regulations mandate the change from PLUS and SLS, to Federal PLUS and Federal SLS at N.J.A.C. 9:9-3.2.

The rule on the insurance fee has been changed to conform with Federal regulation. The prohibition against an origination fee for loans disbursed before a certain date and the requirement of an origination fee for loans disbursed after a specific date are also Federal requirement.

The proposed new rule at N.J.A.C. 9:9-3.4 has been proposed because recent Federal regulations mandate specific disbursement procedures for each of the PLUS and SLS programs.

The additions and recodification in N.J.A.C. 9:9-3.5 reflect changes in the names of the Federal loan programs and specify the Federal regulation to which lenders must conform.

An editorial correction is proposed at N.J.A.C. 9:9-5.1.

At N.J.A.C. 9:9-6.1, the reference to the Student Loan Marketing Association (SLMA) is proposed for deletion because other lenders and servicers are now offering refinancing of loans and references to guidelines are being deleted.

At N.J.A.C. 9:9-6.2 the reference to reporting the transfer/refinance to the Authority is proposed for deletion because recent Federal regulation has changed the reporting requirements, specified the information, and designated what entities will receive the information.

N.J.A.C. 9:9-6.3 is proposed to be deleted and reserved due to the practice of the lenders inspecting student files prior to sale or transfer, which has eliminated rejections prior to sale or transfer.

The rule on consolidated loans at N.J.A.C. 9:9-6.4 is being deleted and a reference to conformance with Federal regulation is being added because recent Federal changes have segregated consolidation loans into two periods; loans made prior to January 1, 1993 and loans made on or after January 1, 1993 each have different Federal provisions.

At N.J.A.C. 9:9-6.9, "Guaranteed Student Loans" has been changed to "Federal Family Education Loan program" to conform to Federal law. The effective date of the reference to Federal regulations is being updated.

At N.J.A.C. 9:9-7.2(a)1, the maximum family income eligibility criteria for the NJCLASS program is being eliminated, making more creditworthy residents eligible for the loan program.

At N.J.A.C. 9:9-7.2(a)3, the reference to disability and bankruptcy is being deleted to reflect sensitivity to the provisions and spirit of the Americans with Disabilities Act. Absence of discharge or default status remains a criteria for eligibility.

The division of Federal Stafford loans into subsidized and unsubsidized components requires clarification in N.J.A.C. 9:9-7.2(a)4 of NJCLASS eligibility criteria.

Maximum individual and aggregate loan amounts are being deleted from the NJCLASS program in N.J.A.C. 9:9-7.3.

Under the NJCLASS loan program, borrowers need not be the parent of the student. The proposed change in N.J.A.C. 9:9-7.4(c) clarifies the rule.

The proposed deletion in N.J.A.C. 9:9-7.5 clarifies that the application and administrative fee is not two separate fees paid at separate times.

The proposed modification in N.J.A.C. 9:9-7.6 provides flexibility to the Authority to take into account costs other than the costs of reserves in establishing the NJCLASS interest rate.

Subchapter 8 is being deleted and reserved because Federal regulation no longer requires the monitoring of school lenders.

Federal regulations permit insurance fees not to exceed three percent. The Authority's rate is currently one percent. The proposed change at N.J.A.C. 9:9-9.4 sets the insurance rate at the Federally prescribed maximum. Funds collected in this manner will be used to help maintain the Authority's reserves at Federally prescribed levels and to support operating costs of the Authority. Reference to checks and to personal visits by borrowers and co-signers are being eliminated to reflect current administrative practices.

Proposed changes in N.J.A.C. 9:9-11.1(b) reflect the increasing use of electronic and other non-paper records in the loan industry.

At N.J.A.C. 9:9-11.4, the proposed modification changes the title of the position of Director of the Authority to Executive Director.

Social Impact

NJHEAA is authorized by the Federal government to serve as a Federal student loan guaranty agency. As such, it must conform to Federal requirements in order to continue to guaranty Federal student loans. The proposed readoption with amendments changes processing and procedures for students, lenders and servicers who participate in the Federal student loan programs to conform to Federal requirements as detailed above in the Summary. Federal student loans serve an important purpose in helping students gain access to higher education.

NJCLASS, the State loan program administered by the NJHEAA also provides access to higher education by providing an alternative and supplemental State student loans available to creditworthy New Jersey residents. The proposed amendments to the NJCLASS rules will increase the number of New Jersey residents who are eligible to participate in the program by eliminating restrictions on eligibility based on family income. Elimination of caps on the total amount of money creditworthy applicants may borrow will help ensure a source of funds to meet the total costs of higher education.

Economic Impact

Annually, the NJHEAA guarantees about $200 million in Federal student loans, helping to provide access to higher education. Over 9,000 NJCLASS loans have been made since the program's inception. Readoption with amendments will enable service to continue.

The change for Federal loan programs from one percent to three percent of the principal balance which may be charged to the borrower for insurance will increase the cost of borrowing consistent with Federal policy in administering the program. If implemented, for every thousand dollars borrowed, the proposed three percent insurance fee would cost the borrower an additional 20.00 dollars as compared to the one percent insurance fee in the current regulations. The fee is incorporated into the principal balance of the borrower's loan. Increased revenues generated by this change in insurance fees will be used by the Authority to help maintain its operations and reserves at Federally prescribed levels.

Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Authority has determined that the proposed readoption of this chapter with amendments will impose significant reporting, recordkeeping and other compliance requirements on small businesses. Since small banks may serve as lenders in the student loan program, they may qualify as small businesses under the Regulatory Flexibility Act. However, the recordkeeping, reporting and compliance requirements of the Federal student loan programs are required under Federal statute and regulations. Federal provisions do not permit differing standards or procedures based on business size. The Authority has made every effort to ensure that its rules and procedures are necessary for the appropriate administration of the programs and to comply with Federal requirements.

N.J.A.C. 9:9-7, the rules governing the New Jersey College Loans to Assist State Students program, do not apply to small businesses as defined in the Regulatory Flexibility Act. Participants in this program who are subject to reporting, recordkeeping or other compliance requirements are individuals.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 9:9.

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

9:9-1.1 Definitions

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

. . . .

"Delinquency" means the failure of the borrower to make a payment when due. Delinquency begins the day after a payment is due and continues for a period up until the loan meets the definition of default.

"Federal Family Education Loan program" shall mean the Federal Stafford Loan, Federal Supplemental Loans for Students, Federal PLUS Loan, and Federal Consolidation Loan program.

"Federal PLUS Loan" is a loan program targeted for parents of dependent undergraduate or graduate students. Formerly known as PLUS Loans, all Federal PLUS loans were made on or after July 23, 1992.

"Federal SLS Loan" is a loan program targeted for independent undergraduate students, graduate students, and dependent undergraduates whose parents are unable to procure a Federal PLUS Loan. Formerly known as SLS loans, all Federal SLS loans were made on or after July 23, 1992.

"Federal Stafford Loan" is a loan program which includes Stafford Loans and Unsubsidized Federal Stafford Loans for Middle-Income Borrowers.

. . . .

["Guaranteed Student Loan Program" shall mean the Stafford Student Loan Program.]

"PLUS" [is] **was** a loan program which [is] **was** targeted for parents of dependent undergraduate or graduate students. **All PLUS loans were made before July 23, 1992.**

"Servicer" means a third party with whom the lender/holder has entered into a contract, through assignment, transfer or sale, to handle specific aspects on student loans on the lender/holder's behalf in accordance with the Federal Family Education Loan program regulations.

"SLS" [is] **was** a loan program targeted for independent undergraduate students, graduate students, and dependent undergraduate students whose parents [are] **were** unable to procure a PLUS loan. **All SLS loans were made before July 23, 1992.**

(b) (No change.)

9:9-1.2 Loan amounts

(a) Annual and aggregate loan amounts that may be borrowed shall be in accordance with 34 C.F.R. 682.204.

[(a)]**(b)** No student shall be permitted to borrow a second time for the same stated grade level in school, as indicated on the previous loan application, if the request is the result of either academic failure or the failure to complete a full-time course load for the stated grade level at the institution attended; provided, however, that the Authority shall have the discretion to permit borrowing a second time for the same grade level in school when, [in] **at** the discretion of the Authority, the borrower's request for repetitive funding is substantially based upon circumstances which were beyond his or her immediate control.

[(b) The minimum amount the Authority will guaranty is $200.00.]

9:9-1.5 Change of lenders

(a) A student should obtain all loans from the same lender. If the student is unable to do so, the student must **notify the Authority in writing of a change of lenders.** [:

1. Request the new lender to purchase the prior outstanding loan; or

2. Submit a letter to the Authority from the original lender stating it is unwilling to process his or her current application; or

3. Submit to the Authority a letter from the original lender stating it is willing to process his or her current application and a letter from the student requesting a change of lenders.]

(b) The Authority, as required by Federal regulation, will make every reasonable effort to ensure that the borrower's loans are obtained and maintained from the same lender, holder, guaranty agency, and servicer to eliminate the need for multiple contacts with the borrower. If the borrower is unable to obtain loans from the same lender, alternative application processing will be available from the Authority and lenders for the borrower.

9:9-1.6 Insurance and origination fees

(a) An applicant for a student loan must:

1. Pay an insurance fee of [one] **three** percent of the [guaranteed amount] **principal balance** of the loan **in accordance with 34 CF.R. 682.202.** Any adjustments or refunds shall be made by the lender or the Authority. The fee is only charged upon disbursement;

however, the fee is not charged twice if the student changes schools within the same academic year;

2. Pay an origination fee based upon a rate assigned by Federal guidelines, **in accordance with 34 C.F.R. 682.202,** on the principal amount of the loan. Refunds shall be made by the lender in accordance with promulgated Federal guidelines.

(b) (No change.)

(c) No educational institution may charge an applicant a fee for processing an application for a [Guaranteed Student Loan, PLUS Loan, or SLS Loan] **Federal Family Education Loan.**

(d) For Unsubsidized Federal Stafford Loans for Middle-Income Borrowers, applicants must pay a combined origination fee and insurance premium to the Federal government, based upon a rate outlined in 34 C.F.R. 682.202, on the principal amount of the loan.

9:9-1.8 Securing the note

[(a)] Prior to approval of the loan, the lender must secure the student's signature on the application/note. The forms provided by the Authority must be used in all cases except when prior approval by the Authority has been given to the lender's form. **Lenders shall adhere to the provisions outlined in 34 C.F R. 682.206.**

9:9-1.9 Disbursement procedures

[(a) Disbursement of funds shall not be made more than 30 days prior to the beginning of the academic year.]

[(b) The] **(a) The disbursement of funds shall be made by a** check [shall be] made jointly payable to the borrower and the school[. The check] **and** must be sent directly to the school by the lender, **or by means of electronic funds transfer, and in accordance with Federal regulation 34 C.F.R. 682.207.** [For students attending foreign schools, the check shall be made payable solely to the borrower and sent directly to the borrower.

(c) Requirements of single or multiple disbursements shall be handled as prescribed by Federal regulations.]

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

9:9-1.10 Change of school before disbursement

If, prior to disbursement of funds, the applicant indicates he or she will be attending a school other than the one indicated on the application he or she must notify the lender **orally or in writing** to cancel the loan application. The loan is not transferable from school to school. Another application for the new school must be completed. No insurance fee will be charged if amounts remain the same.

9:9-1.11 Interest

[(a) Interest is charged on the unpaid principal balance, but if not paid when due, may at the option of the holder of the note be added to the unpaid principal balance.

(b) Interest must be calculated on a simple interest basis by all lenders.

(c) On all loans not approved for Federal interest subsidy, the borrower will be required to pay the full amount of interest.] **Lenders may charge, calculate or accept payment of interest in accordance with Federal regulation 34 C.F.R. 682.202.**

9:9-1.12 Repayment of loan; installment arrangements

[When a borrower ceases to be enrolled at least half time at an eligible school, the borrower must contact the lender within four months prior to the expiration of the grace period for the purpose of making arrangements toward repayment of the loan.] **Repayment of all student loans must be in accordance with Federal regulation 34 C.F.R. 682.209.**

9:9-1.13 Delinquent payments; responsibility of lender

When an account becomes delinquent as a result of nonpayment [of interest on a nonsubsidized loan when due or nonpayment] of an installment when due or failure to return funds due to non-enrollment in school, the Authority must be notified [to] **of** such an event at the time of occurrence **and the lender must follow the provisions of Federal regulation 34 C.F.R. 682.410.**

9:9-1.14 Late charges

Except where authorized by Federal regulation 34 C.F.R. 682.202, [Late] **late** charges are not permitted on any notes which compute simple interest on a daily basis.

9:9-1.15 Notification of bankruptcy proceedings

In the event the lender is notified of any bankruptcy proceedings against the borrower subsequent to purchase of the defaulted loan by the Authority, the lender shall be responsible for [protecting the Authority's interests by actively participating in all legal proceedings before the courts and filing the appropriate documents with the courts and shall notify the Authority of such action] **filing a bankruptcy claim with the guarantee agency within 30 days of the date the lender determines that collection has been stayed.**

9:9-1.16 Procedure for filing claim

(a) With loans [meeting the definition of] **defined as being in a** default status, a [request for] claim form[s] **provided by NJHEAA** may be submitted upon expiration of the required default time period as set forth in Federal regulations provided the lender has been in compliance with all Federal and State due diligence regulations.

(b) More than one loan, **of the same type,** may be combined on one claim form as long as the interest rate is the same. The lender will be reimbursed for the total unpaid principal and interest due for a period not to exceed 90 days beyond the date of default. The original note(s), properly assigned to the Authority, must be forwarded with the claims. By law, the Authority may not reimburse the lender for late charges.

9:9-1.19 Certification of student enrollment in school

If a lender suspects a student is no longer attending the institution stated on the most recent application, steps shall be taken immediately **by the lender** to verify this data in the following manner. The lender shall communicate with the student requesting written evidence of current status from the school and shall simultaneously notify the Authority.

9:9-1.22 [(Reserved)] **Records and access requirements**

Each participating lender/servicer shall maintain records, and allow NJHEAA (the Authority), the Secretary (USDE), and the Secretary's designee access to those records, as outlined in 34 C.F.R. 682.414(a)(3).

SUBCHAPTER 2. [GUARANTEED STUDENT LOAN] **FEDERAL FAMILY EDUCATION LOAN** PROGRAM STATUTES AND REGULATIONS

9:9-2.1 Rules and statutes incorporated by reference

(a) The part of the Code of Federal Regulations known as 34 C.F.R. [§]682.100 through and including 34 C.F.R. [§682.830] **682.840** (as of July [1, 1987] **23, 1992**) including all subsequent amendments and supplements is hereby adopted as rules and incorporated within these regulations.

(b) The part of the United States Code known as Title 20, Chapter 28, Subchapter IV, Part B, 20 U.S.C. [§]1071 through and including [§]1087e3 (as of [December 22, 1987] **March 1, 1990**) including all subsequent amendments and supplements is hereby adopted as rules and incorporated within these regulations with the modifications indicated in (c) below:

(c) (No change.)

SUBCHAPTER 3. POLICY GOVERNING **FEDERAL** PLUS AND **FEDERAL** SUPPLEMENTAL LOANS FOR STUDENTS (SLS) LOAN PROGRAMS

9:9-3.1 Rules and statutes incorporated by reference

(a) The part of the Code of Federal Regulations known as 34 C.F.R. [§]682.100 through and including 34 C.F.R. [§682.830] **682.840** (as of July [1, 1987] **23, 1992**) including all subsequent amendments and supplements is hereby adopted as rules and incorporated within these regulations.

(b) The part of the United States Code known as Title 20, Chapter 28, Subchapter IV, Part B, 20 U.S.C. [§]1071 through and including [§]1087e3 (as of [December 22, 1987] **March 1, 1990**) including all subsequent amendments and supplements is hereby adopted as rules and incorporated within these regulations.

(c) The provisions of [subchapter 1 of this chapter,] N.J.A.C. 9:9-1, governing the [Guaranteed Student Loan] **Federal Family Education Loan** Program shall also apply to loans made under the **Federal** PLUS/SLS programs unless they are inconsistent with or otherwise excepted within the provisions of this subchapter.

9:9-3.2 Eligibility

An applicant for a **Federal** PLUS or **Federal** SLS loan must meet the requirements set forth in 34 C.F.R. [§]682.201.

9:9-3.3 Insurance fee **and origination fee**

(a) An applicant for a **Federal** PLUS or **Federal** SLS loan must pay **the** [an] insurance fee as **prescribed** [set forth] in [N.J.A.C. 9:9-1.6] **34 C.F.R. 682.202**[; however, no applicant for a PLUS or SLS loan shall be charged an origination fee as provided in N.J.A.C. 9:9-1.6(a)(2)].

(b) No applicant for a Federal PLUS or Federal SLS loan, with a first disbursement prior to October 1, 1992, shall be charged an origination fee as prescribed in 34 C.F.R. 682.202.

(c) Applicants for a Federal PLUS or Federal SLS loan, with a first disbursement on or after October 1, 1992, shall be charged an origination fee as set forth in 34 C.F.R. 682.202.

9:9-3.4 Disbursement

Disbursement of funds must be in accordance with provisions set forth in 34 C.F.R. 682.207.

Recodify N.J.A.C. 9:9-3.4 as **3.5** (No change in text.)

9:9-[3.5]**3.6** Capitalization of accrued interest

[(a)] For **Federal** PLUS or **Federal** SLS loans insured under a guarantee agency program, a lender may add accrued interest and unpaid insurance premiums to the borrower's unpaid principal balance according to the institution's own billing cycle but in no case more frequently than quarterly **as set forth in 34 C.F.R. 682.202.**

[(b) For all PLUS or SLS loans made prior to July 6, 1987, this section shall only be applicable upon written consent of the borrower.]

9:9-5.1 Qualifications for eligibility

(a) To qualify for eligibility under this program, an applicant must:

1. Be a permanent resident of New Jersey for at least six months prior to filing an application; [and]

2. Be enrolled or accepted for enrollment as a full-time student pursuing a graduate or professional degree beyond the baccalaureate level, attending a school approved by the Authority for medicine, osteopathy, dentistry, veterinary medicine, podiatry or optometry; **and**

3. (No change.)

9:9-6.1 Eligible lenders

Refinancing by an eligible lender or holder of student loans guaranteed by the Authority [with the Student Loan Marketing Association (hereinafter SLMA) a private corporation Federally sponsored in accordance with 20 U.S.C. §1087-2 et seq.], shall be in conformance with all applicable Authority statutes, rules and regulations, as amended[, and Authority guidelines for loan servicing].

9:9-6.2 Written notification of transfer/refinance

Upon transfer or refinance of an Authority guaranteed note, an eligible lender or holder shall give written notification of such transfer/refinance [to the Authority. Each notification shall contain the name of the student borrower, the student borrower's Social Security number, the amount of the student borrower's loan(s), and any other documentation required by the Authority] **in accordance with 34 C.F.R. 682.208(e).**

9:9-6.3 [Notice of rejection] **(Reserved)**

[If an eligible lender or holder rejects a note after its transfer/refinance, the eligible lender or holder shall immediately notify the Authority of such rejection. If the eligible holder permits the eligible holder to substitute a new note in place of the rejected note, the eligible lender shall immediately notify the Authority of such substitution and shall provide the Authority with the requisite information.]

9:9-6.4 Consolidation loans

[(a) Student borrowers may apply for a separately guaranteed consolidation loan to consolidate certain prior educational loans. Loans eligible for consolidation include a Federally Insured Student Loan (FISL), Guaranteed Student Loan (GSL), Perkins (formerly National Direct Student Loan (NDSL)), PLUS (student), Supplemental Loans for Students (SLS), Health Professions Student Loan (HPSL) programs. Health Education Assistance Loans (HEAL) and PLUS loans made to parents may not be consolidated.

(b) To be eligible for a consolidation loan, a student must:

1. Have a minimum debt of at least $5,000 under the eligible loan program;

2. Be in his or her grace periods or repayment status on all loans being consolidated;

3. Not be over 90 days delinquent on any loan being consolidated; and

4. Not currently have another application for a consolidation loan pending.

(c) The interest rate on consolidation loans is the greater of nine percent or the weighted average of the interest rates of the loans discharged by consolidation, rounded to the nearest whole percent.

(d) Repayment of a consolidation loan must begin within 60 days after all loans selected for consolidation have been discharged.

(e) There shall be no origination or insurance fees levied on the borrower by either the Authority or the lender for consolidation loans.

(f) Purchase of defaulted consolidation loans by the Authority shall be subject to all pertinent Federal and State requirements for the purchase of defaulted Guaranteed Student Loans.] **Consolidation loans shall be made in accordance with Federal regulations, 34 C.F.R. 682.**

9:9-6.9 Rules and statutes incorporated by reference

(a) The part of the United States Code known as Title 20, Chapter 28, Subchapter IV, Part B, 20 U.S.C. §1078-3 through and including §1087e (as of [December 22, 1987] **March 1, 1990**) including subsequent amendments and supplements is hereby adopted as rules and incorporated within these regulations.

(b) (No change.)

(c) Purchase of defaulted refinanced loans by the Authority shall be subject to all pertinent Federal and State requirements for the purchase of defaulted [Guaranteed Student Loans] **Federal Family Education Loan programs.**

9:9-7.2 Eligibility

(a) To be eligible for a NJCLASS loan, each applicant must:

[1. Have an annual adjusted gross family income no greater than $95,000;]

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

[3.]**2.** Not be in default on any student loan or had any prior student loan discharged [due to disability or bankruptcy]; and

[4.]**3.** (No change in text.)

(b) In addition to all of the requirements in (a) above, a student applicant or a student on whose behalf the parent is applying for a NJCLASS loan shall:

1.-3. (No change.)

4. Have exhausted or be ineligible for a **subsidized** Federal Stafford Loan.

9:9-7.3 Loan amounts

[(a) The maximum amount a parent borrower may borrow for each student for each academic year is $7,000; the maximum amount a student borrower may borrow for each academic year is $7,000.

(b) The total aggregate amount borrowed by any one student or parent borrower on behalf of a student shall not exceed $35,000.]

Recodify existing (c) through (d) as **(a) through (b)** (No change in text.)

9:9-7.4 Application procedure

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

(c) Lender will disburse loan funds to parent **and/or** borrowers in one disbursement. Funds to a student borrower will be made jointly payable to the student and the eligible school, mailed directly to the school and may be multiply disbursed.

9:9-7.5 Fees

(a) A recipient of a NJCLASS loan shall be required to pay an application and [an] administrative fee to the New Jersey Higher Education Assistance Authority which combined will not exceed five percent of the total approved loan amount.

1.-2. (No change.)

9:9-7.6 Interest

(a) The NJCLASS loan shall have a daily fixed simple annual interest rate. The NJCLASS interest rate will be a pass through rate of the bond interest rate, associated costs of sale, and such other costs [or reserves] which may be required, **and/or** determined as the bonds are issued. The interest rate will be published in the New Jersey Register after each bond issue.

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

SUBCHAPTER 8. [POLICY CONCERNING THE INSTITUTION OF THE HIGHER EDUCATION EDUCATIONAL LOAN ACT] **(RESERVED)**

[9:9-8.1 Eligible institutions of higher education

Institutions wishing to make loans under these provisions shall notify the New Jersey Higher Education Assistance Authority in writing and provide a description of the program, including terms of the loan, resources available and procedures for obtaining a loan. No such program may commence or operate without approval of the New Jersey Higher Education Assistance Authority. The authority shall be notified promptly in writing of any changes in the program.

9:9-8.2 Terms of loan

(a) The loan amount shall not exceed $8,500 per year per student, but in succeeding years may be adjusted upward from the base year (1977) by an amount not to exceed the percentage increase of the cost of living index for the metropolitan New York area as published by the United States Department of Labor.

(b) The simple interest rate shall be 12 percent per annum on the outstanding principal balance.

(c) Repayment of the loan may be in monthly installments not to exceed 120 months from the date of the due date of the first payment.

(d) Forebearance on behalf of the borrower may be granted by the lender when agreeable to both parties.

9:9-8.3 Accounting

(a) Each institution of higher education having this loan program shall maintain a separate account for such funds which shows the names of student beneficiaries and their permanent residence and the loan amount outstanding for each.

(b) Accurate, up-to-date records shall be maintained by the institution of higher education.

(c) The New Jersey Higher Education Assistance Authority shall be permitted access to records when and if the need arises.

9:9-8.4 Reports

(a) Each institution of higher education shall submit an annual report to the New Jersey Higher Education Assistance Authority which sets forth the number of students granted a loan by income range, by graduate or undergraduate status, by state of residence and by dollar amount loaned.

(b) A similar report as stated in (a) above, showing the same categories, shall be made annually using cumulative figures.

(c) Other reports shall be provided to the New Jersey Higher Education Assistance Authority as may be deemed appropriate by the Authority.

9:9-8.5 Truth-in-lending and equal credit opportunity

Each institution of higher education which establishes a loan program under the Institution of Higher Education Educational Loan Act shall comply with Federal truth-in-lending law and regulations and the Federal equal credit opportunity law and regulations.

9:9-8.6 Suspension and termination

(a) Violation of the law or these regulations shall be deemed to be sufficient cause to suspend operation of the program. The institution of higher education so suspended shall cease making additional loans and shall be advised in writing of the causes for suspension within 10 days of the suspension.

(b) The suspended institution shall be given a hearing before the New Jersey Higher Education Assistance Authority at a date no later than 30 days from the day of suspension and no earlier than 21 days from the day of suspension, or at its next regularly scheduled meeting, whichever is earlier. At a hearing the Authority shall determine whether or not the suspension was based on sufficient cause. If so, the Authority may determine to continue the suspension for a specified period of time, or may terminate the institution from making additional loans.

(c) An institution which has been terminated may apply for reinstatement after a waiting period of 24 months following the date on which the eligible institution was terminated. When requesting reinstatement, the institution shall set forth in writing those actions taken to correct and avoid future violations such as those which caused the termination.]

9:9-9.4 Application procedure; applicant

(a) An applicant for a dirct PLUS/SLS loan shall:

1.-4. (No change.)

5. Pay an insurance fee of [one] **three** percent of the requested amount of the loan. [Checks shall be made payable to "Treasurer, State of New Jersey" and must be submitted with the application.] No refunds will be issued after the application has been approved by the Authority[;].

[6. If approved, borrower and co-signer should appear at the direct loan office to procure the check; however, in some cases where the borrower and co-signer are unable to appear at the direct loan office, the check will be mailed to the borrower.]

9:9-11.1 Standards

(a) (No change.)

(b) Individual institutions shall be periodically evaluated by an Authority program audit to confirm their program compliance. In the performance of this audit, auditors shall be given access to all records relative to student loans, **in paper, microfiche or electronic formats according to industry standards,** including, but not limited to:

1.-9. (No change.)

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

9:9-11.4 Appeal procedure

(a) The **Executive** Director of the Authority is authorized to institute any corrective action set forth in N.J.A.C. 9:9-11.3. Any institution which is sanctioned shall have the right to appeal the **Executive** Director's action within 30 days of the date of the letter notifying the institution of the sanction.

(b) (No change.)

(c) To initiate the informal pre-hearing conference, the following procedure shall be utilized:

1. The petitioner shall file with the **Executive** Director a letter providing the essential facts giving rise to the contesting of the Authority imposed sanction and indicating its desire to appeal the determination.

2. Upon receipt of the letter outlined in (c) above, the **Executive** Director shall schedule a conference between representatives of the institution and members of the NJHEAA staff. The purpose of this conference is to allow [the parties to mediate or] **mediation to** narrow the dispute.

3. (No change.)

(d) To initiate a formal appeal, the following procedure shall be utilized:

1. The petitioner shall file with the **Executive** Director the original copy of a formal petition, together with proof of mailing.
2. The petition must state the name and address of the petitioner, and a statement of the essential facts and legal grounds giving rise to the contesting of the **Executive** Director's imposed sanction.

(e) The **Executive** Director shall bring the petition before the Authority in a timely manner. The petitioner may appear before the Authority but if it chooses not to do so the **Executive** Director shall notify the petitioner of the Authority's decision in the matter. The institution shall be provided with the opportunity for a hearing pursuant to 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.

HUMAN SERVICES

(a)

DIVISION OF MENTAL HEALTH AND HOSPITALS

Quality Assurance, Site Review Standards and Certification Process

Proposed New Rules: N.J.A.C. 10:37-9 and 10
Proposed Repeals: N.J.A.C. 10:37-6.62 through 6.72, and 6.92 through 6.98

Authorized By: William Waldman, Acting Commissioner, Department of Human Services.
Authority: N.J.S.A. 30:9A-10.
Proposal Number: PRN 1993-291.

Submit comments by July 7, 1993 to:
Raymond M. Deeney, Esq.
Administrative Practice Officer
Division of Mental Health and Hospitals
CN 727
Trenton, N.J. 08625-0727

The agency proposal follows:

Summary

There are approximately 150 provider agencies funded by and under contract with the Division of Mental Health and Hospitals at present and they serve approximately 210,000 clients. Currently, quality assurance and site review standards for these providers exist at N.J.A.C. 10:37-6.62 to 6.72 and 6.92 to 6.98. However, those standards have been in effect without amendment since 1981 and the monitoring and evaluation methods which they employ have become outdated. Consequently, the Division elicited extensive input from provider agencies, advocates, consumers, family representatives and other interested parties to develop these proposed rules which would replace the current rules on the same subject matter. Additionally, the New Jersey Association of Mental Health Agencies has requested that agencies be able to receive a certification acknowledging that specific program services are being provided in compliance with applicable standards. The stated basis for the request is that some agencies encounter problems demonstrating their eligibility for third party reimbursement for some covered program services without such a certification.

N.J.A.C. 10:37-9 would establish quality assurance standards for Division funded community mental health programs which require funded programs to conduct ongoing, systematic monitoring and evaluation in order to resolve problems and utilize resources appropriately and efficiently. The rules in Subchapter 9 will replace the rules at N.J.A.C. 10:37-6.62 to 6.72 and 6.92 to 6.98. N.J.A.C. 10:37-10 describes the site review evaluation activities which will be conducted by teams of individuals external to the agency operating the program and coordinated and led by Division staff which result in issuance of a certification to funded agencies which receive a successful site review.

The purpose of these proposed rules is to establish requirements for the monitoring and evaluation of contracted provider agencies which are intended to help identify opportunities for improvements and corrections as needed. These activities are designed to help maintain as high a quality of care in the delivery of these contracted services as possible.

Currently, there are no rules governing a certification process. The Division monitors the contract performance of funded agencies to ensure compliance with the contract provisions by a variety of methods, including team site reviews and administrative oversight by other Divisional staff. If an agency's performance is satisfactory and the particular services are still needed, the Division extends an offer of contract renewal to the agency. However, no formal agency licensure or certification procedures currently exist.

Social Impact

The Department believes that these proposed new rules will promote resource building and additional learning as well as continuous improvement in the delivery of services by agencies funded by the Department. The focus of the rules has shifted from identification of problems to identification of opportunities for agency improvement.

The proposed quality assurance rules specifically focus on monitoring which is conducted on an ongoing, systematic basis; the inclusion of requirements for risk management policies; an emphasis on an agency benefitting from input by a broad-based segment of agency staff and consumers of service; and the importance of agency administrative support for quality assurance activities. These quality assurance requirements positively impact upon the consumer of services, the agency and its staff, the Division and the taxpayer by promoting more effective and efficient service delivery.

The proposed site review and certification rules specifically focus on team resource building and program improvement rather than a simple compliance or non-compliance approach. By broadening the composition of the site review teams to include consumers, family members and representatives from other provider agencies, these rules add a broader perspective to the teams' reports and increase the likelihood of consumer satisfaction with the service delivery. These rules also enhance the likelihood that those current, high-quality services which are delivered in accordance with appropriate standards would be recognized as appropriate for third party payments for certain covered eligible services.

Economic Impact

The proposed new rules will have a positive economic impact upon the indigent and limited-income consumers of State funded mental health services by promoting the highest quality services for them at little or no personal expense. Overall, the Department believes the proposed new rules will not have a significant economic impact on funded agencies. While some new provisions may have a minor administrative cost associated with them, the certification process, on the other hand, may enhance the revenues of some agencies, in some instances, by making some of their services clearly recognized as eligible for certain third party coverage. Enhanced revenues would contribute to a non-profit agency's overall financial viability and promote their ongoing capacity to continue to provide services to the indigent mentally ill.

Specifically, to the extent to which the proposed new quality assurance rules are more detailed and comprehensive, compliance with them may require more staff time than that required by the current quality assurance rules. However, these proposed new rules provide a flexible framework that is adaptable to resource availability and to the uniqueness of each individual agency. Implementation of the site review rules will require additional administrative costs so that staff from funded provider agencies shall be available to participate in site reviews of similar programs. The Department believes that the staff time involved in these efforts is justified by the increased knowledge, exchange of ideas and efficiency which will result within the funded agencies.

On the other hand, cost savings may result from implementation of these standards, since they require funded agencies to review appropriateness of services, staff and resources, and identify methods to reduce liability risks.

Regulatory Flexibility Analysis

Some providers of Division funded mental health services may be small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14-16 et seq. The proposed new rules require documentation of Q.A. activities in the minutes of the QA oversight committee, QA reports from each program element, and the development of a written QA plan. The cost of these requirements is discussed in the Economic Impact above, and it is not anticipated that small business providers will need to engage professional services to comply. The reporting, recordkeeping and other compliance requirements imposed upon such provider agencies must be uniformly applied regardless of the size of the provider agency to ensure that mentally ill individuals receiving these

services throughout the State do so in accordance with basic minimum standards of quality. These standards are important because many mentally ill consumers of these community services would be at risk of more restrictive and expensive hospitalization unless these services are competently and effectively provided. Additionally, these agencies are individually funded by the Division to be able to meet these requirements.

Full text of the proposed repeals may be found in the New Jersey Administrative Code at N.J.A.C. 10:37-6.62 through 6.72, and 6.92 through 6.98.

Full text of the proposed new rules follow:

SUBCHAPTER 9. QUALITY ASSURANCE

10:37-9.1 Introduction

(a) The rules within this subchapter are designed and intended to provide a framework for provider agencies (PAs) to use when developing a quality assurance (QA) program. The standards set forth in this subchapter require PAs to implement a process of ongoing monitoring and evaluation, through the following activities:

1. Development of a written QA plan;
2. Description of how the plan is to be implemented;
3. Identification of important components of all QA programs;
4. Follow-up on problems or opportunities to improve care identified through QA activities; and
5. Evaluation of the impact of the QA program.

(b) The rules do not delineate specific aspects of care to be monitored. These shall be established by each PA, based on the individual PA's mission, goals and objectives.

(c) Additional QA standards specific to particular program elements may also be included in program element rules throughout this chapter.

10:37-9.2 Scope and purpose

(a) This subchapter applies to PAs as defined in N.J.A.C. 10:37-9.3.

(b) PAs shall implement a QA program which provides an ongoing loop of information about important aspects of care.

(c) The standards set forth in this subchapter, when implemented, shall provide PAs with information about their ability to provide responsive, outcome oriented treatment to clients by generating data about the following:

1. Whether clients receive services appropriate to their needs;
2. Whether clients are attaining individual program goals;
3. Whether programming is flexible enough to meet the changing needs of clients;
4. Whether clients are receiving the services that are documented on their treatment plans;
5. Whether clients are receiving services they do not need;
6. Whether clients are receiving services they want;
7. Whether clients are staying in service for an appropriate period of time, commensurate with their needs;
8. Whether there is client participation in treatment and in evaluating the quality of service; and
9. Whether staff are qualified to provide particular services to clients and whether their skills are enhanced through continuing education.

10:37-9.3 Definitions

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

"Adverse medication reactions" means any response to a drug that is unintended, occurring at doses used for prophylaxis, diagnosis or therapy, which demonstrates a deviation from the expected pharmaceutical, therapeutic or chemical action of the drug. Minor adverse medication reactions result in a need for an antidote or therapy. Moderate adverse medication reactions require a change in drug therapy and/or specific treatment. Severe adverse medication reactions are potentially life threatening, cause permanent damage or require intensive medical care.

"Appropriate(ness)" means the right treatment in the right amount/frequency, to the right patient at the right time by the right staff performed the right way.

"Division" means the Division of Mental Health and Hospitals.

"Drug usage evaluation" means a criteria-based, ongoing, planned and systematic process for monitoring and evaluating the prophylactic, therapeutic, and empiric use of drugs to assure that they are provided appropriately, safely and effectively.

"Follow-up" means reassessment of a problem at an appropriate interval to determine whether proposed solutions have been implemented and have remained effective.

"High risk" means any activity or intervention that could result in serious consequences or could deprive clients of substantial benefit, including providing care that is not indicated, or failing to provide care that is indicated.

"High volume" means an aspect of care which occurs frequently or affects large numbers of clients.

"Incident" means an unexpected event that places a client(s) or staff member(s) at risk.

"Indicator" means a defined, measurable, objective dimension of the quality and appropriateness of care which is based on current knowledge and clinical experience. Indicators are structures of care (for example, resources), processes of care (for example, procedures, techniques), or outcomes of care (for example, failure to improve).

"Infection control" means a program that includes the surveillance, prevention and control of infections.

"Justification for continued service(s)" means a determination, based on objective clinical criteria, that a client continues to require a specific service(s) or level of care.

"Length of stay review" means the point in treatment, on a timeline, at which a case should be reviewed to determine that the clinical neeeds of the client are being met and that proper utilization of resources is occurring.

"Life safety" means structures and activities related to provision of a safe, secure physical environment.

"Problem prone" means an aspect of care that has tended, in the past, to produce problems for clients and/or staff.

"Provider agency (PA)" means an agency contracted with, or funded by, the Division to provide specific, direct mental health services to clients.

"Quality assurance (QA)" means a program or set of activities designed to monitor, evaluate and improve care or services provided in order to enhance the health of clients and the effective use of resources.

"Quantitative review" means a review of a clinical record for timely completion of required documentation.

"QA oversight" means the function of ensuring implementation of the QA program and resolution of identified issues, but not necessarily carrying out monitoring and evaluation activities or corrective actions. This can be done by an existing committee or a separate committee established specifically for this purpose.

"Representative sample" means a selected subset of a larger group which exemplifies the characteristics of that group (that is, a cross-section).

"Risk management" means clinical and administrative activities designed to detect, prevent or reduce risks that could impair client care or client, staff or visitor comfort or safety.

"Routine/ongoing monitoring" means collecting and organizing data continuously according to a predetermined frequency; to check or observe.

"Sample size" means a number of cases or observations selected from a population for a specific sample (that is, a subset).

"Special case review" means clinical evaluation of and recommendations about the treatment of a difficult or high risk case by practicing mental health professionals (peers, supervisors, consultants) to the treating mental health professional(s).

"Thresholds for evaluation" means a pre-established level (number, percentage or proportion) in cumulative data that will trigger more intensive evaluation to determine whether an actual problem or opportunity to improve care exists (for example, 90 percent, one half, two out of six).

"Trend" means a recognizable pattern of occurrences; a straight line or other statistical curve showing the tendency of some function to increase or decrease over a period of time.

"Utilization review (UR)" means the process of using predefined criteria to evaluate the necessity of admissions and continued stays and whether clients are receiving the services best suited to their needs. UR monitors services to determine that an agency's services are necessary and cost effective, and that resources are efficiently utilized.

10:37-9.4 Quality assurance (QA) plan

(a) The scope, organization, monitoring, evaluation and problem correction activities of the QA program shall be written and will be referred to as the QA plan.

(b) The QA plan shall describe an ongoing, systematic process of monitoring and evaluation of important aspects of care with participation by all levels of staff.

(c) The QA plan shall include or cross reference a description of indicators monitored in each program element. Indicators shall cover limited areas that are deemed to be high risk, high volume or problem prone.

(d) The QA plan shall include a description of outcome indicators monitored in each program element.

(e) The QA plan shall identify or cross reference thresholds for evaluation for each indicator.

(f) The QA plan shall include procedures for monitoring problem correction.

(g) The QA plan shall describe monitoring activities to ensure client involvement in treatment.

(h) The QA plan shall describe the scope of client participation in the QA program.

(i) The QA plan shall describe reviews of open and closed client records for timely completion of required documentation.

(j) The QA plan shall describe the process for reviews of open and closed client records to evaluate the quality and appropriateness of treatment.

(k) The QA plan shall specify the required sample size for review of open and closed client records. The rationale for sample size selected shall also be described in the plan.

(l) The QA plan shall describe the process, frequency, and criteria for selection of problem, high risk, difficult cases for Special Case Review. Special Case Reviews include, but are not limited to, incidents and adverse medication reactions.

(m) The QA plan shall describe the organizational structure, including lines of authority and how the QA program fits into this structure.

(n) The QA plan shall describe the persons responsible for QA activities.

(o) The QA plan shall describe the extent of medical staff participation in the QA program.

(p) The QA plan shall describe the organization and composition of the committee responsible for QA oversight.

(q) The QA plan shall describe the required frequency of committee meetings in which QA oversight occurs.

(r) In the case of hospital-based PAs, the QA plan shall describe the process for integration with the hospital QA program.

(s) The QA plan shall describe how QA findings are effectively communicated to all relevant components of the organization.

(t) The QA plan shall describe how supervision is utilized to identify and resolve QA issues.

(u) The QA plan shall describe how relevant findings are shared with clients.

10:37-9.5 Quality assurance (QA) implementation

(a) The QA plan shall be implemented.

(b) Data shall be routinely collected from ongoing monitoring activities and periodically evaluated and analyzed, based on thresholds.

(c) Documented reports of all ongoing monitoring and evaluation activities shall be produced. When ongoing monitoring reveals that more intensive evaluation is required, documentation shall include evidence of further assessment, conclusions drawn, and actions taken to improve care and to resolve identified problems. Examples of possible actions that can be taken are: implementation of inservice training, personnel action, changes in policies and procedures, administrative actions.

(d) Status of previously identified problems (follow-up) shall be documented. Problems identified and corrective actions taken shall be monitored for a prescribed time frame.

(e) To the extent that the QA process identifies issues that require medical staff input, review and response to such referrals shall be documented. These referrals may include questionable admissions and continued stays.

(f) Documentation and evidence of QA monitoring activities to ensure client involvement in treatment shall be provided, and shall include, at a minimum: each client's active and informed participation in his or her treatment plan; medication education; and application of clients' rights and the client grievance procedure.

(g) Documentation of monitoring of effectiveness of the PA's mechanisms to respond to client complaints and suggestions shall be provided.

(h) In the case of hospital based PAs, documented evidence of integration with the hospital QA program shall be available.

(i) There shall be evidence that relevant QA findings are effectively communicated to all relevant components of the PA, including clients.

(j) When the PA has developed the QA program, the following additional elements should be implemented:

1. Participation by medical staff on the QA oversight committee;
2. Documentation of analysis of aggregate QA findings to identify and address patterns and trends related to client characteristics, treatment and service utilization;
3. Utilization of responses to client satisfaction surveys and recommendations from clients and family members; and
4. Documentation of the use of applicable QA findings in ongoing staff development, supervision and performance evaluation.

10:37-9.6 Administrative support

(a) The PA administration shall require and support the QA program.

(b) PA administration shall review and approve the QA plan, as part of an annual QA plan review.

(c) QA reports shall be made available to the PA administration, as described in the QA plan.

(d) The annual appraisal of the QA program shall be submitted to the PA administration.

(e) There shall be documentation of administrative review of QA findings.

(f) When the PA has developed the QA program, the PA administration should also document use of QA findings for management decision-making and program planning (for example, link with goals and objectives, and long range or annual plans).

10:37-9.7 Quality assurance (QA) oversight

(a) A committee composed of a representative sample of individuals from the PA's program elements shall perform the function of oversight of organization-wide QA activities.

(b) Appropriate oversight functions shall include:

1. Annual review and reappraisal of the QA plan;
2. Review of problems which cannot be resolved at a program element level, recommending actions to resolve these problems, and following up to ensure correction takes place. These problems may reflect trends, patterns of performance, or problems that affect more than one program element;
3. Review and approval of program element QA indicators; and
4. Review and approval of revisions of QA policies and procedures.

(c) Minutes shall be kept of committee meetings in which QA oversight occurs. Client names shall not appear in minutes or circulated reports.

10:37-9.8 Utilization review (UR)

(a) Each QA program shall include a utilization review (UR) component which shall be described in the QA plan.

(b) The UR component of the QA program shall include a system, which shall include timeframes for review and which shall monitor the appropriateness of:

1. Admission, for at least 10 percent of all new clients each month; and

2. Continued stay, for at least 10 percent of the clients served by the PA during the previous year, with a representative sample from each program element.

(c) Written criteria shall be developed for admission and continued stay in each program element. These criteria shall be utilized during the UR activities described in (b) above.

(d) A written description for the processing of cases deemed inappropriate admissions and continued stays shall be developed. Action for inappropriate cases (those which do not meet criteria or receive approval by the medical reviewer) shall be effected through termination, transfer to an appropriate program or implementation of interventions necessary to facilitate termination.

(e) Criteria shall be developed for each program element for assessing length of stay. Level of functioning, severity of illness, diagnosis or other professionally accepted categories upon which length of stay norms are based shall reflect the clinical needs of the clients served by the PA and the PA's treatment philosophy.

(f) Continued service for a client who exceeds the identified length of stay norm shall be justified in the client's clinical record.

(g) Monthly UR statistical summaries shall be maintained and shall include the number of admission and continued stay reviews completed, as well as dispositions (for example, approvals, transfers, terminations).

(h) There shall be a written policy describing how UR findings and records are maintained to assure client and staff confidentiality. Client numbers and clinician codes are one acceptable method that can be used.

(i) There shall be a written conflict of interest policy that excludes a clinician who is involved in treatment of a client from making the determination of that client's appropriateness for continued stay.

(j) When the PA has developed the QA program, the PA should additionally document UR activities that address efficient use of staff and resources.

10:37-9.9 Risk management (RM)

(a) Each QA program shall include a risk management (RM) component which shall be described in the QA plan.

(b) The RM component of the QA program shall include the following activities:

1. Monitoring of implementation of PA's policies and procedures regarding medication (for example: documentation that staff are aware of medications prescribed for clients, dosage, frequency, side effects, and adverse medication reactions, frequency of laboratory tests when necessary);

2. Monitoring life safety;

3. An incident review and reporting procedure that will allow for the analysis of client and staff incidents to identify patterns and trends or opportunities to improve client care and staff safety and to reduce agency liability risks. Incident review shall include interviews of clients and staff involved in each incident. The PA shall ensure that clients and staff who report incidents are not adversely affected; and

4. Development of an infection control policy and monitoring of the implementation of the policy.

(c) Risk management reports shall document all RM activities. Conclusions, recommendations, actions to reduce risk or resolve problems and follow up of corrective actions taken shall be included in these reports.

(d) When the PA has developed the QA program, the following should be considered for inclusion in RM activities:

1. Monitoring of compliance with PA policies regarding confidentiality and release of information;

2. Identifying categories of potential risk in clinical aspects of care to clients;

3. Review of case-specific instances of potential risk; and

4. Documentation and implementation of a RM plan that fully describes the scope of the RM program and its integration with other QA activities.

10:37-9.10 Annual appraisal

(a) An annual appraisal of the QA program shall be conducted by the PA and documented.

(b) The annual appraisal shall include review of adequacy of monitoring, evaluation and reporting mechanisms, and evidence of solutions to identified problems.

(c) When the PA has developed the QA program, evidence of positive impact on client care and client input should also be included in the appraisal process.

SUBCHAPTER 10. SITE REVIEW AND CERTIFICATION

10:37-10.1 Scope and purpose

(a) Site reviews shall be conducted at every provider agency (PA) as defined at N.J.A.C. 10:37-9.3.

(b) The site review is designed as a collaborative process to promote learning, resource building and program improvement, high quality services and the protection of consumers' rights.

(c) Results of site reviews, including improvement plans and actions, shall be a key factor in contract or funding renewal decisions made by the Division.

(d) Individual programs provided by the PA shall be certified upon completion of a site review, if the programs conform to applicable rules promulgated by the Division in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

10:37-10.2 Team composition

(a) Site reviews shall be conducted by a team tailored to the specific characteristics of the PA being surveyed.

(b) Every team shall be coordinated and led by staff of the Division.

(c) Site reviews of direct service programs shall, whenever possible, include representatives from consumer and family organizations, staff from similar agencies (peers) and county mental health administrators.

(d) Staff from the PA to be reviewed shall have the opportunity to provide input into planning for the site review and shall be an integral part of the onsite process.

10:37-10.3 Site review activities

(a) Team composition, the amount of time scheduled for each site review and the level of intensity of each site review may vary to reflect the characteristics of individual PAs and the populations served.

(b) Site reviews may include, but not be limited to, consumer, direct care and administrative staff interviews, reviews of each program element, record reviews, reviews of policies and procedures, program observations, onsite inspection of the physical plant, review of internal PA documents, including financial records, and review of the quality assurance program.

(c) The review of each of these items shall be based on applicable State rules.

(d) The team shall present preliminary findings the last day of the site review at a summation meeting at the PA.

(e) At the conclusion of each site review, each PA shall be afforded the opportunity to provide feedback to the Division about the performance of the survey team, using a structured process, as determined by the Division.

10:37-10.4 Site review report

(a) An official report of findings and a determination regarding approval for certification shall be issued after review and approval of the Division's Assistant Director responsible for the contract or funding pertaining to the program(s) reviewed and of the Assistant Director for the Office of Quality Improvement and Specialty Services.

(b) Agencies shall be required to send a written response to the official report, including a plan for improvement, with timeframes specified within the official report.

(c) This response shall be attached to the report and together shall constitute a public document.

(d) PAs shall be notified in writing whether the improvement plan, or portions thereof, are approved for implementation and whether there are any areas that need to be addressed further.

10:37-10.5 Initial certification for pre-existing contracted agencies and programs

All PAs which have contracts with, or are funded by, the Division prior to the effective date of these rules shall be issued an Initial Certification for those programs so funded by the Division once it has been determined that the PA is in good standing with no major contract or program deficiencies. The initial certification so provided shall be for periods up to three years and shall remain in effect until the next scheduled site review, or the non-renewal, or termination of a contract or funding with the Division, whichever comes first.

10:37-10.6 Provisional certification for new contract agencies or programs

(a) A provisional certification may be issued by the Division to a PA which is entering a contract with, or requesting funding from, the Division for a new program service and which indicates in writing an intent to comply with all applicable standards.

(b) The Division shall visit the program and assess its ability for compliance with applicable program standards. The Assistant Director responsible for a Division contract or funding for program services shall make the determination for provisional certification and shall notify the applicant of the determination.

(c) The provisional certification shall be issued for a time period not to exceed six months. If, in the Division's judgment, the applicant does not fully meet applicable or contracted provisions at the end of six months, the provisional certification may be extended for an additional six months. The provisional certification shall be extended beyond a second six month period only upon receipt by the Division of a written request from the applicant for such an extension which provides the basis for the request, and only after Division approval of the written request, which shall be based upon a determination of what is in the best interest of the clients.

(d) If the new PA meets applicable standards, a certification shall be issued by the Division.

10:37-10.7 Certification renewal or revocation

(a) The certification shall be for periods up to three years and may be renewed.

(b) Determination of certification renewal shall be based on whether the program meets the rules applicable at the time of renewal.

(c) The Division's Assistant Director responsible for contracts or funding for programs being certified shall make the determination of renewal or revocation.

(d) In the event that a certification expires prior to the determination of renewal, the certification shall remain in effect until such a determination is made.

(e) In the event that a determination is made not to renew certification or to revoke certification, the applicable Assistant Director will notify the PA.

(f) Revocation of certification may occur if it is determined by the Division that a PA is not in compliance with its contract or with applicable rules, in the event that the contract or funding for services is terminated or not renewed or if the life or safety of clients is endangered.

(g) If the PA does not submit the specified written response to a site review report by the required date or if violations have not been corrected within time frames specified in the approved PA response, the Division may revoke the current certification, not renew the certification of the PA or may elect other appropriate administrative actions.

(h) In the event that the Division revokes or does not renew the certification, the responsible Assistant Director shall send written notice to the PA's executive director or designee and to the PA's president of the board of directors providing the basis for the revocation or non-renewal.

10:37-10.8 Review of administrative determinations

Whenever certification is denied, revoked or not renewed and the PA disputes the basis of the action, the PA may apply to the Division Director for a review. A final agency decision shall be rendered within 30 days of the receipt of the written request for a review.

10:37-10.9 Administrative hearing of appeal

If the PA chooses to appeal a final agency decision made pursuant to these rules, the PA may request an administrative hearing, which shall be conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1, and the Uniform Administrative Procedure Rules, at N.J.A.C. 1:1.

(a)

DIVISION OF MENTAL HEALTH AND HOSPITALS
Psychiatric Community Residences for Youth
Proposed New Rules: N.J.A.C. 10:37B

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

Authority: N.J.S.A. 30:11B-4.

Proposal Number: PRN 1993-290.

Submit comments by July 7, 1993 to:

Raymond M. Deeney, Esq.
Administrative Practice Officer
Division of Mental Health and Hospitals
CN 727
Trenton, NJ 08625-0727

The agency proposal follows:

Summary

On April 24, 1987, amendments to N.J.S.A. 30:11B were enacted which granted authority to the Department of Human Services to license and regulate community residences for the mentally ill. On February 21, 1989, licensure standards for community residences for mentally ill adults became effective at N.J.A.C. 10:39. These standards had also been used as a basis for the evaluation of community residences for youth. Subsequently, N.J.A.C. 10:39 was repealed and replaced with new rules, effective May 7, 1990, and those rules will continue to govern licensure and regulation of community residences for mentally ill adults.

Due to the special needs of mentally ill youth, specialized standards were required for licensed residences for youth, and a comprehensive process was initiated which has now culminated in those proposed new rules. This process included convening a work group, which included Division staff, provider agency representatives, advocates and other interested parties to draft these standards. The draft of the rules was then shared with the Statewide Children's Coordinating Council, additional provider agency representatives and other interested parties. All feedback received on the earlier drafts was reviewed and modifications to the earlier drafts were incorporated into these proposed new rules.

These proposed new rules establish operational standards for licensure by the Division, pursuant to N.J.S.A. 30:11B, of psychiatric community residences specifically for youth. These residences provide food, shelter and personal guidance on a 24 hour basis under such supervision as required to not more than 15 youth with mental illness who require assistance. These residences shall be either funded by, or contracted with, the Division for service to youth who have received, or may be at risk of, acute inpatient care in an inpatient facility and who may benefit from psychiatric treatment within a community residence.

The purpose of these proposed new rules is to: (1) enable licensure and regulation of specialized community residences for mentally ill youth; (2) promote the goal of the residences to provide appropriate mental health services to children at risk of hospitalization or who are recently discharged from inpatient care but are not ready to return home or reside in a less intensive facility; and (3) promote high quality and effective delivery of funded residential services for youth.

Subchapter 1 contains general provisions, that is, the purpose and scope of the chapter and the definitions of words and terms used in the chapter.

Subchapter 2 concerns licensure, including the licensure application requirements, the required inspections by the Division, the terms of provisional licenses, the applicability of these rules to programs currently under contract with the Division, the availability of waivers to these rules, the terms for license renewal, the required quality assurance activities for monitoring compliance with these rules, procedures to appeal findings by the Division, administrative sanctions available to the Division and the authority of the Division to respond to emergency situations affecting the welfare of residents.

Subchapter 3 contains the standards for the administration of psychiatric community residences for youth, including requirements regarding a written statement of purpose, incorporation by reference of management standards, establishment of rights of residents, information to be provided to parents, legal guardians and staff members and establishment of policies and procedures which promote good community relations.

Subchapter 4 contains program requirements, including the establishment of affiliation agreements with other child-serving agencies, the development of written admission criteria, the development of procedures to ensure that appropriate admission information is obtained on each admitted youth, establishment of specific admission practices, the development, implementation and maintenance on file of written treatment plans for each youth by treatment teams, the provision of appropriate treatment services, the establishment of requirements and the development of policies and procedures regarding behavior management practices, point systems, "time-out" practices, holding techniques and behavioral management quiet teams, if utilized, a prohibition regarding the use of mechanical restraints and the development of house rules of conduct for residents.

Subchapter 5 contains health and physical environment requirements, including implementation of a comprehensive health plan for residents, provision of a medical examination for each new admission, establishment of sound general medical practices, establishment of policies and procedures regarding the administration of medication other than psychotropic medication, the provision of adequate food and nutrition for residents and the establishment of health and physical care education for residents.

Subchapter 6 contains the education requirements, that is, enrollment of each resident in an appropriate educational program and coordination with the pupil's educational program. Subchapter 6 also references appropriate education law and rules.

Subchapter 7 contains the requirements for staff at the facilities, including minimum staffing requirements, the responsibilities and qualifications for a program director-supervisor, clinical social worker-therapist, direct care paraprofessional workers, nurse-health educators and staff psychiatrists, policies regarding the use of volunteers and student interns and the development of a staff training plan.

Social Impact

The Division currently funds nine agencies to provide psychiatric community residences for youth between five and seventeen years of age. The current capacity for these programs is approximately seventy residents. Provider agencies will receive the benefit of the use of standards recently developed with significant input from staff of several current providers of residential services to youth. The Division, and its clients, will benefit from the ability to apply standards specifically tailored to residential services to youth, rather than having to apply current standards applicable to both adults and youth.

Economic Impact

These proposed new rules will positively economically affect clients of these residences and their families by making available high quality residential services for youth at costs commensurate with the ability of clients or their families to pay for these services. The rules also positively impact both State and local/county government by promoting the efficient and effective expenditure of State funding by provider agencies. Provider agencies are not expected to incur additional costs to comply with these rules, since the funding they receive to provide the services is considered adequate to maintain compliance. No negative economic impacts are anticipated as a result of these proposed new rules.

Regulatory Flexibility Analysis

Some agencies providing residential services to mentally ill youth, as described in the Summary and Social Impact statements, may be small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14-16 et seq.

The proposed new rules govern Division-funded psychiatric community residences for youth and set forth the reporting, recordkeeping and compliance requirements imposed on providers necessary for the efficient operation of the program. Reporting, recordkeeping and other requirements involve the provision of a comprehensive range of program requirements, including maintaining a written statement of purpose, the posting of client's rights, communicating information to parents, negotiating affiliation agreements with other agencies, developing admission criteria, gathering admission information, maintaining individual client treatment plans, documenting the operations of various treatment techniques, implementing a health plan, developing written health care policies and procedures and complying with staffing responsibilities and qualifications. These proposed new rules establish no need for operators of these programs to employ outside professional services to comply with the provisions, nor is there any requirement for providers to expend capital costs to comply with the rules.

The reporting, recordkeeping and other compliance requirements imposed upon such agencies must be uniformly applied, regardless of the size of the agency, to ensure that mentally ill youth receiving these services throughout the State do so in accordance with basic minimum standards of quality and effectiveness. These standards are important because the youth being served are typically currently receiving inpatient services in psychiatric hospitals, and are in need of services which will further stabilize their condition so that they may return home.

Full text of the proposed new rules follows:

CHAPTER 37B
PSYCHIATRIC COMMUNITY RESIDENCES FOR YOUTH

SUBCHAPTER 1. GENERAL PROVISIONS

10:37B-1.1 Scope and purpose

(a) The rules in this chapter apply to all licensed psychiatric community residences for youth funded by or under contract with the Division.

(b) The purpose of the rules in this chapter is to:

1. Enable licensure and regulation of specialized residences for mentally ill youth;

2. Promote the goal of the residences to provide appropriate mental health services to youth at risk of hospitalization or recently discharged from inpatient care but not ready to return home or reside in a less intensive facility; and

3. Promote high quality and effective delivery of funded residential services for youth.

10:37B-1.2 Definitions

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

"Behavior management practice" means the use of a time out quiet room or therapeutic holding technique point system as part of a comprehensive treatment plan to help the youth develop self-control, to reduce maladaptive behavior or to protect the youth and others from harm.

"Behavior management quiet room" means a room used exclusively for the purpose of keeping the youth apart from all social interaction in order to protect the youth or other persons from the youth's assaultive or destructive behavior.

"CCIS" means the regional Children's Crisis Intervention Service unit established to serve, for a period not exceeding 28 days, youth from the ages of five through 17 who have:

1. Received an initial screening by a designated mental health emergency screening service;

2. A primary psychiatric diagnosis; and

3. An impaired level of personal and social functioning to the extent that inpatient psychiatric crisis intervention and treatment services are necessary.

"Comprehensive treatment plan" means the formulation of goals, objectives and interventions for services based on an assessment which includes treatment, recommendations, and which may include: psychological, medical, developmental, family, educational, social, cultural, environmental, recreational and vocational components.

"Consent" means that a parent having legal responsibility for educational decision making or the adult pupil (that is, a person age 18 through 21 who is not under legal guardianship) has been fully informed of all information relevant to the activity for which the consent is sought, in his or her native language or other mode of communication, understands and agrees in writing to the implementation of this activity, and understands that granting of consent is voluntary and may be revoked at any time.

"Counseling for families" means the use of therapeutic methodologies which enable families to resolve problems or temporary stress of situations which they have encountered.

"Daily living skills" means the activities which enable a youth to perform functions for everyday living, such as basic housekeeping, grooming, dressing, maintaining schedules, social and recreational activities.

"Department" means the New Jersey Department of Human Services.

"Division" means Division of Mental Health and Hospitals within the New Jersey Department of Human Services.

"DYFS" means Division of Youth and Family Services within the New Jersey Department of Human Services.

"Educationally handicapped pupil" means a pupil who has been determined to be eligible for special education and or related services according to N.J.A.C. 6:28-3.5. Classification categories for educationally handicapped pupils include: auditorily handicapped, autistic, chronically ill, communication handicapped, emotionally disturbed, mentally retarded, multiple handicapped, neurologically impaired, perceptually impaired, preschool handicapped, orthopedically handicapped, socially maladjusted, and visually handicapped.

"Group counseling" means the use of group processes and supports to develop in individuals the capacity to overcome specific personal problems or problem conditions.

"Individualized education program" means a written plan developed at a meeting according to N.J.A.C. 6:28-3.6 which sets forth goals and objectives and describes an integrated sequential program of individually designed educational activities and related services necessary to achieve the stated goals and objectives.

"Parent" means a birth or adoptive parent, legal guardian, or any other person having responsibility for, or custody of, a youth.

"Provider agency" (PA) means a public or private organization which has a mental health contract with the Division and has been licensed by the Division to provide residential services.

"Psychiatric community residence for youth" (residence) means a community residential facility, licensed by the Division in accordance with this chapter, which provides food, shelter, and personal guidance on a 24-hour basis under such supervision as required to not more than 15 mentally ill youth who require assistance. These residences are funded by or contracted with the Division for youth who have received or may be at risk of inpatient care in an inpatient facility and who may benefit from psychiatric treatment within a community residence setting so as to avert more intensive treatment or to facilitate their return home or placement in a longer term residential facility. Residences do not admit any person residing in the State psychiatric hospital for adolescents or the State correctional facilities who has been found not guilty of a crime by reason of insanity or unfit to be tried on a criminal charge. Residences are not considered a health care facility, within the meaning of the "Health Care Facilities Planning Act," P.L. 1971 c.136 (N.J.S.A. 26:2H-1 et seq.) and include, but are not limited to, group homes, supervised apartment living arrangements, family care homes and hostels.

"Referral" means, for educational purposes, making a written request that a child study team meet to determine the need for evaluation according to N.J.A.C. 6:28-3.3.

"School-age pupil" means a person age three through 21 who is or was enrolled in a public school.

"Seriously emotionally disturbed youth", 18 years of age or younger, exhibiting one of the following characteristics:

1. Behavioral, emotional, or social impairment that disrupts the child's or adolescent's academic and developmental progress and may also impact upon family and interpersonal relationships and has impaired functioning that has continued for at least one year, or

2. Has an impairment of short duration and high severity.

"State facility education program" means a program contracted with the Department and funded by the Department's Office of Education for the provision of education services.

"Therapeutic holding technique" means holding a youth so that he or she cannot move all or part of his or her body. This technique does not involve the use of any mechanical devices, such as hand or foot cuffs to restrict the movement of the youth.

"Time out" means removing a youth to an area or room in the residence where there is limited stimulation. This removal should be a therapeutic intervention and a time for the youth to reflect on his or her behavior in order to gain control so he or she can return to the other youth.

"Youth" means persons who are 18 years of age and under.

SUBCHAPTER 2. LICENSING

10:37B-2.1 Initial licensing process

(a) All inquiries related to licensure of psychiatric community residences for youth shall be made to:

New Jersey Division of Mental Health and Hospitals
CN 727
Trenton, NJ 08625-0727

(b) To become a licensed provider agency (PA), an agency must:

1. Demonstrate intent and capability to operate a community residence within the provisions of this chapter; and

2. Be a mental health services provider with a service contract with, or funding from, the Division. Such a service contract shall include provisions for the operation of community residences.

(c) The PA shall comply with this chapter.

(d) The PA shall apply for licensure to the Division. Applications shall indicate the type or types of community residences intended, the specific geographical location in which residences would be located, and the number of residents to be served. Such application shall be made to the Division at the address in (a) above. There shall be no fee charged to the PA regarding licensing or application for licensing.

10:37B-2.2 Licensing of psychiatric community residences for youth programs

(a) The Division shall inspect any proposed psychiatric community residence for youth site, utilizing the physical and fire safety standards pursuant to N.J.A.C. 10:128-4.1 and 10:128-4.4 through 4.6, and shall review all program operations or descriptions for compliance with the provisions of this chapter.

(b) The Division shall notify the PA in writing of any violations.

(c) Once the PA has corrected all violations, the PA shall request a final site inspection and shall submit documents indicating habitability.

(d) A license shall be issued once intent to comply with all program requirements is demonstrated, inspections are satisfactory, and there is reasonable assurance that the residence shall be operated in the manner required by this subchapter.

(e) The license shall be issued by the Department through the Division.

(f) The license shall be limited to a specifically identified facility, issued for a period of one year and shall indicate the maximum number of persons to be served within that facility.

(g) The license shall be available during normal business hours on the agency's premises for review by the Division or any interested members of the public.

10:37B-2.3 Provisional license

(a) A provisional license may be issued by the Department to a prospective PA which expresses interest in operating a community residence, indicates in writing an intent to comply with the guidelines contained in this chapter and applies to the Division for such provisional licensing. The application shall indicate the type or types of community residences desired, the specific geographical areas in which residences would be located, and the number of residents to be served.

(b) The Division shall review the application of the prospective PA, assess the fiscal, programmatic, and administrative capabilities of the PA and determine whether a provisional license shall be issued. There shall be no fee charged for the issuance of a provisional license.

(c) The provisional license shall authorize a PA to secure a facility or facilities in which to provide services.

(d) A provisional license shall authorize a PA to provide services to residents.

(e) The provisional license shall be issued for a time period not to exceed six months and may be renewed in six months intervals

by the Division if, in its judgement, the PA consistently made good faith efforts to establish the proposed residence(s).

(f) A PA issued a provisional license shall immediately make application for an annual renewable license under provisions of N.J.A.C. 10:39-2.1 when the residence has been secured and services to residents are ready to be initiated.

10:37B-2.4 Applicability of standards

(a) All PAs which are funded by, or have contracts with, the Division prior to the date this chapter is adopted and all community residences in operation prior to the date this subchapter is adopted shall be considered approved for licensing and shall not be subject to the initial or provisional licensing process. From the adoption date on, licensure shall be based on the Division's annual inspection.

(b) Those PAs which are not funded by or do not have contracts with the Division on or before the date this chapter is adopted and those residences established subsequent to adoption of this chapter shall follow the initial licensing process, as required by this chapter, and shall be subject to annual inspections.

10:37B-2.5 Waiver of standards

(a) Requests for waivers shall be made to the Division in writing with supporting information justifying the request.

(b) Waivers of specific standards shall be considered at the discretion of the Division, provided that one or more of the following conditions have been met:

1. Strict enforcement of the standard would result in unreasonable hardship on the clients;

2. The waiver is in accordance with the particular need of a client(s) but does not adversely affect the health, safety, welfare, or rights of the client; or

3. There is a clear clinical or programmatic justification for such a waiver that will enhance a PA's effectiveness or efficiency without an adverse effect on any client's health, safety, welfare or rights.

10:37B-2.6 License renewal

(a) The license shall be subject to an annual renewal.

(b) Determination of license renewal shall be based on the annual evaluation conducted by the Division's Bureau of Licensing and Inspections.

(c) The Director of the Division (or designee) shall make the determination of renewal.

(d) In the event that a license expires prior to the determination of renewal, the license shall remain in effect until such a determination is made.

(e) There shall be no fee charged to the PA for license renewal.

10:37B-2.7 Monitoring compliance

(a) The PA shall ensure, through its quality assurance program, that residences meet the program and facilities requirements for licensure set forth in this chapter. Quality assurance visits to ensure health, safety, and welfare standards shall be conducted by the PA quarterly, at a minimum. The Division will audit the process annually.

(b) All PAs and residences shall be evaluated on site for program requirements annually by the Bureau of Licensing and Inspections, and, at the discretion of the Division, as needed.

(c) A formal report of program and facility evaluations, including all deficiencies and violations, shall be provided to the PA by the division.

(d) No later than 40 days after receipt of the report, the PA shall provide written notice to the Division that specific violations have been corrected, and that actions have been taken to abate specific violations noted and that full correction is anticipated within the time frames noted in the report.

(e) For any violations cited by the Division as life-threatening, meaning presenting an imminent threat to the health and safety of residents, the PA shall correct them and remove the threat created by such deficiencies immediately and shall provide written notice, within 48 hours, to the Bureau of Licensing and Inspections that such action has been taken.

(f) If the Division report identifies violations which are not life-threatening, representatives from the Division, as part of their ongoing monitoring responsibilities, shall visit the specified residence or program and provide a report to the Division on progress toward remediation of deficiencies every 60 days until compliance is achieved.

(g) When the PA is cited for a physical violation and the maintenance is the responsibility of another party, there must be documented evidence that the PA has informed the building owner, and his or her agent, of the need to correct any deficiencies. If such deficiencies are not corrected, the PA shall take further action as appropriate.

10:37B-2.8 Appeal of the Division's findings

(a) The PA may appeal findings of the Division, with the exception of life-threatening violations.

(b) The appeal of findings shall be directed to the director of the Division (or designee) within 20 days of the PA's receipt of the written report of findings.

(c) A response to the appeal shall be provided to the PA within 20 days of its receipt.

10:37B-2.9 Administrative sanction

(a) In the event that the PA does not submit the written notice specified in N.J.A.C. 10:39-3.1(c) by the required date, or if violations have not been abated within time frames specified in the report, the Division shall have the option of suspension of payments to which the PA may be entitled under any agreements with the division, imposition of a moratorium on admissions to the facility, revocation of the current license to operate the facility, non-renewal of the license to operate the facility, or imposition of other administrative sanction(s) appropriate to the violations cited.

(b) In the event that the Division requires the revocation or non-renewal of the license and the relocation of the residents of the facility, a written order shall be directed to the PA's executive director (or designee) and to the President of the Board of Directors of the agency.

(c) When an order to vacate the premises and the revocation of a license has been issued by the Division, the Department shall work with the PA to ensure proper placement of residents.

10:37B-2.10 Review of administrative sanctions

Where an administrative sanction exists and the PA denies the basis of the sanction, the PA may apply to the director of the Division (or designee) for a review, which shall be afforded and a decision rendered by the director of the Division (or designee) within five working days of the receipt of the written request for a review.

10:37B-2.11 Administrative hearing of appeal

If the PA chooses to appeal a decision made pursuant to the provisions of N.J.A.C. 10:37B-2.10, the PA may request an administrative hearing, which shall be conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1, and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

10:37B-2.12 Emergency situation

The Division, when it determines that the health, safety or welfare of the residents warrant it, may immediately suspend a PA license, and take the necessary action to ensure the well-being of residents. Any hearing provided in such cases shall be on an expedited basis.

SUBCHAPTER 3. ADMINISTRATION

10:37B-3.1 Statement of purpose

(a) The residences shall maintain on file a written statement of purpose that shall identify the following:

1. The residence's philosophy, goals and objectives;

2. Characteristics of the youth to be served;

3. Types of treatment services provided to the youth, including those provided directly by the residence and those provided in cooperation with community agencies or outside individuals;

4. Procedures for implementing those services; and

5. Criteria for successful completion of the program.

(b) The residence shall give this statement of purpose to the parents of the youth applying for services, to all staff members and to all persons who request this information.

(c) The residence shall secure and shall maintain on file a record of a parent or legal guardian and staff members' signatures attesting to their receipt of the statement of purpose.

10:37B-3.2 Management

The residences shall comply with all applicable management standards as promulgated by the Division, in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the rules regarding agency rulemaking, N.J.A.C. 1:30.

10:37B-3.3 Rights of youth

(a) The residence shall prepare a list of youth's rights and shall post it in a prominent location in each residence or give it to the youth and document such in each youth's record. In either case these rights shall be explained to the youth to the extent the youth is capable of understanding them, including by appropriate means to youth whose primary language is not English or who have a communication handicap. At a minimum, the list shall specify the youth's right to:

1. Receive prompt medical treatment;
2. Have access to an appropriate education;
3. Live in a safe, clean and healthy environment;
4. Be free of physical or sexual harassment or abuse or corporal punishment;
5. Attend religious services of their choice; and
6. Have unimpeded communication to DYFS in order to report allegations of physical abuse, physical neglect, or sexual abuse.

(b) The residence shall give this list of youth's rights to a parent or legal guardian of the youth applying for admission, all staff members, and all persons who request this information.

(c) The residence shall secure and maintain on file a record of a parent or legal guardian and staff members' signatures attesting to their receipt of the list of youth's rights.

(d) The residence shall prepare, post, or give to all staff members and youth a written grievance procedure governing how the youth may raise questions about or voice disagreements with and concerns about procedures, care, and specific incidents. The residence shall not take, or threaten to take, retaliatory or disciplinary action of any kind against a youth who uses the grievance procedure or files a grievance. The residence shall provide a procedure to explain the above to youth in a manner in which they can understand their rights.

10:37B-3.4 Information to be provided to parent, legal guardians and staff members

(a) The residence shall provide and explain to every parent, within five working days of his or her youth's placement, and to every person upon becoming a staff member, including the provision, by appropriate means, to individuals whose primary language is not English or who have a communication handicap, a written document indicating that the residence is required to:

1. Comply with all applicable provisions of this chapter;
2. Retain a current copy of this chapter and make it available for review by parents or legal guardians of resident youth;
3. Make available for review any Department reports reviewing program compliance with this chapter;
4. Indicate how parents or legal guardians may secure a copy of this chapter by contacting the Office of Children's Services, Division of Mental Health and Hospitals, CN 727, Trenton, New Jersey 08625-0727;
5. Afford parents or legal guardians the opportunity and time to review and discuss with the residence director any questions or concerns about policies, requirements, provisions, or alleged violations of this chapter;
6. Advise parents or the legal guardian that if they believe or suspect that the residence is in violation of any provision of this chapter, they may report such alleged violations to the Divsion and DYFS;
7. Make available, upon request, for parents' or legal guardian's review, any Inspection Violation and Complaint Reports on the residence, as well as any letters of enforcement or other actions taken against the residence during the previous two-year period;
8. Inform parents or legal guardians that they may request a copy of the residence's or agency's behavior management policy, including policies for searches, as specified in this chapter.
9. Inform parents or legal guardian that the residence or agency is required to provide the youth's parent or legal guardian with copies of the residence's or agency's visitation and communication policies, a copy of the procedure for expressing concern or registering complaints regarding their youth's placement, and a description of its religious policies, including a statement that the youth has a right to practice his or her religion;
10. Indicate through this document that any person who has reasonable cause to believe that a youth residing in the residence has been or is being subjected to any form of hitting, corporal punishment, abusive language, ridicule, or harsh, humiliating, or frightening treatment, or any other kind of youth abuse, neglect or exploitation by any person, whether working at the residence or not, is required by State law to report such allegations to the DYFS Office of Child Abuse Control, TOLL FREE at 1-800-792-8610, or any local DYFS District Office immediately, and indicate that such reports may be made anonymously;
11. Indicate through this document how parents or legal guardians and staff members may secure information about the prevention and reporting of child abuse and neglect by contacting the DYFS District Office;
12. Inform parents or legal guardians that the residence or agency must secure written consent from the youth's parents or guardians before the residence or agency may involve the youth in fund raising, publicity, or audiovisual activities related to the residence or agency; and
13. Inform parents or legal guardian that the residence will develop a visitation schedule for parents or legal guardians and youth, as specified in this chapter.

(b) The residence or agency shall comply with the requirements specified in (a) above by:

1. Securing the parent's or guardian's and staff member's signature on a record attesting to receipt of the document, and maintaining the record on file; or
2. Documenting in the record the attempts made to secure the parent's or guardian's signature.

10:37B-3.5 Community participation

(a) The residence shall establish policies and procedures that encourage, enhance, and ensure good community relations.

(b) The director of the residence shall ensure that community activities have been scheduled or completed and shall provide updates on community involvement to the governing board on a quarterly basis.

SUBCHAPTER 4. PROGRAM REQUIREMENTS

10:37B-4.1 Affiliation agreements

Each agency operating a residence shall negotiate affiliation agreements with child-serving agencies and providers. This shall include, but not be limited to, CCIS, children's partial care programs, and other inpatient psychiatric facilities approved for referral by the Division.

10:37B-4.2 Criteria for admission

(a) The program shall develop written inclusionary and exclusionary admission criteria.

(b) Except as approved in writing by the Division, in accordance with N.J.A.C. 10:37B-2.5, admission policies of the PA shall restrict admissions to youth who have received acute inpatient care in an inpatient facility and require psychiatric treatment in a community residence setting prior to returning home or placement in a longer term residential facility, or youth who may be at risk for receiving acute inpatient care.

(c) All admission criteria and admissions procedures shall be stated in the affiliation agreements with referral sources.

10:37B-4.3 Admission information

(a) The agency or residence shall develop procedures with the referral source to obtain written information on each youth prior

to admission to the program. This will be negotiated as part of the affiliation agreement. Information will include, but not be limited to:

1. The reason for referral to the residence;
2. The reason for admission;
3. The youth's full name, nicknames, if any, gender, date of birth, religion, race, and social security numbr if available;
4. The name, address, telephone number and relationship to the youth of the person(s) with whom the youth was living at the time of admission;
5. The name, address, and telephone number of father, mother, or foster parent(s), or legal guardian(s), if different from above;
6. The name, address, and telephone number of the case manager of the placing agency or other agencies involved in the case;
7. The name, address, and telephone number of the person to notify in an emergency;
8. The name of siblings, their ages, and gender;
9. Medicaid card and, if applicable, insurance numbers;
10. School(s) attended, grade level, and employer, if any;
11. In those cases where the birth certificate and immunization records are unavailable, documentation that the referral source has requested the same should be forwarded to the residence;
12. Progress summary to include the progress of treatment and stabilization that occurred while the youth was hospitalized or in an intensive psychiatric treatment program; and
13. A discharge plan, to include a review of the circumstances that precipitated prior psychiatric placement or hospitalization, a review of the youth's needs, current health, medical history, current medications, side effects, reason for referring the youth to program, and a contact person.

10:37B-4.5 Admission

(a) Upon admission, the PA shall possess such information it determines to be necessary to provide treatment.

(b) The PA or residence shall obtain consent for emergency medical and surgical care, semi-annual dental care and annual physical examinations for the youth.

(c) A release of information from the parent or legal guardian for all agencies having provided services for the youth admitted shall be requested. Subsequent requests for information shall be documented.

(d) The youth shall be given a secure place to store valuables and shall have explained to him or her house rules, youth's rights, the discipline policy, and the search and seizure policy, if any. The youth shall also be oriented in emergency and evacuation procedures.

(e) Within 72 hours of admission, a brief assessment—initial service plan shall be completed. This assessment—service plan shall include, at a minimum:

1. A face-to-face interview by the clinical staff member;
2. Consideration of the information supplied by the referring agency;
3. Consideration of needs in the following critical areas: physical health, psychiatric status, family, recreational, social, academic, behavioral, legal and psychological;
4. Specific needs to be addressed by the initial treatment plan;
5. Goals and strategies that relate to assessed needs, reasons for admission, reasons for discharge, and referral to the residence; and
6. Interventions to be implemented in the first two weeks.

10:37B-4.6 Treatment planning

(a) The residence shall develop, implement, and maintain on file a written individual master treatment plan for each youth.

(b) The residence shall form a multi-disciplinary treatment team that is responsible for the development of a treatment plan for each youth. The multi-disciplinary treatment team shall include, but not be limited to, the following members:

1. Representatives from the psychiatric community residences programs;
2. Representatives of DYFS;
3. Representatives of youth case management;
4. Representatives from the youth's responsible school district and current school district, if appropriate; and
5. The youth's parents, designated representative or legal guardian, shall be included in the treatment team unless clinically contraindicated and justified in writing.

(c) The residence shall document in the youth's record that the DYFS case manager or other placing agency, the youth's therapist, parents, or legal guardian and the youth's responsible school district and current school district, if appropriate, were invited to participate as members of the treatment team and assist in the development of the treatment plan and all subsequent revisions.

(d) The residence shall develop and implement the master treatment plan within 10 working days following a youth's admission, and review or revise the treatment plan at least every month thereafter.

(e) The master treatment plan and revisions shall be based on a comprehensive assessment that includes the following:

1. A current psychosocial history and update;
2. A psychiatric evaluation that has been completed within the last 60 days;
3. A psychological evaluation, as indicated;
4. A current report card, as available;
5. A current history of immunization;
6. A current youth study team evaluation and individual education plan;
7. A current physical and medical evaluation;
8. Information received from prior service providers;
9. A socialization and activity evaluation;
10. Other psychological, social, recreational, vocational and behavioral needs; and
11. Statements that integrate the assessment information to include findings and recommendations.

(f) The master treatment plan shall include the following:

1. Goals based on the assessments;
2. Objectives related to the goals;
3. A description of how the goals and objectives are operationalized, that is, strategies and interventions;
4. Services provided outside the facility to minimally include a listing of such services and the contact person of such services;
5. Signatures of each of the professionals participating in the development of the master treatment plan, the youth, if appropriate, and a parent or legal guardian; and
6. Criteria for discharge or reduction in service.

10:37B-4.7 Treatment services

(a) The therapeutic program, including the environment, shall be based on a clear written statement of philosophy that reflects the needs of the client population.

(b) The residence shall provide individualized treatment sessions to meet the clinical needs of each youth. Each treatment session shall be documented in the youth's clinical record.

(c) The residence shall possess the capacity to provide individual and group counseling with the intensity and frequency necessary to meet the youth's needs and in conformance with the master treatment plan.

(d) The residence shall provide or arrange for family therapy or family counseling to the youth's family or natural support system as directed by the treatment plan.

(e) The residence shall provide or arrange psychiatric treatment services for all youth to include at a minimum:

1. Routine and emergency psychiatric evaluations;
2. Medication monitoring services; and
3. Psychiatric input and consultation into the clinical component of treatment planning.

(f) The residence shall provide crisis intervention, for example, emergency counseling, on a 24-hour basis within the residence.

(g) The residence shall coordinate and monitor access to other needed services. The agency or residence shall determine the extent to which said services shall be governed by affiliation agreements and negotiate such agreements. Examples of services include: psychological testing, needed vocational services, specialized medical services, and structured recreational activities.

(h) The residence shall have a behavior management program which includes, at a minimum, the following:

1. A manual which defines the goals and objectives of the program and outlines the program. The manual shall include staff and client responsibilities and shall be available to staff, youths, families, and other caretakers;

2. A behavior management system which addresses the developmental and symptomatic characteristics of the population served;

3. Documentation of the youth's response to the behavior management program and the impact on targeted behaviors; and

4. A behavior management program implemented by trained staff of the residence who can therapeutically intervene with youth. Such staff shall be available to therapeutically intervene with youth.

(i) The residence shall provide or arrange for recreation and assistance in daily living skills services.

(j) Daily routines, activities and schedules shall be based on client needs and specific treatment plan requirements. This shall be reflected in the variety and the timing and pacing of activities and the clarity of their purpose.

(k) The physical environment shall be arranged such that it facilitates treatment, protects individuals, provides privacy, and adequate space, while enabling youth to learn and grow.

(l) Any guidelines and practices for interactions between individuals, staff and clients at the facility shall reflect the philosophy of the program for both routine situations as well as emergency and unusual circumstances. Guidelines for any such interactions shall be fully described in the program's written policies and shall be consistent with daily operations.

10:30B-4.8 Behavior management practices and programs

(a) Residences that choose to utilize behavior management practices shall develop policies and procedures that assist youth in gaining control of their behavior, protect the youth from self-harm, protect other youth or staff members, and prevent the destruction of property.

(b) The residence shall not utilize behavior management practices and programs as a means of punishment, for the convenience of staff members, or as a substitute for a treatment program.

(c) Prior to the youth's admission, the residence shall:

1. Explain to the parent or legal guardian, the youth, the Divisional youth case manager or other agency working with the youth, the behavior management practice or program that is used within the residence, and the circumstances under which it will be employed;

2. A written copy of said procedures shall be provided to the parent or legal guardian; and

3. The residence shall maintain said procedures on file in the residence or residence's administrative office.

10:37B-4.9 Point system

(a) Residences that utilize point systems shall:

1. Provide staff a written description of the residence's behavioral management point system;

2. Determine the targeted behaviors to be addressed through the resident's comprehensive treatment plan and review;

3. Document that all treatment team members and the resident have opportunities for input into the determination of the behaviors to be addressed and that such input is given full consideration in decisions;

4. Record target behavior(s) on a format developed by the residence; and

5. Address, at a minimum, the following goals:

i. Reduction of acting-out behavior;

ii. Interpersonal and social skills development;

iii. Self maintenance and independent functioning; and

iv. Preparation for discharge.

(b) Residences shall not take earned points away from a resident as a consequence for failure to meet goals or negative behavior(s).

10:37B-4.10 "Time out"

(a) Residences that utilize "time out" shall:

1. Inform staff members through written policy of the circumstances when "time out" may be utilized as a behavior management practice when a youth exhibits:

i. Disruptive behavior, including fighting, name calling, and pushing;

ii. Increased agitation;

iii. Non-compliant behavior or failure to participate in the program;

iv. Uncontrollable emotional outbursts such as crying, screaming, and inappropriate laughter; and

v. A request for "time out."

2. Ensure that the youth being given "time out" is not actively suicidal;

3. Prohibit more than one youth from being given "time out" in the same room or area;

4. Ensure that at least one staff member is responsible to make visual contact with the youth every 10 minutes and is within hearing distance of the youth when the youth is removed from the group;

5. Ensure that the residence does not utilize a closet, bathroom, unfinished basement, unfinished attic or locked room when giving "time out" to a youth from the group;

6. Ensure that the "time out" for a youth does not exceed 30 minutes without written approval by the program director-supervisor;

7. Document each "time out" for a youth in an incident report that reflects the following:

i. The name of the youth;

ii. The date and time of day the "time out" occurred;

iii. The name(s) of all staff members observing the youth;

iv. Precipitating factors that lead to the youth needing "time out";

v. Other intervention attempted;

vi. The time the "time out" ended and where the youth was given the "time out"; and

vii. The condition of the youth upon release.

8. Ensure that the youth is reintroduced to the group in a sensitive and non-punitive manner as soon as he or she has gained control; and

9. Ensure that the practice must be reviewed by the staff psychiatrist if the "time out" exceeds more than two hours within a 24 hour period.

10:37B-4.11 Therapeutic holding techniques

(a) Residences that utilize therapeutic holding techniques with youth shall:

1. Ensure that physical restraint is used only to protect a youth from self-harm, or to protect other youth or staff members, or to prevent the destruction of property when the youth fails to respond to other non-restrictive behavior management interventions;

2. Ensure that staff members use only therapeutic holding techniques and holds, such as the basket hold or restraining the youth in the prone position. These techniques and holds shall not be utilized if the youth has not received a medical examination that documents that he or she will not be adversely affected;

3. Ensure that a youth is released from therapeutic holding technique as soon as he or she has gained control;

4. Document each therapeutic holding technique incident in an incident report that reflects the following:

i. The name of the youth;

ii. The date and time of day the restraint occurred;

iii. The name(s) of all staff members involved in the therapeutic holding technique;

iv. Precipitating factors that led to the therapeutic holding technique;

v. Other prior non-restraint interventions attempted;

vi. The time the therapeutic holding technique ended;

vii. The condition of the youth upon release;

viii. A medical review by the nurse or physician if injury to the youth is suspected; and

ix. Psychiatric community residence programs utilizing the therapeutic holding behavior management technique shall ensure that the youth is offered post-therapeutic holding technique counseling;

5. Ensure that all therapeutic holding technique incidents are:
i. Reviewed by a supervisory staff member within one working day after the incident; and
ii. If needed, discussed with the staff member involved in the therapeutic holding technique incident within one working day after the incident;
6. Ensure that staff members who are involved in the therapeutic holding technique of a youth receive training in safe techniques for therapeutic holding techniques;
7. Prohibit staff members from utilizing any technique that could likely result in injury to the youth including, but not limited to, the following practices during a therapeutic holding technique:
i. Pulling a youth's hair;
ii. Pinching a youth's skin;
iii. Twisting a youth's arm or leg in such a manner that would cause the youth pain;
iv. Kneeling or sitting on the chest or back of a youth;
v. Placing a choke hold on a youth;
vi. Bending back a youth's fingers; and
vii. Allowing other youth to assist in the physical restraint; and
8. Ensure that behavior management practices are not used as punishment, discipline or as a convenience to staff.

10:37B-4.12 Mechanical restraints

The residence shall not utilize mechanical restraints of any type on any youth.

10:37B-4.13 Behavior management quiet room

(a) A residence utilizing a behavior management quiet room shall ensure that the room:
1. Is unlocked at all times during its use;
2. Is used for only one youth at a time;
3. Has floor space that provides a minimum of 70 square feet;
4. Has a ceiling height of at least seven feet and six inches;
5. Has durable padded covering secured on the walls at least up to the six-foot level. The covering shall be made of a material that is fire retardant;
6. Provides a minimum of 10 foot candles of light in all areas of the room. All lighting fixtures shall have a protective covering to prevent tampering by a youth;
7. Has a door that is padded and equipped with a safety glass window to provide visibility of the room; and
8. Has adequate ventilation that complies with local and State regulations.

(b) The residence shall establish a written policy regarding the use of the behavior management quiet room for youth. This written policy shall specify:
1. Criteria for the use of this room, including those types of behavior that could result in the youth's need for a behavior management quiet room;
2. Those staff members who are authorized to place a youth in the room;
3. Procedures for ensuring the youth's safety while confined in the room;
4. Procedures for helping the youth re-enter the group, as specified;
5. Time frames governing a youth's time spent in the behavior management quiet room; and
6. Procedures for review of appropriateness of decisions regarding the use of behavior management quiet room. All decisions shall be reviewed by the staff psychiatrist within one working day.

(c) The residence shall ensure that objects such as belts, matches, pens, or other potentially harmful objects are removed from the youth prior to the youth's placement in the behavior management room.

(d) A staff member shall visually observe a youth in such a room at least every 10 minutes to ensure the safety of the youth. However, a staff member shall maintain constant visual contact with any youth considered to be at high risk if left unattended in such a room.

(e) The residence shall ensure that the youth has access to toilet facilities.

(f) The residence shall prohibit the use of a behavior management room for non-violent or non-assaultive offenses or behaviors or for practices such as:
1. To prevent runaways;
2. To seclude a youth who is ill;
3. To punish a youth for stealing, cursing, or failing to cooperate with house rules;
4. For the convenience of staff to facilitate supervision; or
5. To permit a youth to eat his or her meals in such a room.

(g) The residence shall maintain a behavior management log book detailing each use of such a room.

10:37B-4.14 House rules

(a) The residence shall develop house rules to help the youth develop self-control and conform to acceptable patterns of social behavior.
1. The residence shall put the house rules in writing.
2. The residence rules shall include a rationale for such rules and delineate the consequences for infractions.
3. The residence shall explain its house rule practices individually with each youth at the time the youth is placed in the residence.
4. The residence rules shall be maintained on file in the residence and made available to parents as specified in this manual.
5. The residence rules may be incorporated in the bill of rights for youth.

(b) The residence shall assign responsibility for the discipline, control, and supervision of youth to staff members and shall not delegate that responsibility to other youth.

(c) The residence shall not threaten discipline or administer discipline to a youth for the misbehavior of another youth or group of youth.

(d) The residence shall prohibit the following types of punishment from being used on a youth:
1. Any type of threat of physical hitting or the use of corporal punishment;
2. Forced physical exercise or forcing a youth to take an uncomfortable position;
3. Subjection to verbal abuse, ridicule, humiliation, or other forms of degradation;
4. Deprivation of meals, sleep, mail, clothing appropriate to the season or time of day, or verbal communication;
5. Mechanical or chemical restraint;
6. Assignment of overly strenuous physical work;
7. Exclusion from any essential program or treatment service, such as education or clinical treatment;
8. Refusal of entry to the residence;
9. Temporary suspension and return of a youth from the residence to a parent, relative, foster home, or shelter, unless approved by the placing agency or legal guardian; and
10. Seclusion in a locked room.

SUBCHAPTER 5. HEALTH AND PHYSICAL ENVIRONMENT

10:37B-5.1 Comprehensive health plan for youth

(a) The residence shall prepare and implement a comprehensive health plan to ensure that each youth's medical, dental and other health needs are met adequately and promptly.
1. The residence shall identify a physician or health care organization who will assume responsibility for routine medical care of each youth.
2. The residence shall arrange for emergency, routine and follow-up medical care for each youth.

10:37B-5.2 Health care and medical treatment for youth

(a) Within 72 hours after admission, the residence shall ensure that each youth receives a medical examination by a licensed physician, unless the youth had received such a medical examination within 30 calendar days prior to his or her placement. The medical examination shall include, but not be limited to:
1. A measurement of height and weight;
2. A determination of blood pressure;

3. An objective vision screening which uses a Titmus or Snellen test, or equivalent;
4. A hearing screening using an audiometer and, if indicated, tympanometry;
5. A hematrocrit or hemoglobin test, if indicated; and
6. A urinalysis, if indicated.

(b) When the residence suspects that a youth is ill or carrying a contagious disease, the youth shall be examined by a physician prior to admission.

(c) When the residence suspects that a youth has been abused or neglected, the residence shall ensure that the youth is examined by a physician immediately upon admission.

(d) The residence shall ensure that eye glasses, orthopedic apparatus or other equipment is available to each youth who requires them.

(e) The residence shall ensure that all youth 13 years of age and under receive a Mantoux test, unless they have had tuberculosis, and ensure follow-up with the physician if test results are positive.

(f) The residence shall ensure that all youth are appropriately immunized.

(g) The residence shall ensure that each youth receives a dental examination within three months following admission and at least semi-annually thereafter.

(h) The residence shall ensure that youth between two and six years of age receive developmental evaluations by a physician or nurse.

10:37B-5.3 General medical practices

(a) The residence shall ensure that any medical, dental, psychological and psychiatric treatment or medication administered to a youth is explained to the youth.

(b) When serious accidents or illnesses occur to a youth, the residence shall take emergency action and notify the parents or legal guardian. The residence shall document these incidents in the youth's record.

(c) When a youth or staff member has a communicable disease, as specified in the table below, the residence shall:

1. Obtain a note from a licensed physician treating the youth or staff member confirming the diagnosis and indicating that there is no risk to the youth or staff member or to others before the youth or staff member participates in group activities; and
2. Isolate the youth or staff member posing a risk to others.

TABLE OF COMMUNICABLE DISEASES

Respiratory Illnesses	Gastro-intestinal Illnesses	Contact Illnesses
Chicken pox	Giardia lamblia	Impetigo
German measles	Hepatitis A	Lice
Hemophilus influenzae	Salmonella	Scabies
	Shigella	
Measles		
Meningococcus		
Mumps		
Strep throat		
Tuberculosis		
Whooping cough		

(d) The residence shall contact the New Jersey State Department of Health, the local health department or other appropriate public health authority when the youth or staff member has a reportable disease, in accordance with N.J.A.C. 8:57-1.3.

(e) If a youth or staff tests positive for HIV, the residence will follow universal precautions, as delineated in volume 38, #5-6, of the Morbidity and Mortality Weekly Report, published by the Centers for Disease Control, Atlanta, GA 30333.

(f) The agency shall adhere to State and Federal guidelines for reporting all illnesses, diseases, and health circumstances as required by the New Jersey Department of Health's rules or other procedures as approved by the New Jersey Department of Health.

10:37B-5.4 Medication other than psychotropic medication

(a) The residence shall administer prescription medication to a youth only when the medication is authorized by a physician.

(b) The residence shall have written policies and procedures that shall specify which non-prescription medication can or cannot be used and under what circumstances.

(c) The medication in (a) and (b) above shall be administered only after consultation with a physician and in accordance with the recommended dosage, age or weight of the youth.

(d) The residence may permit the dispensing of non-prescription medication other than those listed in (b) above if the youth's physician authorizes it in writing.

(e) The residence shall maintain a medication log book that shall contain the following information:

1. The name of youth receiving medication, whether prescription or non-prescription;
2. The type of medication, dosage, and intervals between dosages;
3. What to do if a dosage is missed;
4. The reason for medication;
5. The date and time medication was administered;
6. Possible side effects of the medication, if any; and
7. The signature and title of the staff member dispensing medication.

(f) The residence shall ensure that the following procedures for storage are followed.

1. The residence shall keep all prescription and non-prescription drugs in a locked cabinet or container, or if required, in a locked box in a refrigerator. The locked container(s) must be kept in a room which can be locked, such as a staff office or nursing station. The residence shall ensure that the keys are adequately safe-guarded and maintained by staff members and are kept out of the reach of the youth.
2. The agency shall develop policies and procedures to assure the safe and timely disposal of outdated stocks and prescriptions.
3. The telephone number of the regional poison control center shall be posted at all medication-dispensing stations and by each telephone.
4. Staff members shall have access to first aid supplies at all times.

10:37B-5.5 Food and nutrition for youth

(a) The residence shall ensure that each youth is provided with three nutritious meals daily, either in the residence itself or in the community, as follows:

1. The residence shall make daily snacks available for youth who desire them, unless there is a medical reason not to provide them;
2. The residence shall select, store, prepare and serve food in a sanitary and palatable manner;
3. The residence shall prepare and date menus and keep the menus on file at the residence for a minimum of 90 calendar days;
4. The residence shall provide table service for youth;
5. The residence shall serve meals in a manner that makes mealtime a pleasant social experience; and
6. The residence shall not require a youth to eat against his or her desires, except by order of a physician.

(b) The residence shall ensure that the daily diet for each youth includes a balance of foods, that will assure the maintenance of good health.

1. The residence shall ensure that each meal contains a sufficient amount of food for every youth.
2. The residence shall make available, as necessary, an alternate choice of food for each meal served for youth on special diets or youth who, because of religious beliefs, cannot eat particular foods.
3. The residence shall follow individualized diets and feeding schedules that are submitted to the home by the youth's physician(s) or registered dietician(s).

10:37B-5.6 Health education and physical care for youth

(a) The residence shall ensure that youth receive training in personal care, hygiene, and grooming habits.

1. The residence shall discuss the physiological changes experienced during adolescence with youth in the residence.
2. The residence shall instruct youth about sexually responsible behavior, including how to protect themselves from pregnancy and sexually transmitted diseases, including AIDS.

3. The residence shall instruct all youth about the health consequences of smoking tobacco products, smokeless tobacco, alcohol and drug abuse.

(b) The residence shall ensure that youth are provided with the following:

1. Individual towels and washcloths;

2. Soap and toilet tissue; and

3. Hygiene supplies that are age appropriate for their needs, such as toothpaste, mouthwash, deodorant, razors, shaving cream and feminine hygiene articles.

(c) For youth unable to provide for their own personal care and hygiene, the residence shall bathe and groom them and provide other personal hygiene services that are necessary to meet their needs.

(d) The residence shall permit residents to maintain over-the-counter cosmetics, acne preparations, and personal hygiene supplies among their personal possessions, except when contraindicated for clinical, programmatic or behavioral management reasons, and so reflected in the client's record.

(e) The residence shall take measures to ensure that each youth has a personal supply of adequate, clean, well-fitting, and attractive clothing appropriate to his or her age, gender, individual needs, community standards and season.

1. The residence shall ensure that each youth's clothing is kept clean and in good repair and the home may require youth 13 years of age and older to do their own laundry.

2. The residence shall not require youth to wear any article of clothing that would explicitly identify them as a resident of the residence.

SUBCHAPTER 6. EDUCATION

10:37B-6.1 Enrollment of each resident in appropriate education program

(a) The residence shall ensure that each school-age youth receives an appropriate educational program pursuant to N.J.S.A. 18A:38-25 and N.J.S.A. 18A:7B, and in accordance with N.J.A.C. 6:28 and 6:9.

(b) Within three calendar days following admissions, the residence staff shall enroll the youth in the identified education program.

(c) The residence shall complete the documentation required by the Department's Office of Education for notification of the pupil's admission, in accordance with Appendix A, incorporated herein by reference.

(d) The residence shall develop policies and procedures to ensure that such education records required for admission are available.

(e) Issues regarding the initiation or appropriateness of an educational program for any pupil, which cannot be resolved by the residence and the education program staff, shall be referred immediately to the Department's Office of Education.

10:37B-6.2 Coordination with the pupil's educational program

(a) The residence shall develop and establish written procedures to ensure provisions for the following services:

1. Emergency (such as illness) pick-up of pupils during school hours;

2. Staff coverage during school hours to accommodate pupils remaining in the residence for reasons of illness, suspension, home instruction or other appropriate purposes;

3. Notification of the education program staff of pupil absences prior to the start of the school day;

4. Daily communication with the education program; and

5. Utilization of community resources, such as the local library, recreational, and cultural activities, which support the education of the pupil.

(b) For pupils with an educational disability, the residence shall attend all child study team (CST) conferences regarding the pupil's educational program.

(c) The residence shall immediately notify the supervisor of the education program when a pupil is confined to the residence or hospital by a physician for at least a two-week period of time so that home instruction may be provided by the education program within seven calendar days after eligibility has been established. If instruction is not instituted within such time frames, the residence shall contact the Department's Office of Education.

(d) The residence staff shall cooperate with the CST case manager should the pupil require referral to the CST.

(e) For pupils with an educational disability, a copy of the individualized education program (IEP) shall be maintained with the pupil's treatment plan.

(f) Educational progress notes or report cards shall also be maintained by the residence. Upon receipt of progress notes or report cards, the residence shall review the educational progress notes or report cards with the pupil.

(g) The residence shall arrange a summer recreational or vocational program, as appropriate, for each pupil receiving a 10-month education program.

(h) The residence staff shall invite the education program staff to any meeting whose purpose is to finalize the pupil's discharge plan.

(i) The residence staff shall complete the documentation required by the Department for notification of the pupil's discharge, in accordance with Appendix B, incorporated herein by reference.

SUBCHAPTER 7. STAFF REQUIREMENTS

10:37B-7.1 General staff requirements

(a) Each residence shall employ sufficient numbers of qualified staff to provide required services.

(b) Residences shall meet the minimum staffing requirements specified in this section.

(c) Each residence or group of residences operated by the same PA shall have a program director.

(d) Each residence shall employ sufficient numbers of professional, direct care workers, paraprofessional workers, nurses, health educators, staff psychiatrists such that the responsibilities listed in this subchapter are only conducted by staff with corresponding minimum qualifications.

(e) During normal program operation hours, a minimum staff-youth ratio of one staff member for each three youths shall apply when youth are awake and present in the residence. During normal program operation hours, a minimum of two staff members shall be on duty for residences with more than six youth. One additional staff member shall be on duty for each additional group of three residents or a portion thereof.

(f) The residence shall have at least two staff members on duty during normal sleeping hours.

1. At least one staff member shall be awake;

2. An additional staff member shall be available to provide emergency in-person coverage; and

3. Each residence shall have a written policy and procedure concerning the provision of emergency back-up coverage.

(g) The residence shall have at least one staff member present in the residence or immediately reachable by telephone when the residence is in operation but the youth are not in the residence on a particular day.

10:37B-7.2 Program director-supervisor responsibilities and qualifications

(a) The responsibilities of the program director-supervisor shall include, but need not be limited to, the following:

1. Planning, identifying, and developing the residence's programs and goals;

2. Managing and directing the daily operation of the psychiatric community residences for youth programs;

3. Ensuring compliance with accepted standards of care;

4. Ensuring that the residence(s) are serving the target population;

5. Assuring adequate staffing appropriate for an intensive treatment program;

6. Providing direct supervision to clinical staff;

7. Developing and implementing orientation and in-service training programs;

8. Apprising a governing body of all relevant information. This shall include an annual program report and any special reports as requested by the governing body;

9. Being responsible for maintaining information on current laws, regulations, licensure requirements, accreditation requirements and professional standards;
10. Establishing communication systems so that all staff are apprised of pertinent information;
11. Ensuring 24-hour staffing and back up for all needed functions;
12. Ensuring 24-hour emergency and crisis capability; and
13. Performing related duties as needed.
(b) The qualifications of the program director-supervisor shall include the following:
1. An earned master's degree in clinical social work, psychology, or its equivalent; and
2. Three years experience in the provision of youth mental health services, at least one of which has been in a supervisory capacity.

10:37B-7.3 Clinical social worker-therapist responsibilities and qualifications

(a) The responsibilities of the clinical social worker-therapist shall include, but need not be limited to, the following:
1. Providing ongoing clinical case management services;
2. Completing intake assessments on new residents;
3. Gathering and assessing case information from the CCIS;
4. Documenting the social assessments, family assessments and other pertinent case information;
5. Maintaining client records;
6. Attending and participating in treatment team meetings;
7. Assisting in the development of treatment plans;
8. Participating in case conferences;
9. Providing individual and family therapy;
10. Leading or co-leading therapy groups;
11. Developing and, if appropriate, coordinating discharge plans for residents;
12. Providing short term case follow-up after discharge;
13. Providing supervision to direct care paraprofessional staff;
14. Providing input into the evaluation of direct care paraprofessional staff performance;
15. Facilitating necessary service linkages and referrals;
16. Attending case assessment resource teams as needed; and
17. Assisting in the development of staff orientation programs.
(b) The qualifications of clinical social worker and therapist staff shall include, but need not be limited to, the following:
1. An earned masters degree in social work, psychology, counseling, family therapy or other related field;
2. Two years internship (or its equivalent), supervised direct practice internship or field practicum; and
3. One year experience in the provision of youth mental health services.

10:37B-7.4 Direct care paraprofessional responsibilities and qualifications

(a) Direct care paraprofessional worker duties shall include, but need not be limited to, the following:
1. Providing a caring and supportive environment;
2. Providing direct care services and supervision to residents;
3. Providing assistance and training in activities of daily living;
4. Providing ongoing information to professional staff;
5. Providing input into assessments, case conferences, and treatment planning;
6. Recognizing client behavioral signs indicating potential emergency and take immediate action by reporting to appropriate staff;
7. Providing one-on-one supervision and record client response;
8. Directing and assisting clients in preparing for group activities;
9. Providing social and recreational activities;
10. Performing light household duties;
11. Providing transportation; and
12. Demonstrating an ability to work positively with youth in a group setting.
(b) The qualifications of the direct care worker-paraprofessional shall include, but need not be limited to the possession of a valid driver's license and, the following:
1. A bachelor's degree in social work, psychology or a related field from an accredited college or university; or
2. An associate's degree in social work or a related field from an accredited college or university with one year experience working with youth in a group setting; or
3. A high school or high school equivalency diploma with two years full time experience working with youth in a group setting or demonstrated attributes and experience which enable the direct care paraprofessional to work appropriately with seriously emotionally disturbed youth.

10:37B-7.5 Nurse-health educator responsibilities and qualifications

(a) The responsibilities of the nurse-health educator shall include, but need not be limited to, the following:
1. Reporing physician's findings of new admission's physical examination to appropriate staff representative;
2. Providing physical examination of client upon request of client or staff, or upon observation of possible client medical problem;
3. Consulting with and advises staff on the dispensing of psychotropic and non-psychotropic medications and possible side effects, under the direction of the medical director or other physician;
4. Reporting to the medical director or physician for direction in the medical care and treatment of any client's medical condition and advises staff accordingly;
5. Providing injections of medication as needed and directed by the medical director or other physician;
6. Preparing and conducting group sessions focusing on health issues; and
7. Providing individual health related guidance as needed under supervision of medical director or physician.
(b) The qualifications for the nurse-health educator shall include the following:
1. A current New Jersey registered nursing license; and
2. One year direct care nursing experience with youth.

10:37B-7.6 Psychiatrist responsibilities and qualifications

(a) The responsibilities of the psychiatrist shall include, but need not be limited to, the following:
1. Consulting with the program director regarding contracting with medical staff;
2. As assigned, serving as medical director;
3. Clinically supervising the nurse-health educator;
4. Developing and monitoring implementation of center medical policies and procedures;
5. Providing consultation to community agencies when appropriate;
6. Providing in-service training to center staff in special areas;
7. Providing medical input to current and planned programs;
8. Providing direct client services, such as diagnosis, evaluation, medication management, crisis intervention and therapy when appropriate;
9. Providing psychiatric consultation to all center programs as appropriate;
10. Providing recordkeeping on an accurate and timely basis as required by center and the Department of Health policies and monitor medical staff recordkeeping;
11. Having medical and legal responsibility for the treatment provided to the residence's clients; and
12. Providing input to PA management regarding issues impacting PA medical practice.
(b) The qualifications for the staff psychiatrist shall include the following:
1. A valid New Jersey license to practice medicine; and
2. Five years clinical practice in psychiatry.

10:37B-7.7 Volunteer and student intern requirements

(a) Residences may use volunteers and student interns to support the activities of regular paid staff members but shall not use volunteers and student interns to substitute for paid staff members.
(b) Residences shall ensure that volunteers and student interns who have contact with youth, parents or legal guardian receive

proper training and are supervised by paid staff members. Such training and supervision shall seek to educate and inform the volunteer and intern about any special needs or problems they might encounter while working with youth.

(c) The PA shall have written policies and procedures governing the activities of volunteers and student interns, which shall clearly articulate their roles, responsibilities, and any activity restrictions.

(d) Residences shall require that references be submitted by prospective volunteer and student intern staff.

10:37B-7.8 Staff training and development

(a) The residence shall develop a training plan and the program director shall ensure that all staff members, upon employment, are trained in all areas appropriate to their responsibilities including, but not limited to, the following:

1. The residence's statement of purpose, as specified;
2. The residence's behavior management policy in these standards;
3. Emergency procedures;
4. Protocols for medication, as specified in these standards;
5. Infection control procedures, as specified in these standards; and
6. The resident's techniques for safe behavior management.

(b) The residence shall ensure that every new staff member is accompanied on his or her duties by an experienced staff member(s) as part of an orientation until the staff member is familiar with daily routines and operations of the residence.

(c) The residence shall document in each staff member's record that all social service and direct care staff members, including full and part time staff members, receive a minimum total of 12 hours of training each year in at least the following areas:

1. The principles of behavior management and crisis intervention;
2. Alcohol and substance abuse;
3. Suicide prevention;
4. Clinical treatment of various diagnoses; and
5. Medication, infection control, cardio-pulmonary resuscitation and first aid.

APPENDIX A
NOTIFICATION OF ADMISSION

Facility:_____ Division:_____

Pupil's Name:_____

Date of Admission:_____ Date of Birth:_____ Sex:_____

Educational Placement:_____

District of Residence:_____

District of Residence Contact:_____

Telephone: (____)_____

Pupil Records:

Date Requested:__ Date Received:___ NOT RECEIVED___

Classified Pupil:_____ Nonclassified Pupil:_____

(Grade: _____)

Classification:_____ Date of Classification:_____

Date of IEP: _____

Date of Psychological Evaluation: _____

Date of Social History: _____

Date of Learning Evaluation: _____

Date of Medical Evaluation: _____

Date of Psychiatric Evaluation: _____

Date of Neurological Evaluation: _____

Date of Speech and Language Evaluation: _____

Parent/Guardian Status:

Is this an adult pupil under his/her own guardianship_____ ?
yes/no

Does DYFS have custody____ and/or guardianship_____ ?
yes/no yes/no

DYFS Caseworker:_____

Telephone: (____)_____

Do any court ordered restraints exist which prohibit the parent(s) from contact with the pupil? If yes, explain:

_____

_____

_____

Parent/Guardian:_____

Address: _____

_____

Telephone: (____)_____ HOME

(____)_____ WORK

_____

_____ _____
Program Coordinator Date

_____

PLEASE FORWARD THIS NOTIFICATION NO **LATER THAN 5 CALENDAR DAYS** FOLLOWING THE PUPIL'S ADMISSION TO:

Mark Gelardo, Ph.D., Manager
Child Study Services
Office of Education
10 Quakerbridge Plaza
CN 700
Trenton, NJ 08625

APPENDIX B
NOTIFICATION OF DISCHARGE

Facility:_____ Division:_____

Pupil's Name:_____ Date of Birth:_____

Date of Admission:_____ Date of Discharge:_____

Reason for Discharge:_____

_____

_____

Discharged To (Facility):_____

Contact Person:_____ Telephone: ( )_____

Address: _____

_____

Date Pupil Records Returned: _____

Records Returned To:_____
Name and Title

School District:_____

_____

Program Coordinator Date

PLEASE FORWARD THIS NOTIFICATION NO **LATER THAN 5 CALENDAR DAYS** FOLLOWING THE PUPIL'S DISCHARGE TO:

Mark Gelardo, Ph.D., Manager
Child Study Services
Office of Education
10 Quakerbridge Plaza
CN 700
Trenton, NJ 08625

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Case Plan

Proposed New Rules: N.J.A.C. 10:133D-2

Authorized By: William Waldman, Commissioner, Department of Human Services.
Authority: N.J.S.A. 30:4C-4(h).
Proposal Number: PRN 1993-315.

Submit comments by July 7, 1993 to:
Barbara Kraeger
Manual Unit
Division of Youth and Family Services
CN 717
Trenton, New Jersey 08625

The agency proposal follows:

Summary

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

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

The Division's Field Operations Manuals describes the process of developing a case plan and the contents of the case plan. While the proposed new rules are similar to the Division's current policy, as contained in the Field Operations Manuals, additions made by the OPTR Group have been incorporated.

The manual material was never part of the New Jersey Administrative Code, but for informational purposes, the changes from the manuals to the proposed new rules are here summarized:

- The proposed new rules allow for the case plan to be revised more often than the semi-annual schedule stated in current policy. N.J.A.C. 10:133D-2.4.
- In conformance to recently enacted legislation, N.J.S.A. 9:6B-1 to 6, the proposed new rules allow "any person appointed by the court" to participate in developing the case plan. N.J.A.C. 10:133D-2.5.
- The process of developing the case plan is specified. N.J.A.C. 10:133D-2.6.
- The caregiver is specifically included as someone who may sign and receive a copy of the case plan. N.J.A.C. 10:133D-2.8.

The Field Operations Manuals, which contain other material not regulatory in nature (hypothetical situations, case practice examples, etc.) will be revised to reflect these proposed new rules upon their adoption.

A summary of the proposed new rules follows:

N.J.A.C. 10:133D-2.1 states the purpose of this subchapter.

N.J.A.C. 10:133D-2.2 states the scope of this subchapter.

N.J.A.C. 10:133D-2.3 references the definitions of terms used in this subchapter.

N.J.A.C. 10:133D-2.4 states when a case plan is developed.

N.J.A.C. 10:133D-2.5 states the participants in developing the case plan.

N.J.A.C. 10:133D-2.6 delineates the process used in developing the case plan.

N.J.A.C. 10:133D-2.7 specifies the contents of the case plan. At paragraphs (a)3 and (b)6, there are cross-references to N.J.A.C. 10:133D-4, In-Person Visits with Clients and Substitute Care Providers, which is proposed as new rules elsewhere in this issue of the New Jersey Register.

N.J.A.C. 10:133D-2.8 indicates who shall receive a copy of the case plan.

Social Impact

These rules on case plans will have a positive effect on clients of the Division of Youth and Family Services, as well as members of the general public who may become or wish to become clients of the Division. In addition, Division employees, caregivers of children in Division-approved out-of-home placements, providers of services to the Division's clients and persons appointed by the court to represent a child "... in the planning and regular review of the child's case ..." per N.J.S.A. 9:6B-4(1) will be affected by these rules.

The impact of the rules on case plans will be that the Division's caseworkers will be required to prepare a written case plan with the parent, child and his or her court-appointed representative, and consult with the caregiver of each child in out-of-home placement. The Division's casework will also be required to give a copy of the case plan to each parent and to anyone else who signs the case plan.

The Division anticipates a positive impact on those affected, as the affected parties will have the opportunity to be aware of what the Division's case plan consists of, their right and responsibility to participate in developing the case plan, and their ability to have a copy of the written case plan. The Division expects that the increased sharing of information and responsibility will result in quicker resolution of problems which necessitated involvement with the Division.

Economic Impact

The Division does not anticipate any economic impact from these proposed rules. These proposed rules do not require any additional capital improvements, expenditures for staff or equipment on the part of the Division or any individual. Any training required to familiarize Division staff with these rules will be part of ongoing staff development. As completing the case plan is only part of the many functions performed by Division direct services staff, the cost of such tasks cannot be estimated with any degree of accuracy.

Regulatory Flexibility Statement

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

Full text of the proposal follows:

CHAPTER 133D
CASE MANAGEMENT

SUBCHAPTER 1. (RESERVED)

SUBCHAPTER 2. CASE PLAN

10:133D-2.1 Purpose

The purpose of this subchapter is to describe the process of developing a case plan, to identify the participants in the development of the case plan, and to identify the contents of the case plan.

10:133D-2.2 Scope

The provisions of this subchapter shall apply to each client, family member, caregiver, Division representative, and other person participating in the case plan development.

10:133D-2.3 Definitions

The definitions in N.J.A.C. 10:133-1.3, Definitions, are hereby incorporated into this subchapter by reference.

10:133D-2.4 When a case plan is developed

A case plan shall be developed for each family for whom services will be provided on the same schedule as the assessment. See N.J.A.C. 10:133C-3.10. The case plan may be revised more often than the standard set above, if the case situation warrants.

10:133D-2.5 Participants in developing the case plan

(a) The Division representative shall develop the case plan with the child's parent, unless he or she is unwilling to participate, any person appointed by the court for this purpose and the child, if the Division representative determines that the child is willing and able to participate in the development of the case plan, in accordance with this subchapter. Other interested parties or service providers may be invited to participate.

(b) In addition to (a) above, when the child lives in an out-of-home placement, the Division representative shall develop the plan in consultation with the child's out-of-home placement caregiver.

10:133D-2.6 Process of developing the case plan

(a) Participation in developing the case plan shall include providing information, identifying problems, identifying services and actions which are needed to resolve the problems and achieve the case goal, suggesting the time frames for beginning and completing the identified services and actions and specifying who is responsible for completing the identified services and actions.

(b) The participants in the case plan may participate by:

1. Meeting together with the Division representative to discuss the case plan;
2. Meeting individually with the Division representative;
3. Providing written information to the Division representative; or
4. Talking with the Division representative by telephone.

(c) The Division representative shall prepare a written case plan.

10:133D-2.7 Contents of the written case plan

(a) The case plan for a family with the child living at home shall include:

1. The reasons for the Division's involvement with the family;
2. The case goal for each family member receiving services;
3. The schedule for contacts between the Division representative and the family members, pursuant to N.J.A.C. 10:133D-4, In-Person Visits with Clients and Substitute Care Providers;
4. The services offered to and used by the family since the last case plan was developed, for each case plan after the initial case plan;
5. The behavioral and other changes expected;
6. The services or activities which are intended to facilitate the changes and who will accomplish or provide them; and
7. Progress toward achieving the case goal for each family member receiving services.

(b) The case plan for a child in an out-of-home placement shall include:

1. Whether a court ordered the placement or the parent signed a voluntary agreement authorizing the placement;
2. The efforts made to prevent placement, the reasons for making the placement or for continuing the placement, all efforts made to reunify the family and the impact of those efforts;
3. The case goal for the child, the progress towards its achievement, and any obstacles to reaching it;
4. An assessment of the appropriateness of the current placement;
5. The efforts made to find a missing parent or relative, pursuant to N.J.S.A. 30:4C-12 et seq.;
6. The schedule for contacts between the Division representative and the family members, pursuant to N.J.A.C. 10:133D-4, In-Person Visits with Clients and Substitute Care Providers;
7. The plan for visits between the child and parents, siblings and other relatives (see N.J.A.C. 10:122D-1);
8. The views of the child, family, and caregiver concerning the placement and the case plan;
9. The needs of the child, the parent, and the child's caregiver in order to meet the case goal; and
10. The services or actions intended to meet the identified needs and who is responsible to provide the services and complete the activities, with projected time frames.

10:133D-2.8 Notice of the case plan

(a) The Division representative shall ask each person who participated in developing the case plan to sign the case plan to indicate his or her participation in developing the case plan.

(b) The Division representative shall give a copy of the case plan to each person who signs the case plan, including the caregiver, and to each parent who declines to participate in or sign the case plan.

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

In-Person Visits with Clients and Substitute Care Providers

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

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

Authority: N.J.S.A. 30:4C-25, N.J.S.A. 30:4C-11 et seq., specifically 30:4C-44, and N.J.S.A. 9:6-8.8 et seq., specifically 9:6-8.15.

Proposal Number: PRN 1993-302.

Submit comments by July 7, 1993 to:

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

The agency proposal follows:

Summary

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

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

This proposal, addressing the Division's in-person visits with clients and substitute care providers, is a product of the OPTR project. Rather than merely codifying the existing section of the Division Field Operations Manual on General Policy and Procedures, entitled "Contact with Clients and Substitute Care Providers," the OPTR Advisory Group approached the issue by determining the way they thought the Division should provide such services. This manual was never part of the Administrative Code, but for information purposes, the changes from the manual to the proposed new rules are here summarized:

- The responsibilities of the Division are clarified throughout the proposed rules.
- The current policy states that the purpose of contact is to further assess case needs, provide advocacy and/or case management services and support services. N.J.A.C. 10:133D-4.5(a) states that the purpose

of an in-person visit is one or more of the following: to assess the appropriateness of the care of the child and the child's safety, determine if the objectives of the case plan are being met, determine the progress being made toward achieving the case goal, and determine if barriers to achieving the case goal are being eliminated.

- The current policy states that each service active member (that is, one who is registered on the DYFS computerized client information system as receiving services) of a client family is required to have a minimum visitation requirement schedule. The supervisor conferences each case with the case manager and helps the case manager develop an appropriate plan for contact. N.J.A.C. 10:133D-4.6(a) states that the Division representative and supervisor shall establish an in-person visitation schedule for each child and parent.
- The Division's policy is that a case plan may include the services of case aides, volunteers, foster grandparents, and/or contract staff. Use of these support services does not obviate the need for the case manager to see the family. N.J.A.C. 10:133D-4.6(a)2 and 3 states that the basis for the in-person visitation schedule shall include services provided by non-Division service providers and the case goal.
- Previously the in-person visitation schedule, depending on various factors, was once every 30 days, once every three months, or once every six months. Now, this has been replaced by N.J.A.C. 10:133D-4.6(c) which provides that each established schedule for in-person visits shall fall between a range of once every week to once every twelve weeks.
- Currently, a child may be placed on a once every six months minimum visitation requirement schedule under the following circumstances: no services are needed which require contact with the case manager, no problems require on-going or frequent contact by the case manager, and the child is in one of four listed living situations. Provisions added by N.J.A.C. 10:133D-4.6(d) and (e) are that: the office manager is the one who approves this schedule, a child placed in an out-of-State residential facility may have the six month in-person visitation schedule, and the Division representative shall maintain monthly telephone contact between visits with all parties.
- A requirement is added at N.J.A.C. 10:133D-4.6(f) that the Division representative shall advise each child, parent and substitute care provider of the schedule for in-person visits.
- Previously a child was to be seen in his or her foster home within one week of his or her initial placement. Now, under N.J.A.C. 10:133D-4.7(a), an in-person visit with the child, his or her prior custodial parent and the substitute care provider must be made by the Division representative within five working days following a child's placement out of his or her own home. The visit with the child must be in the home of the substitute care provider.
- A provision that an in-person visit by the Division representative shall be made within five working days following a change in a child's out-of-home placement has been added at N.J.A.C. 10:133D-4.8.
- N.J.A.C. 10:133D-4.9 changes Division representative telephone contact with the child from within 15 days to five working days of placement in a residential facility, unless the individual treatment plan indicates otherwise. The Division representative shall visit the child in the facility within 20 working days rather than within the first 30 days of placement.
- It is clarified at N.J.A.C. 10:133D-4.10 that the Division representative shall make an in-person visit in the child's residence within 20 working days when a case is initially opened and assigned, or assigned as a case from another Division representative.

The Field Operations Manual on General Policy and Procedures' section entitled "Contact with Client and Substitute Care Providers" contains other material not regulatory in nature, such as hypothetical situations and case situations. This section will remain in existence but will be revised to reflect these proposed new rules upon adoption.

Regularly scheduled in-person visits with each child, his or her parent or guardian, and substitute care provider assures the maximum benefit from Division provided services and non-Division services. In-person visits afford the Division representative the opportunity to observe the child's behavior, the substitute care provider's reaction and the child's overall adjustment to placement outside of his or her own home. From these observations, the Division representative can assess the appropriateness of the case plan and modify or change the services provided. In-person visits with the child's parent or guardian enable the Division representative to assess the progress the parent or guardian is making in alleviating the circumstances that necessitated the child's placement out of the home.

The child, the parent or guardian, and the substitute care provider all benefit from regularly scheduled in-person visits with a Division representative. Each has the opportunity to provide valuable input into the case planning, which ultimately serves the best interests of the child.

A summary of the proposed rules follows:

Proposed N.J.A.C. 10:133D-4.1 gives the source of the Division's authority for in-person visits.

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

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

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

Proposed N.J.A.C. 10:133D-4.5 states the purposes for in-person visits.

Proposed N.J.A.C. 10:133D-4.6 provides the criteria for establishing in-person visitation schedules and the frequency of visitation.

Proposed N.J.A.C. 10:133D-4.7 states when and where the initial in-person visit is to take place, and with whom when a child is placed out of his or her own home.

Proposed N.J.A.C. 10:133D-4.8 states when an in-person visit takes place when a child's out-of-home placement is changed.

Proposed N.J.A.C. 10:133D-4.9 states when the Division representative must telephone and make an in-person visit to a child after placement in a residential facility.

Proposed N.J.A.C. 10:133D-4.10 states when an in-person visit must take place with a newly assigned Division representative.

Social Impact

The proposed new rules represent a thorough review, evaluation and revision of existing DYFS in-person visit policy as contained in the General Policy and Procedures Manual. These rules make explicit the Division's in-person visit policy, and as such, will affect all DYFS representatives who have case assignments. These rules also serve to clarify who receives an in-person visit by a DYFS caseworker, where the visit shall occur, and at what time in the case assignment process the initial in-person visit is to take place. Most importantly, the new rules provide a greater range of visit schedules that may be established for each person serviced in a particular case. Thus, the proposed new rules are more flexible and responsive to the needs of the regulated public. Child advocates, regional and district office staff, and other agency representatives participated in developing these rules through the OPTR process. The Division expects that these new rules, and especially the changes in these proposed rules from the existing DYFS policy which allows only three schedules for in-person visits, will result in improved services to clients.

Economic Impact

The Division does not anticipate any economic impact from these proposed new rules. These rules state Division policy and add some new requirements on Divisional operations which will not require any additional capital improvements, expenditures for staff or equipment on the part of the Division or any individual. Any training required to familiarize Division staff with these rules will be part of ongoing staff development. As in-person visits are only part of many functions performed by DYFS direct service staff, the costs of such tasks cannot be estimated with any degree of accuracy.

Regulatory Flexibility Statement

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

Full text of the proposal follows:

CHAPTER 133D
CASE MANAGEMENT

SUBCHAPTERS 1.-3. (RESERVED)

SUBCHAPTER 4. IN-PERSON VISITS WITH CLIENTS AND SUBSTITUTE CARE PROVIDERS

10:133D-4.1 Authority

N.J.S.A. 30:4C-25 requires the Division of Youth and Family Services, Department of Human Services to regularly visit all children under its care, custody, and supervision.

10:133D-4.2 Purpose

The purpose of this subchapter is to establish criteria for determining the frequency and nature of in-person visits by a Division representative with each child, parent or guardian, and substitute care provider.

10:133D-4.3 Scope

The provisions of this subchapter shall apply to each child receiving services from the Division, his or her parent, and each substitute care provider of a Division supervised child, and to the Division.

10:133D-4.4 Definitions

The definitions in N.J.A.C. 10:133-1.3, Definitions, are hereby incorporated into this subchapter by reference.

10:133D-4.5 Purpose of in-person visits by the Division representative

(a) Each in-person visit by the Division representative shall be made for one or more of the following purposes:

1. To determine whether the child is receiving appropriate care and is safe from harm;

2. To determine whether the objectives of the case plan are being met;

3. To determine what progress is being made toward achieving the case goal; or

4. To determine whether barriers to achieving the case goal are being alleviated.

10:133D-4.6 Establishing a schedule for in-person visits

(a) The Division representative and supervisor shall establish a schedule for each child, his or her parent, and substitute care provider, based on the following:

1. The services to be provided directly by the Division representative;

2. The services to be provided by non-Division service providers;

3. The case goal; and

4. The assessed risk to the child.

(b) The supervisor and the Division representative shall monitor and modify the schedule when appropriate.

(c) Each established schedule for in-person visits shall fall between a range of once every week to once every 12 weeks, except as provided in (d) below.

(d) The office manager may approve an in-person visitation schedule of once every six months for a child, parent, or substitute care provider, when a child resides in:

1. A related or unrelated para-foster home where the only Division service is financial, and appropriate parenting has been demonstrated over a six month period of time during which the Division representative has made frequent in-person visits;

2. A formalized long-term foster care custody placement per P.L. 1992, c.139 and the foster parents have demonstrated the ability to handle all parental responsibilities without close monitoring by the Division; or

3. An out-of-State residential facility that precludes in-person visitation more frequently than once every six months.

(e) Whenever an in-person visitation schedule of once every six months has been approved under the provision of (d) above, the Division representative shall maintain monthly telephone contact between visits with all parties as well as with collateral individuals; for example, school personnel.

(f) The Division representative shall advise each child, his or her parent, and the substitute care provider of the schedule for in-person visits and any changes in the schedule.

10:133D-4.7 In-person visitation when a child is placed out of his or her own home

(a) In addition to the visits made in accordance with the provisions of N.J.A.C. 10:133D-4.6, Establishing a schedule for in-person visits, whenever a child is placed out of his or her own home:

1. Individual in-person visits with the child, the prior custodial parent, and the substitute care provider shall be made by the Division representative within five working days following the child's placement out of his or her own home;

2. The visit with the child shall occur in the home of the substitute care provider; and

3. The Division representative shall, whenever possible or appropriate, have an in-person visit in the home of the prior custodial parent or in the office within five working days following the child's placement.

10:133D-4.8 Change in placement

Following a change in the child's out-of-home placement, the Division representative shall have an in-person visit within five working days with the child and new substitute care provider.

10:133D-4.9 Residential placement

(a) The Division representative shall telephone the child within five working days of the child's residential placement, unless contraindicated by the individual treatment plan for the child.

(b) Within 20 working days of the placement, the Division representative shall visit the child and attend the treatment conference if one is scheduled at the time of the visit.

10:133D-4.10 Initial in-person visit

(a) In addition to the standards set by N.J.A.C. 10:133D-4.7, 4.8 and 4.9, the Division representative shall make an in-person visit in the child's residence within 20 working days when:

1. A case initially opened for services with the Division is assigned to the Division representative; or

2. The case is transferred from one Division representative to another. In this instance, the newly assigned Division representative shall make the in-person visit.

INSURANCE

(a)

DIVISION OF PROPERTY AND CASUALTY

New Jersey Personal Automobile Insurance Plan

Reproposed New Rule: N.J.A.C. 11:3-2.4
Proposed Amendments: N.J.A.C. 11:3-2.2, 2.5, 2.6, 2.11 and 2.12

Authorized By: Samuel F. Fortunato, Commissioner, Department of Insurance.

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

Proposal Number: PRN 1993-304.

Submit comments by July 7, 1993 to:

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

The agency proposal follows:

Summary

N.J.S.A. 17:29D-1 provides that the Commissioner of Insurance (Commissioner) may adopt rules establishing a plan for the providing and apportionment of insurance coverage for applicants who are entitled, but are unable to procure such coverage through ordinary methods. This is also reflected in the Fair Automobile Insurance Reform Act of 1990 (see N.J.S.A. 17:33B-22). The Department adopted N.J.A.C. 11:3-2, effective September 21, 1992 (see 24 N.J.R. 3400(a)), to provide the regulatory framework for a personal automobile insurance assigned risk plan in accordance with N.J.S.A. 17:29D-1. The rules created a New Jersey Personal Automobile Insurance Plan (PAIP) for the administration and the apportionment of personal private passenger automobile insurance for qualified applicants. In adopting N.J.A.C. 11:3-2, the Department did not adopt N.J.A.C. 11:3-2.4, which provided specific exemptions to certain insurers from participation in the PAIP. The exemptions reflect those set forth in N.J.A.C. 11:3-40, which implements N.J.S.A. 17:33B-15 and sets forth those insurers required to provide automobile insurance to eligible persons. Many commenters on N.J.A.C. 11:3-2 expressed concern with the provisions that exempted insurers with less than 1,000 private passenger automobile insurance exposures from

participating in the PAIP, and to require those insurers that write coverage only for certain types of vehicles (specialty writers) to participate in the PAIP only for the particular types of automobiles currently insured. Upon review of the comments, the Department determined it appropriate not to adopt N.J.A.C. 11:3-2.4 at that time and to repropose the exemption provisions in consideration of the ability of insurers to buy-out of the obligation to service assigned risks by utilizing limited assignment distribution (LAD) carriers to service assigned risks. The Department now reproposes N.J.A.C. 11:3-2.4 to revise the exemption provisions and to provide all interested parties an opportunity to comment on these revised provisions.

The Department has determined not to specifically exempt those "de minimis" companies. Such insurers may choose to transfer their obligations to assume PAIP assignments to another member insurer through a LAD carrier arrangement pursuant to procedures set forth in the PAIP plan of operation approved by the Commissioner. Further, pursuant to N.J.A.C. 11:3-2.11(a)4, an insurer receives credits against its share of assigned risks for risks written in designated territories, and for each risk which is not an eligible person written in accordance with the insurer's rating system, regardless of the territory in which the risk is located. Accordingly, an insurer may voluntarily write a sufficient number of risks to reduce or avoid any assignments under the PAIP. Finally, an insurer may request a suspension of its obligations to assume PAIP assignments pursuant to N.J.S.A. 17:33B-23 and 24 and N.J.A.C. 11:2-35, if the obligation to assume PAIP assignments would result in the insurer's financial condition being or becoming unsafe or unsound. The Department believes that these "safety valves" eliminate any undue burden that would be placed on small carriers.

The Department further believes that it is reasonable and appropriate to require insurers that insure or have insured only certain types of vehicles to participate in the PAIP only to the extent of those vehicles it insures. This is consistent with the requirements set forth in N.J.A.C. 11:3-40 governing those insurers that are required to provide coverage to eligible persons pursuant to N.J.S.A. 17:33B-15. Since these insurers have written only certain types of vehicles (for example, motor homes and antique vehicles) in the voluntary market, these insurers may not necessarily have the systems and infrastructure in place to provide coverages for all types of automobiles which may be covered under the PAIP. Accordingly, the costs to provide such coverage or to "buy-out" of those obligations would be disproportionately high in relation to the degree of their participation in the voluntary market.

Moreover, one goal of the PAIP is to promote efficiency in the handling of assigned risks by requiring voluntary market insurers to write and service such risks. An insurer writing insurance only for certain types of automobiles may not have systems in place required to service all types of automobiles covered under the PAIP, and therefore is unlikely to be able to service such business in an efficient manner.

Accordingly, the Department is reproposing N.J.A.C. 11:3-2.4 to exempt insurers that have not issued or renewed policies of private passenger automobile insurance in New Jersey since December 31, 1983; insurers that have issued or renewed policies of private passenger automobile insurance in New Jersey since December 31, 1983 but only in accordance with a commercial lines rating system; insurers transacting private passenger automobile insurance in New Jersey subject to a plan of orderly withdrawal but only to the extent provided by the terms of the approved plan of orderly withdrawal; or insurers transacting private passenger automobile insurance in New Jersey subject to an order issued by the Commissioner in accordance with N.J.S.A. 17:33B-23 and 24, but only to the extent provided by the terms of the order. Moreover, the rules provide that insurers that insure, or have insured since December 31, 1983, only certain types of automobiles (for example, motor homes and antique vehicles), must participate in the PAIP only for the particular automobiles it currently insures. Since the PAIP is now operational, the rule as reproposed requires that insurers seeking an exemption under these provisions file the required information with the PAIP, and file a copy of such information with the Department.

In addition, the Department proposes several amendments to the existing PAIP rules to clarify various provisions and to ensure consistency with the PAIP plan of operation approved by the Commissioner, and operating procedures of the PAIP.

First, N.J.A.C. 11:3-2.5 is amended to provide that one of the members of the governing committee shall be a LAD carrier, in lieu of providing for representation on the governing committee by two public representatives. Although the rules currently provide for representation on the governing committee by two public representatives, only one public representative has been appointed. No other representative of the public has sought to be appointed to the governing committee. The Department does not believe it reasonable or appropriate to leave this position vacant. Moreover, the Department believes that LAD carriers should be represented on the governing committee. Although LAD carriers are insurers (which are currently represented), they are subject to additional specific requirements pursuant to the plan of operation and LAD program manual when acting in the capacity of a LAD carrier. Accordingly, insurers which are also LAD carriers may have different interests and additional concerns than those of insurers that do not act as LAD carriers. The Department therefore believes it is reasonable and appropriate to provide for a LAD carrier representative on the governing committee. In addition, N.J.A.C. 11:3-2.5(b) and (c) are revised to clarify that the nomination of insurers to the governing committee by various trade associations or by insurers which are not members of trade associations relate solely to the nomination of insurers to act as representatives of insurers on the governing committee pursuant to N.J.A.C. 11:3-2.5(a).

Secondly, N.J.A.C. 11:3-2.11(i) is revised to clarify that only the "standard" or "basic" contract to be utilized between insurers and LAD carriers shall be approved by the governing committee and the Commissioner. Insurers and LAD carriers may utilize the standard approved contract without seeking additional approval. However, any changes or deviations from the approved contract must be approved by the governing committee and Commissioner prior to use. This procedure is consistent with the guidelines currently set forth in the approved PAIP plan of operation.

Thirdly, the rules have been revised to delete any references to LAD servicing carriers. As the Department advised through Bulletin No. 92-23, it is in the process of substantially revising the requirements governing LAD servicing carriers set forth in N.J.A.C. 11:3-3. Moreover, LAD servicing carriers are regulated exclusively by the Commissioner, not the PAIP governing committee. In fact, for this reason, the governing committee expressly did not refer to LAD servicing carriers in the approved PAIP plan of operation. Accordingly, in the interests of consistency and uniformity with any revisions to N.J.A.C. 11:3-3 ultimately promulgated, and to avoid any undue confusion, the Department believes it appropriate to delete references to LAD servicing carriers in these rules.

Finally, N.J.A.C. 11:3-2.12 is amended to clarify that a person seeking to become a LAD carrier may also appeal a decision of the governing committee, consistent with the procedures set forth in the approved PAIP plan of operation.

Social Impact

The Department believes that the reproposed rule, in combination with other provisions of N.J.A.C. 11:3-2, provides adequate "safety valves" to exempt insurers in appropriate circumstances from PAIP assignments to eliminate any undue burden which may be imposed by such assignments, while requiring insurers required to provide automobile insurance to eligible persons and participate in the voluntary private passenger automobile insurance market in this State to participate in the PAIP to the same extent. This in turn will ensure that PAIP assignments are equitably distributed to all insurers transacting private passenger automobile insurance in this State.

Moreover, the Department believes that the other technical revisions described in the Summary above clarify the Department's intent and will ensure consistency with the approved PAIP plan of operation and current practice. This, in turn, should eliminate any confusion regarding these provisions and operating requirements of the PAIP, thus benefitting insurers, producers, LAD carriers and insureds.

Economic Impact

The reproposed new rule generally will exempt those insurers which are not required to provide automobile insurance coverage to eligible persons and thus not required to participate in the voluntary private passenger automobile insurance market, from participating in the PAIP. However, insurers which are not exempted from PAIP assignments may "buy-out" of their obligations through a LAD carrier arrangement or may write a sufficient number of risks voluntarily to reduce or avoid any PAIP assignments. Further, an insurer may request a suspension of its obligations to accept PAIP assignments if fulfillment of such obligation would result in the insurer's financial condition being or becoming unsafe or unsound, pursuant to N.J.S.A. 17:33B-23 and 24 and N.J.A.C. 11:2-35. The Department believes that this reproposed rule, in conjunction with other provisions of N.J.A.C. 11:3-2, should reduce any undue economic burden imposed on small carriers through participation in the PAIP. In thus reproposing the rule, the burden of servicing

PAIP business will be more equitably shared among all insurers transacting personal private passenger automobile insurance.

In addition, the Department believes that the other technical revisions to the rules described in the Summary above should impose no additional economic impact on insurers, producers, or the public in that they impose no new reporting or compliance requirements. The revisions merely clarify various provisions of the rules to clarify the Department's intent and ensure consistency with current practice.

Regulatory Flexibility Analysis

This reproposed new rule and proposed amendments may apply to "small businesses" as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The reproposed new rule and proposed amendments will apply to "small businesses" which are insurers authorized to transact private passenger automobile insurance in this State. The proposed new rule and amendments merely set forth exemptions from participation in the PAIP established pursuant to N.J.A.C. 11:3-2, and make other revisions to clarify various provisions, and do not impose reporting, recordkeeping or other compliance requirements (other than the minimal data required as part of a request for an exemption).

The reproposed rule essentially provides that an insurer with a small market share will not automatically be exempt from participating in the PAIP. These small businesses therefore will be required to bear costs associated with servicing business assigned by the PAIP in accordance with N.J.A.C. 11:3-2 and the PAIP plan of operation approved by the Commissioner. To the extent the proposed new rule requires small businesses to comply with N.J.A.C. 11:3-2, they may impose a greater impact on small businesses in that they may have to devote proportionately more staff and financial resources to comply with N.J.A.C. 11:3-2. However, pursuant to N.J.A.C. 11:3-2.11(i), the PAIP governing committee is authorized to establish procedures in the plan of operation for approval by the Commissioner to permit a company to transfer its obligations to accept assignments to another participating insurer. In addition, the amount of business assigned to an insurer is related to the amount of business written by the insurer in the voluntary market. Accordingly, an insurer that writes a large amount of business in the voluntary market will incur greater expense than an insurer that writes a small amount of business. Further, insurers shall receive assigned risk credits for voluntary risks written in designated territories or for ineligible risks written in accordance with the insurer's approved rating system regardless of territory. Finally, as previously noted, an insurer may request a suspension of its obligation to provide insurance for assigned risks pursuant to N.J.S.A. 17:33B-23 and 24, and N.J.A.C. 11:2-35. The Department therefore believes that while no exemption is specifically provided based on insurer size, the provisions of the rule, in conjunction with other provisions of N.J.A.C. 11:3-2, should reduce any additional costs which may be imposed on small businesses.

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

11:3-2.2 Definitions

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

. . .

["LAD servicing carrier" means a limited assignment distribution servicing carrier which is an insurer or other qualified entity appointed by a participating insurer in accordance with requirements established by regulation by the Commissioner to perform certain duties, such as underwriting and claims processing, but which shall not assume any of the risk of the participating insurer.]

. . .

11:3-2.4 [(Reserved)] **Exemptions**

(a) Every insurer shall participate in the PAIP to the extent required by this subchapter and the plan of operation.

(b) The requirements of this subchapter shall not apply to the following:

1. Insurers that have not issued or renewed policies of private passenger automobile insurance in New Jersey since December 31, 1983;

2. Insurers that have issued or renewed policies of private passenger automobile insurance in New Jersey since December 31, 1983, but only in accordance with a commercial lines rating system filed and approved pursuant to N.J.S.A. 17:29AA-1 et seq.

3. Insurers transacting private passenger automobile insurance business in New Jersey subject to a plan of orderly withdrawal approved in accordance with N.J.A.C. 11:2-29, but only to the extent that waiver of participation in the PAIP is explicitly provided by the terms of the approved plan of orderly withdrawal; or

4. Insurers transacting private passenger automobile insurance business in New Jersey subject to an order issued by the Commissioner in accordance with N.J.S.A. 17:33B-23 and 24, but only to the extent provided by the terms of the order.

(c) Insurers that currently insure, or have insured since December 31, 1983, only certain types of automobiles (for example, motor homes, recreational vehicles, antique automobiles or motorcycles) shall participate in the PAIP but only for the particular types of automobiles currently being insured.

(d) Insurers claiming to be excluded from participation pursuant to the provisions of (b) or (c) above shall comply with the following:

1. Such insurers shall file with the PAIP no later than 60 days from the effective date of this rule a certified statement containing the following information:

i. The insurer's name, including the NAIC group number;

ii. A statement that the insurer is not required to participate in the PAIP or receive assignments through the PAIP;

iii. The factual basis upon which the insurer relied to determine that it is not required to comply fully with this subchapter;

iv. The particular provision of this rule under which the insurer is included; and

v. A certification by an officer of the insurer that the statement is complete, correct and accurate to the best of the officer's information, knowledge and belief based upon the officer's personal review of all relevant records.

2. The certified statement shall be sent to the PAIP at the following address:

PAIP Exemptions
New Jersey Personal Automobile Insurance Plan
2000 Midlantic Drive
Laurel Corporate Center
Suite 450
Mt. Laurel, NJ 08054

3. A copy of the information filed pursuant to (c)1 and 2 above shall be filed with the Department at the following address:

ARM Unit
New Jersey Department of Insurance
20 West State Street
CN-325
Trenton, New Jersey 08625-0325

11:3-2.5 Governing committee

(a) The PAIP shall be administered by a governing committee of 14 members.

1.-2. (No change.)

3. [Two members] **One member** shall be **a** public [representatives] **representative** who [are] **is** knowledgeable about automobile insurance matters but who [are] **is** not employed by, or otherwise affiliated with, insurers, insurance producers, or other entities of the insurance industry.

4. One member shall be a salaried employee of an approved LAD carrier for the PAIP.

[4.]**5.** (No change in text.)

(b) The following organizations shall each nominate two members to represent **insurer** participants of PAIP:

1.-3. (No change.)

(c) Insurers which are not members of the organizations in (b) above shall nominate two members to represent **insurer** participants in accordance with a fair method set forth in the plan of operation.

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

(g) The governing committee shall have the power and duty to:

1.-5. (No change.)

6. Investigate complaints and hear appeals from applicants, insureds, producers, LAD carriers, [LAD servicing carriers] or insurers

about any matter pertaining to the proper administration of the PAIP;

7.-12. (No change.)

11:3-2.6 Plan of operation

(a) The plan of operation shall provide for the prompt and efficient provision of personal private passenger automobile insurance to qualified applicants. The plan of operation shall provide for, among other matters:

1. (No change.)

2. Standards and procedures for:

i. (No change.)

ii. The appointment, compensation, and termination by insurers of LAD carriers [and LAD servicing carriers] (consistent with any requirements established by regulation by the Commissioner);

3. Performance standards for insurers, producers, LAD carriers, [LAD servicing carriers,] the PAIP manager, and other employees, professionals and contractors required to administer the PAIP;

4.-11. (No change.)

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

11:3-2.11 Determination and fulfillment of quotas

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

(i) The governing committee shall establish procedures in the plan of operation permitting an insurer by mutual agreement to transfer its obligations to accept assignments to another insurer (to be known as a LAD carrier). [All agreements and LAD carriers shall be separately approved by the Commissioner.] **The basic contract to be entered into between insurers and LAD carriers, including the minimum duration of such agreement, shall be approved by the governing committee and the Commissioner. Any substantive modifications to the approved contract shall be submitted to the governing committee and Commissioner for approval prior to its use.** With respect to the transfer of an insurer's obligations to accept assignments to a LAD carrier, the plan shall address the following:

1.-6. (No change.)

[(j) An insurer which seeks to appoint an insurer or other entity to perform certain duties of the participating insurer, such as underwriting and claims processing, but which shall not assume any of the risk of the participating insurer (to be known as a LAD servicing carrier) may appoint such an insurer or entity in accordance with requirements established by regulation by the Commissioner.]

11:3-2.12 Right to petition for appeal to the Commissioner

(a) An applicant, insured, producer, LAD carrier, [LAD servicing carrier] **person applying to act as a LAD carrier,** or insurer may petition for appeal to the Commissioner from an adverse decision of the governing committee by filing a request in writing within 20 days of the date of receipt of the written decision of the governing committee.

1.-3. (No change.)

(b) (No change.)

(a)

DIVISION OF PROPERTY/CASUALTY

Producer Assignment Program Exemptions

Proposed Amendments: N.J.A.C. 11:3-42.2 and 42.9

Authorized By: Samuel F. Fortunato, Commissioner, Department of Insurance.

Authority: N.J.S.A. 17:1C-6(e), 17:1-8.1 and 17:33B-9.

Proposal Number: PRN 1993-305.

Submit written comments by July 7, 1993 to:

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

The agency proposal follows:

Summary

The purpose of the proposed amendments to N.J.A.C. 11:3-42.9(a)2 and 3 is to reconcile the time frame established for an insurer to submit a completed application for an exemption from the Producer Assignment Program (PAP), with the period of time needed to render a decision thereon. The amendment to N.J.A.C. 11:3-42.9(a)2 provides an insurer with additional time in which to submit an application for exemption. This rule initially provided that an insurer was to provide the information required pursuant to N.J.A.C. 11:3-42.9(a)1 no later than 45 days prior to the end of the quota period. The amendment provides that an insurer shall file its request for exemption no later than the end of the quota period for which assignments are being made. Thus insurers are provided with additional time in which to gather and file the information required by these rules.

The proposed amendment to N.J.A.C. 11:3-42.9(a)3 extends the time in which a decision may be rendered by the Auto Residual Market (ARM) Unit, Department of Insurance, to 45 days after the end of the quota period for which assignments are being made. This amendment ensures that all information required pursuant to N.J.A.C. 11:3-42.9(a)1, submitted as of the end of the quota period, is evaluated by the ARM Unit in accordance with the four tests set forth at N.J.A.C. 11:3-42.9(c)3, in a decision rendered on an application for exemption.

The proposed amendment to N.J.A.C. 11:3-42.2 includes a definition of the term "insurer" and "personal private passenger automobile insurance". These definitions have been added to clarify that all persons authorized to transact the business of private passenger automobile insurance in New Jersey are subject to N.J.A.C. 11:3-42.

A clarifying change has also been made to N.J.A.C. 11:3-42.9(a)2, adding a cross-reference to N.J.A.C. 11:3-42.5, in which the ends of quota periods are set forth.

Social Impact

These proposed amendments recognize the need to evaluate all of an insurer's data which incorporates information to the end of the quota period for which assignments are being made, and to provide sufficient time for receipt and review of that information.

The amendments will have a positive impact on insurers seeking exemption from the PAP, by providing them with additional time in which to compile data, and by affording those insurers an opportunity to supply the ARM Unit with comprehensive information.

Economic Impact

The proposed amendments will not have any economic impact on the public, the Department, or those insurers that seek to obtain exemptions from the PAP, unless some unanticipated benefit will be derived from the revised filing and decision deadlines.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because these amendments do not impose any additional reporting, recordkeeping or other requirements on small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., from those imposed by the original rules. The proposed amendments clarify by adding definitions and push back the deadlines for both filing requests for PAP exemptions and the Department's decision on the requests.

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

11:3-42.2 Definitions

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

...

"Insurer" means any person authorized to transact the business of personal private passenger automobile insurance in this State, including insurers organized pursuant to N.J.S.A. 17:50-1 et seq.

...

"Personal private passenger automobile insurance" means a policy of automobile insurance principally used to provide primary insurance on private passenger automobiles which are owned individually, or jointly by individuals who are residents of the same household, and used for personal, family, or household needs.

...

11:3-42.9 Exemption from program

(a) The Program is intended to address the dual goals of protecting producers who have built businesses and developed expertise serving the residual market and of encouraging auto insurance sales and service in inadequately served territories. Therefore, assignment of producers on an equitable basis should consider whether an insurer's own marketing system has, in practice, provided reasonable access to persons in all areas of the State. When an insurer has demonstrably provided such access, it may be exempt from assignments under the Program.

1. (No change.)

2. Requests for exemptions from this Program [must be received by] **shall be filed with** the Department no later than [45 days prior to] the end of the quota period, **as set forth at N.J.A.C. 11:3-42.5,** for which assignments are being made. Failure to submit a complete application by the due date may result in a denial of the insurer's request for exemption from assignments for that assignment period. An insurer that previously submitted an application for an exemption pursuant to this section may incorporate by reference information included with the previous request. However, the insurer shall submit documentation of continued or additional marketing and solicitation efforts between the time the original request was made and the time the present request is made.

3. The review of requests for exemptions from this Program shall be conducted by the ARM Unit within the Department. The ARM Unit shall review the request and shall notify the insurer in writing as to its decision within 45 days of [receipt of a complete exemption request] **the end of the quota period for which assignments are being made.**

i.-ii. (No change.)

4. (No change.)

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

LABOR

(a)

OFFICE OF GRANTS AND SPECIAL PROJECTS

Notice of Extension of Comment Period
Disability Discrimination Grievance Procedure
Proposed New Rules: N.J.A.C. 12:7

Take notice that the Commissioner of the New Jersey Department of Labor is extending until July 7, 1993 the period for public comment on proposed new rules N.J.A.C. 12:7 which were published in the April 5, 1993 New Jersey Register at 25 N.J.R. 1334(a).

The Department received a request to prepare an audio-cassette recording of the proposal. To prepare the recording and to insure that interested persons are able to submit comments in response to same, the Department is hereby notifying the public that the comment period will be extended for 63 days.

Please submit written comments by July 7, 1993 to:

Linda Flores, Special Assistant
Office of External and Regulatory Affairs
Department of Labor
Office of the Commissioner
CN 110
Trenton, New Jersey 08625-0110; and

Howard Luckett, Director
Office of Grants and Special Projects
Department of Labor
Office of the Commissioner
CN 110
Trenton, New Jersey 08625-0110

(b)

DIVISION OF VOCATIONAL REHABILITATION SERVICES

Waiver of Executive Order No. 66(1978)
Division of Vocational Rehabilitation Services Rules
N.J.A.C. 12:45

Take notice that the rules concerning the Division of Vocational Rehabilitation Services, N.J.A.C. 12:45, were to expire on May 2, 1993, pursuant to Executive Order No. 66(1978). These rules set forth the procedures, standards and criteria used by the Department of Labor to assist individuals seeking vocational rehabilitation services. The Department intends to readopt this chapter in its entirety, but such could not be accomplished by May 2, 1993.

Due to the important purposes served by the standards defined in this chapter, and it being imperative that no lapse in the rules occur, Governor Florio, on April 23, 1993, directed that the five-year sunset provision of Executive Order No. 66(1978) is waived for N.J.A.C. 12:45, and that the expiration date for this chapter is extended from May 2, 1993, to and including December 31, 1993.

COMMERCE AND ECONOMIC DEVELOPMENT

(c)

DIVISION OF DEVELOPMENT FOR SMALL BUSINESSES AND WOMEN AND MINORITY BUSINESSES

Notice of Extension of Comment Period
Certification of Women-Owned and Minority-Owned Businesses
Proposed Amendments: N.J.A.C. 12A:11

Take notice that the Department of Commerce and Economic Development is extending the deadline for comments on the proposed amendments to N.J.A.C. 12A:11, published in the March 15, 1993 New Jersey Register at 25 N.J.R. 1056(a), to August 30, 1993. Through a notice of adoption published elsewhere in this issue of the New Jersey Register, N.J.A.C. 12A:11 was readopted effective April 30, 1993; however, the amendments proposed as part of the readoption have not been adopted at this time, and, through this comment period extension, additional comment on those amendments is sought.

Submit comments on the proposed amendments by August 30, 1993 to:

Hank Diaz, Administrator
Department of Commerce and Economic Development
Division of Small Businesses and Women and Minority Businesses
Office of Certification
20 West State Street
CN 820
Trenton, New Jersey 08625-0820

LAW AND PUBLIC SAFETY

(d)

BOARD OF DENTISTRY

Qualifications of Applicants
Proposed Amendment: N.J.A.C. 13:30-1.1

Authorized By: Board of Dentistry, Jerome Horowitz, D.D.S., President.
Authority: N.J.S.A. 45:6-3 and 45:6-19.4.
Proposal Number: PRN 1993-303.

Submit written comments by July 7, 1993 to:
Agnes Clarke, Executive Director
Board of Dentistry
Post Office Box 45000
Newark, New Jersey 07101

The agency proposal follows:

Summary

The Board of Dentistry proposes to amend its rule concerning the qualifications of applicants for licensure. The amendment would permit those individuals who have completed specific postgraduate residency programs to be licensed without having taken the clinical portion of the Northeast Regional Board Examination in dentistry. All other qualifications of applicants for licensure remain the same including successful completion of all written portions of the Northeast Regional Board Examination.

The Board is of the opinion that any applicant who has successfully completed one of the postdoctoral residency programs described in the amendment will have adequately demonstrated clinical competency. These residency programs permit a young dentist to obtain substantial clinical experience beyond that which is received prior to graduation from dental school. In addition, there is a great deal of competition for positions as residents and, therefore, more qualified applicants are likely to be chosen for the limited residency positions. The Board also has confidence in granting licensure to those individuals who have successfully completed such residencies because they have engaged in this clinical experience under the direct supervision of a licensed dentist and they are subjected to rigorous evaluation.

The Board believes that the completion of any one of these residency programs more than adequately demonstrates clinical competence at least equivalent to, if not greater than, that which is demonstrated by completion of the clinical portion of the Northeast Regional Board Examination, which tests clinical competence in an artificial rather than a real dental situation.

Social Impact

The proposed amendment is basically a "streamlining" measure, to eliminate the taking of a clinical examination by those young dentists who have amply demonstrated clinical competency by completion of advanced and rigorous postgraduate residency programs. It will be of obvious benefit to these individuals, who will not have to take an examination that is, in the Board's opinion, less indicative of clinical competency in real-life situations than a successful residency experience in a closely-supervised postgraduate program. For this reason, there should be no impact upon the public.

Economic Impact

A fee will be saved by those individuals who have completed a residency and will not, as a result, be required to pay for the clinical portion of the Northeast Regional Board Examination in dentistry.

Regulatory Flexibility Statement

This proposed amendment affects only potential licensees of the Board of Dentistry, who are not yet "small businesses" under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. A regulatory flexibility analysis is, therefore, not required.

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

13:30-1.1 Qualifications of applicants

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

(c) [To] **Except as set forth in (f) below, to** obtain a license to practice dentistry, the candidate must pass **all portions of** the Northeast Regional Board Examination. The Board will recognize successful completion of the Northeast Regional Board Examination for up to five years. After five years, the Board will review each request on a case by case basis.

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

(f) Any applicant who has successfully completed any of the programs in (f)1 through 3 below shall not be required to take the clinical portion of the Northeast Regional Board Examination in Dentistry. The applicant shall meet all other qualifications required of applicants for licensure, including successful completion of all written portions of the Northeast Regional Board Examination including, but not limited to, the DOR (Diagnostic, Oral Medicine and Radiology) and the CTP (Comprehensive Treatment Planning):

1. A one year hospital-based general practice residency in a program approved by the Commission on Dental Accreditation;

2. A one year dental school-based advanced education in general dentistry program approved by the Commission on Dental Accreditation; or

3. Successful completion of post-doctoral education in a recognized specialty leading to eligibility for certification by a specialty board in a program accredited by the American Dental Association Council on Dental Education.

TRANSPORTATION

(a)

DIVISION OF ROADWAY DESIGN
BUREAU OF UTILITY AND RAILROAD ENGINEERING
Utility Accommodation
Proposed Readoption with Amendments: N.J.A.C. 16:25

Authorized By: William D. Ankner, Director, Division of Policy and Capital Programming.

Authority: N.J.S.A. 27:1A-5; 27:1A-6, 27:1A-13, 27:7-19, 40:62-35, 65 and 134; 48:7-1; 48:7-2 et seq.; 48:9-17 and 25.4; 48:13-10; 48:17-8, and 16; and 48:19-17.

Proposal Number: PRN 1993-287.

A **public hearing** concerning the proposed readoption will be held on:
Thursday, June 24, 1993
From 1:00 P.M. to 3:00 PM.
Multi-Purpose Room
Engineering and Operations Building
New Jersey Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

Submit written comments by July 7, 1993 to:
Charles L. Meyers
Administrative Practice Officer
Department of Transportation
Bureau of Policy and Legislative Analysis
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

The agency proposal follows:

Summary

In accordance with the "sunset" and other provisions of Executive Order No. 66(1978), the Department of Transportation proposes to readopt N.J.A.C. 16:25, which concerns the accommodation of utilities on Department rights-of-way. These rules are scheduled to expire on August 15, 1993. The proposed amendments update the criteria and standards to be followed for various utilities which are located on or along State Highway System rights-of-way.

As a "corridor state," New Jersey is heavily industrialized and densely populated. The State has worked to provide a safe and modern highway system for its citizens. There also needs to be safe and adequate utility services for its citizens and industries. Freeways, parkways, expressways and other highways and roads are designed and constructed to meet the needs of the motoring public. Many are being widened, dualized, or grade separated to meet the demands of traffic or for improved safety.

In addition to carrying out their own improvement and expansion programs to meet ever increasing customer demands, utilities must also modify their facilities to conform to highway construction projects. Rarely can either the Department or utility companies construct or alter their respective facilities without somehow impacting the other. The Commissioner of Transportation has therefore established, through the rules on utility accommodation, rules to control and coordinate the use of highway rights-of-way, and procedures to be used in achieving this control.

N.J.A.C. 16:25 is summarized as follows:

Subchapter 1 is the introduction and provides the general provisions of the chapter.

Subchapter 2 entails the general considerations as to location and design of utility accommodations.

Subchapter 3 provides the general specifications and requirements pertaining to pipelines. N.J.A.C. 16:25-3.4, Encasement and allied mechanical protection—generally, is being repealed because of technological changes.

Subchapter 4 outlines general considerations concerning installation on highway structures.

Subchapter 5 establishes guidelines concerning overhead power and communication lines. N.J.A.C. 16:25-5.5, Design exceptions, is being deleted to comply with current operational procedures.

Subchapter 6 pertains to general scenic enhancement.

Subchapters 7 and 7A provide the general requirements for underground electric power, communication lines, and fiber-optics.

Subchapter 8 governed irrigation and drainage pipes, ditches, and canals, and is being repealed. The chapter is reserved for future use.

Subchapter 9 provides guidelines and procedures for the enhancement of safety and general provisions for restoration.

Subchapter 10 outlines the requirements for permits for related work on the rights-of-way.

Subchapter 11 specifies the prerequisites for special permits and agreements.

Subchapter 12 establishes the guidelines for reimbursement for the relocation or adjustment of existing utility lines.

Subchapter 13 provides for the severability of the chapter.

Over the past five years these rules have been amended as follows:

N.J.A.C. 16:25-1.1, 1.7, and 2.2 were proposed for amendment and new rules proposed at N.J.A.C. 16:25-7A and 13 at 21 N.J.R. 2234(b), adopted at 22 N.J.R. 359(a).

N.J.A.C. 16:25-1.1 and 1.7 were amended to provide new definitions used throughout the rule, and criteria to be followed.

N.J.A.C. 16:25-2.2 was amended to depict the standards for fiber optic communication facilities.

N.J.A.C. 16:25-7A provided information concerning the general considerations, permitting requirements and fees, utility facility installations and the design facilities.

N.J.A.C. 16:25-13 provided the severability requirements of the chapter.

N.J.A.C. 16:25-1.1, 1.7, 2.1, 7A.1, 7A.3, 7A.4, and 11.3 were proposed for amendment at 23 N.J.R. 3739(c), adopted at 24 N.J.R. 1801(b).

N.J.A.C. 16:25-1.1 was amended to include the use of materials other than glass to transfer information via lightweight signals. This provision accommodates the rapid technological advances in the industry.

This chapter has been reviewed by the Department, and is being brought up to date with Department procedures and organizational structure.

A number of changes are being proposed in this rulemaking, generally to conform to other Department requirements, such as the design standards and the rules at N.J.A.C. 16:41 and N.J.A.C. 16:47. Amendments have also been proposed to reflect the Department's current organization, and to add provisions for railroad grade crossings. References to drainage and irrigation, and standards for them, have been deleted, since these are not part of utilities. The amendments are listed below:

N.J.A.C. 16:25-1.1, which contains definitions, has been amended to delete Chief, Bureau of Utilities and add Manager, Bureau of Utility and Railroad Engineering; delete clear roadside policy, which has been replaced by more detailed specification in other rules of the Department; delete investor owned and public owned utilities, and utilities, replacing them with a new definition of public utility which reflects current ownership; delete public utility order and replace it with the public utility agreement, conforming to current practice, which involves a cooperative effort on the part of the utilities and the Department in the delineation of the agreement, rather than an order on the part of the Commissioner; to add definitions of railroad at grade crossings and railroad grade separated crossings, required by the addition of rules at N.J.A.C. 16:25-11; to amend the definitions for limited access highway and permit to conform to the access and permit rules; to amend regional maintenance office to conform to current Department organization; and to amend the definitions for rigid pipe and semi-rigid pipe to allow for more variation in the compliance requirements.

N.J.A.C. 16:25-1.2, 1.6, 3.13, 5.4, 7.2, 7A.1, 10.1 and 10.2 were amended to conform to Department design, permit and access standards.

N.J.A.C. 16:25-1.3 and 7A.3 were amended to conform to the new definition of utilities.

The need for updated citations was the cause of the amendments to N.J.A.C. 16:25-1.6, 2.1, 2.2, 9.4, 11.2 and 12.1.

N.J.A.C. 16:25-1.1, 2.1, 7A.1 and 7A.4 were amended to allow the use of PVC or other approved conduits (except where utility facilities are attached to structures or are within 15 feet of the edge of the pavement), as requested by AT&T.

N.J.A.C. 16:25-1.7 was amended to conform to current Federal regulations governing the interstate highway system which require the utility seeking to use a limited access highway right-of-way to show that disapproval of the request would result in the loss of productivity of agricultural land, and further amended at subsection (h) to provide for specification of a utility access control line in any permit granted within the right-of-way of a limited access highway.

N.J.A.C. 16:25-1.7(c) was amended to make clear that the Department consults with the Federal Highway Administration prior to making a determination allowing an alternate location.

N.J.A.C. 16:25-2.3 contains waiver provisions which have been conformed to the waiver provisions of other Department standards. N.J.A.C. 16:25-3.6 has been amended to conform to the new waiver provisions at N.J.A.C. 16:25-2.3.

N.J.A.C. 16:25-3.4 is being repealed because the Department considered it more of a commentary rather than regulatory language. The provisions of N.J.A.C. 16:25-3.5 and 3.6 contain the applicable standards.

N.J.A.C. 16:25-3.5 has been changed from an advisory standard to a mandatory standard, in order to protect the structure integrity of the highway, in the event of leakage of the materials listed in the rule. Encapsulation is expected to divert any leakage away from the highway.

N.J.A.C. 16:25-3.7 has been amended to include a requirement for approvals in accordance with Department requirements for permits and access.

N.J.A.C. 16:25-3.9 has been repealed and replaced with requirements which include end-product specifications.

N.J.A.C. 16:25-3.11 was amended at subsections (a)3 and (b)3, to require that the space cut for pipe be filled as tightly as possible, by pipe or by grout backfill, in order to prevent the occurrence of voids or overbreaks which could impair the structural integrity of the highway.

N.J.A.C. 16:25-3.13 was amended to provide for a safer environment for pipelines within the construction work zone.

N.J.A.C. 16:25-5.1 has been amended for clarification.

N.J.A.C. 16:25-5.2(b) was added to allow for non-wooden pole construction, so long as public safety is not compromised.

N.J.A.C. 16:25-5.3 was amended to enable personnel of the Department's Electrical Bureau to maintain Departmental facilities without being in violation of PEOSHA.

N.J.A.C. 16:25-5.4 was amended because the Department is currently in the process of redefining what is considered today to be "clear zone area." (This change reflects what will be in the revised section of the New Jersey Department of Transportation Design Manual—Roadway.)

N.J.A.C. 16:25-5.5 was repealed, in order to discourage exceptions. The waiver provision at N.J.A.C. 16:25-2.3 may be utilized by any member of the regulated public who believes they may be entitled to one.

N.J.A.C. 16:25-5.6 has been recodified as N.J.A.C. 16:25-5.5 and amended to be more specific, in accordance with current Departmental design standards.

N.J.A.C. 16:25-7.2 was amended to be in conformity with the other requirements of this chapter, as proposed.

N.J.A.C. 16:25-7A.1 was amended at subsection (c) to require the public utility company to provide eight operational fiber pairs for the use of the Department, free of cost to the Department, and further amended at subsection (d) to require the installer to be responsible for the maintenance of the system, with future occupants (except the Department) to reimburse the installer for the percentage share, as specified in the rule, of the annual maintenance costs. Additionally amended to emphasize "public" and gives better direction as to how disruption to traffic movement will be handled and managed.

N.J.A.C. 16:25-7A.3 was amended at subsection (a) to require galvanized steel casing when a utility is placed within 15 feet of a roadway; further amended at subsection (g) to allow the attachment of facilities to structures, when alternative locations are not feasible, and additionally amended at subsection (i) to delete requirements regarding environmentally sensitive locations and the replacement of plant material, since these areas are covered in the permitting rules of the Department of Environmental Protection. The location, connections, depth and marking of a fiber-optic system was described at new subsections (h) and (l).

N.J.A.C. 16:25-10.1 was amended to align the permit application process with the Department's recently adopted "Highway Access Management Code," N.J.A.C. 16:47.

N.J.A.C. 16:25-10.2 was revised to reflect the term "permits" rather than "application" because the application leads towards the issuance of a permit, which is the authorization document to commence work.

N.J.A.C. 16:25-11.1, previously reserved, has been proposed to allow for special permits and agreements regarding railroad crossings within the State of New Jersey.

The amendments were proposed as a result of technological changes and meetings with and comments from the regulated public, that is, AT&T.

Social Impact

The proposed readoption with amendments will regulate the location, design, method of installation and maintenance of utilities on highway rights of way. Such regulation will have a positive social impact in that it will maintain and/or improve public safety along the highways in the State of New Jersey. Several amendments are proposed which will affect installation of utilities, and will also have a positive social impact for the same reasons. These amendments include references to the Department's permit and access rules. The regulated public have complied with the rules in the past, without unresolvable problems, and can be expected to continue to do so.

The proposed new rule N.J.A.C. 16:25-11.1 is expected to have a positive social impact in several areas. The process described, which has been followed by the Department for several years, based upon statutory authority and administrative agreement between the Office of Administrative Law and the Department, provides opportunity for input on several levels. The Department, local officials, and the applicant (railroad) form a diagnostic team, visit the site and evaluate the engineering and safety aspects of the crossing. This meeting provides an opportunity for input to those attending, allowing for a balancing of the interests of the Department, the local officials, and the applicant, and considering the safety of the general public. The general public is drawn into the process when the Department provides public notice in a newspaper serving the area, describing the work planned, and inviting members of the public to comment. When the Department decides what will be done at the particular grade crossing, any person who disagrees with that decision may request a hearing.

Economic Impact

Under the rules proposed for readoption, the Department and utilities will incur direct and indirect costs for personnel, mileage, and equipment requirements. Utility companies will incur costs involved in obtaining applicable permits, and in the preparation and implementation of traffic control plans required by N.J.A.C. 16:41 and 16:47. They are also responsible for all costs of restoration and/or repairs to public highway property disturbed or damaged as a result of utility occupancy of highway rights-of-way property. These costs vary, depending upon the type of work done and the site conditions. Each site is unique so there is no average or range which meaningfully reflects the costs.

The proposed amendments incorporated herein do not require any additional fees, although there may be minor construction costs when taller poles are required. Any other costs are generally considered a part of general administrative or operational overhead by the regulated industry. Additionally, the proposed readoption is not requiring the procurement of any technical engineering assistance which is not already a part of the organizational structure of either the Department or the regulated public.

The applicable fees involve fees for application and permit. The application fees range from $1.00 to $150.00 and permit fees from $5.00 to $5000.00. The costs of repairs vary based upon the amount of material required to restore the disturbed or damaged property.

Regulatory Flexibility Statement

The rules proposed for readoption with amendments primarily affect publicly, privately and cooperatively owned utilities, none of which may be considered small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The utilities such as cable companies, which operate in smaller units, are actually part of larger corporations. The compliance requirements of these rules are directed toward maintaining the control and coordination of the use of highway rights-of-way, and procedures to be used in achieving the control, for the purpose of maintaining a safe public highway system. Professional services which may be needed are already a part of the regulated organizations, and there are no changes being implemented which require any such services.

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

16:25-1.1 Definitions

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

...

"Cap" means rigid structural element [surmounding] **surmounting** a pipe or conduit system.

...

["Chief, Bureau of Utilities, Railroad Safety and Engineering" means individual authorized by the Commissioner of the Department of Transportation to prepare Utility Orders and/or Agreements covering rearrangement and/or occupancy of State Highways or Freeways by Utilities in connection with all roadway construction and/or improvement projects.

"Clear Roadside Policy" means the policy by the New Jersey Department of Transportation to provide a clear roadside area in order to increase safety, improve traffic operation, and enhance the appearance of highways by designing, constructing, and maintaining highway roadsides as wide, flat, and rounded as practical and free as practical from physical obstructions above the ground such as trees, drainage structures, massive sign supports, utility poles, and other ground mounted obstructions, CRA is also referred to as clear zone area.]

"Clear Zone Area" means that roadside border area, starting at the edge of the traveled way, available for **safe** use by errant vehicles.

...

"Conduit or Duct" means an enclosed tubular runway for [projecting] **protecting** wires or cables.

...

["Investor Owned Utility" means utility type facility that is owned by stockholders.]

...

"Limited access [Highways] **highway**" [mean, for the purpose of N.J.A.C. 16:25-1.7 and 16:25-7A, freeways, parkways, and interstates] **means a highway, especially designed for through traffic, over which abutting lot owners have no right to light, air, or direct access. Interstate highways, parkways, and freeways are considered limited access highways.**

...

"Manager, Bureau of Utility and Railroad Engineering" means the individual authorized by the Commissioner of the Department of Transportation to prepare utility agreements covering rearrangement and/or occupancy of State highways or freeways by utilities in connection with all roadway construction and/or improvement projects.

...

"Permit" means the document by which the Commissioner of the Department of Transportation approves the use and occupancy of highway rights-of-way or property by any utility facility. Permits are not required where Utility [Orders or] Agreements are to be issued in connection with highway improvements.

...

["Public Owned Utility" means utility type facility owned and or operated by the State or any political subdivision thereof.]

"Public utility" means and includes every individual, copartnership, association, corporation or joint stock company, their lessees, trustees, or receivers appointed by any court, owning, operating, managing or controlling within the State of New Jersey a steam railroad, street railway, traction railway, canal, express, subway, pipe line, gas, electric, light, heat, power, water, oil, sewer, telephone, telegraph system, plant or equipment for public use under privileges granted by the State or by any political subdivision thereof. Although this chapter primarily concerns public utilities, private utilities may also, if installed in accordance with N.J.A.C. 16:25-11.3, occupy highway rights-of-way. The term utility(ies) when used herein is intended to reference both public and private utilities unless they are individually specified.

"Public Utility Agreement (P.U.A.)" means the document by which the Commissioner of Transportation, in connection with [Freeways or Parkways as defined by N.J.S.A. 27:7A-1)] **limited access highways** enters into an agreement with a public utility, [owned or operated by the State or any political subdivision thereof] a [public] utility not covered by N.J.S.A. Title 48, or a [public] utility having compensable property rights as to the removal and/or relocation of its facilities. Also the document by which the Commissioner of the Department of Transportation, in connection with State [Highways [non-Freeways or Parkways)] **highways (non-freeways or parkways)** enters into an agreement with the owner of any utility type facility occupying State highway rights-of-way as to the removal and/or relocation thereof. The Agreement further serves as the permit to occupy highway rights-of-way and specifies the requirements for, and the conditions of said occupancy.

["Public Utility Order (P.U.O.)" means the document by which the Commissioner of the Department of Transportation, in connection with Freeways or Parkways (as defined by N.J.S.A. 27:7A-1) orders a public utility (as defined by N.J.S.A. Title 48) to remove and/or relocate its facilities. The Order also serves as the utility's permit to occupy highway rights-of-way and specifies the requirements for, and conditions of said occupancy.]

"Railroad at grade crossings" means crossings where the railroad track and the highway pavement intersect at the same vertical grade and provide for the operation of rail traffic crossing the highway as well as highway and pedestrian traffic crossing over the railroad track.

"Railroad grade separated crossings" means crossings where either the railroad or the highway is carried over or under the other.

"Regional Maintenance Office" means an office [within the Division of Construction and Maintenance,] **under the jurisdiction of the Executive Director of Regional Operations,** Department of Transportation.

...

"Rigid Pipe" means [a welded or bolted metallic pipe or reinforced, prestressed or pretensioned concrete pressure] pipe designed for diametric deflection of less than [1] **one** percent.

...

"Semi-rigid Pipe" means [a large diameter concrete of metallic] pipe designed to tolerate diametric deflection from 1.0 percent to 3.0 percent.

...

["Utilities" means all public and private utilities including, but not limited to, communication, electric power, water, gas, oil, petroleum products, steam, sewer, drainage, irrigation, and similar facilities. Such utilities may involve construction and maintenance of underground, surface, or overhead facilities, either singly or in combination.]

...

16:25-1.2 Rights-of-way

(a) In the State of New Jersey **public** utilities have the right by franchise, to occupy highway rights-of-way. The Commissioner of Transportation has the right, by law, to regulate and control the manner in which such occupancy shall be accomplished.

(b) The rules contained in this chapter formally establish the criteria used by the Commissioner of Transportation in controlling the use of rights-of-way of State [Highways, Parkways] **highways, parkways** and freeways.

16:25-1.3 Applicability

The rules contained in this chapter apply to all [public and private and cooperatively owned] utilities, including electric power, telephone, telegraph, cable television, water, gas, oil, petroleum products, steam, chemicals, sewage, [drainage, irrigations,] and similar facilities that are to be located, adjusted, or relocated within the rights-of-way under the auspices of the New Jersey Department of Transportation. Such utilities may involve underground, surface, or overhead facilities, either singularly or in combination.

16:25-1.5 Standards and references

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

[1]Standard Specifications for Road and Bridge Construction. New Jersey Department of Transportation, 1983 **as amended or superseded.**

[2](No change.)

16:25-1.6 Authority of utilities to use and occupy the rights-of-way of State highways (land service roads)

[(a) The rights of investor owned utilities are as follows:]

[1.](**a**) The rights [investor-owned] **public** utilities have in State highways are established by N.J.S.A. 48 **and N.J.S.A. 40.**

[2.]**1.** Where usage is permitted, the statutes typically provide that the public utility involved "may use the public highways, streets and alleys", subject to the consents for approvals as the statute may require. Included in this category are:

i.-vi. (No change.)

[(b) The rights of municipally owned utilities are as follows:

1. The rights of municipal utilities with respect to State Right-of-Way are defined by Statutes within N.J.S.A. Title 40. Included are:]

[i.]**vii.** Electric poles—N.J.S.A. 40:62-35;

[ii.]**viii.** Water lines—N.J.S.A. [40:62-65, 134] **40:62-134** and 40:178-40.

16:25-1.7 Limited access highways

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

(c) The Department will take under consideration claims of extreme cases of need when a public utility can demonstrate that alternate locations are not available or cannot be implemented at reasonable cost, **as determined by the Department, in consultation with the Federal Highway Administration (FHWA),** from the standpoint of providing efficient **public** utility services in a manner conducive to safety, durability, and economy of maintenance and operations; that the accommodation will not adversely affect the design, construction, operation, maintenance, or stability of the limited access highways; that it will not interfere with or impair the present use or future expansion of the limited access highways; and that disapproval of the use of the right-of-way would result in the loss of productive agricultural land, or loss of productivity of agricultural land, if any.

(d) The Department's safety criteria are as follows:

1. The **public** utility facility shall be placed underground;

2. The **public** utility facility shall not be used for transmitting gases or liquids under pressure, or for the transmission of products which are flammable, corrosive, expansive, energized or unstable;

3. The **public** utility facility shall not emit any measurable radiation above the ground surface;

4. The **public** utility facility shall present no hazard to life, health or property, if it fails to function properly, is severed, or otherwise damaged; and

5. After **the public** utility facility is installed, it will be virtually maintenance free.

(e) (No change.)

(f) If the Department finds that **public** utility projects for the installation of a fiber-optic cable or system meet the safety criteria established in (d) above, and if extreme cases of need are demonstrated, such projects will qualify for permit approval. The installation of a fiber-optic cable or system shall be in accordance with N.J.A.C. 16:25-7A.

(g)-(h) (No change.)

16:25-2.1 Locations of utility lines

(a) Utility lines installed within a highway right-of-way require a permit issued by the [Regional Maintenance Office, or an] **Department. A public utility** agreement, **as defined in this chapter** with the [Bureau of Utilities] **Bureau of Utility and Railroad Engineering shall serve as a permit.** Utility lines must be located to permit servicing such lines with minimum interference to highway traffic and to minimize need for later adjustments to accommodate future highway improvements.

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

(d) The horizontal and vertical location of utility lines within the highway right-of-way limits must conform with the clear roadside policies applicable for the system, type of highway, and specific conditions for the particular highway section involved. The location of above ground utility facilities must be consistent with the clearances applicable to all roadside obstacles for the type of highway involved. With pole type facilities, where a guide rail is present, poles should always be located behind the guide rail allowing sufficient clear distance behind the guide rail for the guide rail's design deflection **in accordance with N.J.A.C. 16:25-5.5.**

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

16:25-2.2 Design of utility facilities

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

(c) Utility installations on, over, or under the rights-of-way of State highways and utility attachments to highway structures must meet the following minimum requirements:

1.-4. (No change.)

5. Fiber-optic communication facilities installation standards shall conform with the currently applicable sections of the Standard Codes of the American National Standard Institute (ANSI)—E1A472-B, 472B-XX0, incorporated herein by reference.[5] [Copies of the Standards may be obtained from the American National Standards Institute, 1430 Broadway, New York, N.Y. 10018]

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

footnotes 1-4 (No change.)

[5]ANSI Standard Code for Fiber-Optic Facilities E1A472-B, 472B-XX0 of the American National Standards Institute, 1430 Broadway, New York, New York 10018.

16:25-2.3 Waivers

(a) No waivers or other relief from design standards or other provisions of N.J.A.C. 16:25-3.5 may be granted unless the waiver can be granted without substantial detriment to the safety and operation of the highway and without substantially impairing the intent and purpose of this chapter.

(b) If an applicant wishes to seek a waiver, a request must be submitted to the Department as an attachment to the permit application. The request for waiver shall state reasons why a waiver is appropriate and include documentation to support the waiver.

(c) If a waiver is granted, the approval will be incorporated in the conditions of the permit or agreement.

16:25-3.4 [Encasement and allied mechanical protection generally] **(Reserved)**

[(a) Definite guides for the encasement of pipelines cannot be fully resolved from present experience and knowledge. An arbitrary policy of requiring encasement for all highway crossings is too expensive, not only to the utility consumer but also to the highway user; however, considering past experience and current appraisal of future hazard, it would not be prudent to waive all encasement requirements. Consequently, the Department shall evaluate all factors concerning each highway crossing and determine the need for encasement to protect the roadway.

(b) The acceptable methods available to provide such protection include, but are not limited to:

1. Tunnels and galleries;
2. Casing pipe;
3. Grouting by mortar filling;
4. Bore-hole annulus;
5. Cradling;
6. Capping;
7. Walling;
8. Boxing or jacketing;
9. Provisions of thickened wall carrier pipe;
10. Joints of mechanical or welded leakproof type of construction;
11. Coasting and wrapping;
12. Cathodic protection;
13. Electric bonding;

(c) Of these methods, only the casing and tunnel or gallery provide complete independence of the carrier from the surrounding earth. Grouting restores the continuity and integrity of the earth supporting the pavement. Cradling enhances the supporting capacity of rigid pipes. Walling does the same for semi-rigid and flexible pipes. Capping strengthens both rigid and flexible pipes, and protects them from highway operations penetrating the fill. When applied to weak or brittle pipes, boxing or jacketing provides protection from earth loads, leakage, corrosion, or abrasion. On uncased carrier pipes thickened wall sections and leakproof type joints enhance the potential for a trouble free installation of long service life expectancy. Coating or wrapping prevents contact with corrosive water, soil, or vapor.]

16:25-3.5 Encasement

(a) Casing [may] **shall** be required for the following conditions:

1.-3. (No change.)

(b)-(g) (No change.)

16:25-3.6 Allied mechanical protection

(a) [For some conditions, a pipeline crossing a highway may be installed without encasement. Normally, such as] **When a waiver is granted for non-easement,** installation [will] **shall** be limited to open trenched construction. The following controls shall be applied for providing allied mechanical protection to an uncased pipeline crossing a highway.

1.-3. (No change.)

16:25-3.7 Appurtenances

(a) Vents, drains, markers, manholes, and shut-offs are appurtenances to pipeline installations. Required controls for such appurtenances are as follows:

1.-3. (No change.)

4. New manholes shall normally not be located in the pavement of major highways, including urban highways. Exception may be made at those locations where manholes are essential parts of existing lines that are permitted to remain in place under existing and proposed roadways **provided the installations are designed to support highway traffic and are approved by the Department** in accordance with N.J.A.C. 16:41 and 16:47. Manholes may be retained or installed under paving on low traffic roadways, less than 750 ADT, within municipalities. Effort should be made to minimize such installations and to avoid their location at street intersections, insofar as practicable. Manholes shall be designed and located in such a manner that will cause the least interference to other utilities and future highway expansion.

5. (No change.)

16:25-3.9 Installation

[(a) Installation or replacement of pipelines along or crossing existing highways may be controlled by end-product specifications.

(b) However, safety or traffic and preservation of the earth structure supporting the pavement requires some restricting of methods used in the operation.

(c) Several acceptable methods of installation are detailed in N.J.A.C. 16:25-3.10, 3.11 and 3.12.]

Installation or replacement of pipelines along or crossing existing highways shall be controlled by end-product specifications. However, safety of traffic and preservation of the earth structure supporting the pavement requires some restriction of methods used in the operation. Conditions of installation, if any, will be specified in the permit. Several acceptable methods of installation are detailed in N.J.A.C. 16:25-3.10, 3.11, and 3.12.

16:25-3.11 Untrenched construction and grouting

(a) Several techniques **acceptable to the Department** for installing pipelines under a highway without disturbing the surface are as follows:

1.-2. (No change.)

3. Boring: Large pipes can be jacked through oversize bores carved progressively ahead of the leading edge of the advancing pipe as spoil is mucked back through the pipe. Control is excellent. [Annular void and overbreaks may be minimized when cutterhead is sized closely to pipe diameter and pipe is advanced with cutterhead in close proximity.] **Cutterhead should be sized closely to pipe diameter and pipe should be advanced, with cutterhead in close proximity, to minimize annual void and overbreaks.**

4. (No change.)

(b) The required controls for untrenched construction and grouting are as follows:

1.-2. (No change.)

3. The oversize of the boring excavation shall be restricted and the Department shall establish, case by case, the conditions specified under which the void outside the carrier must be back-filled with grout. Where the soils are favorable and the carrier is four feet or more deep, the boring hole may be five percent oversize in diameter. The Department [may] **shall** require grout backfill for pipes more than 12 inches in diameter for overbreaks, unused holes, or abandoned pipes.

16:25-3.13 Adjustment

(a) The following are required controls for adjusting existing pipelines that fall in the path of highway construction projects:

1. (No change.)

2. An existing pipeline shall be relocated in plan and/or grade where:

i. (No change.)

ii. The top of the pipe is within [six inches of subgrade] **18 inches or determined to be too close to highway grade.**

3.-4. (No change.)

5. Notwithstanding reinforcement or protection otherwise provided, the highway construction contractor [will be responsible] **should be warned and made responsible** for the security of each existing pipeline within the construction zone. Where there are unusual utility hazards and where heavy construction equipment will be needed, **it should be arranged that** the contractor [will] provide a temporary protective cover of each or bridge the utility.

16:25-4.1 General consideration

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

(d) Since an encasement is not normally provided for a pipeline attachment to a bridge, additional protective measures shall be taken. Such measures shall employ a higher factor of safety in the design, construction, and testing of the pipeline [that] **than** would normally be required for cased construction.

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

16:25-5.1 General

(a) (No change.)

(b) In an effort to provide a safer environment for the traveling public and to improve the aesthetic qualities of newly designed freeways and land service roadways, above ground utilities are restricted in certain locations as follows:

1. No above ground facilities will be located within grade separated interchange areas [designed to freeway standards] **of limited access highways.**

2. No aerial crossing of [control of] **limited** access highway rights-of-way are permitted with the exception of electrical facilities operating at a potential of 26 KV or above.

16:25-5.2 Type of Construction

(a) Any longitudinal installation of overhead lines on the highway rights-of-way shall be limited to single **wooden** pole type of construction. **The Department shall consider requests to use a non-wooden pole type of construction on a case-by-case basis in accordance with N.J.A.C. 16:25-2.3, only in unusual circumstances in which public safety is not compromised.**

(b) Joint-use single pole construction shall be encouraged, as indicated by Rule 222 [of Part 2] of the National Electrical Safety Code[1], at locations where more than one utility or type of facility is involved. This is of particular significance at locations where the right-of-way widths approach the minimum needed for safe operations or maintenance requirements or where separate installations may require extensive removal or alterations of trees.

[1](No change.)

16:25-5.3 [Vertical clearance] **Clearance**

(a) The minimum [vertical] clearance for overhead power communication lines above the highway and the lateral and vertical clearance from bridges shall in no case be less than the standards prescribed by the National Electrical Safety Code.

(b) (No change.)

(c) The minimum clearances between overhead power lines and highway traffic signals of lighting standards shall be determined by the following:

Power Line Voltages	Minimum Clearances	
	Lateral	Vertical
0-750 volts (secondary)	5 feet	6 feet
750 volts—50 KV (primary)	10 feet	10 feet

Note: Voltages above 50 KV, clearance shall be increased by 0.4 inches per kilovolt.

(d) The minimum clearances between overhead power lines and highway signs, sign standards or sign bridges shall be determined by the following:

Power Line Voltages	Minimum Clearances	
	Lateral	Vertical
0-750 volts (secondary)	5 feet	5 feet
750 volts—8.7 KV (primary)	5 feet	8 feet
8.7 KV—22 KV	6 feet	8 feet
22 KV—50 KV	7 feet	9 feet

Note: Voltages above 50 KV, clearance shall be increased by 0.4 inches per kilovolt.

16:25-5.4 Location

[(a) It is desirable that utility poles be located or relocated beyond the clear zone area for the highway section involved. Minimum offsets from the edge of traveled way shall be determined by the following table and as noted in this section.

Minimum Pole Offsets for Rural and Urban Highways:

Posted Speed/ Design Speed	Posted Speed/ Design Speed
25 mph—9 feet	50 mph—20 feet
30 mph—11 feet	55 mph—25 feet
35 mph—13 feet	60 mph—30 feet
40 mph—15 feet	70 mph—36 feet]
45 mph—17 feet	

(a) Utility poles shall be located as close to the right-of-way line as practical. In the case of vertical stack construction, desirable pole offset should be three feet from the right-of-way line. Where crossarm construction is utilized, desirable pole offset should be five feet from the right-of-way line. Other offsets may be approved by the Department in accordance with the "New Jersey Department of Transportation Design Manual—Roadway."

[(b) The posted speed is for application on resurfacing, restoration and rehabilitation (3R) type projects which involve existing highways; the design speed is for application on reconstruction projects or projects on new alignment. A design exception will be required if minimum pole offsets cannot be met.

(c) On new alignments, the design speed shall be applied and the New Jersey Department of Transportation clear roadside policy used to determine the pole offsets.]

[(d)]**(b)** For existing urban arterials, **urban** collectors and local streets where there are curbed sections, utilities may be located in the border areas between the curb and sidewalk, at least 1.5 feet behind the face of curb, and where feasible, behind the sidewalk and as close to the right-of-way line as [possible] **practical.** For non-curbed urban sections, utility poles should be located [or relocated beyond the clear zone for the highway section involved] **as close to the right-of-way line as practical.**

[(e) Offsets are based on cut slopes of 3:1 or flatter and fill slopes 10:1 or flatter. For fill slopes, steeper than 10:1, the offset should be increased to at least the next higher speed category.]

[(f)]**(c)** Consideration should be given to increasing the minimum pole offsets on the outside of horizontal curves, particularly on those curves with a sharper degree of curvature than what are normal for the section of highway involved.

[(g)]**(d)** For [both] rural [and urban] highways with or without curb and where posted speeds are 25 mph or less, poles should be placed as close to the right-of-way line as possible. If the locations of the poles, as stated herein, are infeasible and other mitigating conditions, such as parking or excess are infeasible and other mitigat-

ing conditions, such as parking or excess lane width lessen the exposure or potential accident severity, then placement of poles at least 1.5 feet behind the face of curb, edge of through pavement or edge of shoulder, based on engineering judgement can be considered.

[———————

[1]Based on the New Jersey Department of Transportation Clear Zone policy. Section 8-02.4 of the New Jersey Department of Transportation Design Manual—Roadway.]

[16:25-5.5 Design exceptions

(a) When the minimum offset, as identified under N.J.A.C. 16:25-5.4 cannot be provided, a design exception can be made where:

1. The documented cost estimates to relocate the utility poles, including any additional right-of-way, in relationship to the construction project are considered excessive, and

2. An accident analysis for the preceding three years for the highway section involved does not reveal a significant history of accidents involving the utility poles.

(b) The exception in (a) above shall be submitted to the Department for approval.]

16:25-[5.6]**5.5** General considerations

(a) The desirable offset behind [a] guide rail is four feet. See the New Jersey Department of Transportation Design Manual—Roadway for further information.

1. In those cases where poles are set, with less than desirable offset behind guide rail, and said placement requires that the guide rail be modified, the utility owner shall be responsible for modifying, or for the cost of modifying the guide rail for a minimum distance of 12 and one-half feet either side of the pole.

(b) Poles shall always be located behind [a] guide rail wherever same exists and [be at least 50 feet longitudinally from a Breakaway Cable Terminal (BCT),] **should not be placed longitudinally within 25 feet of the advance of, or after the terminus of, guide rail. Where crash worthy end treatments exist, poles shall be located 50 feet longitudinally behind the guide rail's termini.** See New Jersey Department of Transportation Design Manual—Roadway[, Section 8, Figure 8K].

(c) [Poles are prohibited from occupying small island areas] **Placement of poles in islands that do not have a longitudinal through roadway length of 100 feet or more is discouraged** except where other locations are unusually difficult and unreasonably costly.

(d) (No change.)

[(e) For new utility pole replacements (scheduled) on existing highways, the poles should be located outside of the clear zone area. Where this is not practical, they should be located as close to the right-of-way line as feasible.]

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

(h) When rebuilding an existing pole line or constructing a new pole line at locations where there is no traffic signal standard, lighting standard, or sign standard, poles of not less than 40 feet on overall length shall be installed and the attached primary line, at its lowest point, shall have a minimum clearance of 30 feet from the ground. At locations where a traffic signal standard, lighting standard, or sign standard exists, the criteria shall conform to N.J.A.C. 16:25-5.3.

(i) When electrical facilities (26 KV and above) are approved for installation across limited access highway rights-of-way in accordance with N.J.A.C. 16:25-5.1, they shall be installed in accordance with the criteria outlined in N.J.A.C. 16:25-5.3; however, the proximity criteria used shall take into account not only existing highway facilities (that is, light standards, sign supports, etc.), but also facilities that the Department proposes within the area where the utility crossing will be constructed.

16:25-7.2 Required controls for underground electric power and communication lines

(a) General rules concerning required controls for underground electric power and communication are as follows:

1. (No change.)

2. The Department has established a minimum [depth of] bury of 36 inches.

3. Pedestals or other above ground utility appurtenances installed as part of buried cable plant shall be located [at or near] **as close to** the right-of-way [lines] **line as possible, or behind guide rail wherever same exists.**

4.-5. (No change.)

6. The controls outlined in N.J.A.C. 16:25-4[.1] for electric power and communication line attachments to highway bridge structures shall be followed.

7. The general controls outlined in N.J.A.C. 16:25-[4.1]**3** for pipelines as relate to markers, installations, trenched and untrenched construction, and adjustment shall be followed, as applicable, on underground installations of electric power and communication lines.

(b) (No change.)

(c) Cased and uncased construction shall be as follows:

1.-3. (No change.)

4. Underground construction within grade separated interchange areas [designed to freeway standards,] **of limited access highways** shall, at a minimum, extend between the interchanges outermost ramps.

16:25-7A.1 General considerations

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

(e) Access to the **public** utility facilities for the purpose of installation, repair or maintenance shall not be achieved from highway ramps or roadways, but rather from local roads or points outside of the limited access highway's control or access line. Exceptions may be granted in appropriate cases with prior written consent at the discretion of the Commissioner where the Commissioner determines that such exception would be in the public interest. All access shall be achieved in [such a manner so as not to impede or disrupt highway traffic movements] **accordance with the Department approved traffic control plan, pursuant to N.J.A.C. 16:41 and N.J.A.C. 16:47, as applicable.**

(f)-(i) (No change.)

16:25-7A.3 Locations

(a) Where the Department deems **public** utility facility installations feasible, the Department will establish, within the right-of-way of limited access highways, a corridor, generally not closer than 30 feet to the edge of roadway, but contiguous to each side of the roadway's control of access line, for the installation of underground utility facilities, with possible exceptions to be granted by the Commissioner, at the Commissioners' sole discretion, where it is determined that the public good justifies an exception. Should such an exception allow a **public** utility facility to be placed within 15 feet of the edge of pavement, the facility shall be placed within a galvanized steel pipe casing.

(b)-(l) (No change.)

SUBCHAPTER 8. [IRRIGATION AND DRAINAGE PIPES, DITCHES, AND CANALS] **RESERVED**

[16:25-8.1 General considerations

(a) Irrigation and drainage facilities installed across highway rights-of-way generally should be designed and constructed in accordance with the Department's specifications for highway culverts. Ditches and canals that closely parallel the highway should be discouraged. Appurtenances which could constitute a hazard to traffic shall not be permitted within the clear zone area and preferably should be located outside of the right-of-way.

(b) Where ditch rider roads are adjacent to ditches or canals that cross the highway, consideration shall be given to safety, traffic operations, and economic features when providing for the continuity of such roads. For example, the enlargement of drainage structures to accommodate the crossing of ditch rider roads would rarely be economically justified.]

16:25-9.4 Multiple use of freeway rights-of-way

(a) (No change.)

(b) When such extreme case need is demonstrated to the satisfaction of the Department as being in the best public interest, and the design, location, and measures for protecting the integrity, operational characteristics, and safety of freeway traffic meet all of the

conditions set forth in [the Federal-Aid Highway Program Manual, Volume 7, Chapter 7, Section 8 (FHPM 7-7-8), formerly Policy and Procedure Memorandum (PPM) 90-5, Dated March 27, 1973, "Joint Development of Highway Corridors and Multiple Use of Roadway Properties", on the Application of Joint Development and Multiple Use Concepts to Freeways and Utilities, and the installation is approved by the Federal Highway Administration] **this chapter,** then a joint use and occupancy agreement or permit may be entered into with the utility by the New Jersey Department of Transportation to allow such installations.

[

[1]Manual on Uniform Traffic Control Devices for Streets and Highways, current issue (for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402).

[2]Maintenance and Protection of Traffic During Permit Operations. Rules and Regulations, The New Jersey State Department of Transportation.]

SUBCHAPTER 10. PERMITS [AND AGREEMENTS]

16:25-10.1 Application for permit

(a) (No change.)

(b) Such written application shall consist of a complete description of the facility to be installed or constructed, or the work to be performed on an existing facility, and a sketch or plans **to scale, no smaller than one inch equals 50 feet, preferably, one inch equals 30 feet, and maximum plansheet size of 24 inch by 36 inch** which show the existing and/or proposed location of the facilities within the highway right-of-way in relation to the existing and/or planned highway improvement, the traveled way, the right-of-way lines, and control of access lines and approved access points where applicable. Profile view plans and cross sections shall also be furnished when required for clarity.

(c) (No change.)

(d) All applications shall be made a part of the permit issued by the Regional Maintenance Office and shall be submitted in the number of copies, including plans or sketches, required by [the Department for distributing the appropriate copies of the respective permit] **N.J.A.C. 16:41 and N.J.A.C. 16:47.**

(e) (No change.)

(f) A permit shall expire if all construction work under the permit, including those permits issued under N.J.A.C. 16:41, is not completed within two years of the date the permit was issued, unless stated otherwise in the permit or extended by renewal. When work covered by the permit is started within two years of the date of permit issuance but cannot be completed in the indicated time, the permittee shall request an extension of time in writing from the appropriate Regional Maintenance Office and submit the required renewal fee in the form of a check or money order. The Department may approve one one-year extension, in accordance with N.J.A.C. 16:41, or N.J.A.C. 16:47, as appropriate.

16:25-10.2 Opening permits

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

(d) [Applications] **Permits** for open-cut [permits, if approved, will] **should** be [closely] supervised by the Regional Maintenance Office to assure satisfactory replacement of base course and roadway paving.

SUBCHAPTER 11. SPECIAL PERMITS AND AGREEMENTS

16:25-11.1 [(Reserved)] **Railroad crossings**

(a) The Commissioner of Transportation has plenary power over all public railroad crossings in the State, in accordance with N.J.S.A. 48:12-49 et seq.

(b) Railroad crossings consist of grade separated crossings (bridged) and at grade crossings:

The following applies to grade separated crossings:

i. For grade separated crossings where the railroad is over the highway, the Department shall determine the vertical and horizontal under clearances and the railroad and the Department shall approve the structure of the crossing;

ii. For grade separated crossings where the railroad is under the highway, the railroad shall determine the vertical and horizontal under clearances and the Department and railroad shall approve the structure of the crossing;

2. The following applies to at grade crossings:

i. Public at grade crossings occur where the railroad intersects an existing or proposed public street or highway. New public at grade crossings or modifications to existing public at grade crossings are only permitted by the Commissioner of Transportation, after he or she exercises the evaluation, public information and response process delineated in (c) below.

ii. Private at grade crossings occur in areas other than public thoroughfares, and the Commissioner normally does not exercise his or her authority over these crossings; however, where a private at grade crossing is used primarily by the general public, the Commissioner may take jurisdiction of the private at grade crossing if he or she is of the opinion such jurisdiction is in the interest of public safety.

(c) The evaluation, public information and response process for at grade public crossings shall be conducted by the Department as follows:

1. A diagnostic team, composed of Department staff, the applicant for the crossing, and municipal and county officials who have an interest in the crossing, will meet on the site of the proposed crossing to evaluate the engineering and safety aspects of the crossing;

2. The team leader (a Department staff member) will prepare a memorandum of record, noting the findings of the team;

3. The Department will publish a notice in the newspaper(s) serving the area in which the proposed grade crossing is located, describing the particular work intended at the grade crossing, and calling for members of the public who object, or who have questions or comments regarding the proposed crossing to submit their objections, questions or comments to the Department; and

4. The Department will respond to the commenters in writing.

(d) Any person who objects to the Department's decision regarding an at grade crossing may request a hearing, in accordance with the provisions 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.

16:25-11.2 Local-Federal Aid Agreements

(a) Pursuant to the provisions of [Paragraph 6.d Federal-Aid Highway Program Manual 6-6-4-3[1] (Formerly PPM 30-5.1)] **Federal-Aid Policy Guide, Title 23, Chapter 1, Subchapter G, Part 645, Subpart B,** the Department shall enter into agreements with appropriate county and municipal officials to provide for regulating the use and occupancy of Federal Aid Roads, and to assist local officials in establishing utility accommodation policies conforming, as appropriate for the type of highway involved, to the provisions of this chapter.

(b) Such agreements may be entered into on a project-by-project basis handled by the Bureau of [Local Federal Aid Programs] **Local Highway Design.** Until a county or municipality adopts a utility accommodation policy approved by the Department conforming to federal requirements, the Bureau of [Utilities Railroad Safety and Engineering] **Utilities and Railroad Engineering** shall review for conformance with the State requirements in effect at the time all utility rearrangement schemes on Federal Aid Roads that are subject to the provisions of [Federal-Aid Highway Program Manual 6-6-3-2 (Formerly PPM 30-4.1)] **Federal-Aid Policy Guide, Title 23, Chapter 1, Subchapter G, Part 645, Subpart B.**

[

[1]Title 23, Code of Federal Regulations, Part 645B.]

16:25-11.3 Private utilities

(a) (No change.)

(b) Where the requested use and occupancy involved more than a road crossing or a relatively short segment of parallel line (for example, up to 1/8 mile), or where equivalent utility service is available without the private line installation, then the request shall be referred to the [Department's Chief Counsel] **Office of the Attorney General** for an opinion as to whether the proposed private

use of the highway right-of-way is in violation of State law. All such private lines must also meet all other applicable provisions of this chapter.

(c) (No change.)

16:25-12.1 Reimbursement basis

(a) Reimbursement to utility owners for required relocations and adjustments of existing utility lines, systems and facilities required by highway construction or improvements shall be made in accordance with the detailed procedures of [Federal Highway Administration, Federal-Aid Highway Program Manual 6-6-3-1[1] (Formerly FHPM 1-4-4 & PPM 30-4] **Federal-Aid Policy Guide Title 23, Chapter 1, Subchapter G, Part 645, Subpart A**. As provided in such Federal regulations, the determination of eligibility for reimbursement shall be made pursuant to applicable State law, both statutory and case, and the Constitution; and such basis for determination of eligibility (compensable property interest) under New Jersey law is generally interpreted by legal counsel for the Department and should be administered, as follows:

1. (No change.)

2. Existing [publicly owned] **public** utilities located on the street right-of-way of any incorporated town or city, and which right-of-way was not a part of, or on the State highway system at the time of the installation or construction of the utilities, shall be considered eligible for reimbursement.

3. Existing [publicly owned] **public** utilities located on county road, dedicated urban development road, and/or private road rights-of-way which were not a part of, or on, the State highway system at the time of the installation or construction of the utilities, shall be considered eligible for reimbursement.

4. The installation or construction of extra utility properties (such as, but not limited to, encasement pipes and taller poles) and other extra costs of installing or constructing new utility facilities that will meet highway construction requirements and/or standards, (and when such construction is on approved highway location or alignment and the extra work will effect lower cost utility adjustments by being performed at the time such new utilities are being installed or constructed on private property or non-highway right-of-way on a Commissioner approved and programmed project) shall be considered eligible for reimbursement. Such "preventive" adjustments shall be handled according to the applicable policies and procedures of [FHPM 6-6-3-1] **Federal-Aid Policy Guide Title 23, Chapter 1, Subchapter G, Part 645, Subpart A,** and any amendments and supplements thereto.

5. Existing [investor owned] **public** utilities located on existing State highway right-of-way by statutory grant and/or written consent of the Department shall be considered as eligible for reimbursement.

6. All [utilities whether] public **utilities** [or investor owned], when effected by freeway construction, shall be considered as eligible for reimbursement.

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

[

[1]Title 23, Code of Federal Regulations, Part 645A (23 CFR 645A).]

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID

Speed Limits
Routes N.J. 167 in Atlantic County and N.J. 44 in Gloucester County
Proposed Amendment: N.J.A.C. 16:28-1.93
Proposed New Rule: N.J.A.C. 16:28-1.48

Authorized By: Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Authority: N.J.S.A. 27:1A-5, 27:1A-6 and 39:4-98.
Proposal Number: PRN 1993-319.

Submit comments by July 7, 1993 to:

Charles L. Meyers
Administrative Practice Officer
Department of Transportation
Bureau of Policy and Legislative Analysis
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The Department of Transportation proposes new rule N.J.A.C. 16:28-1.93 to establish a 25 mile per hour speed limit zone along Route N.J. 167 in the City of Port Republic, Atlantic County; and proposes to amend N.J.A.C. 16:28-1.48, to establish revised speed limit zones along Route N.J. 44 in Greenwich and West Deptford Townships, in Gloucester County. The provisions of these rules will improve the flow of traffic and enhance safety along the highway system.

This amendment and new rule are being proposed at the request of the City of Port Republic, Greenwich Township, and West Deptford Township. The Department's Bureau of Traffic Engineering and Safety Programs evaluated these requests and conducted investigations. The Department's review proved that the establishment of speed limit zones along Route N.J. 167 in the City of Port Republic, Atlantic County, and Route N.J. 44 in Greenwich and West Deptford Townships, Gloucester County, were warranted. Signs are required to notify motorists of the restrictions proposed herein.

Social Impact

The proposed amendment and new rule will establish "speed limit" zones along Routes N.J. 167 in the City of Port Republic, Atlantic County, and N.J. 44 in the Townships of West Deptford and Greenwich, Gloucester County, for the efficient flow of traffic and the enhancement of safety along the highway system. 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" zone signs. The costs involved in the installation and procurement of signs vary, depending upon the material used, size, and method of procurement. Motorists who violate the rules will be assessed the appropriate fine in accordance with the "Statewide Violations Bureau Schedule," issued under New Jersey Court Rule 7:7-3.

Regulatory Flexibility Statement

The proposed amendment and new rule do not place any reporting, recordkeeping or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendment and new rule primarily affect the motoring public and the governmental entities responsible for the enforcement of the rules.

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

16:28-1.48 [(Reserved)] **Route 167**

(a) The rate of speed designated for the certain parts of State highway Route N.J. 167 described in this subsection shall be established and adopted as the maximum legal rate of speed:

1. For both directions of traffic:

i. In the City of Port Republic, Atlantic County:

(A) 25 miles per hour for the entire length (approximate mileposts 0.00 to 0.62).

16:28-1.93 Route 44

(a) The rate of speed designated for the certain parts of State highway Route N.J. 44 described in this subsection shall be established and adopted as the maximum legal rate of speed[.]:

1. For both directions of traffic in Gloucester County:

i. (No change.)

ii. Greenwich Township:

(1) Zone 1: 50 miles per hour between the Logan Township northerly line and [1950] **2525** feet [south of Veterans Avenue] **North of Repaupo Creek** (approximate mileposts 2.14 to [2.68] **2.60**); thence

(2) Zone 2: 40 miles per hour between [1950] **2525** feet south of [Veterans Avenue] **Repaupo Creek** and 50 feet south of [Veterans Avenue] **Willow Drive** (approximate mileposts [2.68 to 3.04] **2.60 to 3.00**); thence

(3) Zone 3: 35 miles per hour between 50 feet south of [Veterans Avenue] **Willow Drive** and the Borough of Paulsboro southwesterly line (Billingsport Road), except for 25 miles per hour when passing through the Gibbstown Elementary School zone (mileposts 3.51 to 3.74) during recess when the presence of children is clearly visible from the roadway or while children are going to or leaving school, during opening or closing hours (approximate mileposts [3.04] **3.00** to 5.18); thence

iii. (No change.)

iv. West Deptford Township:

(1)-(2) (No change.)

[(3) Zone 3: 40 miles per hour between 800 feet south of Church Street and Salem Avenue (approximate mileposts 8.37 to 9.07); thence

(4) Zone 4: 45 miles per hour between Salem Avenue and Route I-295-U.S. 130 (approximate mileposts 9.07 to 9.60).]

(3) Zone 3: 40 miles per hour between 800 feet south of Church Street and Route I-295-Route U.S. 130 (approximate mileposts 8.37 to 9.60).

2.-3. (No change.)

(a)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID

Restricted Parking and Stopping Routes U.S. 1 Business in Mercer County; U.S. 9 in Ocean and Monmouth Counties; N.J. 26 in Middlesex County; U.S. 33 in Middlesex County; U.S. 46 in Warren and Morris Counties; and N.J. 57 in Warren County

Proposed Amendments: N.J.A.C. 16:28A-1.1, 1.7, 1.17, 1.23, 1.32 and 1.36

Authorized By: Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 39:4-138.1, 39:4-198 and 39:4-199.

Proposal Number: PRN 1993-318.

Submit comments by July 7, 1993 to:

Charles L. Meyers
Administrative Practice Officer
Department of Transportation
Bureau of Policy and Legislative Analysis
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

The agency proposal follows:

Summary

The Department of Transportation proposes to amend and establish parking restrictions along various highways as described in the following counties and municipalities.

• N.J.A.C. 16:28A-1.1, Route U.S. 1 Business, is amended to add a near side bus stop at Colonial Lake Drive in Lawrence Township, Mercer County.

• N.J.A.C. 16:28A-1.7, Route U.S. 9, is amended to add far side bus stops along the easterly (northbound) and westerly (southbound) sides of Route 9 at Station 452 "U" turn in Marlboro Township, Monmouth County.

• N.J.A.C. 16:28A-1.17, Route 26, is amended to effect no stopping or standing along both sides from Route U.S. 1 to McCauliffe Drive-York Road in North Brunswick Township, Middlesex County. The rule is also recodified to bring it into conformance with the Department's current rulemaking format.

• N.J.A.C. 16:28A-1.23, Route 23, is amended to add a no stopping or standing zone along both sides in Monroe Township, Middlesex County.

• N.J.A.C. 16:28A-1.32, Route U.S. 46, is amended to add a no stopping or standing zone along both sides in Independence Township, Warren County, and to establish a mid-block bus stop at Change Bridge Road in Montville Township, Morris County.

• N.J.A.C. 16:28A-1.36, Route 57, is amended to add a time limit parking zone along Washington Avenue in Washington Borough, Warren County.

The proposed amendments provide for the efficient flow of traffic, the enhancement of safety, the safe off and on loading of passengers at established bus stops and the well-being of the populace.

Based upon requests received from local governments, in the interest of safety, and as part of an on-going review of current conditions, the Department's Bureau of Traffic Engineering and Safety Programs conducted traffic investigations. The investigations proved that the changes in traffic regulations described above were warranted. Appropriate signs will be erected to advise motorists.

Social Impact

The proposed amendments establish "no parking bus stop" zones, "no stopping or standing" zones, and "time limit parking" zones at various locations to improve the safe on and off loading of passengers at established bus stops along the highway system, and to enhance the safe and efficient flow of traffic. Signs will be erected advising the motoring public of the specific restrictions at each location.

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 of installing "no stopping or standing" signs. Local governments will pay for the "no parking bus stop" and "time limit parking" signs. The costs involved in the installation and procurement of signs vary, depending upon the material used, size, and method of procurement. Motorists who violate the rules will be assessed the appropriate fine in accordance with the "Statewide Violations Bureau Schedule," issued under New Jersey Court Rule 7:7-3.

Regulatory Flexibility Statement

The proposed amendments do not place any reporting, recordkeeping or compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendments primarily affect the motoring public and the governmental entities responsible for the enforcement of the rules.

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

16:28A-1.1 Route U.S. 1 **Business**

(a) (No change.)

(b) The certain parts of State highway Route U.S. 1 **Business** described in this subsection shall be designated and established as "no parking bus stop" zones where parking is prohibited at all times. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established bus stops:

1.-2. (No change.)

3. Along the northbound (easterly) side in Mercer County:

i. In Lawrence Township:

(1) Near side bus stop:

(A) Colonial Lake Drive—Beginning at a point 35 feet south of the southerly curb line of Colonial Lake Drive and extending 70 feet southerly therefrom.

16:28A-1.7 Route U.S. 9

(a) (No change.)

(b) The certain parts of State highway Route U.S. 9 described in this subsection shall be designated and established as "no parking **bus stop**" zones where parking is prohibited at all times. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established bus stops:

1.-4. (No change.)

5. Along the easterly (northbound) side in Marlboro Township, Monmouth County:

i.-ii. (No change.)

iii. Far side bus stop:

(1) Station 452 U turn between Covered Bridge Boulevard and Union Hill Road—Beginning 68 feet from the northerly curb line of Station 452 and extending 140 feet north therefrom.

6. Along the westerly (southbound) side in Marlboro Township, Monmouth County:

i. Far side bus stops:

(1)-(2) (No change.)

(3) Station 452 U-turn between Covered Bridge Boulevard and Union Hill Road—Beginning at the southerly curb line of Station 452 and extending 135 feet south therefrom.

ii. (No change.)

7.-40. (No change.)

(c) (No change.)

16:28A-1.17 Route 26

(a) The certain parts of State highway Route 26 described [herein below shall be, and hereby are] **in this subsection shall be** designated and established as "no [parking] **stopping or standing**" zones where stopping or standing is prohibited at all times except as provided in N.J.S.A. 39:4-139. **In accordance with the provisions of N.J.S.A. 39:4-198, proper signs will be erected.**

1. No stopping or standing in North Brunswick Township, Middlesex County:

i.-ii. (No change.)

iii. [Along both sides of Route 26 from Route US 1 (northbound) to Patton Street.] **Along both sides:**

(1) From Route U.S. 1 (northbound) to Patton Street.

(2) From Route U.S. 1 to McCaulliffe Drive—York Road.

16:28A-1.23 Route 33

(a) The certain parts of State Highway Route 33 described in this subsection shall be designated and established as "no stopping or standing" zones where stopping or standing is prohibited at all times except as provided in N.J.S.A. 39:4-139. **In accordance with the provisions of N.J.S.A. 39:4-198, proper signs will be erected.**

1.-7. (No change.)

8. No stopping or standing in Monroe Township, Middlesex County:

i. Along both sides:

(A) For the entire length within the corporate limits, including all ramps and connections thereto, which are under the jurisdiction of the Commissioner of Transportation; except in areas covered by parking restrictions adopted in accordance with the Administrative Procedure Act and N.J.A.C. 1:30.

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

16:28A-1.32 Route U.S. 46

(a) The certain parts of State highway Route U.S. 46 described in this subsection shall be designated and established as "no stopping or standing" zones where stopping or standing is prohibited at all times **except as provided in N.J.S.A. 39:4-139**. In accordance with the provisions of N.J.S.A. 39:4-198, proper signs [must] **will** be erected.

1.-18. (No change.)

19. No stopping or standing in Independence Township, Warren County:

i. Along both sides:

(1) For the entire length within the corporate limits, including all ramps and connections thereto, which are under the jurisdiction of the Commissioner of Transportation; except in areas covered by parking restrictions adopted in accordance with the Administrative Procedure Act and N.J.A.C. 1:30.

(b) The certain parts of State highway Route U.S. 46 described in this subsection shall be designated and established as "no parking **bus stop**" zones where parking is prohibited at all times. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established bus stops:

1.-14. (No change.)

15. Within Montville Township, Morris County:

i. Along the westbound (northerly) side:

(1) Mid-block bus stop:

(A) Change Bridge Road—Beginning at a point 246 feet west of the westerly curb line of Change Bridge Road and extending 135 feet westerly therefrom.

16:28A-1.36 Route 57

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

(e) The certain parts of State highway Route 57 described in this subsection shall be designated and established as "time limit parking" zones where parking is prohibited except as specified. In accordance with the provisions of N.J.S.A. 39:4-199, permission is granted to erect appropriate signs at the following established time limit parking zones:

1. In Washington Borough, Warren County:

i. Along both sides (Washington Avenue):

(1) Two hours time limit parking from 8:00 A.M. to 6:00 P.M. daily from Belvidere Avenue and Broad Street to Jackson Avenue.

(2) Two hours time limit parking daily from 8:00 A.M. to 6:00 P.M. from Belvidere Avenue and Broad Street to Lincoln Avenue.

(a)

BUREAU OF CONSTRUCTION SERVICES, PROCUREMENT

Waiver of Executive Order No. 66(1978) Construction Services Rules N.J.A.C. 16:44

Take notice that the rules concerning the Construction Services, N.J.A.C. 16:44, were to expire on May 25, 1993, pursuant to Executive Order No. 66(1978). The standards and requirements set forth in these rules establish uniform procedures for the qualification of contractors, utilization of standard specifications, fair and uniform advertising and bid procedures, and uniform standards for the execution of contracts. The Department intends to readopt this chapter with technical amendments, but such could not be accomplished by May 25, 1993.

As the standards in this chapter are administratively necessary for the Department of Transportation, and it thus being imperative that no lapse in the rules occur, Governor Florio, on May 11, 1993, directed that the five-year sunset provision of Executive Order No. 66(1978) is waived for N.J.A.C. 16:44, and that the expiration date for this chapter is extended from May 25, 1993, to and including May 25, 1994, when successful readoption can be accomplished.

OTHER AGENCIES

(b)

CASINO CONTROL COMMISSION

Accounting and Internal Controls
Definitions
Jackpot Payouts of Cash or Slot Tokens That Are Not Paid Directly From the Slot Machine
Re-proposed Amendments: N.J.A.C. 19:45-1.1 and 1.40

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 99(a)4 and 12.

Proposal Number: PRN 1993-317.

Submit written comments by July 7, 1993 to:

Barbara A. Mattie, Chief Analyst
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

On August 19, 1992, the Casino Control Commission proposed amendments to N.J.A.C. 19:45-1.1 and 1.40, which were published in the September 21, 1992 issue of the New Jersey Register at 24 N.J.R. 3251(a). Among other things, that proposal would have permitted a slot attendant or slot attendant supervisor to particpate in manual jackpots of less than $25,000 and increased the threshold dollar amount for a slot shift manager's involvement from $10,000 to $25,000.

Resorts International Hotel, Inc. (Resorts) and Adamar of New Jersey, Inc. (TropWorld) filed comments in support of the adoption of the regulatory amendments. Bally's Park Place, Inc., (Bally's Park), GNOC, Corp. (Bally's Grand) and Greate Bay Hotel and Casino, Inc. (Sands) generally supported the proposal but recommended some minor technical changes for purposes of clarity and comprehension. The Division of Gaming Enforcement filed comments that objected to any increase in the threshold for involvement of slot supervisors; therefore, the amendments published on August 19, 1992 will not be adopted as proposed. Technical changes to the threshold for involvement of a slot supervisor have been made.

Basically the new amendment to N.J.A.C. 19:45-1.40 allows a slot attendant, slot mechanic or slot attendant supervisor to participate in manual jackpots up to $10,000, a slot attendant supervisor for jackpots of $10,000 or more but less than $25,000 and, for jackpots in excess of $25,000, a slot attendant supervisor and slot shift manager. The rest of the amendment basically codifies existing casino procedures for the payment of jackpots and is substantially similar to that which was previously published.

The amendment incorporates the use of a Request for Jackpot Payout Slip which is prepared to document the winning reel combinations on the slot machine and the appropriate payout, as well as other pertinent information. Additionally, the amendment incorporates the use of a Jackpot Payout Receipt which is given to a winning patron if the jackpot is not paid to the patron before the progressive meter is reset. The amendment also sets forth the procedures that must be followed when using a Jackpot Payout Slip, a Jackpot Payout Receipt and a Request for Jackpot Payout.

N.J.A.C. 19:45-1.1 has been amended to address the terms Jackpot Payout Slip, Jackpot Payout Receipt and Request for Jackpot Payout.

Please note that this reproposal supersedes the prior proposal. Accordingly, any comments received in response to the prior proposal will not be considered in connection with this reproposal, unless they are specifically resubmitted during the present comment period. Additional comment from any other interested parties is also permissible.

Social Impact

The proposed amendment to N.J.A.C. 19:45-1.40 serves to codify and modify existing casino procedures for paying jackpots. Increasing the dollar threshold of the jackpot limits may allow for better customer service, since jackpot payout transactions may be completed more expeditiously and efficiently. Casino procedures require the use of a Jackpot Payout Receipt, which is issued to a patron if the progressive meter or slot machine is reset prior to payment of the jackpot, and a Request for Jackpot Payout Slip, which is used by a slot attendant or slot attendant supervisor to record pertinent information concerning the slot machine and the appropriate amount of the payment. Use of these forms should help ensure that winning patrons receive the correct amount of money for each jackpot that is not totally and automatically paid by a slot machine.

Economic Impact

The proposed amendments to N.J.A.C. 19:45-1.40 concerning the Request for Jackpot Payout Slip and Jackpot Payout Receipt and attendant procedures are anticipated to have no direct economic impact on the regulated public except as noted below. The proposal merely codifies existing casino procedures.

Those portions of the amendments, which give casino licensees the option to have either a slot attendant, slot mechanic or a slot attendant supervisor pay jackpots of less than $10,000, have a slot attendant supervisor pay jackpots of $10,000 or more but less than $25,000 and which raise the threshold amount of a jackpot that requires the participation of two members of the slot department from $10,000 to $25,000 are anticipated to have a positive economic impact on casino licensees, since the proposed amendments would enable casino licensees to more effectively utilize slot operations resources. Further, increasing the dollar amount of the jackpot payout limits may allow for better customer service, since jackpot payout transactions may be completed more expeditiously and efficiently.

Regulatory Flexibility Statement

The proposed amendments to N.J.A.C. 19:45-1.40 will affect only the operations of New Jersey casino licensees, none of which qualifies as a "small business" protected under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Accordingly, no regulatory flexibility analysis is required.

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

19:45-1.1 Definitions

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

...

"Jackpot Payout Receipt" is defined in N.J.A.C. 19:45-1.40.

"Jackpot Payout Slip" is defined in N.J.A.C. 19:45-1.40.

...

"Request for Jackpot Payout Slip" is defined in N.J.A.C. 19:45-1.40.

...

19:45-1.40 Jackpot payouts of cash or slot tokens that are not paid directly paid from the slot machine

(a) Whenever a patron wins a jackpot of [cash] **coins** or slot tokens [to be exchange for cash] that is not totally and automatically paid directly from the slot machine, [a slot booth cashier ("slot cashier"), a general cashier or a master coin bank cashier shall prepare a jackpot payout slip] **a Request for Jackpot Payout Slip ("Request") shall be prepared after the preparer observes the combinations on the slot machine and determines the appropriate amount of the payout, based on the winning combinations. If the manual jackpot is less than $10,000, the preparer of the Request shall be a slot attendant, slot mechanic or a slot attendant supervisor. If the manual jackpot is $10,000 or more, the preparer of the Request shall be a slot attendant supervisor. The Request shall be, at a minimum, a one-part form or the information required on it maintained in stored data, access to which, prior to use or input, shall be restricted to slot attendants, slot mechanics and slot attendant supervisors.**

(b) The following information, at a minimum, shall be on the Request or maintained in stored data:

1. The date and time of the jackpot;

2. The asset number of the slot machine on which the jackpot was registered;

3. The winning combination of characters constituting the jackpot;

4. The amount to be paid to the winning patron;

5. The method of payment requested by the patron (cash, slot tokens or casino check);

6. The signature or identification code of the preparer; and

7. The following additional signatures or identification codes shall be required if the slot machine or the progressive meter is reset prior to the patron being paid or if payment is made directly to the patron by a slot cashier, master coin bank cashier or general cashier:

i. The signature or identification code of the casino security department member attesting to the characters constituting the jackpot and the amount to be paid to the winning patron; and

ii. The signature or identification code of the slot shift manager attesting to the characters constituting the jackpot and the amount to be paid to the winning patron when the jackpot amount is $25,000 or more.

(c) Following preparation, the Request shall be immediately transported by the preparer or the information maintained in stored data shall be available to a slot booth, the master coin bank or the cashiers' cage where it will serve to authorize the preparation of a Jackpot Payout Slip ("Payout") by a slot cashier, master coin bank cashier or general cashier.

(d) If the winning patron will not be paid before the slot machine or progressive meter is reset, the preparer of the Request required

by (a) above shall also prepare a Jackpot Payout Receipt ("Receipt"). The Receipt shall be, at a minimum, a two-part form, and shall contain the following information:

1. The date and time of the jackpot;

2. The asset number of the slot machine on which the jackpot was registered;

3. The winning combination of characters constituting the jackpot;

4. The amount to be paid to the winning patron stated in numbers and in words;

5. The signature of the winning patron on the original form only; and

6. The signature of the preparer indicating that the information on the Receipt is correct and agrees with the information on the Request or as maintained in the stored data required by (a) above.

(e) Upon preparation, the Receipt shall be distributed as follows:

1. The original shall be immediately delivered to the slot cashier, master coin bank cashier or general cashier along with the Request if manually generated in accordance with (c) above; and

2. The duplicate shall be immediately presented to the winning patron who shall be required to present the duplicate Request before being paid the jackpot in accordance with the procedures set forth in this section.

Recodify existing (b)-(d) as **(f)-(h)** (No change in text.)

[(e)]**(i)** On originals, duplicates, triplicates, or in stored data, the preparer shall record, **or if computerized, the printer shall print,** at a minimum, the following information:

1. (No change.)

2. The winning combination of [reel] characters constituting the jackpot;

3. The date [and shift] during which the jackpot occurred;

4. The amount to be paid from cashiers' cage, **master coin bank** or slot booth funds;

5.-7. (No change.)

[(f)]**(j)** The time of preparation of the [jackpot] **payment** shall be recorded, at a minimum, on the original and duplicate upon preparation.

[(g)]**(k)** All [coin or currency] **cash or slot tokens** paid or any casino check issued to a patron as a result of winning a jackpot shall be:

1. Distributed by the slot cashier, general cashier or master coin bank cashier directly to the patron **in accordance with the procedures in (l) below**; or

2. Disbursed by a slot cashier, general cashier or master coin bank cashier to:

i. [a] **A** slot attendant, **slot mechanic** or slot **attendant** supervisor, [and if the manual jackpot is $1,200 or more, to a slot supervisor,] **if the manual jackpot is less than $10,000 or to a slot attendant supervisor if the manual jackpot is $10,000 or more** who shall transport the [coin, currency] **cash, slot tokens** or casino check directly to the patron[.] **in accordance with (m) below; or**

ii. A casino security department member who shall transport the cash, slot tokens or casino check to a slot attendant, slot mechanic or slot attendant supervisor if the manual jackpot is less than $10,000 or to a slot attendant supervisor if the manual jackpot is $10,000 or more for payment to the patron in accordance with (m) below.

[(h) Signatures attesting to the accuracy of the information contained on the original shall be, at a minimum, of the following personnel at the following times:

1. The original:

i. The slot cashier, general cashier or master coin bank cashier upon preparation; and

ii. A slot attendant or slot supervisor after observing the reel characters of the slot machine or if the manual jackpot is $1,200 or more, a slot supervisor after observing the reel characters of the slot machine; and

2. The duplicate:

i. The slot cashier, or general cashier or master coin bank cashier upon preparation;

ii. A slot attendant or slot supervisor after observing the reel characters of the slot machine or if the manual jackpot is $1,200 or more, a slot supervisor after observing the reel characters of the slot machine;

iii. A security department member after observing the reel charcters of the slot machine; and

iv. A slot shift manager after observing the reel characters of the slot machine if the amount of the jackpot is in excess of $10,000.

(i) Upon meeting the signature requirements as described in (h)1 and (h)2 above, the security department member shall maintain and control the duplicate and the slot, master coin bank or general cashier shall maintain and control the original.]

(l) Whenever the winning patron is paid directly by the slot cashier, general cashier or master coin bank cashier, the following procedures shall be followed:

1. The cashier shall prepare or generate a Payout in accordance with (i) and (j) above;

2. If a casino security department member has not signed the Request, the cashier shall summon a casino security department member and provide him or her with the Request. The casino security department member shall proceed to the slot machine identified on the Request and shall verify that the winning characters on the slot machine and the amount to be paid match those which appear on the Request and sign the Request. If the jackpot amount is $25,000 or more, a slot shift manager shall similarly verify that the winning characters of the slot machine and the amount to be paid match those which appear on the Request and sign the Request. The Request shall then be immediately returned to the cashier by the casino security department member;

3. After the cashier determines that all required signatures verifying the characters of the slot machine and the amount to be paid have been placed on the Request, if the amount being paid is less than $10,000, the cashier shall pay the winning patron in the presence of the casino security department member and the slot attendant, slot mechanic or slot attendant supervisor who signed the Request in accordance with this section, or if the amount being paid is $10,000 or more but less than $25,000, the cashier shall pay the winning patron in the presence of the casino security department member and the slot attendant supervisor who signed the Request in accordance with this section. If the amount being paid by the cashier is $25,000 or more, the cashier shall pay the winning patron in the presence of the casino security department member, the slot attendant supervisor, and the slot shift manager who signed the Request in accordance with this section. All casino personnel required by this section to witness the payment shall sign the duplicate Payout attesting to the accuracy of the information on the Payout and the disbursement of the payment to the patron;

4. If a Receipt was issued and all the required verifications of the characters were completed in accordance with (b) above, the cashier shall summon a casino security department member and a slot attendant, slot mechanic or slot attendant supervisor, if the manual jackpot is less than $10,000, a casino security department member and slot attendant supervisor or if the manual jackpot is $10,000 or more and if the jackpot is $25,000 or more, a slot shift manager shall also be summoned. The patron shall be required to present the duplicate Receipt to the cashier and sign it in his or her presence in order to receive payment. The cashier shall compare the duplicate Receipt to the original Receipt and, if in agreement, make the payment to the winning patron. All casino personnel required by this section to witness the payment shall sign the duplicate Payout attesting to the accuracy of the information on the Payout and the disbursement of the payment to the patron;

5. Once payment has been made and all required signatures obtained, the cashier shall give the duplicate Payout to the casino security department member, who shall as expeditiously as possible deposit it into a locked accounting box at the casino security podium or other location as approved by the Commission; and

6. The cashier shall attach the Request, if applicable, and the original and duplicate Receipt, if applicable, to the original Payout. If the disbursement is made from a slot booth all forms shall be forwarded by the end of the gaming day to the master coin bank

for reimbursement. If the disbursement is made from the cashiers' cage, all forms shall be forwarded by the end of the gaming day to the main bank for reimbursement.

(m) Whenever a winning patron will be paid by a slot attendant, slot mechanic or slot attendant supervisor, the following procedures shall be followed:

1. The slot cashier, general cashier or master coin bank cashier shall prepare or generate a Payout in accordance with (i) or (j) above;

2. The cashier shall disburse the cash, slot tokens or casino check to the slot attendant, slot mechanic or slot attendant supervisor. The casino employee receiving the payment shall verify the amount to be paid to the patron and sign the original and duplicate Payout attesting to the accuracy of the information on the Payout and the receipt of the payment from the cashier. The cashier shall retain the original Payout and the duplicate Payout shall be transported with the payment by the casino employee;

3. If a casino security department member has not signed the Request, the slot attendant, slot mechanic or slot attendant supervisor shall provide the duplicate Payout to the casino security department member who shall verify that the winning characters of the slot machine and the amount to be paid match those which appear on the duplicate Payout. If the jackpot amount is $25,000 or more and the slot shift manager has not signed the Request, the slot shift manager shall similarly verify that the winning characters of the slot machine and the amount to be paid match those which appear on the duplicate Payout;

4. Once the verifications required by (m)3 above have been completed, if the payment is less than $10,000, the slot attendant, slot mechanic or slot attendant supervisor shall pay the winning patron in the presence of the casino security department member who verified the winning characters and the amount to be paid, if the payment is $10,000 or more but less than $25,000, the payment shall be made by a slot attendant supervisor in the presence of the casino security department member who verified the winning characters and the amount to be paid, and if the payment is $25,000 or more, the payment shall be made in the presence of the casino security department member and the slot shift manager who verified the winning characters and the amount to be paid. Once the patron has been paid, all casino personnel required by this section to witness the payment shall sign the duplicate Payout attesting to the verification of the characters, the accuracy of the information on the Payout and the disbursement of the payment to the winning patron;

5. If a Receipt was issued and all the required verifications of the characters were completed in accordance with (b) above, the cashier shall give the slot attendant, slot mechanic or slot attendant supervisor the original Receipt along with the duplicate Payout in accordance with (m)2 above to be transported with the payment. The patron shall be required to present the duplicate Receipt to the slot attendant, slot mechanic or slot attendant supervisor and sign it in his or her presence in order to receive the payment. The slot attendant, slot mechanic or slot attendant supervisor shall compare the duplicate Receipt to the original Receipt and if in agreement make the payment to the winning patron;

6. Once the patron has been paid and all necessary signatures have been obtained on the duplicate Payout in accordance with (m)4 above, a casino security department member shall as expeditiously as possible deposit the duplicate Payout into a locked accounting box at the security podium or other location as approved by the Commission;

7. The slot attendant, slot mechanic or slot attendant supervisor shall immediately return the original and duplicate Receipt, if applicable, to the slot booth, cashiers' cage or master coin bank; and

8. The cashier shall attach the Request, if applicable, and the original and duplicate Receipt, if applicable, to the original Payout. If the disbursement is made from a slot booth all forms shall be forwarded by the end of the gaming day to the master coin bank for reimbursement. If the disbursement is made from the cashiers' cage, all forms shall be forwarded by the end of the gaming day to the main bank for reimbursement.

(n) Nothing in this section shall preclude the use of a computerized data storage system, as approved by the Commission, that electronically records the information required on a Request.

[(j)](o) At the end of each gaming day, at a minimum, [the original and duplicate of the jackpot payout slip] **all forms required by this section** shall be forwarded as follows:

1. The [slot cashier shall forward the] original [to the master coin bank cashier in exchange for coin, currency or credit, after which the original] **Payout with the attached Request, if applicable, and the original and duplicate Receipt, if applicable,** shall be forwarded to the accounting department for agreement with the triplicate Payout or stored data [or, if prepared in the master coin bank, shall forward the original directly to the accounting department for agreement, with the triplicate or stored data]; **and**

[2. The general cashier shall forward the original to the main bank cashier in exchange for coin, currency or credit, after which the original shall be forwarded to the accounting department for agreement with the triplicate or stored data; and]

[3.]**2.** The duplicate [jackpot payout slip] **Payout** shall be [forwarded directly] **collected from the locked accounting boxes located at the casino security podium or other approved location by an accounting department employee and returned** to the accounting department for recording on the Slot Win Sheet, agreement with the meter reading [stored] **recorded** on the Slot Meter Sheet, and agreement with the triplicate **Payout** or stored data.

(a)

CASINO CONTROL COMMISSION

Card-O-Lette
Accounting and Internal Controls
Gaming Equipment
Rules of the Games

Proposed Amendments: N.J.A.C. 19:45-1.19, 19:46-1.1, 1.8, 1.9, 1.20, and 19:47-8.2
Proposed New Rules: N.J.A.C. 19:46-1.13F, 19:47-15.1 through 15.7

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.
Authority: N.J.S.A. 5:12-5, 69(a), 70(f), (j), 99 and 100(e).
Proposal Number: PRN 1993-299.

Submit written comments by July 7, 1993 to:
Barbara A. Mattie, Chief Analyst
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

The proposed new rules and amendments are intended to govern the implementation of the game of card-o-lette in Atlantic City casinos. The actual rules of the game are set forth in N.J.A.C. 19:47-15.1 through 15.7. The Commission has found that card-o-lette is a variation of the authorized game of roulette and big six, pursuant to N.J.S.A. 5:12-5.

Briefly, card-o-lette may be played with either a revolving bowl-type wheel (similar to a roulette wheel) or an upright wheel (similar to a big six wheel). In either case, the wheel shall be divided into 54 sections. A depiction of each of the 52 cards contained in a standard deck of playing cards and two different jokers are located in each of the sections of the wheel in the order described in proposed N.J.A.C. 19:46-1.13E. Players may bet on individual cards, various combinations of cards, red or black, as depicted on the layout, which will be determined by each spin of the wheel.

Proposed new rule N.J.A.C. 19:46-1.13F contains the requirements governing the physical characteristics of the card-o-lette wheel and card-o-lette layout. The remainder of the proposed amendments at N.J.A.C.

19:45-1.19, N.J.A.C. 19:46-1.1, 1.8, 1.9 and 1.20 and N.J.A.C. 19:47-8.2 are technical proposals which add reference to card-o-lette to the existent rules which shall govern the operation of card-o-lette in Atlantic City casinos.

Social Impact

The proposed new rules and amendments are not anticipated to have any social impact independent of that created by the statutory authorization which permits the Casino Control Commission to find that games are variations of authorized games. N.J.S.A. 5:12-5. The proposed new rules do not reflect any social judgments made by the Commission. It is anticipated that the implementation of the new game may generate patron interest in the game, but it is unclear at this time whether new or additional patrons will be attracted to Atlantic City as a result of the introduction of card-o-lette.

Economic Impact

Implementation of any game will, by its very nature, require casino licensees to incur some costs in preparing to offer the game to the public. These costs will presumably be offset by the increased casino revenues generated by the new game. Moreover, to the extent that the new game does generate increased casino revenues, senior and disabled citizens of New Jersey will benefit from the additional tax revenues which will be collected. As noted above, however, any attempt to quantify the effects of the introduction of card-o-lette on casino revenue would be highly speculative at this time. The proposed amendments and new rules may require the regulatory agencies to incur some costs in preparing to regulate the game. However, these costs are necessary to introduce and test the game of card-o-lette in Atlantic City casinos.

Regulatory Flexibility Statement

A regulatory flexibility statement is not required since the proposal will affect the operation of New Jersey casino licensees, none of which qualifies as a small business protected under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

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

19:45-1.19 Acceptance of tips or gratuities from patrons

(a) (No change.)

(b) All tips and gratuities allowed dealers shall be:

1. Immediately deposited in a transparent locked box reserved for that purpose. If non-value chips are received at a roulette [or], pokette **or card-o-lette** table, the marker button indicating their specific value shall not be removed until after a dealer, in the presence of a casino supervisor, has expeditiously converted them into value chips which shall then be immediately deposited in a transparent locked box reserved for that purpose;

2.-3. (No change.)

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

19:46-1.1 Gaming chips; value and non-value; physical characteristics

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

(h) Nothing in this section shall preclude a casino licensee from using non-value chips approved for use in roulette at the [game] **games** of pokette **and card-o-lette**.

(i) Non-value chips issued at a roulette [or], pokette **or card-o-lette** table shall only be used for gaming at that table and shall not be used for gaming at any other table in the casino or casino simulcasting facility nor shall any casino licensee or its employees allow any patron to remove non-value chips from the table from which they were issued.

(j) No person at a roulette [or], pokette **or card-o-lette** table shall be issued or permitted to game with non-value chips that are identical in color and design to value chips or to non-value chips being used by another person at the same table. When a patron purchases non-value chips, a chip of the same color shall be placed in a slot or receptacle attached to the outer rim of the roulette wheel or, for pokette **and card-o-lette**, in such other device as approved by the Commission. At that time, a marker button denoting the value of a stack of 20 chips of that color shall also be placed in the slot, receptacle or other device.

(k) (No change.)

(l) Each casino licensee shall have the discretion to permit, limit or prohibit the use of value chips in gaming at roulette [and], pokette **and card-o-lette** provided, however, that it shall be the responsibility of the casino licensee and its employees to keep accurate account of the wagers being made at roulette [and], pokette **and card-o-lette** with value chips so that the wagers made by one player are not confused with those made by another player at the table.

(m) An impressment of each [roulette] table [on the gaming floor] **which utilizes non-value gaming chips** shall be completed at least once a week. A casino licensee shall not [complete a roulette table] **perform an** impressment **of any such table** unless it provides at least one-half hour prior notice to the Commission. The casino licensee shall record the results of such impressment in the Chip Inventory Ledger and shall utilize a "Non-Value Roulette Chip Impressment" form to perform such impressment as follows:

1.-3. (No change.)

(n)-(q) (No change.)

19:46-1.8 Roulette **and card-o-lette** balls

Balls used in gaming at roulette **and card-o-lette** shall be made completely of a non-metallic substance and not be less than 12/16 of an inch nor more than 14/16 of an inch in diameter unless otherwise approved by the Commission.

19:46-1.9 Roulette **and card-o-lette**; inspection procedures; security procedures

(a) Prior to opening a roulette table **or a card-o-lette table pursuant to N.J.A.C. 19:46-1.13F(c)1** for gaming activity, a casino supervisor or member of the casino security department shall:

1. Inspect the roulette **or card-o-lette** table and roulette **or card-o-lette** wheel for any magnet or contrivance that would affect the fair operation of such wheel;

2. Inspect the roulette **or card-o-lette** wheel to assure that it is level and rotating freely and evenly;

3. Inspect the roulette **or card-o-lette** wheel to assure that all parts are secure and free from movement;

4. Inspect the roulette **or card-o-lette** ball by passing it over a magnet or compass to assure its non-magnetic quality; and

5. (No change.)

(b) If a casino licensee uses a roulette wheel **or a card-o-lette wheel pursuant to N.J.A.C. 19:46-1.13F(c)1** which has external movable parts, any adjustments to the movable parts shall be made by a casino supervisor or a member of the casino maintenance department, in the presence of a security department member. Adjustments to the movable parts of a roulette **or card-o-lette** wheel that is located on the casino floor, or in a casino simulcasting facility, shall only be made:

1. (No change.)

2. If the roulette **or card-o-lette** wheel is moved to a secure location outside the casino or casino simulcasting facility as approved by the Commission.

(c) (No change.)

(d) The casino licensee may replace any of the movable parts at any time, provided, however, if any one or more of the movable parts are external then an inspection must be completed by the Division prior to reopening the roulette **or card-o-lette** wheel and table for gaming activity.

(e) A log shall be maintained which shall include, at a minimum, the date, the roulette **or card-o-lette** table number, whether an adjustment or replacement was completed and the signature of the person making the adjustment or replacement.

(f) When a roulette table **or card-o-lette table pursuant to N.J.A.C. 19:46-1.13F(c)1** is not open for gaming activity, the roulette **or card-o-lette** wheel shall be secured by placing a cover over the entire wheel and securely locking such cover to the roulette **or card-o-lette** table.

19:46-1.13F Card-o-lette table; card-o-lette wheel; physical characteristics

(a) Each card-o-lette table shall have the name of the casino licensee imprinted on the cloth covering it and shall have a drop box and a tip box attached to it on the same side of the gaming

table as, but on opposite sides of, the dealer in a location as approved by the Commission.

(b) The cloth covering each card-o-lette table shall be approved by the Commission and shall be marked with:

1. Depictions of each of the 52 playing cards contained within a deck as depicted on the card-o-lette wheel;

2. Two jokers as depicted on the card-o-lette wheel; and

3. The following wagers:

i. Black;

ii. Red;

iii. 2 through 4;

iv. 5 through 7;

v. 8 through 10;

vi. Jack through King; and

vii. Each suit.

(c) Card-o-lette shall be played with a wheel to be known as a "card-o-lette wheel" which shall be either:

1. A revolving bowl-type wheel which shall be circular in shape and no less than 30 inches in diameter which shall be at one end of the table and a card-o-lette layout imprinted on the opposite end of the table. The bowl-type card-o-lette wheel shall have 54 equally spaced pockets around the wheel where the card-o-lette ball shall come to rest. Such wheel shall also have a ring of 54 equally spaced areas to correspond to the position of the pockets containing a depiction of each of the 52 playing cards contained within a deck and two sections each containing a depiction of a joker that is different from the other joker. The background of each joker and the color of its corresponding pocket shall be of a different color from each other, so as to be distinguishable from each other, and shall not be red or black. The color of each pocket shall either be a corresponding color to those depicted on the ring or a neutral color as approved by the Commission; or

2. An upright wheel which shall be circular in shape and no less than five feet in diameter. The rim of the card-o-lette wheel shall be divided into 54 equally spaced sections with 52 sections containing a depiction of each of the 52 playing cards contained within a deck and two sections each containing a depiction of a joker that is different from the other joker. The background of each joker shall be of a different color from each other, so as to be distinguishable from each other, and shall not be red or black. All 54 sections of an upright wheel shall be covered with glass or some other transparent covering.

(d) The sections shall be arranged around the card-o-lette wheel as follows: joker, 10 of clubs, 7 of hearts, king of spades, 4 of diamonds, 9 of clubs, 6 of hearts, queen of spades, 3 of diamonds, 8 of clubs, 5 of hearts, jack of spades, 2 of diamonds, ace of clubs, 10 of hearts, 7 of spades, king of diamonds, 4 of clubs, 9 of hearts, 6 of spades, queen of diamonds, 3 of clubs, 8 of hearts, 5 of spades, jack of diamonds, 2 of clubs, ace of hearts, joker, 10 of spades, 7 of diamonds, king of clubs, 4 of hearts, 9 of spades, 6 of diamonds, queen of clubs, 3 of hearts, 8 of spades, 5 of diamonds, jack of clubs, 2 of hearts, ace of spades, 10 of diamonds, 7 of clubs, king of hearts, 4 of spades, 9 of diamonds, 6 of clubs, queen of hearts, 3 of spades, 8 of diamonds, 5 of clubs, jack of hearts, 2 of spades and ace of diamonds.

(e) The location of and the necessary security measures over the non-value and value gaming chips at a card-o-lette table shall be approved by the Commission.

19:46-1.20 Approval of gaming and simulcast wagering equipment; retention by Commission or Division; evidence of tampering

(a) The Commission shall have the discretion to review and approve all gaming and simulcast wagering equipment and other devices used in a casino, casino simulcasting facility or hub facility as to quality, design, integrity, fairness, honesty and suitability including without limitation gaming tables, layouts, roulette wheels, pokette wheels, **card-o-lette wheels,** roulette balls, **card-o-lette balls,** drop boxes, big six wheels, sic bo shakers, sic bo electrical devices, pai gow shakers, chip holders, racks and containers, scales, counting devices, trolleys, slip dispensers, dealing shoes, dice, cards, pai gow tiles, locking devices, card reader devices, data processing equipment, pari-mutuel machines, self-service pari-mutuel machines and totalisators.

(b) (No change.)

(c) Any evidence that gaming equipment or other devices used in a casino, casino simulcasting facility or hub facility including, without limitation, gaming tables, layouts, roulette wheels, pokette wheels, **card-o-lette wheels,** roulette balls, **card-o-lette balls,** drop boxes, big six wheels, sic bo shakers, sic bo electrical devices, pai gow shakers, gaming chips, plaques, chip holders, racks and containers, scales, counting devices, trolleys, slip dispensers, dealing shoes, locking devices, card reader devices, data processing equipment, tokens, slot machines, pari-mutuel machines, self-service pari-mutuel machines and totalisators have been tampered with or altered in any way which would affect the integrity, fairness, honesty or suitability of the gaming equipment or other device for use in a casino, casino simulcasting facility or hub facility shall be immediately reported to an agent of the Commission and the Division. A member of the casino licensee's casino security department shall be required to insure that the gaming equipment or other device and any evidence required to be reported pursuant to this subsection is maintained in a secure manner until the arrival of an agent of the Division. Rules concerning evidence of tampering with dice, cards and pai gow tiles may be found at N.J.A.C. 19:46-1.16, 19:46-1.18 and 19:46-1.19B, respectively.

19:47-8.2 Minimum and maximum wagers

(a) (No change.)

(b) The spread between the minimum wager and the maximum wager at table games shall be as follows:

1.-11. (No change.)

12. Card-o-lette:

i. If the minimum wager at a table is $5.00 or less, the maximum wager shall be at least $40.00. Nothing in this chapter shall preclude a casino licensee from establishing different maximum wagers for each permissible wager at the game of card-o-lette; provided, however, that such limitations are posted at the table.

(c) (No change.)

SUBCHAPTER 15. CARD-O-LETTE

19:47-15.1 Definitions

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

"Rank" shall mean the four cards of identical value within a single deck of cards. For example, the 5 rank consists of the 5 of diamonds, 5 of spades, 5 of clubs and 5 of hearts.

"Suit" shall mean one of the four categories of cards, that is, diamond, spade, club or heart.

"Winning card" shall mean the card which is depicted in the section of the card-o-lette wheel where the ball comes to rest in a card-o-lette wheel pursuant to N.J.A.C. 19:46-1.13F(c)1 or where the clapper comes to rest on a card-o-lette wheel pursuant to N.J.A.C. 19:46-1.13F(c)2 after a valid spin of the card-o-lette wheel.

19:47-15.2 Wagers; supervision

(a) All wagers at card-o-lette shall be made by placing gaming chips or plaques on the appropriate areas of the card-o-lette layout except that verbal wagers accompanied by cash may be accepted provided that they are confirmed by the dealer and that such cash is expeditiously converted into gaming chips or plaques in accordance with the regulations governing the acceptance and conversion of such instruments.

(b) No person at a card-o-lette table shall be issued or permitted to game with non-value chips that are identical in color and design to value chips or to non-value chips being used by another person at the same table.

(c) Each player shall be responsible for the correct positioning of his or her wager on the card-o-lette layout regardless of whether he or she is assisted by the dealer. Each player must ensure that any instructions given to the dealer regarding the placement of his or her wager is correctly carried out.

(d) For purposes of complying with the organization and supervision requirements contained in N.J.A.C. 19:45-1.11 and 1.12, each card-o-lette table shall be considered the same as one roulette table.

19:47-15.3 Permissible wagers

(a) The following shall constitute the permissible wagers at the game of card-o-lette.

1. "Single card or straight" is a wager that the winning card shall be the same card as the single card selected by the player.

2. "Two cards or split" is a wager that the winning card shall be the same card as either of the two adjoining cards selected by the player.

3. "Four cards or corner" is a wager that the winning card shall be the same card as any of the four adjoining cards selected by the player.

4. "Single row or single rank" is a wager that the winning card shall be one of the four cards contained in the single rank selected by the player.

5. "Double row or double rank" is a wager that the winning card shall be one of the eight cards contained in the two adjacent ranks selected by the player.

6. "Suit or column" is a wager that the winning card shall be one of the 13 cards contained in the suit selected by the player.

7. "Two through four" is a wager that the winning card shall be one of the 12 cards contained in the 2, 3 and 4 ranks.

8. "Five through seven" is a wager that the winning card shall be one of the 12 cards contained in the 5, 6 and 7 ranks.

9. "8 through 10" is a wager that the winning card shall be one of the 12 cards contained in the 8, 9 and 10 ranks.

10. "Jack through king" is a wager that the winning card shall be one of the 12 cards contained in the jack, queen and king ranks.

11. "Red" is a wager that the winning card shall be a diamond or a heart.

12. "Black" is a wager that the winning card shall be a spade or a club.

19:47-15.4 Payout odds

(a) The payout odds for card-o-lette printed on any layout or in any brochure or other publication distributed by a casino licensee shall be stated through the use of the word "to" or "win" and no odds shall be stated through the use of the word "for."

(b) Each casino licensee shall pay off winning wagers at the game of card-o-lette at no less than the odds listed below:

Wager	Payout Odds
Single card or straight	50 to 1
Two cards or split	24 to 1
Four cards or corner	11 to 1
Single row or single rank	11 to 1
Double row or double rank	5 to 1
Suit or column	3 to 1
2 through 4	3 to 1
5 through 7	3 to 1
8 through 10	3 to 1
Jack through king	3 to 1
Black	1 to 1
Red	1 to 1

19:47-15.5 Procedures for dealing the game

(a) The procedures for dealing card-o-lette shall be as follows:

1. For a card-o-lette wheel pursuant to N.J.A.C. 19:46-1.13F(c)1:

i. The ball shall be spun by the dealer in a direction opposite to the rotation of the wheel and shall complete at least four revolutions around the track of the wheel to constitute a valid spin.

ii. While the ball is still rotating in the track around the wheel, the dealer shall call "No more bets."

iii. Each wager shall be settled strictly in accordance with its position on the layout.

iv. Upon the ball coming to rest in a compartment around the wheel, the dealer shall announce the winning card, including its suit, and shall place a marker on the corresponding card on the card-o-lette layout.

v. After placing the marker on the layout, the dealer shall first collect all losing wagers and then pay off all winning wagers at the odds currently being offered pursuant to N.J.A.C. 19:47-15.4.

2. For a card-o-lette wheel pursuant to N.J.A.C. 19:46-1.13F(c)2:

i. Prior to spinning the card-o-lette wheel, the dealer shall announce "No more bets."

ii. The card-o-lette wheel shall be spun by the dealer in either direction and shall complete at least three revolutions to constitute a valid spin.

iii. Each wager shall be settled strictly in accordance with its position on the layout.

iv. Upon completion of each spin, the dealer shall announce the winning card, including its suit, and shall place a marker on the corresponding card on the card-o-lette layout. After placing the marker on the layout, the dealer shall first collect all losing wagers and then pay off all winning wagers at the odds currently being offered pursuant to N.J.A.C. 19:47-15.4.

19:47-15.6 Irregularities

(a) For a card-o-lette wheel pursuant to N.J.A.C. 19:46-1.13F(c)1:

1. If the ball is spun in the same direction of the wheel, the dealer shall announce "No spin" and shall attempt to remove the ball from the wheel prior to its coming to rest in one of the compartments.

2. If the ball does not complete four revolutions around the track of the wheel, the dealer shall announce "No spin" and shall attempt to remove the ball from the wheel prior to its coming to rest in one of the compartments.

3. If a foreign object enters the wheel prior to the ball coming to rest, the dealer shall announce "No spin" and shall attempt to remove the ball from the wheel prior to its coming to rest in one of the compartments.

(b) For a card-o-lette wheel pursuant to N.J.A.C. 19:46-1.13F(c)2:

1. If the clapper comes to rest between two depictions of cards upon completion of the spin of the card-o-lette wheel, the casino licensee has the option to do one of the following:

i. Declare the winning card to be the depiction of the card previously passed; or

ii. Declare the spin void and re-spin the wheel.

2. Upon a casino licensee choosing one of the options as outlined in (b)1 above, it shall conspicuously post a sign at each table stating which option is in effect.

3. If the card-o-lette wheel does not complete at least three revolutions, the dealer shall announce "No spin" and re-spin the card-o-lette wheel.

19:47-15.7 Minimum and maximum wagers

(a) Each casino licensee shall submit to the Commission for review and approval, in accordance with N.J.A.C. 19:47-8.2, the minimum wagers permitted at each card-o-lette table.

(b) Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each card-o-lette table.

(a)

CASINO CONTROL COMMISSION

Nature and Exchange of Gaming Chips, Slot Tokens and Plaques

Proposed Amendment: N.J.A.C. 19:46-1.5

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.

Authority: N.J.S.A. 5:12-63(c), 69(a), 70(i) and 100(d).

Proposal Number: PRN 1993-301.

Submit comments by July 7, 1993 to:

Seth H. Briliant, Counsel
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

For security, operational, marketing, and other considerations, casino licensees sometimes remove their gaming chips from active use and replace them with different chips. See N.J.A.C. 19:46-1.3, which requires a casino licensee to maintain primary and secondary sets of gaming chips. One of the main reasons for removing and replacing gaming chips is when the use of counterfeit gaming chips is suspected or detected.

Chips which have been removed from active use are still valid and must be redeemed upon request if genuine, N.J.A.C. 19:46-1.5(e) and (f). However, this proposed amendment would provide that such gaming chips may not be used for wagering at an authorized game or casino simulcasting facility, and cannot be accepted or exchanged at a gaming table or simulcast counter. Instead, the chips would be required to be redeemed at the cashiers' cage. This should reduce the use and improve the detection of counterfeit gaming chips.

Social Impact

This proposed amendment may result in some minor inconvenience for casino patrons who attempt to place wagers with gaming chips that have been removed from active use and replaced. However, it is anticipated that such a policy will improve the integrity of gaming by reducing the possible use of counterfeit chips.

Economic Impact

It is hoped that this proposed amendment will have a positive economic impact upon casino licensees, by reducing the possible use of counterfeit chips, as noted above. There should be no economic impact upon the Commission, the Division of Gaming Enforcement, or the general public.

Regulatory Flexibility Statement

This proposed amendment will affect New Jersey casino licensees, none of which is a "small business" as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Accordingly, a regulatory flexibility analysis is not required.

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

19:46-1.5 Nature and exchange of gaming chips, slot tokens and plaques

(a) All wagering on authorized games in a casino or casino simulcasting facility shall be conducted with gaming chips or plaques[,]; provided[,] however, that slot tokens or coins shall be permitted for use in slot machines or simulcast wagering. **Gaming chips previously issued by a casino licensee which are not in active use by that casino licensee shall not be used for wagering at authorized table games or casino simulcasting, and shall not be accepted nor exchanged for any purpose at a gaming table or a casino simulcast counter. Such chips shall only be redeemed at the cashiers' cage pursuant to (f) below.**

(b)-(k) (No change.)

(a)

CASINO CONTROL COMMISSION

Gaming Equipment
Rules of the Games
Blackjack Table; Physical Characteristics
Surrender
Splitting Pairs
Irregularities
Multiple Action Blackjack Rule
Proposed Amendments: N.J.A.C. 19:46-1.10; 19:47-2.8, 2.11 and 2.15
Proposed New Rule: N.J.A.C. 19:47-2.18

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.
Authority: N.J.S.A. 5:12-70(f) and 100(e).
Proposal Number: PRN 1993-300.

Submit written comments by July 7, 1993 to:
Barbara A. Mattie, Chief Analyst
Casino Control Commission
Arcade Building
Tennessee Avenue and Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

The proposed amendments and the proposed new rule at N.J.A.C. 19:47-2.18 would give a casino licensee the discretion to offer a patron in the game of blackjack the option to make up to three separate wagers on the outcome of one hand of the player against three separate hands of the dealer which are all formed using the dealer's original face up card. Specifically, prior to receiving his or her first two cards, a patron must place two or three wagers, as required by the casino licensee.

After the decisions of each player to split pairs, double down, take insurance, stand or draw have been implemented and all additional cards have been dealt, a second card and any additional cards as required by N.J.A.C. 19:47-2.12(b) shall be dealt to the dealer. Once all wagers on the dealer's first hand have been decided and all losing wagers collected and all winning wagers paid, the dealer shall collect all his or her cards except the original face up card. The dealer shall then move the original face up card to the area of the layout designated for the dealer's second hand and shall deal that hand a second card and any additional cards. Once all wagers on the dealer's second hand have been decided, the dealer shall collect all his or her cards except the original face up card. The dealer shall then move the original face up card to the area of the layout designated for the dealer's third hand and shall deal that hand a second card and any additional cards, except that if no player has made a wager on the third spot the round of play shall be concluded.

At the conclusion of the third hand, all cards still remaining on the layout shall be picked up in accordance with N.J.A.C. 19:47-2.6(i).

The proposal includes two alternative amendments to N.J.A.C. 19:47-2.15(m) concerning the procedure which must be followed when a dealer inadvertently discards his or her original face up card prior to the completion of the second or third hand of the round of play. Alternative A of the proposal would require the dealer under such circumstances to call all wagers on the remaining hand dead. Alternative B of the proposal would permit a casino supervisor to reconstruct the last hand of play so as to determine the dealer's original face up card and permit play to continue. Alternative proposals are being published in order to obtain comment from the public as to the preferable procedure.

N.J.A.C. 19:46-1.10(h) sets forth the design requirements for the multiple action layout.

Social Impact

The proposed amendments and new rule are not anticipated to have any significant social impact. They would allow a casino licensee to offer an additional variation in the game of blackjack, which may increase interest and participation among patrons.

Economic Impact

The proposed amendments and new rule would permit casino licensees to make use of new strategies in marketing their table games, which may increase participation and gaming revenues. Casinos which elect to utilize this option may benefit by realizing increased revenues at the game of blackjack. Moreover, to the extent that the rule option generates increased casino revenues, senior and disabled citizens of New Jersey will benefit from the additional tax revenues which will be collected. However, any attempt to quantify the effects of the introduction of Multiple Action Blackjack on casino revenue would be highly speculative at this time.

Regulatory Flexibility Statement

A regulatory flexibility statement is not required for this proposal. The proposed amendments and new rule only affect licensed casinos in Atlantic City, none of which is a small business as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

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

19:46-1.10 Blackjack table; card reader device; physical characteristics; inspections

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

(h) Notwithstanding the requirements of (b) above, if a casino licensee offers multiple action blackjack in accordance with the requirements of N.J.A.C. 19:47-2.18, the cloth covering the blackjack table shall be approved by the Commission and shall contain, at a minimum, the following:

1. Three separate designated betting areas for each player at the table with each separate area being numbered one through three. The number of players at each table shall not exceed six;

2. A separate designation on the layout, for each player, for the placement of insurance wagers;

3. A separate designation on the layout, for each player, for the placement of double down and split pair wagers; and

4. Three separate areas designated for placement of the dealer's original face up card with each area being numbered one through three.

19:47-2.8 Surrender

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

(c) Each casino licensee may, at its discretion, offer its patrons the surrender option authorized in this section, **except that when a casino licensee offers the rule variation multiple action blackjack pursuant to N.J.A.C. 19:47-2.18, the surrender option shall not be available.** A casino licensee shall not initiate or terminate the use of the surrender option at a table unless the casino licensee complies with the notice requirements set forth in N.J.A.C. 19:47-8.3.

19:47-2.11 Splitting pairs

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

(e) Notwithstanding the provisions of (c)1 above, a casino licensee may, at its discretion, permit a player to split pairs up to three times (a total of four hands) at a blackjack table with up to six player boxes or twice (a total of three hands) at a blackjack table with seven player boxes if notice of the option is provided as set forth in N.J.A.C. 19:47-8.3, **except that this option shall not be available in games in which the rule variation multiple action blackjack is available pursuant to N.J.A.C. 19:47-2.18.** If a casino licensee elects to offer [this] **the option of splitting pairs more than once,** it may, at its discretion, prohibit a player from splitting a pair of aces more than once (a total of two hands) if notice is provided as set forth in N.J.A.C. 19:47-8.3. All other requirements of this section shall apply to each hand which is formed as a result of splitting pairs more than once.

19:47-2.15 Irregularities

(a)-(k) (No change.)

(l) If the dealer fails to move his or her original face up card to the area of the layout designated for the second or third hand of the round in accordance with N.J.A.C. 19:47-2.18, the round shall continue as if the original face up card was moved to the appropriate area of the layout.

Alternative A

(m) If the dealer inadvertently picks up his or her original face up card and places it in the discard rack prior to completion of the second or third hand of multiple action blackjack, the dealer shall call all wagers on the remaining hand(s) dead.

Alternative B

(m) If the dealer inadvertently picks up his or her original face up card and places it in the discard rack prior to the completion of the second or third hand of multiple action blackjack, the dealer shall immediately notify a casino supervisor assigned to that table. The casino supervisor shall remove the appropriate cards from the discard rack and reconstruct the last hand of play so as to determine the dealer's original face up card. The original face up card shall be placed in the appropriate box on the layout, and the remaining cards shall be returned to the discard rack. Play shall resume in accordance with the rules of this chapter.

19:47-2.18 Multiple action blackjack rule

(a) A casino licensee may, in its discretion, offer to all players at a blackjack table the option to make up to three separate wagers on the outcome of the players' original hand against the dealer's original face up card which is used to complete three separate hands, provided that the casino licensee complies with the notice requirements set forth in N.J.A.C. 19:47-8.3 prior to withdrawing the offer of this option.

(b) Prior to the first card being dealt for the first of the three rounds of play, each player shall be required to make two or three wagers against the dealer as required by N.J.A.C. 19:47-2.3(a) and (d). Any rules regarding the number of wagers required and minimum and maximum limits for the three wagers shall be posted at the table in accordance with N.J.A.C. 19:47-8.3.

(c) After all wagers have been placed, the dealer shall deal the cards in accordance with N.J.A.C. 19:47-2.6(e). As each player's point total is announced, the player shall indicate whether he wishes to double down, split pairs, stand or draw as provided for by this chapter, except that, a decision to double down or split pairs shall include an additional wager for each wager placed by the player in accordance with (b) above.

(d) Any player may elect to make an insurance wager pursuant to N.J.A.C. 19:47-2.9 on any or all of his or her wagers made in accordance with (b) above. Such wager or wagers shall be decided individually based on the dealer's second card for each of his or her hands.

(e) After the decisions of all players have been implemented and all additional cards have been dealt to them, the dealer shall deal a second card to his or her original face up card and any additional cards in accordance with N.J.A.C. 19:47-2.6(h) and 2.12(b).

(f) Once all wagers on the dealer's first hand have been decided, the dealer shall collect all losing wagers and pay off all winning wagers for the wager(s) placed in the first spot of each player's betting area, except that all of a player's wagers shall be collected along with his or her cards when that player's hand exceeds a hard total of 21. The dealer shall collect all of his or her cards and place them face down in the discard rack in accordance with one of the following:

1. If hands of all players at the table have exceeded a hard total of 21, the dealer shall draw no additional cards pursuant to N.J.A.C. 19:47-2.12 and the dealer shall collect all of his or her cards including his or her original face up card; or

2. If a wager remains on the second and third spots of a player's betting area, the dealer shall then collect all of his or her cards except his or her original face up card.

(g) If the dealer's cards have been collected in accordance with (f)2 above, the dealer shall move his or her original face up card to the area of the layout designated for the dealer's second hand and shall deal a second card to his or her original face up card and any additional cards in accordance with (e) above.

(h) Once all wagers on the dealer's second hand have been decided, the dealer shall collect all losing wagers and pay off all winning wagers for the wager(s) placed in the second spot of each player's betting area. The dealer shall then collect all of his or her cards except his or her original face up card and place them face down in the discard rack. The dealer shall then move his or her original face up card to the area of the layout designated for the dealer's third hand and shall deal a second card to his or her original face up card and any additional cards in accordance with (e) above, except that if no player has made a third wager the round shall be concluded in accordance with (j) below.

(i) Once all wagers on the dealer's third hand have been decided, the dealer shall collect all losing wagers and pay off all winning wagers for the wager(s) placed in the third spot of each player's betting area.

(j) At the conclusion of the third hand, all cards still remaining on the layout shall be picked up in accordance with N.J.A.C. 19:47-2.6(i).

(a)

CASINO CONTROL COMMISSION

Poker
Gaming Schools
Accounting and Internal Controls
Gaming Equipment
Rules of the Games
Proposed New Rules: N.J.A.C. 19:46-1.13E and 19:47-14
Proposed Amendments: N.J.A.C. 19:44-8.3, 19:45-1.1, 1.2, 1.11, 1.12 and 1.20, and 19:46-1.17 and 1.18

Authorized By: Casino Control Commission, Joseph A. Papp, Executive Secretary.
Authority: N.J.S.A. 5:12-5, 69(a), 70(f) and (j), 99 and 100(e).
Proposal Number: PRN 1993-298.

Submit written comments by July 7, 1993 to:
Barbara A. Mattie, Chief Analyst
Casino Control Commission
Arcade Building
Tennessee Avenue and the Boardwalk
Atlantic City, NJ 08401

The agency proposal follows:

Summary

The proposed new rules and amendments are intended to govern the implementation of the game of poker in Atlantic City casinos. The Commission has determined pursuant to N.J.S.A. 5:12-5 that poker constitutes a game which is compatible with the public interest, subject to the Commission ultimately finding that poker is suitable for casino use after an appropriate test period. The actual rules of the game are set forth in N.J.A.C. 19:47-14.1 through 14.18.

Briefly, poker shall be played with a single deck of 52 cards. The dealer or house shall not participate in the actual playing or outcome of the game. The casino shall provide a table, a deck of cards and a dealer to facilitate the game. The casinos may offer any or all of the following types of poker: seven card stud high; high-low split and high-low split eight or better; hold 'em high; omaha high and high-low split eight or better; five card draw high and low; and five card stud high.

The dealer shall wash, shuffle and cut the cards. The dealer shall then deal the appropriate number of cards either face up or face down depending on the type of poker being offered. Dealing from the hand, the dealer shall deal all cards in a clockwise rotation starting with the position to the left of the dealer.

As the cards are dealt, players shall make a decision to check, raise or fold. Each player wagers on the cards that the player holds in his or her hand. At the completion of play, the dealer shall award the pot to the winning player or players pursuant to the rankings set forth in N.J.A.C. 19:47-14.3 or to the last remaining player if all other players have folded.

Since the casino does not participate in the outcome of the game, the casino shall derive its revenue by extracting a commission known as the "rake." N.J.A.C. 19:47-14.14 permits the casinos to use one or more of the following types of rake: (1) a percentage of sums wagered on the pot; (2) a flat fee based on certain predetermined dollar levels contained within the pot; and (3) time charges expressed as an hourly fee.

N.J.A.C. 19:47-14.15 addresses the handling of irregularities and N.J.A.C. 19:47-14.18 addresses the use of a waiting list for vacant seats at the poker tables. At N.J.A.C. 19:45-1.1, gender specific language is being amended.

N.J.A.C. 19:45-1.11 and 1.12 address the personnel needed to operate the game of poker. N.J.A.C. 19:45-1.1 defines the meaning of poker revenue (rake), N.J.A.C. 19:45-1.2 addresses the maintenance of statistical game records for poker and N.J.A.C. 19:45-1.20 addresses its placement into the table inventory container.

Proposed new rule N.J.A.C. 19:46-1.13E addresses the requirements for the poker table. N.J.A.C. 19:46-1.17 addresses the use of plastic cards which are distinguishable from other cards used in that casino. N.J.A.C. 19:46-1.18 addresses the procedures for the distribution of poker cards to the table, the reuse of plastic poker cards, the insertion of replacement cards into a deck and the daily inspection requirements. N.J.A.C. 19:44-8.3 sets forth the training requirements to be a dealer at the game of poker.

Social Impact

The proposed new rules and amendments are not anticipated to have any social impact independent of that created by the statutory authorization of a game which is compatible with the public interest. The proposed rules do not reflect any social judgments made by the Commission. It is anticipated that the implementation of the new game may generate patron interest in the game, but it is unclear at this time whether new or additional patrons will be attracted to Atlantic City as a result of the introduction of poker.

Economic Impact

Implementation of any new game will, by its very nature, require casino licensees to incur some costs in preparing to offer the game to the public. These costs will presumably be offset by the increased casino revenues generated by the new game. Moreover, to the extent that the new game does generate increased casino revenues, senior and disabled citizens of New Jersey will benefit from the additional tax revenues which will be collected. As noted above, however, any attempt to quantify the effects of the introduction of poker on casino revenue would be highly speculative at this time. The proposed amendments and new rules may require the regulatory agencies to incur some costs in preparing to regulate the game. However, these costs are necessary to introduce and test the game of poker.

Regulatory Flexibility Statement

The proposed new rules and amendments, for the most part, affect casino licensees and casino employees, none of which is a "small business" within the meaning of the Regulatory Flexibility Act, N.J.S.A. 52:14B-16, et seq. However, the proposed amendment to N.J.A.C. 19:44-8.3 establishes a minimum requirement of hours of training that must be given by gaming schools in training for dealing poker. Some of these schools may be small businesses. However, no need for differing standards based on business size are being offered because the requirements are not so burdensome and are necessary for uniform performance of those being trained.

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

19:44-8.3 Minimum hours

(a) Any training or instruction designed to prepare a student for employment as a dealer shall satisfy the following minimum requirements:

1. For a student being trained to deal a first game the following minimum hours of training and instruction shall be required:

i.-iv. (No change.)

v. 270 hours to deal pai gow; [and]

vi. 180 hours to deal pai gow poker[.] ; **and**

vii. 140 hours to deal poker.

2. For a student being trained to deal a second or subsequent game the following minimum hours of training and instruction shall be required:

i. For a student certified to deal blackjack:

(1)-(4) (No change.)

(5) 210 hours to deal pai gow; [and]

(6) 95 hours to deal pai gow poker[.]; **and**

(7) 80 hours to deal poker.

ii. For a student certified to deal roulette:

(1)-(4) (No change.)

(5) 110 hours to deal pai gow poker[.]; **and**

(6) 95 hours to deal poker.

iii. For a student [trained] **certified** to deal craps:

(1)-(3) (No change.)

(4) 210 hours to deal pai gow; [and]

(5) 110 hours to deal pai gow poker[.]; **and**

(6) 95 hours to deal poker.

iv. For a student certified to deal baccarat:

(1)-(5) (No change.)

(6) Ten hours to deal pai gow; [and]

(7) 95 hours to deal pai gow poker[.]; **and**

(8) 80 hours to deal poker.

v. (No change.)
(b) (No change.)

19:45-1.1 Definitions

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

....

"Casino supervisor" means a person employed in the operation of a casino or of the authorized games in a casino simulcasting facility in a supervisory capacity or empowered to make discretionary decisions which regulate casino operations, including but not limited to, [boxmen, floormen,] **boxpersons, floorpersons,** pit bosses, **poker shift supervisors,** casino shift managers, the assistant casino manager, and the casino manager.

....

"Master Game Report (Stiff Sheet)" means a record of the computation of the win or loss **or, for the game of poker, the poker revenue,** for each gaming table, each game, and each shift.

"Poker revenue" means the total amount of rake charged to patrons at the poker tables pursuant to N.J.A.C. 19:47-14.14. The poker revenue is determined by adding the amount of cash, coupons, the amount recorded on the Closer, the totals of amounts recorded on the Credits and issuance copies of Counter Checks removed from a drop box, and subtracting the amount on the Opener and the total of amounts recorded on Fills removed from a drop box.

....

"Rake" is defined in N.J.A.C. 19:47-14.1.

....

"Table game win or loss" means the amount of gaming chips and plaques and cash won from patrons at gaming tables **other than poker tables** less the amount of gaming chips, plaques and coins won by patrons at gaming tables **other than poker tables.** The table game win or loss is determined by adding the amount of cash, coupons, the amount recorded on the Closer, the totals of amounts recorded on the Credits, and issuance copies of Counter Checks removed from a drop box, and subtracting the amount recorded on the Opener and the total of amounts recorded on Fills removed from a drop box.

....

19:45-1.2 Accounting records

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

(c) The detailed, supporting, and subsidiary records shall include, but not necessarily be limited to:

1. (No change.)

2. Statistical game records to reflect drop and win amounts **or, for the game of poker, the poker revenue,** by table for each game, by each shift.

3.-10. (No change.)

19:45-1.11 Casino licensee's organization

(a) (No change.)

(b) In addition to satisfying the requirements of (a) above, each casino licensee's system of internal controls shall include, at a minimum, the following departments and supervisory positions. Each of these departments and supervisors shall be required to cooperate with, yet perform independently of, all other departments and supervisors. Mandatory departments are as follows:

1.-3. (No change.)

4. A table games department supervised by a casino key employee holding a license endorsed with the position of casino manager. The table games department may be responsible for the operation and conduct of the simulcast counter and shall be responsible for the operation and conduct of the following games:

i.-viii. (No change.)

ix. Pai Gow; [and]

x. Pai Gow Poker[.] ; **and**

xi. Poker, except as otherwise authorized by (g) below.

5.-10. (No change.)

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

(g) Notwithstanding the provisions of (b)4 above and N.J.A.C. 19:45-1.12, a casino licensee may operate and conduct the game of poker separately from the other table games. If a casino licensee elects to operate the game of poker as its own unit, the operation and conduct of poker shall be the responsibility of a casino key employee holding a license endorsement approved by the Commission. The supervisor of the poker department shall report directly to the vice president of casino operations or an equivalent position.

19:45-1.12 Personnel assigned to the operation and conduct of gaming and slot machines

(a) (No change.)

(b) The following personnel shall be used to operate the table games in an establishment:

1. (No change.)

2. Dealers shall be the persons assigned to each craps, baccarat, blackjack, roulette, minibaccarat, red dog, sic bo, big six, pai gow [and] , pai gow poker **and poker** table to directly operate and conduct the game.

3.-4. (No change.)

5. Floorperson shall be the second level supervisor assigned the responsibility for directly supervising the operation and conduct of a craps game, and the first level supervisor assigned the responsibility for directly supervising the operation and conduct of a baccarat, blackjack, roulette, sic bo, minibaccarat, red dog, pai gow, pai gow poker [or] , big six **or poker** game.

6. (No change.)

7. Poker shift supervisor shall be licensed as a casino key employee and shall be the supervisor assigned and present during a shift with the responsibility for directly supervising all activities related to the operation and conduct of poker. Nothing in this section shall preclude the poker shift supervisor from having other responsibilities; provided, however, that in such case there is no incompatible function and the additional responsibilities do not impede the poker shift supervisor from performing his or her supervisory responsibilities for the game of poker.

Recodify existing 7.-8. as **8.-9.** (No change in text.)

(c) Each casino licensee shall maintain the following standard levels of staffing:

1. (No change.)

2. One dealer shall be assigned to each blackjack, roulette, minibaccarat, sic bo, red dog, pai gow, pai gow poker [and] , big six **and poker** table;

3.-4. (No change.)

5. One floorperson shall supervise:

i. (No change.)

ii. Not more than two craps tables or pai gow poker tables or a combination of one pai gow poker table and one other authorized gaming table excluding craps; [or]

iii. Not more than one baccarat or pai gow table[.] ; **or**

iv. Not more than 12 poker tables.

6. (No change.)

(d) Notwithstanding the provisions of (c)5 above, if a casino licensee has six or less poker tables opened for gaming activity, no floorperson shall be required and the tables may be supervised by the poker shift supervisor. Once the casino licensee has opened seven or more poker tables for gaming activity, in addition to the poker shift supervisor required by (b)7 above, one floorperson shall be assigned pursuant to the provisions of (c)5iv above.

Recodify existing (d)-(i) as **(e)-(j)** (No change in text.)

19:45-1.20 Table inventories

(a) Whenever a gaming table in a casino or casino simulcasting facility is opened for gaming, operations shall commence with an amount of gaming chips, coins and plaques to be known as the "table inventory" and no casino licensee shall cause or permit gaming chips, coins or plaques to be added to, or removed from, such table inventory during the gaming day except:

1.-3. (No change.)

4. In conformity with the Fill and Credit Slip procedures described in N.J.A.C. 19:45-1.22 and 1.23; [and]

5. In conformity with N.J.A.C. 19:47-3.3 and 7.3 coin may be used for the purpose of marking baccarat vigorish[.] ; **and**

6. In conformity with N.J.A.C. 19:47-14.14, the rake collected from patrons playing the game of poker shall always be placed in the table inventory container.

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

19:45-1.33 Procedure for opening, counting and recording contents of drop boxes and slot cash storage boxes

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

(h) Procedures and requirements for conducting the count shall be the following:

1.-7. (No change.)

8. As the contents of each drop box are counted, one count team member shall record on a Master Game Report or supporting documents, by game, table number, and shift, the following information:

i.-xiv. (No change.)

xv. The **table game** win or loss **or, for poker, the poker revenue.**

9.-13. (No change.)

(i)-(j) (No change.)

19:46-1.13E Poker table; physical characteristics

(a) Poker shall be played on a table which is oval in shape and which has places for up to 11 players and a dealer. The design of each poker table shall be approved by the Commission after consultation with the Division. Each poker table shall be designed and constructed to contain any feature the Commission may require to maintain the integrity of the game. The cloth or nylon covering for the poker table shall have contained thereon the name or trade name of the casino licensee in a manner approved by the Commission.

(b) Each poker layout shall be approved by the Commission and shall contain, at a minimum, a designated holding area located to the right of the dealer for the collection of the rake prior to final placement of the rake in the table inventory container.

(c) Each poker table shall have a designated area, in a location approved by the Commission, for the placement of at least one deck of cards. This area may be part of the table inventory container.

(d) Each poker table shall have a drop box and a tip box attached to it on the same side of the gaming table as, but on opposite sides of, the dealer in a location approved by the Commission.

19:46-1.17 Cards; physical characteristics

(a) Cards used to play blackjack, baccarat, minibaccarat, pai gow poker, pokette [and] , red dog **and poker** shall be in decks of 52 cards each with each card identical in size and shape to every other card in such deck. Notwithstanding the foregoing, decks of cards used to play pai gow poker shall include one additional card, a joker, which shall be identical in size and shape to every other card in such deck.

(b)-(e) (No change.)

(f) The design to be placed on the backs of cards used by casino licensees shall **contain the name or trade name of the casino licensee and shall** be submitted to the [chairman] **Commission** for approval prior to use of such cards in gaming activity.

(g) Each deck of cards shall be packaged separately and shall contain a seal affixed to the opening of such package. **Notwithstanding this requirement, cards used at poker may be packaged and sealed in sets containing two decks of cards in accordance with the provisions of N.J.A.C. 19:47-14.2.**

(h) (No change.)

(i) In addition to satisfying the requirements of this section, the cards used by a casino licensee at poker must:

1. Be visually distinguishable from the cards used by that casino licensee to play any other table game; and

2. Be made of plastic.

(j) Each casino licensee which elects to offer the game of poker shall be required to have and use on a daily basis at least six visually distinguishable card backings for the cards to be used at the game of poker. These card backings may be distinguished, without limitation, by different logos, different colors or different design patterns.

19:46-1.18 Cards; receipt, storage, inspections, and removal from use

(a) When decks of cards are received for use in the casino or casino simulcasting facility from the manufacturer or distributor thereof, they shall be placed for storage in a locked cabinet in the cashiers' cage or within a primary or secondary storage area by at least two individuals, one of whom shall be from the casino department and the other from the casino security department. The cabinet or primary storage area shall be located in the cashiers' cage or in another secure place, the location and physical characteristics of which shall be approved by the Commission. Secondary storage areas shall be used for the storage of surplus cards. Cards maintained in secondary storage areas shall not be distributed to gaming pits or tables for use in gaming until the cards have been moved to a primary storage area. All secondary storage areas shall be located in secure areas, the location and physical characteristics of which shall be approved by the Commission. **Nothing herein shall preclude a casino licensee from having a separate storage area for the cards to be used at the game of poker; provided, however, the location and physical characteristics of which shall be approved by the Commission.**

(b) All primary [and] , secondary **and poker** storage areas, other than the cashiers' cage, shall have two separate locks. The casino security department shall maintain one key and the casino department or cashiers' cage shall maintain the other key; provided, however, that no person employed by the casino department below the assistant shift manager in the organizational hierarchy shall have access to the casino department key **for the primary and secondary storage areas and no person below the poker shift supervisor in the organizational hierarchy shall have access to the casino department key to the poker storage area.** Cards stored in a cabinet within the cashiers' cage shall be secured by a lock, the key to which shall be maintained by an assistant shift manager or casino supervisor thereof.

(c) Immediately prior to the commencement of each gaming day and at other times as may be necessary, the assistant shift manager or casino supervisor thereof, in the presence of a casino security officer, shall remove the appropriate number of decks of cards for that gaming day from a primary storage area, **and if applicable, the poker shift supervisor or supervisor thereof, in the presence of a casino security officer, shall remove the appropriate number of decks of cards to be used at poker for that gaming day from the poker storage area.**

(d) [The] **If removed from the primary storage area, the** assistant shift manager or casino supervisor thereof and the casino security officer who removed the decks shall distribute sufficient decks to **the poker shift supervisor and to** the pit boss **who shall then distribute the decks to the dealer at each table. If removed from the poker storage area, the decks shall be removed by the poker shift supervisor, in the presence of the casino security officer, and transported to the poker pit stand. Subsequently, the poker shift supervisor shall distribute the decks to the dealer at each poker table. The distribution of the decks to the poker tables shall comply with the provisions of N.J.A.C. 19:47-14.2.**

1. [The pit boss shall then distribute the decks to the dealer at each table, and shall place] **The poker shift supervisor or pit boss shall place** extra decks for card reserve [in] **into** the pit stand.

2. Prior to distributing the decks to each table, the poker shift supervisor shall examine each package to determine if any replacement cards are necessary pursuant to (n)5 below. If needed, the poker shift supervisor shall place the appropriate replacement cards into the deck from the cards held in reserve at the pit stand. Upon insertion of the replacement cards into the deck, the poker shift supervisor shall re-examine the front of each card and the back of each card to ensure a consistent shading pattern and to ensure that the condition of the deck with the inclusion of the replacement cards has sufficient quality in order to maintain the integrity of gaming at poker. If the integrity of gaming at poker would in any way be compromised by the use of the deck with the replacement cards, the entire deck of cards shall be placed in a sealed envelope or container, identified by table number, date and time and shall

be signed by the poker shift supervisor. The poker shift supervisor shall maintain the envelope or container in a secure place within the pit stand until collection by a casino security officer.

[2.]**3.** Cards in the pit stand shall be placed in a locked compartment, keys to which shall be in the possession of **the poker shift supervisor or supervisor thereof or** the pit boss or casino supervisor thereof.

(e) With the exception of cards used to game at pokette, which are governed by the requirements of N.J.A.C. 19:47-12.3, prior to their use at a table, all decks shall be inspected by the dealer, and the inspection verified by a floorperson. Card inspection at the gaming table shall require each pack to be used to be sorted into sequence and into suit to assure that all cards are in the deck. The dealer shall also check the back of each card to assure that it is not flawed, scratched or marked in any way.

1. If, after checking the cards, the dealer finds that a card is unsuitable for use, a **poker shift supervisor or** casino supervisor shall bring a substitute card from the card reserve in the pit stand.

2. The unsuitable card shall be placed in a sealed envelope or container, identified by table number, date, and time and shall be signed by the dealer and [casino supervisor] **floorperson assigned to that table.** The **poker shift supervisor or** casino supervisor shall maintain the envelope or container in a secure place within the pit until collection by a casino security officer.

(f) (No change.)

(g) Any cards which have been opened and placed on a gaming table shall be changed at least every 24 hours. In addition:

1. (No change.)

2. Cards opened for use on a pai gow poker table and dealt from a dealing shoe shall be changed at least every eight hours; [and]

3. Cards opened for use on a pai gow poker table and dealt from the dealer's hand shall be changed at least every four hours[.]**; and**

4. Cards opened for use on a poker table shall be changed at least every four hours.

(h) Cards damaged during course of play shall be replaced by the dealer who shall request a **floorperson or supervisor thereof for the game of poker or** casino supervisor **for all other games** to bring cards in substitution from the pit stand.

1. The damaged cards shall be placed in a sealed envelope, identified by table number, date and time and shall be signed by the dealer and [casino supervisor] **the individual who brought the replacement card to the table.**

2. The **poker shift supervisor or** casino supervisor shall maintain the envelopes or containers in a secure place within the pit until collection by a casino security officer.

(i) At the end of each gaming day or, in the alternative, at least once each gaming day at the same time each day, as designated by the casino licensee and approved by the Commission, and at such other times as may be necessary, the **floorperson or supervisor thereof for the game of poker or** casino supervisor **for all other games** shall collect all used cards.

1. These cards shall be placed in a sealed envelope or container. A label shall be attached to each envelope or container which shall identify the table number, date and time and shall be signed by the dealer and [casino supervisor] **floorperson assigned to the table.**

2. The **poker shift supervisor or** casino supervisor shall maintain the envelopes or containers in a secure place within the pit until collection by a casino security officer.

(j) (No change.)

(k) All extra decks in card reserve with broken seals shall be placed in a sealed envelope or container, with a label attached to each envelope or container which identifies the date and time and is signed by **the floorperson or supervisor thereof for poker and** the pit boss **for all other games.**

(l) (No change.)

(m) At the end of each gaming day or, in the alternative, at least once each gaming day at the same time each day, as designated by the casino licensee and approved by the Commission, and at such other times as may be necessary, an assistant shift manager or casino supervisor thereof may collect all extra decks in card reserve. **If the casino maintains a separate storage area for poker cards, a poker shift supervisor or supervisor thereof may collect all extra decks in card reserve for the game of poker.** If collected, all sealed decks shall either be cancelled or destroyed or returned to the storage area.

(n) When the envelopes or containers of used cards and reserve cards with broken seals are returned to the casino security department, they shall be inspected for tampering, marks, alterations, missing or additional cards or anything that might indicate unfair play.

1. (No change.)

2. The casino licensee shall also inspect:

i.-ii. (No change.)

iii. All cards used for pai gow poker; [and]

iv. All cards used for pokette, which must be inspected by sorting the cards sequentially by suit[.]**; and**

v. All cards used for poker.

3. The procedures for inspecting all decks required to be inspected under this subsection, with the exception of pokette cards, shall, at a minimum, include:

i. (No change.)

ii. The inspection of the backs with an ultraviolet light; [and]

iii. The inspection of the sides of the cards for crimps, bends, cuts and shaving[.]**; and**

iv. The inspection of the front and back of all plastic cards for consistent shading and coloring.

4. If, during the inspection procedures required in (n)3 above, one or more plastic cards in a deck are determined to be unsuitable for continued use, those cards shall be placed in a sealed envelope or container and a three-part card discrepancy report shall be completed in accordance with (n)9 below.

5. Upon completion of the inspection procedures required in (n)3 above, each deck of plastic cards which is determined suitable for continued use shall be placed in sequential order, repackaged and returned to the primary or poker storage area for subsequent use. If a deck has any missing cards pursuant to (n)4 above, the individual who repackages the cards shall indicate the need for the appropriate replacement card(s) in a manner approved by the Commission.

6. The casino licensee shall develop internal control procedures for returning the repackaged cards to the storage area.

Recodify existing 4.-6. as **7.-9.** (No change in text.)

(o) (No change.)

(p) Where cards in an envelope or container are inspected and found to be without any indication of tampering, marks, alterations, missing or additional cards or anything that might indicate unfair play, those cards **with the exception of plastic cards used at poker which are of sufficient quality for reuse,** shall within 48 hours of collection be destroyed or cancelled. Once released by the Commission and Division, the cards submitted as evidence shall immediately be destroyed or cancelled.

1.-3. (No change.)

(q) If a deck of plastic cards has been reused 12 or more times and the deck has been determined to be suitable for reuse by the individual performing the inspection procedures required by (n)3 above, before that deck may be reused at a poker table, the deck must be inspected by a poker shift supervisor. A satisfactory inspection shall be documented by the poker shift supervisor. If the poker shift supervisor determines that the deck may not be reused, the deck shall be placed in a sealed envelope or container, with a label attached which identifies the date and time and shall be signed by the poker shift supervisor. At the end of the gaming day or at such other times as may be necessary, said envelope or container shall be collected by a casino security officer and be returned to the casino security department for destruction or cancellation pursuant to (p) above.

SUBCHAPTER 14. POKER

19:47-14.1 Definitions

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

"All-in" means a player who has no funds remaining on the poker table to continue participating in a round of play, but who still retains the right to contend for that portion of the pot in which the player has already placed a bet.

"Ante" means a predetermined wager which each player is required to make in some poker games prior to any cards being dealt in order to participate in the round of play.

"Bet" means an action by which a player places gaming chips or gaming plaques into the pot on any betting round.

"Betting round" means a complete wagering cycle in a hand of poker after all players have called or folded.

"Blind bet" means a mandatory wager in some poker games which only players sitting in specific betting positions at the poker table shall be required to place prior to looking at any cards.

"Burn card" means a card taken from the top of a deck which is discarded face down, which is not in play and the identity of which remains unknown.

"Button" means an object which is moved clockwise around the table to denote an imaginary dealer and thereby determine the betting and dealing sequence.

"Call" means a wager made in an amount equal to the immediately preceding wager.

"Check" means that a player waives the right to initiate the betting in a betting round but retains the right to act if another player initiates the betting.

"Common card" means, in any game of stud poker, a card which is dealt face upward if there are insufficient cards left in the deck to deal each player a card individually and which can be used by all players at the showdown.

"Community cards" means cards which are dealt face upward and which can be used by all players to form their best hand.

"Cover card" means a yellow or green plastic card used during the cut process and then to conceal the bottom card of the deck.

"Draw" means, in any game of draw poker, an exchange by a player of cards held in his or her hand, after the initial round of betting, for an equal number of new cards from the deck.

"Fold" means the withdrawal of a player from a round of play by discarding his or her hand of cards during a betting round and refusing to equal a wager.

"Forced bet" means a wager which is required to start the wagering on the first betting round.

"Fouled hand" means a hand that either has an improper number of cards or has come into contact with other cards in such a way as to render it impossible to determine accurately which cards are contained in the hand.

"High" means a game of poker in which the highest hand wins the pot.

"High-low split" means a form of poker in which there is a winner for both the highest and lowest ranking hands.

"High-low split eight or better" means a version of high-low split poker in which a winning low hand must satisfy an eligibility requirement.

"Hole cards" means any cards dealt to a player face down.

"Low" means a game of poker in which the lowest hand wins the pot.

"Opening bet" means the first bet in a round of play.

"Pot" means the amount which is awarded to the winning player or players at the conclusion of a round of play and is equal to the total amount anted and bet by the players during the round of play, less any rake extracted pursuant to N.J.A.C. 19:47-14.14.

"Protected hand" means a hand of cards which the player is physically holding or has placed under one or more gaming chips.

"Raise" means a bet in an amount greater than the immediately preceding bet in that betting round.

"Rake" means the amount of gaming chips, gaming plaques or coin collected by the dealer as poker revenue in accordance with 19:47-14.14.

"Round of play" means, for any game of poker, the process by which cards are dealt, bets are placed and the winner of the pot is determined and paid in accordance with the rules of this subchapter.

"Showdown" means the action of revealing the hands of each player in order to determine who shall win the pot.

"Side pot" means a separate pot formed when one or more players are all-in.

"Stub" means the remaining portion of the deck after all cards in a round of play have been dealt.

"Suit" means one of the four categories of cards, that is, diamond, spade, club or heart.

"Up-cards" means, in a game of stud poker, any card dealt to a player face up.

19:47-14.2 Cards; number of decks

(a) Poker shall be played with one deck of cards with backs of the same color and design and one additional solid yellow or green cover card. Two decks of cards shall be maintained for use at each poker table at all times. Each deck maintained at the poker table shall be visually distinguishable in some manner from the other deck. While one deck is in use, the other deck shall be stored in a designated area pursuant to N.J.A.C. 19:46-1.13E.

(b) Each deck of cards maintained at the poker table may be rotated in and out of play; provided, however, that no deck of cards shall be used at the table for more than two hours without the dealer or floorperson placing the 52 cards into suit and sequence. All decks opened for use on a poker table shall be changed at least every four hours.

(c) Each gaming day, decks of cards with distinguishable card backings as required by N.J.A.C. 19:46-1.17(j) shall be distributed among all open poker tables in a manner determined by the poker shift supervisor or supervisor thereof. The distribution of decks among tables shall consider, at a minimum, the table limits, the location of the table and the type of poker available at each table and shall be intended to ensure the integrity of gaming at poker.

19:47-14.3 Poker rankings

(a) The rank of the cards used in all types of poker other than low poker, for the determination of winning hands, in order of highest to lowest rank, shall be: ace, king, queen, jack, 10, 9, 8, 7, 6, 5, 4, 3 and 2. All suits shall be considered equal in rank. For purposes of completing a "straight flush" or a "straight," an ace may be combined with a 2, 3, 4 and 5.

(b) The permissible high poker hands as determined by the holding of a full five card hand, in order of highest to lowest rank, shall be:

1. "Royal flush" is a hand consisting of an ace, king, queen, jack and 10 of the same suit;

2. "Straight flush" is a hand consisting of five cards of the same suit in consecutive ranking, with king, queen, jack, 10 and 9 being the highest ranking straight flush and ace, 2, 3, 4 and 5 being the lowest ranking straight flush;

3. "Four-of-a-kind" is a hand consisting of four cards of the same rank regardless of suit, with four aces being the highest ranking four-of-a-kind and four twos being the lowest ranking four-of-a-kind;

4. "Full house" is a hand consisting of "three-of-a-kind" and a "pair," with three aces and two kings being the highest ranking full house and three 2s and two 3s being the lowest ranking full house;

5. "Flush" is a hand consisting of five cards of the same suit;

6. "Straight" is a hand consisting of five cards of consecutive rank, regardless of suit, with an ace, king, queen, jack and 10 being the highest ranking straight and an ace, 2, 3, 4 and 5 being the lowest ranking straight; provided, however, that an ace may not be combined with any other sequence of cards for purposes of determining a winning hand (for example, queen, king, ace, 2, 3);

7. "Three-of-a-kind" is a hand consisting of three cards of the same rank regardless of suit, with three aces being the highest ranking three-of-a-kind and three 2s being the lowest ranking three-of-a-kind;

8. "Two pairs" is a hand consisting of two "pairs," with two aces and two kings being the highest ranking two pair and two 3s and two 2s being the lowest ranking two pair; and

9. "One pair" is a hand consisting of two cards of the same rank, regardless of suit, with two aces being the highest ranking pair and two 2s being the lowest ranking pair.

(c) When comparing two hands which are of identical poker hand rank pursuant to the provisions of this section, or which contain none of the poker hands authorized herein, the hand which contains the highest ranking card as provided in (a) above or (d) below, whichever is applicable, which is not contained in the other hand shall be considered the higher ranking hand. If the hands are of identical rank after the application of this subsection, the hands shall be considered tied and the pot shall be equally divided among the players with the tied hands.

(d) The rank of the cards used in low poker, for the determination of winning hands, in order of highest to lowest rank, shall be: ace, 2, 3, 4, 5, 6, 7, 8, 9, 10, jack, queen and king. All suits shall be considered equal in rank.

(e) The ranking of a low poker hand as determined by the holding of a full five card hand shall be the opposite of the rankings for a high poker hand as set forth in (b) above; provided, however, that straights and flushes shall not be considered for purposes of determining a winning hand at low poker.

(f) In all games of poker, a five card hand shall be ranked according to the cards actually contained therein and not by the player's opinion or statement of its value.

19:47-14.4 Opening the table for gaming

(a) After receiving two decks of cards at the table, in accordance with N.J.A.C. 19:46-1.18 and N.J.A.C. 19:47-14.2, the dealer shall sort and inspect the cards and the floorperson or supervisor thereof shall verify the inspection as required by N.J.A.C. 19:46-1.18.

(b) Following the inspection of the cards by the dealer and the verification by the floorperson or supervisor thereof, the cards shall be spread out face up on the table for visual inspection by the first two players to be seated at the table. The cards shall be spread out according to suit and in sequence.

(c) Immediately prior to the commencement of play and not before a minimum of two players are afforded an opportunity to visually inspect the cards from each deck at the table, each deck shall be separately turned face down on the table, mixed thoroughly by a "washing" or "chemmy shuffle" of the cards and stacked. Each deck of cards shall be shuffled in accordance with N.J.A.C. 19:47-14.5. One of the decks shall be cut in accordance with N.J.A.C. 19:47-14.5 and the other deck shall be maintained pursuant to N.J.A.C. 19:46-1.13E for subsequent use pursuant to N.J.A.C. 19:47-14.2. In the alternative, a casino licensee may wash, shuffle and cut only the deck intended for immediate use and maintain the other deck pursuant to N.J.A.C. 19:46-1.13E. Upon rotation pursuant to N.J.A.C. 19:47-14.2, the other deck shall be washed, shuffled and cut in accordance with the requirements herein and N.J.A.C. 19:47-14.5.

19:47-14.5 Shuffle and cut of the cards

(a) Immediately prior to commencement of play and after the completion of each round of play, the dealer shall shuffle all cards so that they are randomly intermixed.

(b) After the cards have been shuffled and placed on the table in front of the dealer, the dealer shall, using one hand, cut the deck by taking a stack of at least 10 cards from the top of the deck and place them on top of the cover card. The dealer shall then place the cards remaining in the deck on top of the stack of cards which were cut. The cover card shall always be placed in front of the deck of cards prior to the cut of the cards by the dealer.

(c) If there is no gaming activity at the poker table, each deck of cards at the table shall be spread out on the table either face up or face down. If the cards are spread face down, they shall be turned face up once at least two players have arrived at the table. After the first two players are afforded an opportunity to visually inspect both of the decks, the procedures required by N.J.A.C. 19:47-14.4(c) shall be completed for one deck and the remaining deck shall be maintained pursuant to N.J.A.C. 19:46-1.13E.

19:47-14.6 Poker overview; general dealing procedures for all types of poker

(a) Poker shall be conducted in a separate and distinct area of the casino floor or the casino simulcasting facility approved by the Commission.

(b) Poker shall be played by a minimum of two players and a maximum of 11 players. Poker shall be dealt by a dealer at a poker table. For all types of poker set forth in N.J.A.C. 19:47-14.8, the dealer shall not participate in the playing or outcome of the game in any way except as otherwise authorized in this subchapter.

(c) A player shall wager on the cards that the player holds in his or her hand. All bets by a player shall be placed by the dealer in the designated area of the table known as the pot. A player may be required to ante or place a blind bet prior to the receipt of any cards. After each round of cards is dealt, a betting round shall be conducted. Each player shall decide whether to continue contending for the pot by calling or raising the bet of the other players.

(d) The object of the game shall be for a player to win the pot either by making a bet that no other player elects to call, or by having the hand of highest rank at the showdown in accordance with the provisions of N.J.A.C. 19:47-14.3. If two or more players are still in contention for a pot after all cards have been dealt and the final betting round has been completed, there shall be a showdown among the players still in contention to determine which player has the hand of highest rank. Based on the type of poker being played, the winning player may be the player who holds the highest ranking high poker hand, the highest ranking low poker hand or both the highest ranking high and low poker hands.

(e) The following procedures shall be utilized by the dealer when dealing the game of poker:

1. The dealer shall choose the hand in which he or she will hold the cards. Once the dealer has chosen a hand, the dealer must use that hand whenever holding the cards. The cards held by the dealer shall, at all times, be held in front of the dealer, as level as possible and over the poker table. If during a round of play the deck must be set down to handle a transaction, the dealer shall place a marker button on top of the deck until the transaction has been completed.

2. The dealer shall verbalize or physically indicate the action which is occurring at the poker table with regard to the operation of play and instruct each player as to his or her various turns to act and options.

3. All burn cards required by this subchapter shall be kept separate from the pile of discarded cards.

4. The dealer shall be required to count the stub, at least once every 15 minutes, in order to determine that the correct number of cards are present. If this count reveals an incorrect number of cards, the deck shall be removed from the table in accordance with N.J.A.C. 19:46-1.18(n).

5. At the completion of a round of play, the dealer shall award the pot to the winning player or players after a showdown or to the last remaining player if all other players have folded. Prior to pushing the pot to the winner and collecting the winning hand, the dealer shall first collect the cards from all losing players.

6. All side pots shall be awarded before the dealer awards the pot in the center of the poker table.

7. All discarded hands shall be counted by the dealer to determine that the proper number of cards have been returned.

8. The dealer shall collect the rake in accordance with N.J.A.C. 19:47-14.14.

19:47-14.7 Wagers

(a) Only players who are seated at the poker table may be permitted to receive cards and participate in each betting round.

(b) Depending upon the particular type of poker game being dealt, a player may be required to:

1. Place an ante prior to receiving any cards;

2. Place a predetermined blind bet prior to receiving any cards; or

3. Place a forced bet to initiate a betting round based on that player's up-card.

(c) A player may only participate in the wagering during a round of play with the gaming chips, gaming plaques or currency which were already on the poker table in front of the player when the round of play commenced.

1. A player may only add to his or her gaming chips, gaming plaques or currency between rounds of play and may not remove

any of his or her gaming chips, gaming plaques or currency from the poker table at any time during a round of play.

2. Currency which is available for use by a player pursuant to the requirements of this section may be utilized to initiate, call or raise a bet if such currency is expeditiously converted into gaming chips or gaming plaques by the dealer in accordance with the regulations governing the acceptance and conversion of such instruments.

3. In order to participate in a round of play, a player shall be required to have an amount of gaming chips, gaming plaques or currency available on the poker table prior to the start of the round of play which is sufficient to make any bet required by (b) above and at least one bet at the posted table minimum.

4. A player who satisfies the requirements of (c)3 above but who depletes his or her funds on the poker table prior to the completion of a round of play shall be deemed to be "all-in."

i. An "all-in" player shall retain financial interest in the outcome of the round of play, but shall only be eligible to win the amount of the pot to which he or she contributed;

ii. An "all-in" player shall continue to receive any cards to which he or she would normally be entitled; and

iii. Betting shall continue unimpeded among the other players by generating a separate secondary pot which only those active players shall be eligible to win.

(d) A verbal statement of "fold," "check," "call," "raise," or an announcement of a specific size wager by a player, assuming it is within the rules of the poker game being played and the minimum and maximum wager limits for the poker table, shall be binding on the player if it is the player's turn to act.

(e) A player who announces a bet or raise of a certain amount but places a different amount of gaming chips or gaming plaques in the pot shall be required to correct his or her bet or raise to the announced amount in accordance with the instructions of the dealer.

(f) A player shall be considered to have placed a bet if the player:

1. Pushes gaming chips or gaming plaques forward to indicate the intent of placing a bet;

2. Releases gaming chips or gaming plaques into the pot; or

3. Releases gaming chips or gaming plaques at a sufficient distance from the player and towards the pot to make it obvious that it is intended as a bet.

(g) A player shall not be permitted to make a bet and thereafter attempt to increase the amount of that bet.

1. If the player wishes to add additional gaming chips or gaming plaques to the bet, the player must indicate at the time the bet is being made that the bet is not yet complete.

2. A player who puts the proper amount of gaming chips or gaming plaques into the pot to call a bet, without indicating his or her intention to raise, may not thereafter raise the previous bet.

3. Subject to the posted table wagering limits, a player who announces "raise" may continue to bet gaming chips or gaming plaques until both of his or her hands come to rest in front of the pot.

(h) It shall be the dealer's responsibility to ensure that no player touches any of the gaming chips or gaming plaques once placed into the pot.

(i) Unless a raise has been verbally announced by that player, a player who puts into the pot a single gaming chip that is larger than required is assumed to have only called the preceding bet and to be awaiting change from the dealer.

(j) Unless specifically posted to the contrary, a player shall be permitted to raise after he or she has previously checked in a betting round.

19:47-14.8 Types of permissible poker games

(a) A casino licensee may offer the following types of poker games:

1. Seven-card stud (high, high-low split and high-low split 8 or better);

2. Hold 'em (high);

3. Omaha (high, high-low split 8 or better);

4. Five-card draw (high and low); and

5. Five-card stud (high).

(b) No casino licensee shall offer or permit the playing of any poker game in its casino room or casino simulcasting facility which is not authorized by this subchapter.

19:47-14.9 Seven-card stud poker; procedures for dealing of cards; completion of each round of play

(a) Each casino licensee shall be required to observe the procedures set forth in this section for each game of seven-card stud high, seven-card stud high-low split or seven-card stud high-low split 8 or better poker offered in its casino room or casino simulcasting facility.

(b) Each poker table shall be restricted to a maximum of eight players as determined by the casino licensee. Each player who elects to participate in a round of play may be required to place an ante. The rule governing the placement of an ante and the amount of the ante, if any, shall be posted on a sign at each poker table in accordance with N.J.A.C. 19:47-8.3.

(c) Starting with the first player to the left of the dealer and continuing in a clockwise rotation around the poker table, the dealer shall deal two rounds of cards face down and one round of cards face up to each player.

(d) Once each player has received three cards in accordance with (c) above, the first betting round shall commence by comparing the up-card of each player. For the purposes of this subsection only, in the event that two or more up-cards are of the same rank, the up-cards shall then be ranked by suit, with the highest to lowest ranked suits in order as follows: spades, hearts, diamonds, clubs. Betting shall be commenced by:

1. For high poker, the player with the lowest ranked up-card;

2. For high-low-split poker, the player with the highest ranked up-card. For this purpose, an ace shall be considered ranked below a 2; and

3. For high-low split eight or better poker, the player with the lowest ranked up-card. For this purpose, an ace shall be considered the highest ranking card.

(e) Following the placement of the forced bet required by (d) above, each subsequent player may, proceeding in a clockwise rotation from the player who placed the forced bet, fold, call or raise the bet. After the last player has responded to the most recent bet, the betting round shall be considered complete.

(f) Upon completion of the first betting round, the dealer shall burn the top card of the deck and then, starting with the first remaining player to his or her left, deal a fourth card face up to each player who has not folded. The next betting round shall commence as follows:

1. The player with the highest ranking poker hand showing shall be required to bet or check; or

2. If the highest ranking poker hand showing is held by two or more players, the player closest to the left of the dealer shall be required to bet or check.

(g) Following the initial bet or check required by (f) above, each subsequent player, proceeding in a clockwise rotation, may fold, call, raise or, if the preceding players have not made a bet, check. Each player may check until a bet has been made. Once a bet has been made, the next player in clockwise rotation may fold, call or raise. After the last player has responded to the most recent bet, the betting round shall be considered complete.

(h) The dealer shall then deal two additional rounds of cards face up and one round of cards face down to each player who has not folded, with each such round followed by a betting round conducted in accordance with the provisions of (f) and (g) above. Prior to each round of cards being dealt, the dealer shall burn the top card of the deck. If insufficient cards remain in the deck to give each remaining player a seventh and final card, the top card of the deck shall be burned and a common card shall be dealt face up in the center of the table.

(i) If more than one player remains in the round of play after the final betting round has been completed, a showdown shall be used to determine the winner of the pot. Each player remaining in the game shall form a five card poker hand from the seven cards which he or she was dealt. This five card hand shall constitute the

poker hand of that player at the showdown. The winner of the pot shall be:

1. In high poker, the player with the highest ranking five card high hand;

2. In high-low split poker or high-low split 8 or better poker, the player with the highest ranking five card high hand and the player with the highest ranking five card low poker hand, subject to the provisions of (j) below, who shall divide the pot equally unless the pot cannot be so divided, in which case the excess amount, which shall not exceed $1.00, shall be given to the player with the highest ranking high hand. If a tie exists between the players with the high hands, the excess shall be given to the player with the highest ranking high poker card by suit. If a tie exists between the players with the low hands, the excess shall be given to the player with the lowest ranking low poker card by suit. For purposes of this subsection, the cards shall be ranked by suit with the highest to lowest ranked suit in order as follows: spades, hearts, diamonds and clubs.

(j) In seven-card stud high-low split 8 or better poker, a winning low hand may not contain any pairs or a 9, 10, jack, queen or king. This defines the qualifying clause known as "8 or better." In the event that none of the hands of the remaining players satisfies this requirement, the entire pot shall be awarded to the player with the highest ranking high hand.

(k) In seven-card stud high-low split poker and seven card stud high-low split 8 or better poker, the player may form two different hands of five cards each out of the player's seven available cards, enabling that player to contend for both the high hand and low hand share of the pot. A player may use the same five card grouping to make a high poker hand and a low poker hand. For example:

1. A hand consisting of a 2, 3, 4, 5 and 6 would qualify as a straight for purposes of the high hand and as a high ranking low hand; or

2. A hand consisting of five cards of the same suit, none higher than an 8, would qualify as a flush for purposes of the high hand and as a high ranking low hand.

(l) In seven-card stud high-low split poker and seven-card stud high-low split 8 or better poker, an ace may be used concurrently as a low ranking card to satisfy a low hand and as a high ranking card to satisfy a high hand.

(m) In seven-card stud high-low split poker and seven-card high-low split 8 or better poker, if two or more players tie for either the high hand or the low hand, half of the pot shall be divided equally among the tied players.

19:47-14.10 Hold'em poker; procedures for dealing of cards; completion of each round of play

(a) Each casino licensee shall be required to observe the procedures set forth in this section for each game of hold'em high poker offered in its casino room or casino simulcasting facility. Hold'em poker shall be played to determine a winning high hand only.

(b) Each poker table shall be restricted to a maximum of eleven players. Each player who elects to participate in a round of play may be required to place an ante. The rule governing the placement of an ante and the amount of the ante, if any, shall be posted on a sign at each poker table in accordance with N.J.A.C. 19:47-8.3.

(c) The order in which the cards shall be dealt and the order in which players shall be required or have the option to bet shall be determined as follows:

1. A flat disk called the "button" shall be used to indicate an imaginary dealer;

2. At the commencement of play, the button shall be placed in front of the first player to the right of the dealer; and

3. Thereafter, the button shall rotate around the table in a clockwise manner after each round of play.

(d) The player to the immediate left of the button shall be required to initiate the first betting round by placing a blind bet in accordance with the posted table requirements. A casino licensee may require additional blind bets to be made immediately subsequent to the initial blind bet. The amount and number of all blind bets required by the casino licensee shall be posted on a sign in accordance with N.J.A.C. 19:47-8.3.

(e) Starting with the player to the immediate left of the button and continuing in a clockwise rotation around the poker table, the dealer shall deal two rounds of cards face down to each player, with the player with the button being the last player to receive a card each time.

(f) Following the placement of the blind bet(s), each player shall in turn, in a clockwise rotation around the poker table, either fold, call or raise the bet. The option to raise shall also apply to the player who made the blind bet(s). After the last player has responded to the most recent bet, the betting round shall be considered complete.

(g) The dealer shall then burn the top card of the deck and proceed to deal three community cards face up in the center of the table. The next betting round shall commence with the option to bet or check belonging to the first player to the left of the button who has not folded. Each subsequent player may, in clockwise rotation, fold, call, raise the bet or, if preceding players have not made a bet, make an opening bet or check. The betting round shall be considered complete when each player has either folded or called in response to the most recent bet.

(h) Upon completion of the betting round required by (g) above, the dealer shall again burn the top card of the deck and then deal a fourth community card face up in the center of the table. The next betting round shall be commenced and completed in accordance with the requirements of (g) above.

(i) Upon completion of the betting round required by (h) above, the dealer shall again burn the top card of the deck and then deal a fifth and final community card face up in the center of the table. The final betting round shall be commenced and completed in accordance with the requirements of (g) above.

(j) If more than one player remains in the round of play after the final betting round has been completed, a showdown shall be used to determine the winner of the pot. Each player remaining in the game shall form his or her highest ranking five card high poker hand by using, in any combination, his or her own two cards and the five community cards available on the table. The winner of the pot shall be the player with the highest ranking five card high poker hand. If the highest ranking five card high poker hand that each of the remaining players can form is comprised of the five community cards, all players remaining in the round of play shall share equally in the pot.

19:47-14.11 Omaha poker; procedures for dealing of cards; completion of each round of play

(a) Each casino licensee shall be required to observe the procedures set forth in this section for each game of omaha high and omaha high-low split 8 or better poker offered in its casino room or casino simulcasting facility.

(b) Each poker table shall be restricted to a maximum of ten players. Each player who elects to participate in a round of play may be required to place an ante. The rule governing the placement of an ante and the amount of the ante, if any, shall be posted on a sign at each poker table in accordance with N.J.A.C. 19:47-8.3.

(c) The order in which the cards shall be dealt and the order in which players shall be required or have the option to bet shall be determined in accordance with the procedures governing the use of a button as set forth in N.J.A.C. 19:47-14.10(c).

(d) Starting with the player to the immediate left of the button and continuing in a clockwise rotation around the poker table, the dealer shall deal four rounds of cards face down to each player with the player with the button being the last player to receive a card each time.

(e) After each player is dealt four cards face down, an initial blind bet and all subsequent dealing and betting rounds shall be completed in accordance with the provisions of N.J.A.C. 19:47-14.10(d) through (i).

(f) If more than one player remains in the round of play after the final betting round has been completed, a showdown shall be used to determine the winner of the pot. Each player remaining in the game shall form a five card poker hand by using two of the

four cards dealt to the player and three of the five community cards. This five card hand shall constitute the poker hand of the player at the showdown. The winner of the pot shall be:

1. In high poker, the player with the highest ranking five card high poker hand; or

2. In high-low split 8 or better poker, the player with the highest ranking five card high poker hand and the player with the highest ranking five card low poker hand, subject to the provisions of (g) below who shall divide the pot equally unless the pot cannot be so divided, in which case the excess amount, which shall not exceed $1.00, shall be given to the player with the highest ranking high hand. If a tie exists between the players with the high hands, the excess shall be given to the player with the highest ranking high poker card by suit. If a tie exists between the players with the low hands, the excess shall be given to the player with the lowest ranking low poker card by suit. For purposes of this subsection, the cards shall be ranked by suit with the highest to lowest ranked suit in order as follows: spades, hearts, diamonds and clubs.

(g) In omaha high-low split 8 or better poker, the eligibility requirements of N.J.A.C. 19:47-14.9(j) must be satisfied. In the event that none of the hands of the remaining players satisfies this requirement, the entire pot shall be awarded to the player with the highest ranking high poker hand.

(h) The following rules shall only apply in omaha high-low split 8 or better poker:

1. A player may form two different hands of five cards each, enabling that player to contend for both the high hand and low hand share of the pot; provided, however, that the distribution of cards contained in each hand shall comply with (f) above;

2. A player may use the same five card grouping to make a high hand and a low hand;

3. An ace may be used concurrently as a low ranking card to satisfy a low hand and as a high ranking card to satisfy a high hand; and

4. If two or more players tie for either the high hand or the low hand, half of the pot shall be divided equally among the tied players. If an amount cannot be divided equally the excess amount, which shall not exceed $1.00, shall be given to the player with the highest ranking high hand. If a tie exists between the players with the high hands, the excess shall be given to the player with the highest ranking high poker card by suit. If a tie exists between the players with the low hands, the excess shall be given to the player with the lowest ranking low poker card by suit. For purposes of this subsection, the cards shall be ranked by suit with the highest to lowest ranked suit in order as follows: spades, hearts, diamonds and clubs.

19:47-14.12 Five-card draw poker; procedures for dealing of cards; completion of each round of play

(a) Each casino licensee shall be required to observe the procedures set forth in this section for each game of five-card draw high and five-card draw low poker offered in its casino room or casino simulcasting facility.

(b) Each poker table shall be restricted to a maximum of eight players. Each player who elects to participate in a round of play may be required to place an ante. The rule governing the placement of an ante and the amount of the ante, if any, shall be posted on a sign at each poker table in accordance with N.J.A.C. 19:47-8.3.

(c) The order in which the cards shall be dealt and the order in which players shall be required or have the option to bet shall be determined in accordance with the procedures governing the use of a button as set forth in N.J.A.C. 19:47-14.10(c).

(d) Starting with the player to the immediate left of the button and continuing in a clockwise rotation around the poker table, the dealer shall deal five rounds of cards face down to each player with the player with the button being the last player to receive a card each time.

(e) After each player has been dealt five cards face down, an initial betting round shall be completed in accordance with the provisions of N.J.A.C. 19:47-14.10(d) and (f).

(f) After completion of the initial betting round, each player remaining in the round of play, starting with the player to the immediate left of the button and continuing in a clockwise rotation around the poker table, shall have an opportunity to draw new cards. This process shall be accomplished one player at a time. Each player may keep his or her original hand or discard as many cards as he or she chooses. Each discarded card shall be replaced by the dealer with a new card dealt from the deck as follows:

1. Prior to the first player receiving any new cards, the dealer shall burn the top card of the deck; and

2. If insufficient cards remain in the deck for each player remaining in the round of play to draw new cards, the discard pile shall be reshuffled and used for this purpose; provided, however, that the cards to be discarded by a player who has not yet requested new cards shall not be included as part of the reshuffled cards.

(g) The final betting round shall commence with the option to bet or check belonging to the first player to the left of the button who has not folded. Each subsequent player may, in clockwise rotation, fold, call, raise the bet or, if preceding players have not made a bet, make an opening bet or check. The final betting round shall be considered complete when the last player has responded to the most recent bet.

(h) If more than one player remains in the round of play after the final betting round has been completed, a showdown shall be used to determine the winner of the pot. The winner of the pot shall be:

1. In high poker, the player with the highest ranking five card high hand; and

2. In low poker, the player with the highest ranking five card low hand.

19:47-14.13 Five-card stud poker; procedures for dealing of cards; completion of each round of play

(a) Each casino licensee shall be required to observe the procedures set forth in this section for each game of five-card stud high poker offered in its casino room or casino simulcasting facility. Five-card stud shall be played to determine a winning high hand only.

(b) Each poker table shall be restricted to a maximum of eight players. Each player who elects to participate in a round of play may be required to place an ante. The rule governing the placement of an ante and the amount of the ante, if any, shall be posted on a sign at each poker table in accordance with N.J.A.C. 19:47-8.3.

(c) Starting with the first player to the left of the dealer and continuing in a clockwise rotation around the poker table, the dealer shall deal one round of cards face down and one round of cards face up to each player.

(d) Once each player has received two cards in accordance with (c) above, the first betting round shall commence by comparing the up-card of each player. The player with the lowest ranked up-card, which shall be determined by suit in accordance with the provisions of N.J.A.C. 19:47-14.9(d) if two or more players have an up-card of the same rank, shall be required to make a forced bet.

(e) Following the forced bet, each subsequent player may, proceeding in a clockwise rotation from the player who placed the forced bet, fold, call or raise the bet. After the last player has responded to the most recent bet, the betting round shall be considered complete.

(f) Upon completion of the first betting round, the dealer shall burn the top card of the deck and then deal another round of cards face up to each player who has not folded. The next betting round shall be commenced by the player with the highest ranking high poker hand showing. If two or more hands are of equal rank, the player closest to the left of the dealer shall be required to bet. The betting round shall be completed in accordance with the procedures in (e) above.

(g) The dealer shall then deal two additional rounds of cards face up to each player who has not folded, with each such round followed by a betting round conducted in accordance with the provisions of (f) above. Prior to each round of cards being dealt, the dealer shall burn the top card of the deck.

(h) If more than one player remains in the round of play after the final betting round has been completed, a showdown shall be

used to determine the winner of the pot. The winner of the pot shall be the player with the highest ranking five card high poker hand.

19:47-14.14 Poker revenue

(a) The casino licensee shall derive its poker revenue at all poker tables by extracting a commission known as the "rake." Each casino licensee shall submit to the Commission in its Rules of the Games Submission the manner for determining:

1. The types of rake utilized;
2. The methodology used for calculating the rake; and
3. The amount of maximum permissible rake.

(b) Each casino licensee shall use one or more of the following procedures in determining and extracting the rake:

1. A straight percentage rake, pursuant to which:

i. A fee, not to exceed 10 percent of all sums bet in the hand, shall be extracted from the pot;

ii. The amount to be raked shall be calculated and extracted from the pot after the conclusion of a betting round and placed into the designated rake area pursuant to N.J.A.C. 19:46-1.13E as play progresses; and

iii. Upon completion of a round of play, the rake shall be immediately placed by the dealer into the table inventory container.

2. A rake which shall be taken in incremental amounts, pursuant to which:

i. Assessments of predetermined amounts shall be extracted from the pot as certain predetermined dollar levels of the pot have been achieved;

ii. Upon collection, the amount to be raked shall be placed into the designated rake area pursuant to N.J.A.C. 19:46-1.13E; and

iii. Upon completion of a round of play, the rake shall be immediately placed by the dealer into the table inventory container.

3. A rake based on time charges, pursuant to which:

i. Assessments may be imposed on a "per-player" basis or on a "per-table" basis. If taken on a "per-player" basis, inactive players seated at the table shall also be assessed;

ii. Time charges shall be expressed as an hourly fee based on the particular minimum and maximum wagering limits at a game;

iii. Time charges may be assessed fractionally every 20 or 30 minutes as determined by the casino licensee;

iv. Time charges once assessed shall be placed by the dealer into the designated rake area pursuant to N.J.A.C. 19:46-1.13E; and

v. Upon verification by a floorperson or supervisor thereof of the time charges collected, the rake shall be immediately placed by the dealer into the table inventory container.

(c) A sign describing the type and amount of rake to be collected pursuant to (b) above shall be posted at each poker table in accordance with the requirements of N.J.A.C. 19:47-8.3.

(d) An uncalled final bet shall not be considered part of the pot for purposes of calculating the amount of rake pursuant to methods (b)1 and 2 above.

(e) Once the dealer has extracted the rake and the pot has been collected by the winning player or players, no additional rake shall be taken by the casino licensee.

19:47-14.15 General operating rules for all types of poker; handling of irregularities

(a) It shall be the responsibility of each player to ensure that his or her hand has lost to the other hands at the table before discarding the hand.

(b) In all disputes in which a ruling, interpretation, clarification or intervention is required, the decision of the poker shift supervisor shall be final.

(c) Each player shall be required to keep all cards dealt to the player in full view of the dealer at all times. The dealer shall ensure compliance with this requirement.

(d) At the showdown, a winning hand must be clearly displayed in its entirety and properly identified. The player initiating the final wager shall be the first player to show his or her hand at the showdown; all other players who have not folded shall then reveal their hands in a clockwise rotation. Any player holding a losing hand may concede his or her rights to the pot and discard the hand; provided, however, that the casino licensee may require the disclosure of any discarded hands.

(e) If any player folds after making a forced bet or blind bet or on a round of checking, that player's position shall continue to receive a card until there is a subsequent wager at the table.

(f) Misdeals shall cause all the cards to be returned to the dealer for a reshuffle. Any of the following errors shall be cause for a misdeal:

1. Failure to shuffle and cut the cards in accordance with N.J.A.C. 19:47-14.5;
2. Dealing to an incorrect starting position if the error has been detected prior to two players voluntarily placing wagers into the pot;
3. If more than one card is found face-up in the deck; or
4. Failure to deal to an eligible seated player, if the error has been detected prior to two or more players voluntarily placing wagers into the pot.

(g) If one or more cards are mistakenly dealt to an ineligible player, only those cards dealt to that player shall be discarded and the round of play shall be continued.

(h) If at any time during a round of play, missing cards are discovered or additional cards are found, the round of play shall be called dead, all gaming chips and gaming plaques in the pot shall be returned to the approriate player and the deck shall be replaced pursuant to the procedures outlined in N.J.A.C. 19:46-1.18.

(i) A card found face upwards in the deck shall not be used in the game and shall be placed with the pile of discarded cards.

(j) A player who fails to take reasonable means to protect his or her hand shall have no redress if his or her hand becomes a fouled hand or the dealer accidentally collects the hand.

1. Hole cards in a game of stud poker shall be considered protected for purposes of fouling a hand.

2. If a protected hand comes into contact with discarded cards, every effort shall be made to reconstruct the hand and complete the round of play.

3. A player who has a protected hand collected by the dealer or fouled by discarded cards shall be entitled to a refund from the pot of all monies that he or she put in the pot if the player has been a victim of and not a contributor to the error.

4. A player who leaves the table without comment and has an unprotected hand shall be assumed to have no interest in the pot, and his or her cards shall be collected and discarded.

(k) Verbal statements which are clearly audible by and directed to the dealer shall always have precedence over actions and gestures and are considered binding on the player whose turn it is to act.

1. A player shall be deemed to have folded if, when faced with calling a wager, he or she:

i. Discards his or her hand face-down towards the pile of discarded cards or the pot; or

ii. Turns face-down his or her up-cards in a game of stud poker.

2. If a player is obligated to place a wager by virtue of a verbal statement or forced betting situation, throwing away his or her cards does not relieve the player of that obligation.

(l) If a player's first or second hole card is accidentally turned face-up in the dealing process, the third card shall be dealt face-down. If both hole cards are accidentally turned face-up, the dealer shall collect the two cards, call the player's hand dead and return the player's ante, if applicable.

(m) If a card is accidentally dealt off the table, it shall not be used in that round of play and shall be placed with the pile of discarded cards after a thorough examination by the dealer.

(n) If any of the face-down cards in the games of Hold'em or omaha are accidentally turned face-up in the dealing process, the dealer shall exchange the exposed card with a card from the top of the deck and place the exposed card with the pile of discarded cards.

(o) Nothing herein shall preclude a casino licensee from clarifying and supplementing the above irregularities through its internal control procedures, as submitted to the Commission for review and approval.

19:47-14.16 Conduct of players

(a) Each player in a poker game shall play the game solely to improve his or her chance of winning and shall take no action to improve another player's chance of winning. No player may com-

municate any information to another player which could assist the other player in any manner respecting the outcome of a poker game.

(b) A casino licensee which has reasonable cause to believe that a player has acted or is acting in violation of (a) above shall require the player to leave the game.

(c) Any casino licensee which takes action under (b) above in good faith shall not be liable civilly to such person.

19:47-14.17 Minimum and maximum wagers

Each casino licensee shall provide notice in accordance with N.J.A.C. 19:47-8.3 of the minimum and maximum wagers in effect at each poker table. Such sign shall also include any restrictions with regard to the maximum number of raises that may be permitted for any round of betting.

19:47-14.18 Waiting list

A casino licensee may maintain a list of players who have requested to be seated at a particular type of poker table. All vacant seats shall be filled on a first come first served basis. The casino licensee shall be permitted to announce only those seating vacancies for which an individual has been placed on a waiting list.

RULE ADOPTIONS

ADMINISTRATIVE LAW

(a)

OFFICE OF ADMINISTRATIVE LAW

Special Hearing Rules
Division of Consumer Affairs
Lemon Law Hearings; Exceptions
Adopted Repeal and New Rule: N.J.A.C. 1:13A-18.2
Adopted New Rule: N.J.A.C. 1:13A-1.2
Adopted Amendment: N.J.A.C. 1:13A-18.1

Proposed: May 18, 1992 at 24 N.J.R. 1843(a).
Adopted: May 17, 1993 by Jaynee LaVecchia, Director, Office of Administrative Law.
Filed: May 17, 1993 as R.1993 d.289, **without change.**

Authority: N.J.S.A. 52:14F-5(e), (f) and (g).

Effective Date: June 7, 1993.
Expiration Date: April 3, 1994.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

1:13A-1.2 Presumptions
An initial decision mailed pursuant to these rules shall be presumed to be received three days after mailing.

1:13A-18.1 Initial decisions
(a)-(b) (No change.)
(c) The initial decision shall be mailed promptly to the agency head and to the parties.
(d) Within four days after the initial decision is mailed to the agency head, the Clerk shall certify the entire record with original exhibits to the agency head.

1:13A-18.2 Exceptions; replies
(a) If a party wishes to take exception to the initial decision, such exception must be submitted in writing to the Director of the Division of Consumer Affairs, the judge and to all parties. Exceptions must be received by the Division of Consumer Affairs no later than eight days after the initial decision was mailed to the parties. Exceptions shall not exceed three pages in length. In all other respects, exceptions shall conform to the requirements of N.J.A.C. 1:1-18.4(b) and (c).
(b) No replies or cross-exceptions shall be permitted.

AGRICULTURE

(b)

DIVISION OF ADMINISTRATION

Disability Discrimination Grievance Procedure
Adopted New Rules: N.J.A.C. 2:1-4

Proposed: April 5, 1993 at 25 N.J.R. 1314(a) and 25 N.J.R. 1338(a).
Adopted: May 12, 1993 by Arthur R. Brown, Jr., Secretary, Department of Agriculture.
Filed: May 13, 1993 as R.1993 d.274, **without change.**

Authority: N.J.S.A. 4:1-11, 42 U.S.C. 12101 et seq. and 28 C.F.R. 35.107.

Effective Date: June 7, 1993.
Expiration Date: Exempt (see 28 C.F.R. Part 35).

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adopted new rules follows.

SUBCHAPTER 4. DISABILITY DISCRIMINATION GRIEVANCE PROCEDURE

2:1-4.1 Definitions
The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.
"ADA" means the Americans with Disabilities Act, 42 U.S.C.A. §12101 et seq.
"Agency" means the New Jersey Department of Agriculture.
"Designated decision maker" means the Secretary of Agriculture or his or her designee.

(c)

DIVISION OF MARKETS

Equine Advisory Board Rules
Adopted Amendments: N.J.A.C. 2:34-2.1 and 2.2

Proposed: March 1, 1993 at 25 N.J.R. 740(a).
Adopted: May 4, 1993 by Arthur R. Brown, Jr., Secretary, Department of Agriculture.
Filed: May 6, 1993 as R.1993 d.252, **without change.**

Authority: N.J.S.A. 5:5-88.

Effective Date: June 7, 1993.
Expiration Date: January 2, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

2:34-2.1 Qualifications for year-end and non-racing breeder awards
(a)-(e) (No change.)
(f) Each breed's share of the year-end money is determined by:
1. (No change.)
2. The number of horses entered in specific breed futurities. For a futurity run by a New Jersey breed group at a separate location, each New Jersey Bred horse's owner must sign an owner's eligibility certification form which, along with a photocopy of the entry blank, must be sent by the breed group to the New Jersey Department of Agriculture within two weeks of the show; and
3. The number of animals who race at the Trotting Bred Pony Association races. All owners must sign an eligibility certification form which, along with a photocopy of the entry blank, must be sent by the Trotting Bred Association to the Department of Agriculture within two weeks of the race.
(g)-(i) (No change.)

2:34-2.2 Conduct of the New Jersey Bred All Breed Horse Show
(a) The New Jersey Bred All Breed Horse Show, or any other show conducted by the New Jersey Department of Agriculture, shall be governed as follows:
1. It is the policy of the New Jersey Department of Agriculture to accept the decisions of the individual breed groups regarding which horses are qualified to enter and show at the New Jersey Bred All Breed Horse Show, and to receive non-racing breeder awards, as well as the tabulation of breeder award points. Such decisions and tabulations must not be in opposition to the intent of this chapter. Any disagreement with the decision of the groups must be presented to the officers and/or directors of the particular breed group pursuant to (b) below.
Recodify existing 1.-4. as 2.-5. (No change in text.)

6. Foals dropped later than two months prior to show date will not be accepted as entries. No horse under three years of age may compete in under saddle classes, except that two year olds will be allowed to compete in under saddle classes specifically designed for only two year olds.

7. (No change in text.)

8. All entries must be postmarked (meter marks shall not be accepted) no later than the closing date of entries in order for entry to appear in the program. A check or money order (no cash) for the entry and stall fees must accompany the entry blank. No horse will be allowed to compete until all fees are paid.

i. Post entries will be accepted at two times the regular fee. Any entry received postmarked after closing date will be considered a post entry and will be accepted at two times the regular entry fee provided it meets all other New Jersey bred requirements. Entry fees must be paid by money order or check. No cash will be accepted. Post entries not completely in order when received will not be accepted.

ii. Phone entries are not accepted.

9. There shall be no refunds once a horse has performed in a class, or if entered and not exhibited, after the start of the show.

10. All entry and stall fees will be refunded upon request before the closing date of entries minus a $10.00 office charge per horse. After this date, entry fees only will be refunded upon receipt of a veterinarian's certificate; however, there will be a charge of $10.00 on each horse entered. The actual refund will not be made until after completion of the show. There is a penalty of $30.00 if a check is refused.

11. Exhibitor numbers will be provided for each entry in this show at the Secretary's booth. It is the exhibitor's responsibility to make certain the proper horse is entered in the proper class with the proper number. Horses entered in the wrong class will be disqualified.

Recodify existing 8.-10. as 12.-14. (No change in text.)

15. Two horses are required to fill a class at the All Breed Horse Show. If Classes with A and B sections do not have two entries each, A and B sections will be combined. Other classes will be combined only as specified in the prize list. Two horses are required to be shown and judged in order to receive both prize money and points.

i. Prize money will be paid as follows:

Four horses or more in class	50 percent; 25 percent; 15 percent; 10 percent.
Three horses in class	50 percent; 25 percent; 15 percent.
Two horses in class	50 percent; 25 percent.
One horse in class	50 percent; no points.

16. If only one horse reports for judging, show money will be paid but no points will be given. However, that horse shown and judged will receive credit for the All Breed Horse Show, one of the horse's required three New Jersey shows.

Recodify existing 12.-13. as 17.-18. (No change in text.)

19. The Horse Park of New Jersey at Stone Tavern, Inc., the New Jersey Department of Agriculture, the New Jersey Bred All Breed Horse Show committee and the New Jersey Equine Advisory Board will not be responsible for injury to any person, horse or property incurred on the grounds.

20. (No change in text.)

21. A veterinarian certificate excusing a horse from competition must be dated on or before the start of its competition and be postmarked within five days of the competition. This must be supplied on the veterinarian's letterhead and have the signature of the veterinarian.

22. (No change in text.)

(b) Any appeal from the provisions of this section shall be made within 20 days of the horse show date, or within 20 days of notification to owners of a decision.

1. (No change.)

BANKING

(a)

DIVISION OF REGULATORY AFFAIRS

Applications

Adopted Amendments: N.J.A.C. 3:1-2.3, 2.5 and 2.21

Proposed: March 15, 1993 at 25 N.J.R. 1033(a).
Adopted: May 5, 1993 by Jeff Connor, Commissioner, Department of Banking.
Filed: May 10, 1993 as R.1993 d.258, **without change.**

Authority: N.J.S.A. 17:1-8.1, 17:9A-10 and 11 and 17:12B-17.

Effective Date: June 7, 1993.
Expiration Date: January 4, 1996.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

3:1-2.3 Branch applications

(a) An application by a depository to establish a branch office or a minibranch office shall contain the following before it will be accepted by the Department:

1.-8. (No change.)

9. A copy of the depository's most recent Community Reinvestment Act Statement; and

10. All other documentation required of a specific applicant by the Commissioner or which the applicant wishes the Department to consider.

(b)-(e) (No change.)

3:1-2.5 Branch applications; notice and publication

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

(c) Within 15 days after receiving notification from the Department that the application was accepted, the applying depository shall publish notice of the application in a newspaper published within the municipality in which it proposes to locate the branch office if there is one, and if there is no such newspaper, in a newspaper published in the county and having a substantial circulation in the municipality. The notice shall contain the name and address of the applying depository, the proposed location and the statement contained in (b) above. The depository shall provide the Commissioner with proof of publication within 10 days after this publication.

3:1-2.21 Minimum and maximum stock subscriptions

(a) Each charter application for a depository shall provide for stated capital of at least $6,000,000 which shall include at least $3,000,000 in capital stock, or such other amount as required by the Commissioner; except that an application for a charter for a trust company, which does not have authority to take deposits, may provide for stated capital of $4,000,000 or more which shall include at least $2,000,000 in capital stock; and except that an application for a charter incident to the purchase of a failed institution or a branch or branches of a failed institution, may provide for stated capital of $4,000,000 or more, or six percent of deposits acquired, whichever is greater, with at least $2,000,000 in capital stock, so long as the depository agrees to raise additional capital to reach $6,000,000 within one year following issuance of the Certificate of Authority while also satisfying the capital requirements set forth in N.J.A.C. 3:4.

(b)-(e) (No change.)

EDUCATION

(a)

STATE BOARD OF EDUCATION

School District

Adopted Repeal and New Rules: N.J.A.C. 6:3
Adopted New Rules: N.J.A.C. 6:21-12 and 6:29-1.7, 9 and 10

Proposed: March 15, 1993 at 25 N.J.R. 1095(a).
Adopted: May 5, 1993 by the State Board of Education, Mary Lee Fitzgerald, Secretary, State Board of Education and Commissioner, Department of Education.
Filed: May 13, 1993 as R.1993 d.272, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 18A:4-10, 18A:4-15, 18A:6-10, 18A:6-50, 18A:6-7A-1, 18A:7A-1.1, 18A:10-6, 18A:13-14, 18A:16-1, 18A:17-14 to 14.3, 18A:17-15, 18A:17-17, 18A:17-20, 18A:17-32, 18A:17-42 to 17-45, 18A:18A-4, 18A:18A-6, 18A:22-1, 18A:22-2, 18A:22-14, 18A:22-19, 18A:22-22, 18A:24-11, 18A:28-9 to 28-13, 18A:29-6 to 29-16, 18A:40-12.1 and 18A:49-1 to 49-8.

Effective Date: June 7, 1993.
Expiration Date: June 7, 1998, N.J.A.C. 6:3;
November 22, 1994, N.J.A.C. 6:21;
February 8, 1995, N.J.A.C. 6:29.

Summary of Public Comments and Agency Responses:

The New Jersey State Board of Education was due to hold public testimony sessions on December 16, 1992 and March 17, 1993 at which the above captioned rule was on the agenda; however, those sessions were cancelled. A public testimony session was held on April 21, 1993 at which Mr. Robert Broderick, representing the New Jersey Education Association spoke regarding this rulemaking. Written comments were received from Mr. Broderick as well as Nicholas R. Scalera, Division of Youth and Family Services; Marilyn A. Moore, Galloway Township Public Schools; Lee B. Laskin, Laskin and Botcheos; Jean Paashaus; Raymond J. Zane, Senator, Third District; Dr. Richard Wiener, O.D. and Edward V. Niemczyk, O.D.

COMMENT: A commenter requested clarification regarding whether records required as part of Federally funded programs under the provisions of N.J.A.C. 6:3-6.4(d) can be stored on computer disks, questioned the applicability of the standards for all records, and expressed a concern that it will be difficult to maintain the confidentiality of such records for children who change residences.

RESPONSE: N.J.A.C. 6:3-6.4(d) clearly states that all documents to which this Federal standard applies must be maintained for five years. The rule does not restrict the form in which records are kept; they may be hard copy or stored electronically. The existing standards for maintenance and security of pupil records at N.J.A.C. 6:3-6.4 and conditions for access to pupil records at N.J.A.C. 6:3-6.6 afford adequate procedures for the confidentiality of the records if properly administered. Therefore, the Department disagrees that there is a need to amend the proposed rule based on the comments.

COMMENT: Two commenters raised concerns that the requirements in N.J.A.C. 6:3-7, for a municipality to withdraw from a regional school district, appear to be inconsistent with N.J.S.A. 18A:13-51 and 18A:13-52 as well as burdensome to the municipality.

RESPONSE: The Department disagrees that the proposed rules are inconsistent with N.J.S.A. 18A:13-51 and 18A:13-52.

The requirements for application and data for investigation of advisability of withdrawal as required by N.J.A.C. 6:3-7 has been clearly set forth to constituent districts and municipalities since the rules effective date of September 8, 1976, as R.1976 d.286. Although it is true that the provisions at N.J.A.C. 6:3-7 require that a significant amount of information accompanies the application and resolution from a constituent district or municipality, this is information that originates in the district or municipality and is relevant to the issue at hand. The county superintendent conducts his or her investigation based on the preliminary information submitted by the district or municipality. The information required would necessarily have been analyzed by the district or municipality in deciding to request the investigation from the county superintendent. The county superintendent receives the information with the assurances that the petitioner has carefully considered the ramifications of the request.

COMMENT: Two commenters supported the adoption and implementation of N.J.A.C. 6:29-1.7.

RESPONSE: The Department agrees.

COMMENT: A commenter recommended that a comprehensive eye examination by an eye care professional should be mandated, because the existing requirement for school screening is inadequate.

RESPONSE: The proposed rule (N.J.A.C. 6:29-1.7) deals with eye protection in the public schools. This comment pertains to the provisions of N.J.A.C. 6:29-2.1, student physical examinations. Therefore, the Department declines to make the requested change.

COMMENT: A commenter recommended that N.J.A.C. 6:29-1.7 should include a requirement for periodic education of the school staff responsible for implementing eye protection standards and a requirement for inspecting eye protective devices.

RESPONSE: The Department rejects the recommended change to the proposed rule because further study of this issue is needed in order to determine an appropriate and adequate regulatory response. In doing so, the Department recognizes the importance of this issue, and asserts its commitment to addressing it as a part of a separate revision action. The rules continue to be necessary as proposed for readoption and address the needs of both the Department and the population it serves.

COMMENT: A commenter recommended that the system for reporting child abuse should be changed, as hundreds of inappropriate calls to the Division of Youth and Family Services (DYFS) are made from schools, and most allegations of abuse prove baseless.

RESPONSE: The Department disagrees with the comment based on data from the DYFS annual report which indicate that educators contribute significantly to the identification of child abuse in New Jersey under the current reporting system, accounting for 17 percent of all reports, with a 45 percent rate of substantiation. This substantiation rate compares favorably to that of other groups of professionals, such as county welfare agencies and the legal system.

COMMENT: Two commenters recommended that changes be made to the rule to strengthen the requirements for maintaining the confidentiality of child abuse records pursuant to N.J.A.C. 6:29-9.2(a)7iv in order to better protect the reputations of school staff who have been suspected of child abuse and subsequently cleared of such allegations by virtue of a DYFS investigation.

RESPONSE: The Department rejects the recommended change to the proposed rule because further study of this issue is needed in order to determine an appropriate and adequate regulatory response. In doing so, the Department recognizes the importance of this issue, and asserts its commitment to addressing it as a part of a separate revision action. The rules continue to be necessary as proposed for readoption and address the needs of both the Department and the population it serves.

COMMENT: A commenter suggested amending N.J.A.C. 6:29-9.2 to inform employees accused of child abuse of their legal rights.

RESPONSE: The Department rejects this recommendation, as due process rights are specified in N.J.S.A. 9:6-3.1, which the Department has disseminated to all district boards of education. Investigations by the DYFS are civil procedures, and it is the responsibility of local bargaining units to advise employees of their rights. If the investigation is conducted by law enforcement agents, it is their responsibility to advise suspected perpetrators of their rights.

COMMENT: A commenter recommended revising N.J.A.C. 6:29-9.2(a) so that the required district liaison to the DYFS should have the responsibility for transmitting allegations of child abuse to the DYFS.

RESPONSE: The Department disagrees with the recommendation because it weakens the reporting process, which has proved to be effective, by requiring the district liaison to perform a screening function that is currently performed by trained DYFS staff who are independent of the influences of the school system.

COMMENT: Two letters were received commenting on the need to strengthen the training requirement at N.J.A.C. 6:29-9.2(a).

RESPONSE: The Department agrees, and the rule as proposed specifies at N.J.A.C. 6:29-9.2(a)6 that school staff must receive annual in-service training, and requires that all new district staff, both paid and voluntary, shall receive training concerning child abuse.

COMMENT: A commenter recommends that child abuse neglect as well as abuse should be defined in the reporting requirements for

N.J.A.C. 6:29-9, to be consistent with the reporting requirement in N.J.S.A. 9:6-8.21.

RESPONSE: The Department rejects the recommended change to the proposed rule because further study of this issue is needed in order to determine an appropriate and adequate regulatory response. In doing so, the Department recognizes the importance of this issue, and asserts its commitment to addressing it as a part of a separate revision action. The rules continue to be necessary as proposed for readoption, and address the needs of both the Department and the population it serves.

COMMENT: A commenter recommends that the proposed rule should be revised to reflect that DYFS child abuse investigative reports can be used in employee disciplinary actions according to the provisions of N.J.S.A. 6:8-72a, which requires the department to promulgate regulations regarding the responsibility of local school districts to respond to the findings of child abuse investigative reports.

RESPONSE: The Department rejects the recommended change to the proposed rule because further study of this issue is needed in order to determine an appropriate and adequate regulatory response. In doing so, the Department recognizes the importance of this issue, and asserts its commitment to addressing it as a part of a separate revision action. The rules continue to be necessary as proposed for readoption, and address the needs of both the Department and the population it serves.

COMMENT: A commenter indicated that there is a conflict between N.J.A.C. 6:29-10.3(b)41i indicating that school officials have an option to request that law enforcement officials assume responsibility for conducting any search or seizure, and N.J.A.C. 6:29-10.3(b)41v which provides that, upon their arrival, school staff shall permit law enforcement officials to assume responsibility for searches.

RESPONSE: The Department disagrees that there is a conflict in the proposed rule. The identified sections of the regulations reflect a sequence of events. If law enforcement is summoned by school officials to conduct a search, then law enforcement shall assume primary responsibility for that search.

COMMENT: A commenter suggested that weapons reporting and handling requirements specified in N.J.A.C. 6:29-10 should be in a separate subchapter from the provisions for reporting and handling of drugs, because weapons could be construed to mean any article used to inflict injury, creating an unworkable standard for school and police officials.

RESPONSE: The Department disagrees with the recommendation, because the definition of weapons is part of the criminal code, as noted in the proposed rule at N.J.A.C. 6:29-10.2(a)1iv and v.

Summary of Agency-Initiated Changes:

Typographical errors were corrected upon adoption at the following cites: N.J.A.C. 6:3-2.2(i), 2.2(k), 4.1(a), 4.1(d)4 and 6:21-12.1.

Full text of the adopted new rules follows (additions to the proposal indicated in boldface with asterisks ***thus***; deletions from the proposal indicated in brackets with asterisks *[thus]*).

CHAPTER 3
SCHOOL DISTRICTS

SUBCHAPTER 1. BOARDS OF EDUCATION

6:3-1.1 Board of school estimate

In any district board of education operating under N.J.S.A. 18A:9-2, the mayor of the municipality comprising the school district shall be the presiding officer of the board of school estimate, and in the event of the absence of the mayor at any meeting of the board of school estimate, the members thereof present at such meeting shall proceed to elect a presiding officer pro tem.

6:3-1.2 Special meetings of district boards of education

In every school district of the State, it shall be the duty of the secretary of the board of education to call a special meeting of the board whenever requested by the president of the board to do so or whenever there shall be presented to such secretary a petition signed by a majority of the whole number of members of the district board of education requesting the special meeting. Public notice of such special meeting shall be made pursuant to law and regulation. In accordance with N.J.S.A. 18A:10-6 and N.J.S.A. 10:4-6 et seq., the public notice shall include the date, time, location, and purpose(s) of the special meeting.

6:3-1.3 Minimum bond requirements for treasurer of school moneys

(a) The minimum requirements for the surety bond for the treasurer of school moneys shall be such percentage of the current year's school budget as is required in the schedule set forth below:

Total School Budget	Minimum Bond Required
Up to $100,000.00	10 percent of budget (Minimum $5,000)
$100,000.01 to $250,000.00	$10,000 plus eight percent of all over $100,000
$250,000.01 to $500,000.00	$22,000 plus six percent of all over $250,000
$500,000.01 to $750,000.00	$37,000 plus four percent of all over $500,000
$750,000.01 to $1,000,000.00	$47,000 plus two percent of all over $750,000
$1,000,000.01 to $2,000,000.00	$52,000 plus one percent of all over $1,000,000
$2,000,000.01 to $5,000,000.00	$62,000 plus ½ percent of all over $2,000,000
$5,000,000.01 to $10,000,000.00	$77,000 plus ¼ percent of all over $5,000,000
$10,000,000.01 and upwards	$89,500 plus ⅛ percent of all over $10,000,000

(b) In fixing such minimum bond, the nearest even $1,000 shall be used.

(c) The independent school auditor shall verify the adequacy of the treasurer's surety bond which is required by N.J.S.A. 18A:17-32 and shall include appropriate comment, and a recommendation, if needed, in the annual school audit report.

6:3-1.4 Local district responsibility for employment of staff

(a) State certification requirements are those structured training and competency evaluation requirements that are prescribed by the State Board of Education in order to protect the public. In addition, the teaching and other background experiences of candidates for professional positions may often be important considerations in the local selection of specific staff for specific positions. Each district board of education shall determine the types of background experiences and personal qualities, if any, that the district requires or prefers successful candidates for specific positions to possess in addition to appropriate State certification. Such local requirements shall be based upon a careful review of the position in question, and the requirements shall emphasize the nature of experience and the quality of individual achievement desired, rather than only the amount of experience.

(b) No teaching staff member shall be employed in the public schools by any board of education unless he or she is the holder of a valid certificate (see N.J.S.A. 18A:26-2). In addition, district boards of education should exercise their right and responsibility to require job candidates to present other, more detailed documentation of their competency. Such documentation includes resumes, references, records of past experiences, college transcripts, certification test scores, assessment reports, internship evaluations, and other documentation of competency relevant to the specific position.

(c) District boards of education shall assign to administrative positions those functions which are consistent with the individual qualifications of the position occupant, and shall support the establishment of structures for making instructional decisions that take administrator qualifications into account.

6:3-1.5 Support residencies for regularly-certified, inexperienced first-year principals

(a) Regularly-certified, inexperienced first-year principals are individuals who:

1. Acquired regular New Jersey school principal endorsements pursuant to N.J.A.C. 6:11-9.5 prior to September 1, 1989;

2. Have not previously held full-time employment as principals, vice-principals, or in other positions for which the principal endorsement is required in New Jersey or elsewhere; and

3. Have been offered employment as principals or vice-principals in a New Jersey public school district.

(b) Each district employing a regularly-certified, inexperienced first-year principal shall enter into an agreement to provide a principal residency program pursuant to N.J.A.C. 6:11-9.5, including a pre-residency experience, except that:

1. Entry requirements in N.J.A.C. 6:11-9.5 shall not apply to regularly-certified, inexperienced first-year principals;

2. Special certification evaluations as described in N.J.A.C. 6:11-9.5(c)5iv shall not be conducted for regularly-certified, inexperienced first-year principals, and no evaluations or recommendations concerning their certification shall be presented to the State Department of Education; and

3. As part of the support residency, the district shall require the new principal to undergo an assessment of performance at a State-approved center during the pre-residency phase. The sole purpose of this assessment shall be to provide a diagnosis of strengths and weaknesses as a basis for designing continuing education and support exercises.

(c) The State Department of Education shall monitor local districts to determine compliance with this section.

SUBCHAPTER 2. CHIEF SCHOOL ADMINISTRATOR

6:3-2.1 Chief school administrator defined

Whenever the phrase "chief school administrator" is used throughout Title 6, it shall mean the superintendent of schools, or, if there is no superintendent, the administrative principal. The term "administrative principal" means the principal who works directly with the board of education in a district which has no position of superintendent of schools.

6:3-2.2 Annual evaluation of tenured and nontenured chief school administrators

(a) Every district board of education shall adopt a policy and implementation procedures requiring the annual evaluation of the chief school administrator by the district board of education.

(b) The purpose of the annual evaluation shall be to:

1. Promote professional excellence and improve the skills of the chief school administrator;

2. Improve the quality of the education received by the pupils served by the public schools; and

3. Provide a basis for the review of the performance of the chief school administrator.

(c) Such policy and procedures shall be developed by each district board of education after consultation with the chief school administrator and shall include, but not be limited to:

1. A determination of roles and responsibilities for the implementation of the policy and procedures;

2. Development of a job description and evaluation criteria, based upon the district's local goals, program objectives, policies, instructional priorities, State goals, statutory requirements, and the functions, duties and responsibilities of the chief school administrator;

3. Specification of methods of data collection and reporting appropriate to the job description;

4. Provision for the preparation of an individual plan for professional growth and development based in part upon any needs identified in the evaluation, which shall be mutually developed by the district board of education and the chief school administrator; and

5. Preparation of an annual written performance report by a majority of the full membership of the district board of education and an annual summary conference between the district board of education, with a majority of the total membership of the board and the chief school administrator present.

(d) Nothing shall preclude a district board of education, at its discretion, from hiring a qualified consultant to assist or advise in the evaluation process; however, the evaluation itself is the responsibility of the district board of education.

(e) Such policy shall be distributed to the chief school administrator upon adoption. Amendments to the policy shall be distributed within 10 working days after adoption.

(f) The annual summary conference between the district board of education, with a majority of the total membership of the board and the chief school administrator present, shall be held before the written performance report is filed. The conference shall be held in private, unless the chief school administrator requests that it be held in public. The conference shall include, but not be limited to:

1. Review of the performance of the chief school administrator based upon the job description;

2. Review of the chief school administrator's progress in achieving and/or implementing the district's goals, program objectives, policies, instructional priorities, State goals and statutory requirements; and

3. Review of available indicators of pupil progress and growth toward the program objectives.

(g) The annual written performance report shall be prepared by April 30 by a majority of the total membership of the district board of education and shall include, but not be limited to:

1. Performance areas of strength;

2. Performance areas needing improvement based upon the job description and evaluation criteria set forth in (c)2 above;

3. Recommendations for professional growth and development;

4. A summary of available indicators of pupil progress and growth and a statement of how these available indicators relate to the effectiveness of the overall program and the performance of the chief school administrator; and

5. Provision for performance data which have not been included in the report prepared by the board of education to be entered into the record by the chief school administrator within 10 working days after the completion of the report.

(h) These provisions are the minimum requirements for the evaluation of chief school administrators.

(i) For purposes of this section:

1. "Chief school administrator" is defined in N.J.A.C. 6:3-2.1;

2. "Available indicators of pupil progress and growth" mean***s*** the results of formal and informal assessment of pupils as defined in N.J.A.C. 6:8-6.1; and

3. "Job description" means a written specification of the functions, duties and responsibilities of the chief school administrator and the relationship of such functions, duties and responsibilities to those of the district board of education.

(j) The evaluation procedure for a nontenured chief school administrator shall be completed by April 30 each year.

(k) Each *[new]* ***newly*** appointed or elected board of education member shall complete a New Jersey School Boards Association training program on the evaluation of the chief school administrator within six months of the commencement of his or her term of office pursuant to N.J.S.A. 18A:17-20.3b.

SUBCHAPTER 3. CONDITIONS OF EMPLOYMENT FOR TEACHERS

6:3-3.1 Full-time employment of teachers

The period of time in each day required for full-time employment shall be the number of hours prescribed by the district board of education but shall not be less than four clock hours.

6:3-3.2 Duty-free lunch periods for teachers

Any teacher employed in both a morning and an afternoon session shall be entitled to a duty-free lunch period during the hours normally used for lunch periods in the school. The duty-free lunch period shall not be less than 30 minutes except in a school where the lunch period for pupils is less than 30 minutes in which case the duty-free lunch period shall not be less than the lunch period time allowed pupils.

SUBCHAPTER 4. SUPERVISION, OBSERVATION AND EVALUATION

6:3-4.1 Supervision of instruction: observation and evaluation of nontenured teaching staff members

(a) For the purpose of this section, the term "observation" shall be construed to mean a visitation to an assigned work station by a certified supervisor of the local school district for the purpose***s*** of formally collecting data on the performance of a nontenured

teaching staff member's assigned duties and responsibilities and of a duration appropriate to those duties and responsibilities.

1. Each of the three observations required pursuant to N.J.S.A. 18A:27-3.1 shall be conducted for a minimum duration of one class period in a secondary school, and in an elementary school for the duration of one complete subject lesson.

(b) The term "evaluation" shall be construed to mean a written evaluation prepared by the administrative or supervisory staff member who visits the work station for the purpose of observing a teaching staff member's performance of the instructional process.

(c) Each district board of education shall adopt a policy for the supervision of instruction, setting forth procedures for the observation and evaluation of all nontenured teaching staff members. Such policy shall be distributed to each teaching staff member at the beginning of his or her employment.

(d) Each policy for the supervision of instruction shall include, in addition to those observations and evaluations herein before described, an annual written evaluation of the nontenured teaching staff member's total performance as an employee of the district board of education, including, but not limited to:

1. Performance areas of strength;

2. Performance areas needing improvement based upon the job description;

3. An individual professional improvement plan developed by the supervisor and the teaching staff member; and

4. A summary of available indicators of pupil progress and growth, and a statement of how these indicators *[related]* ***relate*** to the effectiveness of the overall program and the performance of the individual teaching staff member.

(e) Each of the three observations required pursuant to N.J.S.A. 18A:27-3.1 shall be followed within a reasonable period of time, but in no instance more than 10 days, by a conference between the administrative or supervisory staff member who has made the observation and written evaluation, and the nontenured teaching staff member. Both parties to such a conference will sign the written evaluation report and retain a copy for his or her records. The nontenured teaching staff member shall have the right to submit his or her written disclaimer of such evaluation within 10 days following the conference and such disclaimer shall be attached to each party's copy of the evaluation report.

(f) The purposes of this procedure for the observation and evaluation of nontenured teaching staff members shall be to identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendations regarding reemployment, and improve the quality of instruction received by the pupils served by the public schools.

(g) "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, or any educational services commission, holding office, position or employment of such character that the qualifications for such office, position or employment require him or her to hold a valid and effective standard, provisional or emergency certificate, appropriate to his or her office, position or employment, issued by the State Board of Examiners and includes a school nurse. The district chief school administrator, however, will not be evaluated pursuant to this subchapter but shall instead be evaluated pursuant to N.J.A.C. 6:3-2.2.

6:3-4.2 Procedure for appearance of nontenured teaching staff members before a district board of education upon receipt of a notice of nonreemployment

(a) Whenever a nontenured teaching staff member has requested in writing and has received a written statement of reasons for nonreemployment pursuant to N.J.S.A. 18A:27-3.2, he or she may request in writing an informal appearance before the district board of education. Such written request must be submitted to the board within 10 calendar days of receipt of the board's statement of reasons.

(b) Such an informal appearance shall be scheduled within 30 calendar days from receipt of the board's statement of reasons.

(c) Under the circumstances described in this section, a nontenured teaching staff member's appearance before the board shall not be an adversary proceeding. The purpose of such an appearance shall be to permit the staff member to convince the members of the board to offer reemployment.

(d) Each district board shall exercise discretion in determining a reasonable length of time of the proceeding, depending upon the specific circumstances in each instance.

(e) Each district board shall provide adequate written notice to the employee regarding the date and time of the informal appearance.

(f) The nontenured teaching staff member may be represented by counsel or one individual of his or her own choosing.

(g) The staff member may present witnesses on his or her behalf. Such witnesses need not present testimony under oath and shall not be cross-examined by the board. Witnesses shall be called into the meeting to address the board one at a time and shall be excused from the meeting after making their statements.

(h) The proceeding of an informal appearance before the district board as described herein may be conducted pursuant to N.J.S.A. 10:4-12(b)(8).

(i) Within three days following the informal appearance, the board shall notify the affected teaching staff member, in writing, of its final determination. Such notification may be delegated by the board to its superintendent or board secretary.

6:3-4.3 Evaluation of tenured teaching staff members

(a) Every district board of education shall adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members by appropriately certified personnel (see N.J.S.A. 18A:1-1; N.J.A.C. 6:11-9.3).

(b) The purpose of the annual evaluation shall be to:

1. Promote professional excellence and improve the skills of teaching staff members;

2. Improve pupil learning and growth; and

3. Provide a basis for the review of performance of tenured teaching staff members.

(c) The policies and procedures shall be developed under the direction of the district's chief school administrator in consultation with tenured teaching staff members and shall include, but not be limited to:

1. Roles and responsibilities for implementation of the policies and procedures;

2. Development of job descriptions and evaluation criteria based upon district goals, program objectives and instructional priorities;

3. Methods of data collection and reporting appropriate to the job description including, but not limited to, observation of classroom instruction;

4. Observation conference(s) between the supervisor and the teaching staff member;

5. Provision for the use of additional appropriately certified personnel where it is deemed advisable;

6. Preparation of individual professional improvement plans; and

7. Preparation of an annual written performance report by the supervisor and an annual summary conference between the supervisor and the teaching staff member.

(d) These policies shall be distributed to reach tenured teaching staff members no later than October 1. Amendments to the policy shall be distributed within 10 working days after adoption.

(e) The annual summary conference between supervisors and teaching staff members shall be held before the written performance report is filed. The conference shall include, but not be limited to:

1. Review of the performance of the teaching staff member based upon the job description;

2. Review of the teaching staff member's progress toward the objectives of the individual professional improvement plan developed at the previous annual conference;

3. Review of available indicators of pupil progress and growth toward the program objectives; and

4. Review of the annual written performance report and the signing of said report within five working days of the review.

(f) The annual written performance report shall be prepared by a certified supervisor who has participated in the evaluation of the teaching staff member and shall include, but not be limited to:

1. Performance areas of strength;
2. Performance areas needing improvement based upon the job description;
3. An individual professional improvement plan developed by the supervisor and the teaching staff member;
4. A summary of available indicators of pupil progress and growth, and in statement of how these indicators relate to the effectiveness of the overall program and the performance of the individual teaching staff member; and
5. Provisions for performance data which have not been included in the report prepared by the supervisor to be entered into the record by the evaluatee within 10 working days after the signing of the report.

(g) These provisions are the minimum requirements for the evaluation of tenured teaching staff members.

(h) For the purposes of this section:

1. "Appropriately certified personnel" means personnel qualified to perform duties of supervision which includes the superintendent, assistant superintendent, principals, vice-principals, and supervisors of instruction who hold the appropriate certificate and who are designated by the board to supervise instruction;
2. "Indicators of pupil progress and growth" means the results of formal and informal assessment of pupils as defined in N.J.A.C. 6:8-6.1;
3. "Individual professional improvement plan" is a written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timelines for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the plan;
4. "Job description" means a written specification of the function of the position, duties and responsibilities, the extent and limits of authority, and work relationships within and outside the school and district;
5. "Observation conference" means a discussion between supervisor and teaching staff member to review a written report of the performance data collected in a formal observation and its implications for the teaching staff member's annual evaluation;
6. "Observation" means a visitation to an assigned work station by a certified supervisor for the purpose of formally collecting data on the performance of a teaching staff member's assigned duties and responsibilities and of a duration appropriate to same;
7. "Performance report" means a written appraisal of the teaching staff member's performance prepared by an appropriately certified supervisor;
8. "Supervisor" means any appropriately certified individual assigned with the responsibility for the direction and guidance of the work of teaching staff members; and
9. "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him or her to hold a valid and effective standard, provisional or emergency certificate, appropriate to his or her office, position or employment, issued by the State Board of Examiners and includes a school nurse. The district chief school administrator, however, will not be evaluated pursuant to this section, but shall instead be evaluated pursuant to N.J.A.C. 6:3-2.2.

SUBCHAPTER 5. SENIORITY

6:3-5.1 Standards for determining seniority

(a) The word "employment" for purposes of these standards shall also be held to include "office" and "position."

(b) Seniority, pursuant to N.J.S.A. 18A:29-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for study or research shall be credited toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.

(c) In computing length of service for seniority purposes, full recognition shall be given to previous years of service within the district and the time of service in or with the military or naval forces of the United States or this State, pursuant to the provisions of N.J.S.A. 18A:28-12.

(d) Employment in the district prior to the adoption of these standards shall be counted in determining seniority.

(e) The holder of an emergency certificate shall not be entitled to seniority rights but, when he or she becomes the holder of a standard certificate, the years of employment under the emergency certificate shall count toward seniority under the standard certificate. Upon acquisition of a standard certificate, any periods of service under a provisional certificate shall also be counted toward seniority.

(f) Whenever a person shall hold employment simultaneously under two or more subject area endorsements or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he or she is or has been employed. For purposes of calculating seniority entitlement, there shall be no distinction between academic years and calendar years.

(g) Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title. Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6:11-3.3.

(h) Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his or her seniority in any or all categories in which he or she previously held employment.

(i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

(j) If he or she shall have insufficient seniority in the category to which he or she shall revert, he or she shall, in like manner, revert to the next category in which he or she held employment immediately prior to his or her employment in the category to which he or she shall have reverted, and shall be placed and remain upon the preferred eligible list of the next preceding category, and so forth, until he or she shall have been employed or placed upon all the preferred eligible lists of the categories in which he or she formerly held employment in the school district.

(k) In the event of his or her employment in some category to which he or she shall revert, he or she shall remain upon all the preferred eligible lists of the categories from which he or she shall have reverted, and shall be entitled to employment in any one or more such categories whenever a vacancy occurs to which his or her seniority entitles him or her.

(l) The following shall be deemed to be specific categories, not necessarily numbered in order of precedence:

1. Superintendent of schools;
2. Assistant superintendent;

i. Each assistant superintendency shall be a separate category; and

ii. District boards of education shall adopt a job description for each assistant superintendent position which shall set forth qualifications and endorsements for such position;

3. Director;

i. Each director position shall be a separate category; and

ii. District boards of education shall adopt job descriptions for each director position which sets forth the qualifications and endorsements for such position;

4. High school principal;
5. Adult high school principal;
6. Alternative school principal;
7. Vocational school principal;
8. Junior high school principal;
9. Elementary principal;
10. Supervisor;

i. Each supervisory title shall be a separate category; and

ii. District boards of education shall adopt a job description for each supervisory position which sets forth the qualifications and specific endorsements required for such position;

11. High school vice-principal or assistant principal;
12. Adult high school vice-principal or assistant principal;
13. Alternative school vice-principal or assistant principal;
14. Junior high school vice-principal or assistant principal;
15. Elementary school vice-principal or assistant principal;
16. Vocational school vice-principal or assistant principal;

17. Secondary. The word "secondary" shall include grades nine through 12 in all high schools, grades seven and eight in junior high schools and grades seven and eight in elementary schools having departmental instruction;

i. Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served;

ii. Whenever a person shall be reassigned from one subject area endorsement to another, all periods of employment in his or her new assignment shall be credited toward his or her seniority in all subject area endorsements in which he or she previously held employment;

iii. Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special subject field endorsement; and

iv. Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis;

18. Elementary. The word "elementary" shall include kindergarten, grades one through six and grades seven and eight without departmental instruction;

i. District boards of education who make a determination to reorganize instruction at grades seven and eight pursuant to these rules must do so by adoption of a formal resolution setting forth the reasons for such reorganization;

ii. Any person employed at the elementary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational services certificate or special subject field endorsement;

iii. Persons employed and providing services on a district-wide basis under a special field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.

iv. Persons serving under elementary endorsements in departmentally organized grades seven and eight prior to September 1, 1983 shall continue to accrue seniority in the elementary category for all such service prior to and subsequent to September 1, 1983. In addition, such persons shall accrue seniority in the secondary category but limited to the district's departmentally organized grades seven and eight and the specific subject area actually taught in such departmentally organized grades, subsequent to September 1, 1983; and

19. Additional categories of specific educational service endorsements issued by the State Board of Examiners and listed in the State Board rules dealing with teacher certification (N.J.A.C. 6:11).

(m) In the event of a restructure of grade levels which results in the elimination of all junior high schools in the district and the creation of schools with a grade level organization which includes grades seven and eight the seniority rights of the junior high principals, vice principals and assistant principals displaced by such restructuring shall be transferable to the newly reorganized schools in the category as defined by (l)9 above.

SUBCHAPTER 6. PUPIL RECORDS

6:3-6.1 Definitions

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

"Access" means the right to view, to make notes, and/or to have a reproduction of the pupil record made.

"Adult pupil" means a person who is at least 18 years of age, or is attending an institution of postsecondary education, or is an emancipated minor.

"Parent" means the natural parent(s) or legal guardian(s), foster parent(s) or parent surrogate(s) of a pupil. Where parents are separated or divorced, "parent" means the person or agency who has legal custody of the pupil, as well as the natural or adoptive parents of the pupil, provided such parental rights have not been terminated by a court of appropriate jurisdiction.

"Parent surrogate(s)" means an individual or individuals approved by the district board of education in accordance with N.J.A.C. 6:28-2.2 to act on behalf of a pupil whose parents are not available to assure the pupil's educational rights.

"Pupil" means a person who is or was enrolled in a public school.

"Pupil record" means information related to an individual pupil gathered within or outside the school system and maintained within the school system, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record. Therefore, information recorded by any certified school personnel solely as a memory aid, not for the use of a second party, is excluded from this definition.

"Student information directory" means a publication of a district board of education which includes the following information relating to a pupil: the student's name, address, telephone number, grade level, date and place of birth, dates of attendance, major field of study, participation in officially recognized activities, weight and height relating to athletic team membership, degrees, awards, the most recent educational agency attended by the pupil and other similar information.

6:3-6.2 General considerations

(a) This subchapter applies to all district boards of education or private agencies which provide educational services by means of public funds. District boards of education shall include, but not be limited to, all county boards of special services school districts, county vocational boards of education, jointure commissions, educational services commissions, education programs operated by county residential facilities and State-operated special education programs.

(b) Each district board of education shall have the responsibility to compile and maintain pupil records and to regulate access, disclosure or communication of information from educational records in a manner that assures the security of such records in accordance with this subchapter.

(c) Pupil records shall contain only such information as is relevant to the education of the pupil and is objectively based on the personal observations or knowledge of the certified school personnel who originate(s) the record.

(d) The district board of education shall notify parents and adult pupils annually in writing of their rights in regard to pupil records and pupil participation in educational, occupational and military recruitment programs. Copies of the applicable State and Federal laws and local policies shall be made available upon request. District boards of education shall make every effort to notify parents and adult pupils in their dominant language.

(e) A nonadult pupil may assert rights of access only through his or her parents. However, nothing in these rules shall be construed to prohibit certified school personnel, in their discretion, from disclosing pupil records to nonadult pupils or to appropriate persons in connection with an emergency, if such knowledge is necessary to protect the health or safety of the pupil or other persons.

(f) The parent or adult pupil shall either have access to or be specifically informed about only that portion of another pupil's record that contains infomation about his or her own child or him or herself.

(g) Each district board of education shall establish written policies and procedures for pupil records which:

1. Guarantee access to persons authorized under this subchapter within 10 days of the request, but prior to any review or hearing conducted in accordance with the State Board of Education rules;

2. Assure security of the records;

3. Enumerate and describe the pupil records collected and maintained by the district board of education;

4. Provide for the inclusion of educationally relevant information in the pupil record by the parent or adult pupil;

5. Allow for the designation, release and public notice of directory information as defined herein;

6. Provide the parent or adult pupil a 10-day period to submit a written statement to the chief school administrator prohibiting the institution from including any or all types of information about the student in any student information directory before allowing access to such directory and school facilities to educational, occupational and military recruiters pursuant to N.J.S.A. 18A:36-19.1;

7. Assure limited access to pupil records by secretarial and clerical personnel pursuant to N.J.A.C. 6:3-6.5; and

8. Provide for the access and security of pupil records maintained in a computerized system.

(h) All anecdotal information and assessment reports collected on a pupil shall be dated and signed by the individual who originated the data.

(i) The chief school administrator or his or her designee shall require all permitted pupil records of currently enrolled pupils to be reviewed annually by certified school personnel to determine the education relevance of the material contained therein. The reviewer shall cause data no longer descriptive of the pupil or educational situation to be deleted from the records except that prior notice must be given for classified students in accordance with N.J.A.C. 6:28. Such information shall be destroyed and not be recorded elsewhere. No record of any such deletion shall be made.

(j) No liability shall be attached to any member, officer or employee of any district board of education permitting access or furnishing pupil records in accordance with these rules.

(k) When the parent's or adult pupil's dominant language is not English or the parent or adult pupil is deaf, the district board of education shall provide interpretation of the pupil record in the dominant language of the parents or adult pupil.

6:3-6.3 Mandated and permitted pupil records

(a) The district board of education shall not compile any other pupil records except mandated and permitted records as herein defined.

1. Mandated pupil records are those pupil records which the schools have been directed to compile by New Jersey statute, regulation or authorized administrative directive. Mandated pupil records shall include the following:

i. Personal data which identifies each pupil enrolled in the school district. These data shall include the pupil's name, address, date of birth, name of parent(s), citizenship and sex of the pupil. The district board of education is prohibited from recording the religious or political affiliation of the pupil and/or parent unless requested to do so in writing by the parent or adult pupil. The district is also prohibited from labeling the pupil illegitimate;

ii. Record of daily attendance;

iii. Descriptions of pupil progress according to the system of pupil evaluation used in the district. Grade level or other program assignments shall also be recorded;

iv. History and status of physical health compiled in accordance with State regulations, including results of any physical examinations given by qualified district employees;

v. Records pursuant to rules and regulations regarding the education of eduationally handicapped pupils; and

vi. All other records required by the State Board of Education.

2. Permitted pupil records are those which a district board of education has authorized by resolution adopted at a regular public meeting to be collected in order to promote the educational welfare of the pupil. The district board of education shall report annually at a public board meeting a description of the types of pupil records it has authorized certified school personnel to collect and maintain. The pupil records so authorized must also comply with this subchapter as to relevance and objectivity.

6:3-6.4 Maintenance and security of pupil records

(a) The chief school administrator or his or her designee shall be responsible for the security of pupil records maintained in the school district and shall devise procedures for assuring that access to such records is limited to authorized persons.

(b) Records for each individual pupil shall be maintained in a central file at the school attended by the pupil. When records are maintained in different locations, a notation in the central file as to where such other records may be found is required.

(c) When records are stored in a computerized system, computer programmed security blocks are required to protect against any security violations of the records stored therein. To guard against the loss of pupil records, school districts must maintain an updated duplicate copy of pupil records.

(d) Mandated or permitted records required as part of programs established through state administered entitlement or discretionary funds from the U.S. Department of Education must be maintained for a period of five years after completion of the program activities.

6:3-6.5 Access to pupil records

(a) Only authorized organizations, agencies or persons as defined herein shall have access to pupil records.

(b) The district board of education may charge a reasonable fee for reproduction, not to exceed the schedule of costs set forth in N.J.S.A. 47:1A-2, provided that the cost does not effectively prevent the parents or adult pupils from exercising their rights under this subchapter or under rules and regulations regarding educationally handicapped pupils.

(c) Authorized organizations, agencies and persons shall include only:

1. The parent of a pupil under the age of 18 and the pupil who has the written permission of such parent;

2. Pupils at least 16 years of age who are terminating their education in the district because they will graduate secondary school at the end of the term or no longer plan to continue their education;

3. The adult pupil and the pupil's parent who has the written permission of such pupil, except that the parent shall have access without consent of the pupil as long as the pupil is financially dependent on the parent and enrolled in the public school system or if the pupil has been declared legally incompetent by a court of appropriate jurisdiction. The parent of the financially dependent adult pupil may not disclose information contained in the adult pupil's record to a second or third party without the consent of the adult pupil;

4. Certified school district personnel who have assigned educational responsibility for the pupil;

5. Certified educational personnel who have assigned educational responsibility for the pupil and who are employed by:

i. An approved private school for the handicapped;

ii. A state facility;

iii. Accredited nonpublic schools in which pupils with educational disabilities have been placed according to N.J.S.A. 18A:46-14; or

iv. Clinics and agencies approved by the Department of Education;

6. A district board of education, in order to fulfill its legal responsibility as a board, has access through the chief school administrator or his or her designee to information contained in a pupil's record. Information shall be discussed in executive session unless otherwise requested by the parent or adult pupil;

7. Secretarial and clerical personnel under the direct supervision of certified school personnel shall be permitted access to those portions of the record to the extent that is necessary for the entry and recording of data and the conducting of routine clerical tasks. Access shall be limited only to those pupil files which such staff are directed to enter or record information and shall cease when the specific assigned task is completed;

8. Accrediting organizations in order to carry out their accrediting functions;

9. The Commissioner of Education and members of the New Jersey Department of Education staff who have assigned responsibility which necessitates the review of such records;

10. Officials of other district boards of education within the State of New Jersey in which the pupil is placed, registered or intends to enroll subject to the following conditions:

i. Mandated pupil records shall be forwarded to the receiving district with written notification to the parent or adult pupil;

ii. Permitted records shall be forwarded to the receiving district only with the written consent of the parent or adult pupil except where a formal sending-receiving relationship exists between the school districts;

iii. All records to be forwarded shall be sent to the chief school administrator or his or her designee of the school district to which the pupil has transferred within 10 days after the transfer has been verified by the requesting school district;

iv. The chief school administrator or his or her designee shall request all pupil records in writing from the school district of last attendance within two weeks from the date that the pupil enrolls in the new district;

v. The chief school administrator or his or her designee of the school district of last attendance shall upon request, provide a parent(s) or an adult pupil with a copy of the records disclosed to other educational agencies or institutions; and

vi. Proper identification, such as a certified copy of the pupil's birth certificate, shall be requested at the time of enrollment in a new school district;

11. Officials of the United States Department of Education who have assigned responsibilities which necessitate review of such records;

12. Officers and employees of a State agency who are responsible for protective and investigative services for pupils referred to that agency, pursuant to N.J.S.A 9:6-8.40. Wherever appropriate, district boards of education shall ask such State agency for its cooperation in sharing the findings of the investigation;

13. Organizations, agencies and persons from outside the school if they have the written consent of the parent or adult pupil, except that these organizations, agencies and persons shall not transfer pupil record information to a third party without the written consent of the parent or adult pupil;

14. Organizations, agencies and individuals outside the school, other than those specified in this section, upon the presentation of a court order; and

15. Bona fide researchers who explain in writing the nature of the research project and the relevance of the records sought and who satisfy the chief school administrator or his or her designee that the records will be used under strict conditions of anonymity and confidentiality. Such assurance must be received in writing by the chief school administrator prior to the release of information to the researcher.

6:3-6.6 Conditions for access to pupil records

(a) All authorized organizations, agencies and persons defined in this subchapter shall have access to the records of a pupil, subject to the following conditions:

1. No pupil record shall be altered or destroyed during the time period between a request to review the record and the actual review of the record.

2. Authorized organizations, agencies and persons from outside the school whose access requires the consent of parents or adult pupils must submit their request in writing together with any required authorization, to the chief school administrator or his or her designee.

3. The chief school administrator or his or her designee shall be present during the period of inspection to provide interpretation of the records where necessary and to prevent their alteration, damage or loss. In every instance of inspection of pupil records by persons other than parents, pupils or individuals who have assigned educational responsibility for the individual student, an entry shall be made in the pupil record of the names of persons granted access, the reason access was granted, the time and circumstances of inspection, the records studied and the purposes for which the data will be used.

4. Unless otherwise judicially instructed, the district board of education shall, prior to the disclosure of any pupil records to organizations, agencies or persons outside the school district pursuant to a court order, give the parent or adult pupil at least three days' notice of the name of the requesting agency and the specific records requested. Such notification shall be provided in writing if practicable. Only those records related to the specific purpose of the court order shall be disclosed.

5. A record may be withheld from a parent of a pupil under 18 or from an adult pupil only when the local education agency obtains a court order or is provided with evidence that there is a court order revoking the right to access. Only that portion of the record designated by the court may be withheld. When the local education agency has or obtains evidence of such court order the parent or adult pupil shall be notified in writing within five days of his or her request that access to the record has been denied and that the person has the right to appeal this decision to the court issuing the order.

6:3-6.7 Rights of appeal for parents and adult pupils

(a) Pupil records are subject to challenge by parents and adult pupils on grounds of inaccuracy, irrelevancy, impermissive disclosure, inclusion of improper information or denial of access to organizations, agencies and persons. The parent or adult pupil may seek to:

1. Expunge inaccurate, irrelevant or otherwise improper information from the pupil record;

2. Insert additional data as well as reasonable comments as to the meaning and/or accuracy of the records; and/or

3. Request an immediate stay of disclosure pending final determination of the challenge procedure as described in this subchapter.

(b) To appeal, a parent or adult pupil must notify the chief school administrator in writing of the specific issues relating to the pupil record. Within 10 days of notification, the chief school administrator or his or her designee shall meet with the parent or adult pupil to revise the issues set forth in the appeal. If the matter is not satisfactorily resolved, the parent or adult pupil may appeal this decision either to the district board of education or the Commissioner of Education within 10 days. If appeal is made to the district board of education, a decision shall be rendered within 20 days. The decision of the district board of education may be appealed to the Commissioner pursuant to N.J.S.A. 18A:6-9 and rules adopted in accordance with such statute. At all stages of the appeal process, the parent or adult pupil shall be afforded in a full and fair opportunity to present evidence relevant to the issue. A record of the appeal proceedings and outcome shall be made a part of the pupil record with copies made available to the parent or adult pupil.

(c) Appeals relating to the pupil records of educationally handicapped pupils shall be processed in accordance with the requirements of N.J.A.C. 6:28.

(d) Regardless of the outcome of any appeal, a parent or adult pupil shall be permitted to place a statement in the pupil record commenting upon the information in the pupil record or setting forth any reasons for disagreement with the decision of the agency. Such statements shall be maintained as part of the pupil record as long as the contested portion of the record is maintained. If the contested portion of the record is disclosed to any party, the statement commenting upon the information must also be disclosed to that party.

6:3-6.8 Retention and destruction of pupil records

(a) A pupil record is considered to be incomplete and not subject to the provisions of the Destruction of Public Records Law, N.J.S.A. 47:3-15 et seq., while the student is enrolled in the school district.

(b) Mandated pupil records of currently enrolled pupils, other than that described in (e) below, may be destroyed after the information is no longer necessary to provide educational services to a pupil. Such destruction shall be accomplished only after written parental or adult pupil notification and written parental or adult pupil permission has been granted or after reasonable attempts of such notification and reasonable attempts to secure parental or adult pupil permission have been unsuccessful.

(c) Upon graduation or permanent departure of a pupil from the school system:

1. The parent or adult pupil shall be notified in writing that a copy of the entire pupil record will be provided to them upon request.

2. Information in pupil records, other than that described in (e) below, may be destroyed but only in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 et seq. Such destruction shall be accomplished only after written parental or adult pupil notification and written parental or adult pupil permission has been granted, or after reasonable attempts at such notification and reasonable attempts to secure parental or adult pupil permission have been unsuccessful.

(d) No additions shall be made to the record after graduation or permanent departure without the prior written consent of the parent or adult pupil.

(e) The New Jersey public school district of last enrollment graduation or permanent departure of the pupil from the school district and shall keep in perpetuity a permanent record of a pupil's name, date of birth, sex, address, telephone number, grades, attendance record, classes attended, grade level completed, year completed, name of parent(s) and citizenship status.

SUBCHAPTER 7. WITHDRAWAL FROM REGIONAL SCHOOL DISTRICTS

6:3-7.1 Application and data for investigation of advisability of withdrawal

(a) Any district board of education constituting part of a limited purpose regional school district or the governing body of such local school district, or the governing body of any municipality constituting part of an all purpose regional school district may apply to the county superintendent of schools to make an investigation as to the feasibility of withdrawal of such constituent district or municipality from the regional district. Such body shall adopt a resolution by a recorded roll call vote of the majority of the full membership requesting that the county superintendent make such investigation. The resolution request submitted to the county superintendent shall include the following information:

1. A general description of the regional district and of the withdrawing constituent district, including but not limited to, the type of educational system, number of schools and grade levels served, community population, and geographical characteristics;

2. Enrollment data, including, but not limited to, the number of pupils enrolled as reported by grade on the Annual Application for State School Aid and estimated projected enrollments, by grade level, for the succeeding five school years for both the withdrawing district or municipality and the remaining regional district, based on growth factors using average percentages for the last three school years;

3. The racial composition of the pupil population enrolled in the regional district from the withdrawing district or municipality, and the effect of such withdrawal upon the racial composition of the remaining pupil population of the regional district;

4. Two appraisals of each school site which is part of the regional district prepared by qualified appraisers. If two or more constituent districts or municipalities request such a study, the selection of the appraisers and the cost of the required appraisals shall be made and shared jointly; and

5. The proposed educational plan for the pupils from the withdrawing district or municipality presently enrolled in the school or schools of the regional district.

(b) Within 21 days following adoption of such resolution, such body shall confer with the remaining constituent districts and/or the governing bodies of the constituent municipalities, and the regional board of education and the county superintendent to review the procedure required for withdrawal from a regional school district. Such conference may be called by the county superintendent at the request of a constituent district or municipality prior to its adoption of such resolution.

6:3-7.2 Investigation and report by county superintendent of schools

(a) Upon receipt of the resolution and accompanying data pursuant to N.J.A.C. 6:3-7.1, the county superintendent shall make an investigation and shall within 60 days after receipt of such request issue a report, in accordance with N.J.S.A. 18A:13-52 or 13-67, to governing bodies of the municipalities constituting the regional district and the board of education of the regional district. If the county superintendent's report addresses the withdrawal of a constituent district or districts from a limited purpose regional districts, the report shall also be issued to the boards of education of the constituent district. When the county superintendent has begun such investigation, no action shall be taken upon a subsequent request from another constituent district or municipality of the same regional district until the investigation, report and action thereon have been completed. This report shall be based on data supplied by the petitioning district(s) or municipality(ies) including, but not limited to, the following:

1. A general description of the regional district, including the number of constituent districts, schoolhouses, area of the total district, and area of the withdrawing district or municipality;

2. Enrollment data, including the number of pupils enrolled as reported by grade on the Annual Application for State School Aid and estimated projected enrollment, by grade level, for the succeeding five school years for both the withdrawing district or municipality and the remaining regional district, based on growth factors using average percentages for the last three school years;

3. Enrollment data, by grade level, showing the racial composition of the present regional pupil population and the resulting racial composition for both the withdrawing district or municipality and the remaining regional district if withdrawal is approved;

4. The operating expenses of the regional district for the present school year including the distribution of such current operating expenses among the constituent districts or municipalities;

5. The equalized valuation of each constituent district or municipality of the regional district as set forth in N.J.S.A. 18A:7D-1 et seq.;

6. The average equalized valuations of the real property of each constituent district or municipality of the regional district as set forth in N.J.S.A. 18A:24-1 et seq.;

7. The borrowing margin of each constituent district or municipality of the regional district as determined by N.J.S.A. 18A:24-1 et seq., and the revised borrowing margin of each constituent district or municipality and the withdrawing district or municipality, if approval is granted;

8. The apportionment of debt service for the current school year among all the constituent districts or municipalities of the regional district by dollar amounts and percentages;

9. The replacement costs of schoolhouses and additions, grounds, furnishings and equipment of the regional district, and the replacement cost of any schoolhouse, and additions of the regional district including grounds, furnishings, and equipment, situated in the withdrawing district or municipality. School building replacement costs will be calculated by the Bureau of Facility Planning Services as follows:

i. The current overall cost per square foot for school construction in New Jersey, updated annually in the fall of each year, will be multiplied by the gross area of the building;

ii. This figure will include construction costs, moveable and built-in furniture and equipment, and fees; and

iii. Site costs will be excluded since they are already included under N.J.A.C. 6:3-7.1(a)4;

10. The amount of indebtedness, if any, to be assumed by the withdrawing constituent district or municipality;

11. The distribution of assets and liabilities of the existing regional district and remaining regional district following withdrawal in the manner as provided by N.J.S.A. 18A:8-24;

12. A proposed educational plan for the withdrawing constituent district or municipality, if withdrawal is approved, including the effects of such withdrawal upon the educational program of the remaining regional district;

13. A summary of the advantages of withdrawal to both the withdrawing constituent district or municipality and the remaining regional district and the disadvantages to the withdrawing constituent district or municipality and the remaining regional district; and

14. A recommendation regarding the request for withdrawal from the regional school district by the county superintendent.

(b) Upon adoption of a resolution, in accordance with N.J.S.A 18A:13-51 or 13-66, the board of education of the regional school district shall not incur any additional indebtedness for capital projects, pending either the rejection of the proposal at a special school election or an effective date of withdrawal as determined by the Commissioner of Education.

6:3-7.3 Special school election

(a) If the application is granted upon completion of the procedures contained in N.J.S.A. 18A:13-54 to 56 or 18A:13-69 to 71, the county superintendent shall confer with the regional board and the boards of education of the constituent districts of a limited purpose regional district or the constituent municipal governing bodies of an all purpose regional district and fix a day and time for holding a special school election, in accordance with the provisions of N.J.S.A. 18A:13-57 or 18A:13-72.

(b) To be effective the proposal must be adopted by a majority of the legal votes cast within the withdrawing constituent district or municipality, and, in addition, a majority of the combined legal votes cast within the remainder of the regional district.

6:3-7.4 Final determination of board of review

The board of review, which shall consist of the Commissioner, who shall be chairperson, the State Treasurer or his or her designee, and the Director of the Division of Local Government of Community Affairs, shall include in its final determinations required by N.J.S.A. 18A:13-56 or 18A:13-71, any specific conditions under which its consent is granted in order to insure that a thorough and efficient system of public schools will be maintained in the withdrawing district(s) or municipality(ies) and the remaining regional district.

6:3-7.5 Effective date of withdrawal

If approved at said election, the withdrawal of the district or municipality shall become effective upon a date to be determined by the Commissioner of Education, pursuant to the provisions of N.J.S.A 18A:13-59 or 18A:13-74.

SUBCHAPTER 8. PROVISIONS FOR THE EDUCATION OF HOMELESS CHILDREN AND YOUTH

6:3-8.1 Purpose

The purpose of this subchapter is to establish uniform Statewide policies and procedures for ensuring that homeless children and youth have access to a free and appropriate public education. Specific rules have been established to determine the educational placement of these students and to respond to appeals made by parents or other parties. These rules will implement N.J.S.A. 18A:38-1 and 18A:7B-12.

6:3-8.2 Definitions

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

"District liaison for the education of homeless children" means the person identified in each school district who facilitates all of the activities needed to ensure the timely educational placement of homeless children and youth.

"District of residence" for a homeless child whose parent(s) or guardian(s) temporarily move from one school district to another as the result of being homeless pursuant to N.J.S.A. 18A:38-1, N.J.A.C. 6:20-5.3(g) and N.J.S.A 18A:7B-12 means the district in which the parent(s) or guardian(s) last resided prior to becoming homeless.

"Homeless" child or youth means one who lacks a fixed, regular, and adequate residence.

"Parent" means the natural parent(s) or legal guardian(s), foster parent(s), surrogate parent(s), person acting in the place of a parent such as the person with whom the pupil legally resides and/or a person legally responsible for the pupil's welfare. Unless parental rights have been terminated by a court of appropriate jurisdiction, the parent(s) retains all rights under this chapter.

6:3-8.3 Determination of homelessness

(a) A child or youth shall be considered homeless for purposes of this program if he or she resides in any of the following:

1. A supervised publicly or privately operated shelter designed to provide temporary living accommodations, including:
   i. Welfare hotels;
   ii. Congregate shelters;
   iii. Transitional housing for families; and
   iv. Transitional housing for the mentally ill;
2. An institution that provides a temporary residence for individuals intended to be institutionalized; or
3. A public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings.

(b) Additionally, a child or youth shall be considered homeless if he or she is:

1. Living with a parent in a domestic violence shelter;
2. A runaway living in a shelter;
3. A school-aged mother residing in a home for adolescent mothers;
4. Sick or abandoned and residing in a hospital and would otherwise be released if he or she had a permanent residence;
5. Abandoned and therefore has no permanent residence;
6. The child of a homeless family which is out of necessity living with relatives or friends; or
7. The child of a migrant family which lacks adequate housing.

(c) When a dispute occurs regarding the determination of homelessness, the involved districts shall immediately notify the county superintendent of schools, who shall decide the status of the child within 48 hours.

6:3-8.4 Responsibilities of the district of residence

(a) The district of residence for a homeless child shall be responsible for the education of the child, shall determine the educational placement after consulting with the parent(s) or guardian(s), shall pay the costs of tuition and transportation when the child attends school in another district, and shall provide transportation when a child attends school in the district of residence while residing in another district.

(b) The determination of a homeless child's district of residence shall be made by the school districts involved as described in N.J.A.C. 6:3-8.5 based upon information received from the Department of Human Services, shelter providers, school districts, involved agencies, case managers or parents.

(c) The school district which has been determined to be the district of residence for a homeless child shall be the district of residence for as long as the parent(s) or guardian(s) remains homeless.

(d) When a dispute occurs regarding the determination of the district of residence, the involved districts shall immediately notify the county superintendent of schools, who will resolve the dispute. When the dispute involves districts in different counties, the county superintendents will work collectively to resolve the dispute. If the county superintendent(s) is unable to resolve the dispute, an appeal may be made to the Assistant Commissioner, Division of Finance, pursuant to N.J.A.C. 6:20-5.3(d), (e), and (f).

(e) When the district of residence cannot be determined for a homeless child or if the district of residence is outside of the State, the State shall assume fiscal responsibility for the tuition of the child pursuant to N.J.S.A. 18A:7B-12(d). The Department of Education shall pay the amount to the school district in which the child is currently enrolled for as long as the parent(s) or guardian(s) remains homeless.

6:3-8.5 Responsibilities of the district liaison

(a) The superintendent of each school district shall identify a district liaison for the education of homeless children.

1. The liaison shall facilitate communication and cooperation between the district or residence and the district where the homeless child is temporarily residing.
2. The liaison shall develop a system to ensure that any homeless child residing in the district is enrolled and attending school according to the placement options described in N.J.A.C. 6:3-7.6(a).

(b) When a child becomes homeless and is living temporarily in a school district, the liaison of that district, upon receiving notification from the Department of Human Services, shelter directors, involved agencies, case managers, or parent(s) or guardian(s), shall notify the liaison of the district of residence within 24 hours. This procedure shall also apply to those children identified as homeless pursuant to N.J.A.C. 6:3-8.3 and who may not be receiving services through a social service agency.

(c) When the liaison in the district of residence of a homeless child receives notification of the need for educational placement, that person shall coordinate placement procedures immediately based on the best interest of the child and criteria set forth in N.J.A.C. 6:3-8.6(c).

6:3-8.6 Educational placement

(a) The district of residence shall decide the educational placement of the homeless child according to criteria described in this section. The options for placement are:

1. To continue the child's education in the school district of last attendance.

2. To enroll the child in the district of residence if the district of residence is not the district of last attendance; or

3. To enroll the child in the school district where the child is temporarily living.

(b) When the district of residence for a homeless child cannot be determined, the district in which the child is temporarily residing or the district of last attendance shall enroll the child immediately.

(c) The decision regarding educational placement of a homeless child shall be based on what is in the best interest of the child. The district of residence shall consider the following in the placement decision process:

1. The preference of the parent(s) or guardian(s) as to where the child should attend school;

2. The continuity of the child's educational program with consideration given to the child continuing in the same school, the length of time the child attended a particular school, the time remaining in the school year, graduation requirements and district policies regarding the number of credits needed for graduation, and geographical location where the family plans to seek permanent housing;

3. The eligibility of the child for special instructional programs, such as bilingual, compensatory, gifted and talented, special education and vocational programs; and

4. The distance, travel time, and safety factors in coordinating transportation services from the temporary residence to the school.

(d) When a decision is made to enroll an educationally handicapped homeless child in a district other than the district of residence and an immediate review of the placement options available to implement the pupil's current individualized educational program cannot be conducted, the child shall be placed in a program consistent with the goals and objectives of the current individualized educational program for a period not to exceed 30 calendar days. Within this 30 day period, the district of residence must assure that the individualized educational program is reviewed and revised pursuant to N.J.A.C. 6:28.

(e) The district of residence shall determine the educational placement in a timely manner and only after consultation with the parent(s) or guardian(s) as described below:

1. Placement decisions shall be made by the superintendent of the district of residence or his or her designee within three school days of notification of the need for educational placement. Once the decision is made, the child shall be placed immediately.

2. Consultation with the parent(s) or guardian(s) regarding the placement decision and their right to appeal that decision shall be documented by the superintendent or his or her designee in writing.

3. When there is a dispute regarding the placement decision, the child will be enrolled when the county superintendent determines the educational placement pursuant to N.J.A.C. 6:3-8.7.

(f) When a decision is made to enroll the child in a district other than the district of residence, the district where the child last attended school shall forward to the new district all relevant school and health records. When the parent(s) or guardian(s) is homeless due to conditions of domestic violence, the transfer of pupil records shall be subject to the provisions of N.J.A.C. 6:3-6.

6:3-8.7 Disputes and appeals

(a) If the parent(s) or guardian(s), involved school district officials, involved agencies, case managers, or shelter providers object to the educational placement decision made by the district of residence, the superintendent or designee of the district of residence shall immediately notify the county superintendent of schools. The county superintendent shall determine the placement of the child within 48 hours based on the child's best interest and the criteria set forth in N.J.A.C. 6:3-8.6(c).

(b) If the parent(s) or guardian(s) or any of the above parties object to the decision of the county superintendent, mediation shall be available through the Department of Education's Office of Education for Homeless Children and Youth. Mediation shall be provided as follows:

1. A request for mediation shall be made to the Office of Education for Homeless Children and Youth either verbally or in written form. The mediation request shall cite the issues in dispute and the relief sought;

2. A mediation conference with all parties present, including representation from the county superintendent's office, shall be conducted within five school days after the request is made at which time:

i. Issues shall be determined; and

ii. Options explored.

3. The role of the mediator is not judgmental;

4. The mediation conference shall be:

i. Informal; and

ii. Held at a time and place reasonably convenient to the parties in the dispute.

5. If the mediation results in agreement, conclusions shall be incorporated into a written agreement, signed by each party, and forwarded to the county superintendent for appropriate action. If the mediation does not result in agreement, the Office of Education for Homeless Children and Youth shall assist the parent(s) or guardian(s) in filing an appeal to the Commissioner of Education pursuant to N.J.S.A. 18A:6-9 and N.J.A.C. 6:24.

(c) Any dispute or appeal from any party at any stage of the process shall not delay the homeless child's immediate entrance into school. The homeless child shall be placed in the district designated by the county superintendent pending resolution of the dispute or appeal.

(d) Any disputes and appeals involving an educationally handicapped homeless child shall be pursuant to N.J.A.C. 6:28.

6:3-8.8 Tuition

(a) When the homeless child is enrolled in a district other than the district of residence, the district of residence shall pay the costs of tuition for the child to that district pursuant to N.J.S.A. 18A:38-19 and N.J.A.C. 6:20-3.1.

(b) The district of residence shall also include the child on its annual Application for State School Aid (ASSA) for as long as the parent(s) or guardian(s) remains homeless and the child is enrolled in another school district.

(c) When the State assumes fiscal responsibility for the tuition of a homeless child, the State shall pay the district in which the child is enrolled the State foundation amount plus the appropriate special education aid, if any.

6:3-8.9 Transportation

(a) When the homeless child is enrolled in a district other than the district of residence, the district in which the child is enrolled shall provide transportation services and the district of residence shall pay for any transportation costs incurred by that district pursuant to N.J.S.A. 18A:39-1 et seq. and N.J.A.C. 6:21.

(b) When the homeless child attends school in the district of residence while temporarily residing in another district, the district of residence shall provide for transportation to and from school pursuant to the provisions of N.J.A.C. 6:21.

(c) When a district of residence cannot be determined and the State has assumed fiscal responsibility for the payment of tuition,

the district where the homeless child is enrolled shall provide transportation pursuant to N.J.A.C. 6:21.

(d) In implementing the transportation services required for a homeless child, school districts shall explore alternatives and provide the most economical and safest mode of transportation pursuant to N.J.A.C. 6:21.

6:3-8.10 Evaluation procedures for compliance

(a) The Department of Education shall monitor school districts responsible for implementing the requirements set forth in this subchapter, including:

1. Placement decisions made according to rules and within specified timelines; and

2. Provision of appropriate educational services and transportation.

SUBCHAPTER 12. USE OF SCHOOL BUSES OTHER THAN TO AND FROM SCHOOL AND SCHOOL RELATED ACTIVITIES

6:21-12.1 Definitions

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

"Contiguous district" means a district adjoining and adjacent to another district and sharing in some part a common boundary within the State of New Jersey. For a regional school district a contiguous school district shall be an adjoining and adjacent district which shares in some part a common boundary with the total regional district.

"Group" means 10 or more persons.

"Senior citizens" means those people of the State of New Jersey who are 60 years of age or older. Spouses of senior citizens may be less than 60 years of age.

6:21-12.2 General provisions

(a) The board of education of any district may permit the use of school buses, owned or leased by the school district, for the purpose of transporting senior citizens' groups to and from events within the districts or in any contiguous district, for transporting handicapped citizens in any district, and for transporting children and adults participating in a recreation or other program operated by the municipality or municipalities in which the district is located or the municipality in which any constituent district of a regional school district is located. Such events shall include, but not be limited to, civic, social, cultural, educational, recreational, nutritional and health programs and activities.

(b) The board of education shall adopt a policy addressing the transportation of these groups. The policy shall require groups seeking the use of school buses to pay all or part of any costs incurred by the district in permitting such use. The costs shall include, but not be limited to, the costs of fuel, driver salaries, insurance, and depreciation.

(c) The use of school buses by these groups requires the approval of the board of education and shall not interfere with the transportation of school pupils.

(d) Buses shall be operated only by a person having a valid school bus driver's license approved by the New Jersey Division of Motor Vehicles.

(e) School bus warning lamps shall not be used when transporting these groups.

(f) School buses, when used to transport these groups, shall load and unload off the public roadway so as not to interfere with traffic.

(g) Boards of education using buses for the transportation of these groups shall file proof of insurance coverage for such transportation with their county superintendents of schools. Insurance coverage shall include liability for bodily injury and property damage in the amount of $1,000,000 combined single limit per occurrence.

6:29-1.7 Eye protection in public schools

(a) Each district board of education shall require each pupil, teacher and visitor in the public schools of the district, including evening adult schools programs, to wear appropriate eye protective devices while participating in any regular school program as defined in N.J.A.C. 6:8-1.1 in which caustic or explosive chemicals or materials, hot liquids or solids, molten materials, welding operations of any type, repairing or servicing of vehicles, heat treatment or tempering of metals, the shaping of solid materials and laser device operation and experimentation or any similar process or activity is engaged in, exposure to which might have a tendency to cause damage to the eyes.

(b) The term "appropriate eye protective device" shall include plain or prescription lenses provided the lenses and other portions of the device meet or exceed the prescribed specifications for the device. Specifications for appropriate eye protection for various activities shall meet or exceed standards described in (b)1 and 2 below. The standards, with all subsequent amendments and supplements, are hereby adopted as rules and incorporated herein by reference.

1. American National Standard Practice for Occupational and Educational Eye and Face Protection, ANSI Z87.1-1979.

2. American National Standard Practice for the Safe Use of Lasers, ANSI Z136.1-1986 and eye protective procedures recommended by the manufacturer of the laser device.

(c) The documents in (b)1 and 2 above are available for review at the Administrative Code Office, Department of Education, 225 West State Street, CN 500, Trenton, New Jersey 08625-0500. These documents may be purchased from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018.

(d) Emergency eye wash fountains or similar devices, capable of a minimum 15 minutes continuous flow of eye wash solution shall be provided in classrooms, shops, laboratories or other area where pupils or instructors are exposed to caustic materials that can cause damage to the eyes.

(e) The following types of eye protective devices shall be used to fit the designated activities or processes:

Potential Eye Hazard—Eye Protective Device(s)

1. Caustic or explosive—Goggles, flexible fitting, hooded ventilation; add plastic window face shield for severe exposure;

2. Dust producing operations—Goggles, flexible fitting, hooded ventilation;

3. Electric arc welding—Welding helmet in combination with spectacles with eye cup or semi or flat-fold side shields;

4. Oxy-acetylene welding—Welding goggles, eye cup type with tinted lenses; welding goggle, coverspec type with tinted lenses or tinted plate lense;

5. Hot liquids and gases—Goggles, flexible fitting, hooded ventilation; add plastic window face shield for severe exposure;

6. Hot solids—Clear or tinted goggles or spectacles with side shields;

7. Molten materials—Clear or tinted goggles and plastic or mesh window face shield;

8. Heat treatment or tempering—Clear or tinted goggles or clear or tinted spectacles with side shields;

9. Glare operations—Tinted goggles; tinted spectacles with side shields or welding goggles, eye cup or coverspec type with tinted lenses or tinted plate lenses;

10. Shaping solid materials—Clear goggles, flexible or rigid body; clear spectacles with side shields; add plastic window face shield for severe exposure;

11. Laser device operation or experimentation—Appropriate for specific hazard;

12. Repair or servicing of vehicles—Clear goggles, flexible or rigid body; clear spectacles with side shields;

13. Other potentially eye hazardous processes or activities—Appropriate for specific hazard.

(f) Each district board of education shall establish and implement a specific eye protective policy and program to assure that:

1. No teacher, pupil or visitor shall be subjected to any hazardous environmental condition without appropriate eye protection;

2. The detection of eye hazardous conditions shall be continuous;

3. Eye protection devices shall be inspected regularly and adequately maintained;

4. Shared eye protective devices shall be disinfected between uses by a method prescribed by the local school medical inspector;

5. All eye protective devices shall meet or exceed the appropriate specifications for the various types of devices and suppliers of eye protective devices shall certify, in writing, that the devices meet or exceed said specifications;

6. Specific policy and procedures shall be established to deal with individuals who refuse to abide by established eye safety practices and procedures;

7. The use of contact lenses shall be restricted in learning environments which entail exposure to chemical fumes, vapors or splashes, intense heat, molten metals, or highly particulate atmospheres. Contact lenses, when permitted, shall only be worn in conjunction with appropriate eye protective devices and the lens wearer shall be identified for appropriate emergency care in eye hazardous learning environments;

8. All spectacle type eye protective device shall have side shields of the eye cup, semi or flat-fold type;

9. Pupils, teachers or visitors wearing personal corrective eyewear shall be required to wear cover goggles or similar devices unless it can be certified, by competent authority, that the personal eyewear meets or exceeds standards identified in (b) above.

SUBCHAPTER 9. THE REPORTING OF ALLEGATIONS OF CHILD ABUSE

6:29-9.1 Purpose

The purpose of this subchapter is to establish uniform Statewide policies and procedures for public school personnel to report allegations of child abuse to the Division of Youth and Family Services (DYFS) and to cooperate with the investigation of such allegations.

6:29-9.2 Adoption of policies and procedures

(a) District boards of education shall adopt and implement policies and procedures for the reporting and the cooperation with the Division of Youth and Family Services (DYFS) in investigations of child abuse. District policies and procedures developed pursuant to this subchapter shall be reviewed and approved by the county superintendent. These policies and procedures shall not be limited to the following, but shall:

1. Include provisions requiring school personnel, compensated and uncompensated (volunteer), to immediately report to the DYFS incidents of child abuse. The person reporting the alleged child abuse shall inform the school principal or his or her designee of the report after the DYFS referral has been made. However, notice to the principal or his or her designee need not be given when the person believes that such notice would be likely to endanger the referrer or child(ren) involved or when the person believes that such disclosure would be likely to result in retaliation against the child or in discrimination against the referrer with respect to his or her employment.

i. School personnel having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse as defined under N.J.S.A. 9:6-8.9 shall immediately report to the DYFS (see N.J.S.A. 9:6-8.10). When referring cases to the DYFS, the school referrer shall provide, when possible, the following information:

(1) The name of the child;

(2) The age and grade of the child;

(3) The name and address of the child's parent or guardian or other person having custody and control (for example, foster parent);

(4) A description of the child's condition, including any available information concerning current or previous injuries, abuse, or maltreatment and including any evidence of previous injuries;

(5) The nature and possible extent of the child's injuries, abuse, or maltreatment; and

(6) Any other pertinent information that the referrer believes may be relevant with respect to the child abuse and/or to the identity of the alleged perpetrator;

2. Include a statement indicating the importance of early identification of child abuse;

3. Provide assurances that no school personnel will be discharged from employment or in any manner discriminated against as a result of making in good faith a report or causing to be reported an allegation of child abuse (see N.J.S.A. 9:6-8.13);

4. Require procedures for the following:

i. District cooperation with the DYFS in investigations of child abuse that has occurred at any time outside or within the confines of the school or during a school-related function;

ii. District action as defined in N.J.S.A. 9:6-3.1 in response to the findings at each stage of the investigation process as it affects the child(ren) and the school personnel;

iii. Release of the child(ren) from the school; and

iv. Transfer of the child(ren) between schools;

5. Provide for the establishment of a liaison to the DYFS from the district board of education.

i. The function of the liaison is to:

(1) Facilitate communication and cooperation between the district and the DYFS; and

(2) Act as the primary contact person between the schools and the DYFS with regard to general information sharing and the development of mutual training and other cooperative efforts;

6. Include provisions for the annual delivery of information and in-service training programs to school personnel concerning child abuse, instructional methods and techniques relative to issues of child abuse in the local curriculum, and personnel responsibilities pursuant to N.J.S.A. 9:6-8.10 et seq.;

i. All new school district employees, both paid and voluntary, shall receive the required information and training as part of their orientation;

7. Detail the responsibilities of the district board of education as follows:

i. Permit the DYFS investigator to interview the child(ren) in the presence of the school principal or his or her designee. If the child(ren) is intimidated by the presence of that school representative, the child(ren) shall name a staff member, whom he or she feels will be supportive, who will be allowed to accompany the child during the interview. The purpose of including a school representative is to provide comfort and support to the child, not to participate in the investigation;

ii. Cooperate with the DYFS in scheduling interviews with any school personnel who may have information relevant to the investigation;

iii. Release, in accordance with N.J.S.A. 18A:36-19 and N.J.A.C. 6:3-6, all pupil records of the child(ren) under investigation that are deemed to be relevant to the assessment or treatment of child abuse (see N.J.S.A. 9:6-8.40);

iv. Maintain and secure all confidential information about child abuse cases in accordance with N.J.S.A. 18A:36-19, N.J.S.A. 9:6-8.10a, and N.J.A.C. 6:3-6;

v. Permit the DYFS to physically remove pupils from school during the course of a school day when it is necessary to protect the child or take the child to a service provider. Such removal shall take place once the principal or his or her designee has been provided, either in advance or at the time removal is sought, with appropriate authorization as specified in N.J.S.A. 9:6-8.27 through 8.30;

vi. Cooperate with the DYFS when it is necessary to remove the child(ren) from his or her home for proper care and protection and when such removal results in the transfer of the child to a school other than the one in which he or she is enrolled; and

vii. Provide due process rights to school personnel who have been reassigned or suspended in accordance with N.J.S.A. 18A:6-10 et seq., 18A:25-1, 18A:25-6, and N.J.S.A. 9:6-3.1. Temporary reassignment or suspension of school personnel alleged to have committed an act of child abuse shall occur if there is reasonable cause to believe that the life or health of the alleged victim or other children is in imminent danger due to continued contact between the school personnel and a child (see N.J.S.A. 18A:6-10 et seq. and N.J.S.A. 9:6-3.1).

SUBCHAPTER 10. SAFE AND DRUG FREE SCHOOLS

6:29-10.1 Purpose

The purpose of this subchapter is to establish uniform Statewide policies and procedures for cooperating with law enforcement operations and activities on or near school grounds to ensure a safe school

environment, and to identify the circumstances under which school officials shall refer violations to the police for handling, as authorized by the Attorney General's Executive Directive 1988-1. Such policies and procedures shall be consistent with and complementary to the State Memorandum of Agreement approved by the Department of Law and Public Safety and the Department of Education.

6:29-10.2 Adoption of policies and procedures

(a) District boards of education shall adopt and implement policies and procedures to ensure cooperation between school staff and law enforcement authorities in all matters relating to:

1. The unlawful possession, distribution and disposition of the following:

i. Controlled dangerous substances, including anabolic steroids;

ii. Drug paraphernalia;

iii. Alcohol;

iv. Firearms, as defined in N.J.S.A. 2C:39-1f; and

v. Other deadly weapons, as defined in N.J.S.A. 2C:39-1r; and

2. The planning and conduct of law enforcement activities and operations occurring on school property, including arrest procedures and undercover school operations.

6:29-10.3 General requirements

(a) District policies and procedures developed pursuant to this section shall:

1. Be developed, implemented, and revised, as necessary, through consultation with the county prosecutor and such other law enforcement officials as may be designated by the county prosecutor;

2. Be reviewed and approved by the county superintendent;

3. Be made available annually to all school staff, pupils, and parents or guardians; and

4. Be consistent with reporting, notification and examination procedures of students suspected of being under the influence of alcohol and other substances in accordance with N.J.A.C. 6:29-6.

(b) District policies and procedures shall include, but not be limited to, the following components:

1. The designation of liaisons to law enforcement agencies and the prescription of their roles and responsibilities by the district chief school administrator;

2. Specific procedures for and responsibilities of staff in summoning appropriate law enforcement authorities onto school property for the purpose of conducting law enforcement investigations, searches, seizures, and arrests;

3. Specific procedures for and responsibilities of staff in cooperating with arrests made by law enforcement authorities on school property;

4. Specific procedures for and responsibilities of staff in initiating or conducting searches and seizures of pupils, their property, and personal effects. All searches and seizures conducted by school staff shall comply with the standards prescribed by the United States Supreme Court in *New Jersey* v. *T.L.O.,* 469 *U.S.* 325 (1985), as set forth in the "Attorney General's Guidelines Regarding School Searches," issued in 1985;

i. Any question concerning searches conducted by school officials shall be directed to the appropriate county prosecutor.

ii. School officials may request that law enforcement authorities assume responsibility for conducting any search or seizure.

iii. No school staff member shall impede any law enforcement officer engaged in a lawful search, seizure, or arrest whether pursuant to a warrant or otherwise.

iv. School staff shall permit law enforcement authorities upon their arrival to assume responsibility for conducting any search or seizure.

v. Any questions concerning the legality of any contemplated or ongoing search, seizure, or arrest conducted by a law enforcement officer on school property shall be directed to the county prosecutor or, in the case of a search, seizure or arrest undertaken by the Division of Criminal Justice in the Department of Law and Public Safety, to the Assistant Attorney General in charge;

5. The procedures for and responsibilities of staff, with regard to interviews of pupils suspected of possessing, or distributing a controlled dangerous substance, drug paraphernalia, or a firearm or other deadly weapon;

6. Procedures for planning, approving, and conducting undercover school operations;

i. The chief school administrator and school principal shall cooperate with law enforcement authorities in the planning and conduct of undercover school operations. The chief school administrator shall approve such undercover operations without prior notification to the district board of education.

ii. All information concerning requests to undertake any undercover school operation, information supplied by law enforcement authorities to justify or explain the need for and of a proposed undercover school operation, and all other information concerning an ongoing undercover school operation, including the identity of any undercover officer placed in a school, shall be kept strictly confidential by the chief school administrator and school principal. The chief school administrator and principal shall not divulge information concerning any undercover school operation to any person without the prior express approval of the county prosecutor or designee. In the event that the chief school administrator, principal or any other school staff or district board member who may have been informed as to the existence of the undercover school operation subsequently learns of any information which suggests that the true identity of the undercover officer has been revealed, or that any person has questioned the identity or status of the undercover officer as a bona fide member of the school community, or that the integrity of the undercover school operation has been in any other way compromised, such information shall be immediately communicated to the county prosecutor or designee;

7. The procedures for and responsibilities of staff concerning the safe and proper handling of any seized controlled dangerous substance, drug paraphernalia, or a firearm or other deadly weapon, and the prompt delivery of such items to appropriate law enforcement authorities in accordance with the provisions of this subchapter;

8. The procedures for and responsibilities of staff in notifying authorities of any suspected violation of any laws prohibiting the possession, sale or other distribution of any controlled dangerous substance, drug paraphernalia, or a firearm or other deadly weapon;

9. Provisions for requesting uniformed police attendance at extracurricular school events;

10. Provisions for notifying parents or guardians as soon as possible whenever a pupil is arrested for violating any laws prohibiting the possession, sale or other distribution of any controlled dangerous substance, drug paraphernalia, or a firearm or other deadly weapon;

11. Provisions for the inservice training of school staff concerning policies and procedures established in this subchapter, and the exchange of information regarding the practices of the education and law enforcement agencies; and

12. An agreement or memorandum of understanding with appropriate law enforcement authorities. Such agreements or memoranda of understanding shall be consistent with the policies established in this subchapter and in the State Memorandum of Agreement. These agreements or memoranda of understanding shall define the reciprocal rights and obligations of pupils, parents or guardians, school staff, and law enforcement officials with respect to the possession, distribution and disposition of controlled dangerous substances, drug paraphernalia, and firearms and other deadly weapons; with respect to the planning and conduct of law enforcement activities and operations, occurring on school property, including arrests and undercover school operations; and with respect to law enforcement's participation in substance abuse prevention programs;

i. Copies of all agreements or memoranda of understanding entered into with law enforcement authorities shall be approved by the district board of education and shall be submitted to and approved by the county prosecutor and county superintendent of schools;

13. Provisions for resolving disputes concerning law enforcement activities occurring on school property; and

14. An annual process for the local chief school administrator and appropriate law enforcement officials to discuss the implementation and need for revising the agreement or memorandum of understanding, and to review the effectiveness of policies and procedures implemented pursuant to the provisions of this subchapter. This annual review shall include input from the county superintendent, community and meeting(s) with the county prosecutor and such other law enforcement officials designated by the county prosecutor.

6:29-10.4 Reporting pupils or staff members to law enforcement authorities

(a) Subject to the provisions of N.J.A.C. 6:29-10.6 below, any teaching staff member having reason to believe that a pupil or staff member has unlawfully possessed or in any way been involved in the distribution of a controlled dangerous substance, including anabolic steroids, or drug paraphernalia, on or near school property, shall report the matter as soon as possible to the principal or, in the absence of the principal, to the staff member responsible at the time of the alleged violation. Either the principal or the responsible staff member shall notify the chief school administrator, who in turn shall notify as soon as possible the appropriate county prosecutor or other law enforcement official designated by the county prosecutor to receive such information.

1. The chief school administrator or designee shall provide to the county prosecutor or designee all known information concerning the matter, including the identity of the pupil or staff member involved. The chief school administrator or designee shall not disclose, however, the identity of any pupil or staff member who has voluntarily sought treatment or counseling for a substance abuse problem provided the pupil or staff member is not currently involved or implicated in drug distribution activities.

i. For the purpose of this section, an admission by a pupil or staff member in response to questioning initiated by the principal or teaching staff member, or following the discovery of a controlled dangerous substance, including anabolic steroids, or drug paraphernalia by the principal or teaching staff member, shall not constitute a voluntary, self-initiated request for counseling and treatment.

(b) Whenever any school employee develops reason to believe that a firearm or other deadly weapon has unlawfully been brought onto school property, or that any student or other person is in unlawful possession of a firearm or other deadly weapon, whether on or off school property, or that any student or other person has committed an offense with or while in possession of a firearm, whether or not such offense was committed on school property or during school operating hours, the matter shall be reported as soon as possible to the principal, or in the absence of the principal, to the staff member responsible at the time of the alleged violation. Either the principal or the responsible staff member shall notify the chief school administrator, who in turn shall notify, as soon as possible, the county prosecutor or other law enforcement official designated by the county prosecutor to receive such information. The chief school administrator or designee shall provide to the county prosecutor or designee all known information concerning the matter, including the identity of the pupil or staff member involved.

6:29-10.5 Handling of substances, firearms and other items

(a) Any school employee who seizes or discovers any substance or item believed to be a controlled dangerous substance, including anabolic steroids, or drug paraphernalia, shall immediately notify and turn over the substance or item to the principal or designee. Either the principal or designee shall then immediately notify the chief school administrator or designee who in turn shall notify the appropriate county prosecutor or other law enforcement official designated by the county prosecutor to receive such information. The school employee, principal or designee, shall safeguard the substance or paraphernalia against further use or destruction and shall secure the substance or paraphernalia until such time as the substance or paraphernalia can be turned over to the county prosecutor or designee.

1. The principal or designee shall provide to the county prosecutor or designee all information concerning the manner in which the substance or paraphernalia was discovered or seized, the identity of all persons who had custody of the substance or paraphernalia following its discovery or seizure, and the identity of any pupil or staff member believed to have been in possession of the substance or paraphernalia. However, the principal or designee shall not disclose the identity of any pupil or staff member who voluntarily and on his or her own initiative turned over the substance or paraphernalia to a school employee, provided that there is reason to believe that the pupil or staff member was involved with the substance or paraphernalia for the purpose of personal use, not distribution activities, and further provided that the pupil or staff member agrees to participate in an appropriate treatment or counseling program.

i. For the purposes of this section, an admission by a pupil or staff member in response to questioning initiated by the principal or teaching staff member, or following the discovery of a controlled dangerous substance, including anabolic steroids, or drug paraphernalia by the principal or teaching staff member shall not constitute a voluntary self-initiated request for counseling and treatment.

(b) Whenever a school employee seizes or comes upon any firearm or dangerous weapon, school officials should in the case of a dangerous weapon other than a firearm, and shall in the case of a firearm, immediately advise the county prosecutor or appropriate law enforcement official, and secure the firearm or weapon pending the response by law enforcement to retrieve and take custody of the firearm or dangerous weapon. School employees having custody of a firearm or dangerous weapon will take reasonable precautions, as per local board of education procedures, to prevent its theft, destruction or unlawful use by any person.

6:29-10.6 Confidentiality of pupil or staff member involvement in substance abuse intervention and treatment programs

(a) All information concerning a pupil's or staff member's involvement in a school intervention or treatment program for substance abuse shall be kept strictly confidential in accordance with applicable Federal regulations (42 C.F.R. Part 2).

(b) Nothing in this subchapter shall be construed in any way to authorize or require the transmittal of any information or records which are in the possession of a substance abuse counseling or treatment program.

(c) The principal or designee shall not disclose to law enforcement officials or to any person other than a member of the local district's substance abuse program that a pupil or staff member has received or is receiving evaluation or treatment services from the local district's substance abuse program; nor shall the principal or designee disclose any information, including the pupil's or staff member's identity or information about illegal activity, where such information was learned in the course of or as a result of evaluation or treatment services provided by the local district's substance abuse program.

(d) Nothing in the section shall be construed to preclude the disclosure of information about illegal activity which was learned by any school employee outside of the local district's substance abuse program, and any such information about illegal activity shall be reported in accordance with N.J.A.C. 6:3-6.4 and 10.5.

(a)

STATE BOARD OF EDUCATION

Certification Fees

Adopted Amendment: N.J.A.C. 6:11-3.2

Proposed: March 15, 1993 at 25 N.J.R. 1111(a).

Adopted: May 5, 1993 by the State Board of Education, Mary Lee Fitzgerald, Secretary, State Board of Education and Commissioner, Department of Education.

Filed: May 11, 1993 as R.1993 d.266, **without change.**

Authority: N.J.S.A. 18A:1-1, 4-15, 6-7, 6-34, 6-38 and 26-10.

Effective Date: June 7, 1993.

Expiration Date: September 21, 1995.

Summary of Public Comments and Agency Responses:

No comments received.

The New Jersey State Board of Education was due to hold a public testimony session on March 17, 1993 at which the above captioned rule was on the agenda, however, that session was cancelled. A public testimony session was held on April 21, 1993 at which no one spoke.

Full text of the adoption follows.

CHAPTER 11
PROFESSIONAL LICENSURE AND STANDARDS

6:11-3.2 Fees

(a) The State Board of Education may make and enforce rules for the granting of appropriate certificates or licenses to teach or to administer, direct, or supervise the teaching, instruction or educational guidance of pupils in public schools operated by district boards of education.

(b) Rules for certification fees include the following:

1. For each standard, provisional or emergency certificate, a fee of $50.00 shall be charged.

2. For each county substitute certificate, a fee of $38.00 shall be charged.

3. For each renewal of an emergency or provisional certificate, a fee of $30.00 shall be charged.

4. For each request for a duplicate copy of a certificate or change of holder's name, a fee of $25.00 shall be charged.

5. For each request for evaluation of credentials to determine eligibility to take a particular State licensing examination or to obtain information concerning qualification for certification, a fee of $30.00 shall be charged.

6. In cases where a single application results in the sequential issuance of both a provisional and standard certificate in the same endorsement field, a fee of $25.00 shall be charged for the standard certificate.

7. Fees and refunds for obtaining a qualifying academic certificate as defined in N.J.S.A. 18A:6-40 are provided in N.J.S.A. 18A:6-41.

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

(a)

STATE BOARD OF EDUCATION

Adult Education Programs

Readoption with Amendments: N.J.A.C. 6:30

Proposed: March 15, 1993 at 25 N.J.R. 1112(a).
Adopted: May 5, 1993 by the State Board of Education,
Mary Lee Fitzgerald, Secretary, State Board of Education and Commissioner, Department of Education.
Filed: May 11, 1993 as R.1993 d.267, **without change.**

Authority: N.J.S.A. 18A:1-1, 4-15, 7C-1 et seq., 48-1 through 8, 50-12, 13 and 14, and the Adult Education Act, U.S.C. 1201 et seq.

Effective Date: May 11, 1993, Readoption;
June 7, 1993, Amendments.
Expiration Date: May 11, 1994.

Summary of Public Comments and Agency Responses:

No comments received.

The New Jersey State Board of Education was due to hold a public testimony session on March 17, 1993 at which the above captioned rule was on the agenda, however, that session was cancelled. A public testimony session was held on April 21, 1993 at which no one spoke.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 6:30.

Full text of the adopted amendments follows:

6:30-1.1 Purpose and functions

(a) (No change.)

(b) The Division of Academic Programs and Standards is responsible for:

1.-7. (No change.)

6:30-1.5 School and community planning process

(a) Each district or agency sponsoring an adult education program shall adopt a school and community planning process for State and Federal funding for adult education programs received through the Division of Academic Programs and Standards to operate these programs.

1. (No change.)

(b) (No change.)

6:30-1.6 Evaluation requirements

(a) (No change.)

(b) Based upon the evaluation, the Assistant Commissioner, Division of Academic Programs and Standards, shall determine approval or non-approval of all programs except for an adult high school, in which case, the Assistant Commissioner shall make a recommendation to the Commissioner regarding the status of the adult high school.

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

6:30-1.7 Monitoring process

(a) The Assistant Commissioner, Division of Academic Programs and Standards shall establish evaluation worksheets for the monitoring of adult education programs.

1. Monitoring teams shall be composed of representatives of the Division of Academic Programs and Standards and may include a representative from the county office of education in which the program is located.

2. The Assistant Commissioner, Division of Academic Programs and Standards shall establish annually a monitoring schedule. Each program scheduled for monitoring shall be notified in advance by the Assistant Commissioner, Division of Academic Programs and Standards, and dates for such monitoring visits shall be established with the concurrence of the chief school administrator of the district or agency director with notification to the appropriate county office of education. For the purpose of this section, "agency, institution and organization" shall be referred to as "agency".

(b)-(e) (No change.)

(f) Approval of adult programs shall be based on acceptable ratings on all of the essential elements applicable to each given program. The Assistant Commissioner, Division of Academic Programs and Standards shall send formal notification of the findings to the chief school administrator and the appropriate county superintendent of schools or agency director within 30 days after the completion of the monitoring visit.

1. (No change.)

2. For each adult high school that receives an acceptable rating, the Assistant Commissioner, Division of Academic Programs and Standards, in addition to (f)1 above, shall submit a report of findings and recommendations to the Commissioner for final action by the State Board.

i. (No change.)

(g) For any adult program not approved, the district board of education or a sponsoring agency board may, within 30 days following receipt of notification, petition the Assistant Commissioner, Division of Academic Programs and Standards to rescind the rating by presenting written documentation of performance on elements rated as unacceptable in any given program.

1. The Assistant Commissioner, Division of Academic Programs and Standards, shall rule on such petitions.

(h) A school district or agency with any adult program rated as not approved shall implement the following program improvement process for each program so rated:

1.-2. (No change.)

3. The plan shall be submitted to the Assistant Commissioner, Division of Academic Programs and Standards who shall approve or disapprove the plan within 14 days of receipt.

i. Failure to submit a plan shall be cause for the Assistant Commissioner, Division of Academic Programs and Standards to judge the unacceptably rated adult program as being in non-compliance with law and rule and to determine the continuance or discontinuance of the program at a time established by the Assistant Commissioner.

ii. For an adult high school, failure to submit a plan shall be cause for the Division of Academic Programs and Standards to notify the Commissioner of the non-compliance of the adult high school with law and rule and recommend to the Commissioner the continuance or discontinuance of the adult high school program at a time to be established by the Commissioner.

4. (No change.)

5. Unacceptable plans shall be referred to the chief school administrator or agency director with recommendations for improvement.

i. The chief school administrator or agency director shall have 30 days to make the necessary revisions and resubmit the plan to the Assistant Commissioner, Division of Academic Programs and Standards.

ii. Failure to resubmit a plan or resubmitting a plan which continues to be unacceptable shall be cause for the Assistant Commissioner, Division of Academic Programs and Standards to judge the non-approved adult program as being in non-compliance with law and rule and to determine the continuance or discontinuance of the program at a time established by the Assistant Commissioner.

iii. For an adult high school, failure to resubmit a plan or resubmitting a plan which continues to be unacceptable shall be cause for the Assistant Commissioner, Division of Academic Programs and Standards to notify the Commissioner of the non-compliance of the adult high school with law and rule and recommend to the Commissioner the continuance or discontinuance of the adult high school program at a time to be established by the Commissioner.

6. The district or agency shall have 90 days from the date of improvement plan approval to fully implement the plan. The Assistant Commissioner, Division of Academic Programs and Standards may determine a longer time period for full implementation which shall be explicitly stated at the time of plan approval.

7. (No change.)

8. Following the remonitoring, the Assistant Commissioner, Division of Academic Programs and Standards shall send formal notification of the findings to the chief school administrator and appropriate county superintendent of schools or agency director. The approval process shall be completed pursuant to (f) above.

(i) For adult programs that are not approved following the implementation of a program improvement plan, the Assistant Commissioner, Division of Academic Programs and Standards shall convene an external team consisting of three adult program administrators and two nonadministrative professional adult program staff members from programs outside of the county of the program which has failed to receive approval.

1. The members of the external team shall review reports and events leading to non-approval and may schedule visits to the program site in order to render an advisory report to the Assistant Commissioner, Division of Academic Programs and Standards regarding the program's rating.

2. Following the receipt of the advisory report from the external team, the Assistant Commissioner, Division of Academic Programs and Standards may determine the continuance or discontinuance of the adult program at a time established by the Assistant Commissioner and explicitly stated in a formal notification to the chief school administrator and appropriate county superintendent of schools or agency director at the time of this action.

3. Following the receipt of the advisory report from the external team for an adult high school, the Assistant Commissioner, Division of Academic Programs and Standards shall make a recommendation to the Commissioner regarding the status of the adult high school. The Commissioner will recommend to the State Board of Education the continuance or discontinuance of the adult high school program.

6:30-2.3 Application for funding

(a) Eligible agencies entitled to program support shall submit a statement of anticipated funding needs for the succeeding fiscal year to the Division of Academic Programs and Standards by July 1 of the pre-budget year. For the purpose of this section, "agency, institution and organization" shall be referred to as "agency." In this section, the phrase "pre-budget year" shall mean the school year prior to the school year to which a statement of anticipated funding needs, a tentative allocation, an application for funds, or a notification of funding makes reference.

1. The Assistant Commissioner, Division of Academic Programs and Standards shall forward a notice of tentative allocation by September 1 of the pre-budget year to each agency which submitted a statement of anticipated funding needs.

(b) Eligible agencies shall submit an application for funds in accordance with procedures established by the Division of Academic Programs and Standards by November 1 of the pre-budget year. All applications will be reviewed and approved or disapproved for funding in accordance with eligibility criteria established in the State Plan for Adult Education pursuant to P.L. 91-230.

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

6:30-2.6 Monitoring elements and indicators

(a) The monitoring team shall examine the essential elements of the educational process in the program using prescribed indicators of acceptable performance and documentation which follow. For the purpose of this section, "agency, institution and organization" shall be referred to as "agency."

1.-2. (No change.)

3. The curriculum and instruction element shall be rated acceptable upon documentation of performance in four indicators as follows:

i. (No change.)

ii. An educational plan shall be developed for each adult student except for persons enrolled in ESL classes. The plan shall be developed jointly by a professional staff member and the adult and shall reflect the adult's interests, experiences, goals and objectives and those educational skills identified as requiring remediation. A diagnosis of academic needs shall be completed within 10 instructional hours of a student's enrollment using a standardized test approved by the Assistant Commissioner, Division of Academic Programs and Standards. Effective September 1, 1989, the educational plan shall also include a record of the adult's progress, as measured by the standardized test used above, administered 50 instructional hours following the initial diagnostic testing. Effective September 1, 1989, the plan shall also include a dated review of the degree to which a student's goals and objectives are being achieved. Documentation shall be copies of educational plans.

(1) For persons enrolled in ESL programs, a placement test approved by the Assistant Commissioner, Division of Academic Programs and Standards, consisting minimally of an oral interview, shall be administered within 10 instructional hours of enrollment.

iii.-iv. (No change.)

4.-7. (No change.)

8. The mandated assessment testing elements shall be rated as acceptable upon documentation of performance in the indicator as follows:

i. Adults enrolled in a program shall be tested within 10 instructional hours of enrollment. Effective September 1, 1989, students shall also be tested at 50 instructional hours following the initial testing, using standardized tests approved by the Assistant Commissioner, Division of Academic Programs and Standards. The 50 hour test requirement shall not apply to ESL students. Documentation shall be a dated record of test results.

9.-10. (No change.)

6:30-3.3 Application for participation

Eligible agencies shall submit an application in accordance with procedures established by the Division of Academic Programs and Standards which may include, but not be limited to, documentation related to location, target population, facilities, marketing strategies, institutional commitment, and hours of operation. Contracts shall be approved by the State Department of Education based on an agency's certification that contractual terms and conditions will be met.

6:30-3.4 Monitoring elements and indicators

(a) The monitoring team shall examine the essential elements of the educational process in the program using prescribed indicators of acceptable performance and documentation as follows:

1.-5. (No change.)

6. The staff element for the testing center shall be rated acceptable upon documentation of performance in three indicators as follows:

i. The testing center shall be staffed by persons with appropriate qualifications for administering the tests and for ensuring separation of GED instructional activities and testing functions. Staff administering or having access to the test shall be trained and approved by the Division of Academic Programs and Standards. The testing center shall have a State-approved chief examiner who shall have access to all test center materials and records at all times. Documentation shall include the identification of the chief examiner and copies of valid approvals issued by the Division of Academic Programs and Standards.

ii.-iii. (No change.)

7.-9. (No change.)

10. The financial element for the testing center shall be rated acceptable upon documentation of performance in the indicator as follows:

i. Fees shall be charged in accordance with N.J.A.C. 6:30-1.4, shall be recorded on cash control sheets, and shall be forwarded to the Division of Academic Programs and Standards. Documentation shall include copies of properly completed cash control sheets and evidence from the Department of Education that all monies are forwarded in a timely manner.

6:30-4.2 Definitions

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

...

"Disabled adult" means any adult who has any physiological, mental or psychological disorder or condition which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

...

6:30-4.3 Permission to establish, expand or relocate an adult high school

(a) To establish an adult high school, the district board of education shall file a request with the Division of Academic Programs and Standards prior to December 31 preceding the year of anticipated operation. The request shall include:

1.-7. (No change.)

(b) The Division of Academic Programs and Standards shall evaluate the application of the district board of education and visit the proposed site before the Assistant Commissioner shall grant or deny provisional approval to establish an adult high school.

1.-2. (No change.)

(c) To expand or to relocate an existing program to another site, the district board of education shall file a request with the Division of Academic Programs and Standards three months prior to the anticipated change. The request shall include elements (a)2, 3 and 4 listed above.

6:30-4.4 Evaluation elements and indicators

(a) The monitoring team shall examine the essential elements of the educational process in the program using prescribed indicators of acceptable performance and documentation as follows:

1.-3. (No change.)

4. The attendance and register maintenance element will be rated as acceptable upon documentation of performance in the indicator as follows:

i. The adult high school administrator shall maintain a New Jersey Adult High School Register and be responsible for the security of said Register for a period of six years following the close of the school year. Documentation of this shall be a correctly maintained Register which follows the instructions for Register maintenance which are printed in the document. The Register is available from the Division of Academic Programs and Standards. Attendance of students recorded in the Register shall be verifiable through backup data maintained by teachers. Certification of Non-Enrollment in School forms for students 16 and 17 years of age shall be filed with the student's educational plan.

5.-10. (No change.)

6:30-4.6 Adults with special needs

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

(d) Disabled adults without previous experience in a special education program or those individuals with IEP's that have been issued more than three years prior to their application to the adult high school shall be counseled regarding educational options which would lead to high school graduation and shall be served to the maximum extent appropriate to the needs of the disabled adult within the capability of the program to provide such services.

6:30-4.9 Award of credit

(a) The district board of education of each adult high school shall annually adopt policies at a public meeting which provide for the awarding of credit.

1.-5. (No change.)

6. Credits may be awarded for completion of apprentice training with the following limitations:

i.-iii. (No change.)

iv. The Assistant Commissioner, Division of Academic Programs and Standards, shall announce annually the apprenticeship titles eligible for the award of credit and determine the amount of credit to be awarded.

7. Credit may be awarded for possession of a current occupational license, issued by an agency of the State of New Jersey, with the following limitations:

i. (No change.)

ii. The Assistant Commissioner, Division of Academic Programs and Standards, shall announce annually those occupational titles eligible for the award of credit;

iii.-iv. (No change.)

8.-12. (No change.)

6:30-4.10 Awarding credit for foreign studies

(a) Credit for the equivalent of American secondary school studies experienced in a foreign country may only be awarded as determined by the Assistant Commissioner, Division of Academic Programs and Standards following an evaluation of transcript(s) presented by the adult.

(b) Transcript evaluation shall be for the purpose of participating in an adult high school program and shall be transmitted to the Division of Academic Programs and Standards with a request for such an evaluation by the principal of the adult high school.

1. (No change.)

6:30-5.3 Application for funding

(a) To receive funding under this program, school districts shall make application annually to the Division of Academic Programs and Standards.

1.-3. (No change.)

4. Upon receipt of a notice of allocation from the Division of Academic Programs and Standards, districts shall submit an application for approval by the Division. The annual allocation and application shall be distributed to school districts by June 30 of the school year preceding funding.

5.-6. (No change.)

6:30-5.6 Monitoring elements and indicators

(a) The monitoring team shall examine the essential elements of the educational process in the program using prescribed indicators of acceptable performance and documentation as follows:

1.-2. (No change.)

3. The curriculum and instruction element shall be rated acceptable upon documentation of performance in four indicators as follows:

i. (No change.)

ii. Effective September 1, 1989, a placement test approved by the Director, Division of Academic Programs and Standards consisting

minimally of an oral interview shall be administered within 10 instructional hours of enrollment. Documentation shall be copies of test results.

iii.-iv. (No change.)

4.-10. (No change.)

ENVIRONMENTAL PROTECTION AND ENERGY

(a)

NEW JERSEY WATER SUPPLY AUTHORITY

Policies and Procedures

Readoption: N.J.A.C. 7:11

Proposed: March 15, 1993 at 25 N.J.R. 1036(a).

Adopted: April 28, 1993 by the New Jersey Water Supply Authority, Scott A. Weiner, Chairman and Commissioner, Department of Environmental Protection and Energy.

Filed: May 3, 1993 as R.1993 d.239, **without change.**

Authority: N.J.S.A. 58:1B-7.

DEPE Docket Number: 12-93-02.

Effective Date: May 3, 1993.

Expiration Date: May 3, 1998.

Summary of Public Comments and Agency Responses:

Pursuant to Executive Order No. 66(1978), N.J.A.C. 7:11 was to have expired on May 13, 1993. The New Jersey Water Supply Authority (Authority) has reviewed these rules and has determined them to be necessary, reasonable and proper for the purpose for which they were originally promulgated. Notice of the proposed readoption was published in the New Jersey Register at 25 N.J.R. 1036(a). In addition, a direct mailing of the proposed readoption was made to all water customers, the Public Advocate, Board of Regulatory Commissioners and Department of Environmental Protection and Energy (State Parks Service and Division of Fish, Game and Wildlife). A notice of readoption was also posted at all recreational facilities covered by these rules.

After reviewing the comments received, the New Jersey Water Supply Authority approved the readoption of N.J.A.C. 7:11 without change.

The Raritan Basin System Water Users Association submitted a letter dated April 6, 1993 containing several comments as follows:

1. COMMENT: The Water Users Association stated that N.J.A.C. 7:11-1.27(a) should contain a requirement for the DEPE to insure the Authority for any claims due to recreational uses of the Authority's property.

RESPONSE: The legal agreements between the Authority and the DEPE for the recreational use of Authority owned or leased properties already require indemnification of the Authority for any recreational related claims.

2. COMMENT: The Water Users Association stated that the first sentence of N.J.A.C. 7:11-1.27(b) should be expanded to read: "Activities not included in (a) above shall require a written permit issued by the Executive Director of the Authority or his or her designee, **which permit shall include a provision for insurance and indemnification**" and that N.J.A.C. 7:11-1.27(c) should also be expanded to read "No person shall engage in the following recreational activities on Authority lands and waters without a written permit issued by the Executive Director or his or her designee, **which permit shall include provision for insurance and indemnification.**"

RESPONSE: All permits issued by the Authority must conform to standards set by the Office of the Attorney General. Provisions for insurance and indemnification already are standard requirements in all such permits.

3. COMMENT: The Water Users Association proposed that new subsections be added at N.J.A.C. 7:11-2.1(d) and 4.1(f) to ensure that neither the Raritan Basin System water customers nor the Manasquan Reservoir System water purchasers will be required to pay Operation and Maintenance and/or Debt Service assessments related to the other system.

RESPONSE: The contracts for water sales with both the Raritan Basin System and the Manasquan Reservoir System water customers include specific terms which protect the customers from charges or assessments related to any other water supply system(s).

4. COMMENT: The Water Users Association suggested that N.J.A.C. 7:11-2.2(a)1 be expanded to specifically exempt "**costs related to recreational facilities and recreational activities on Authority property**" and that N.J.A.C. 7:11-2.2(a)3 be expanded to specifically exempt "**any costs for insurance related to recreational activities or recreational facilities on Authority property.**"

RESPONSE: The provisions of N.J.A.C. 7:11-2.2(a)1 and 3 are consistent with the terms of the water use contract(s) between the Authority and the water user(s). Any changes to these provisions would require review and approval by counsel for the Authority's bond holders. Also, the legal agreements between the Authority and the DEPE and/or the Monmouth County Parks System for the recreational use of Authority property, require that all costs related to recreational facilities be borne by those respective agencies.

5. COMMENT: The Water Users Association stated that N.J.A.C. 7:11-2.10(d) should be expanded to read: "Contracts for new or additional water sales after July 1, 1989 shall also contain provisions requiring the retroactive payment of a full proportionate share of the total annual Debt Service Assessment payments made by the New Jersey Water Supply Authority to its bond holders during the period from July 1, 1989 to the effective date of any new contract, **including all costs of subsequent capital financing programs (notes or bonds).**"

RESPONSE: N.J.A.C. 7:11-2.10(d) provides for reimbursement of pre-existing water users for debt service payments specifically related to the Series 1988 Revenue Bonds. Any future capital financing program will require that a separate new provision be added to N.J.A.C. 7:11-2.10. The new provision would be similar to N.J.A.C. 7:11-2.10(d) and would ensure that new water customers repay all pre-existing water customers a proportionate share of the debt service payments made by the pre-existing water customers for any additional capital financing program.

6. COMMENT: The Water Users Association stated that N.J.A.C. 7:11-3.25 should be modified to provide some recognition of the Authority's responsibility for water quality related issues.

RESPONSE: The protection sought by the Water Users Association is already provided in the respective water use contracts. Inasmuch as the Authority is bound by its bond indentures, the provisions of the water use contracts cannot be readily modified. The water quality protections mentioned by the Water Users Association have greater legal force as a contractual obligation.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 7:11.

(b)

NEW JERSEY WATER SUPPLY AUTHORITY

Schedule of Rates, Charges and Debt Service Assessments for the Sale of Water from the Delaware and Raritan Canal-Spruce Run/Round Valley Reservoirs System

Adopted Amendments: N.J.A.C. 7:11-2.2, 2.3 and 2.9.

Proposed: December 21, 1992 at 24 N.J.R. 4472(a).

Adopted: April 28, 1993 by Scott A. Weiner, Chairman, New Jersey Water Supply Authority and Commissioner, Department of Environmental Protection and Energy.

Filed: May 3, 1993 as R.1993 d.240, **with substantive changes** not requiring additional public comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 58:1B-7.

DEPE Docket Number: 55-92-11.

Effective Date: June 7, 1993.

Operative Date: July 1, 1993.

Expiration Date: May 3, 1998.

Summary of Public Comments and Agency Responses:

The New Jersey Water Supply Authority (Authority) is adopting amendments to the Schedule of Rates, Charges and Debt Service Assessments for the Sale of Water from the Delaware and Raritan Canal-Spruce Run/Round Valley Reservoirs System. In accordance with

N.J.A.C. 7:11-2.11(a)4, Procedures for rate adjustments, the Authority held a pre-public hearing meeting with the Authority's contractual water customers to present and explain the proposed adjustments to the rate schedule embodied in these rules. Notice of the pre-public hearing meeting was provided to the contractual water customers and Public Advocate's office as required by N.J.A.C. 7:11-2.11(a)4. This meeting was held on January 5, 1993, at the Authority's Clinton, New Jersey Administration Building conference room and was attended by one representative from the Elizabethtown Water Company.

Notice of the proposed rate adjustments and public hearing was published in the New Brunswick Home News, Trenton Times, Newark Star Ledger, Hunterdon County Democrat, the Courier-News and the Greater Media Newspapers. A news release covering the proposed rate adjustments was also distributed to newspapers of general circulation in the water customers' service area. In addition, a direct mailing of the Notice of Public Hearing was made to all water customers and approximately 300 interested parties on the Authority's mailing list.

A public hearing concerning this rule was held on February 3, 1993, at the Authority's West Trenton, New Jersey, Delaware and Raritan Canal Field Office Facility to provide interested persons the opportunity to present testimony. Two individuals attended the hearing, one of whom presented comments. No letters were received during the public comment period, which closed on March 12, 1993. The comments received at the public hearing are summarized below.

Effect on Rate Adjustment and Sales Bases

1. COMMENT: Edward D. Mullen, Elizabethtown Water Company, asked if the proposed rate adjustment and sales base accurately reflected Johnson & Johnson's reduced contract water use allocation.

RESPONSE: Johnson & Johnson's reduced allocation was included in the revised sales bases and used to determine the proposed rate adjustments for FY94.

Effect of Insurance Renewal on Rate Adjustment

2. COMMENT: Edward D. Mullen, Elizabethtown Water Company, asked how the Authority's upcoming insurance renewal would affect the proposed rate adjustments.

RESPONSE: When the FY94 budget was first prepared, increases of 10 percent to 15 percent where anticipated for various insurance coverages. Upon renewal of the Authority's insurance coverages on March 1, 1993, the liability premiums decreased by five percent and the property premiums increase by 17 percent. Any savings at the end of FY94 will be used to offset FY95 expenses, thereby minimizing any rate adjustment for FY95.

Summary of Hearing Officers' Recommendations and Agency Response:

Authority Board Members Peggy Haskin and George M. Haskew served as Hearing Officers at the February 3, 1993 public hearing. After reviewing the testimony presented at the public hearing, Hearing Officers Haskin and Haskew made the following recommendations:

1. Due to unanticipated revenues in the budget year ending June 30, 1993 an amount of $114,500 is available for appropriation into the Rate Stabilization Fund. This amount is recommended for appropriation into the Rate Stabilization Fund to be applied to the FY94 revenue stream for the purpose of offsetting projected FY94 operational expenses.

2. For the reasons discussed in the Summary of Agency-Initiated Changes below, the proposed Operations and Maintenance Expense Component of $116.99 per million gallons should be reduced to $115.66 per million gallons at N.J.A.C. 7:11-2.2(b) and 7:11-2.9(a)1 and 2, effective July 1, 1993.

3. The remaining adjustments to the Rate Schedule should be adopted as originally proposed to become effective on July 1, 1993.

The Authority accepts these recommendations, and has modified the rules accordingly upon adoption.

Summary of Agency-Initiated Changes:

N.J.A.C. 7:11-2.2(b) and 2.9(a)1 and 2

Due to a projected reduction of $61,100 to the originally proposed insurance budget for FY94, the projected operations and maintenance component of the rate schedule is changed in this adoption from $116.99 as the charge per million gallons set forth in the proposed rule to $115.66 per million gallons, a reduction of $1.33 per million gallons. This reduced rate is reflected at N.J.A.C. 7:11-2.2(b), which sets forth the operations and maintenance rate itself, and at N.J.A.C. 7:11-2.9(a)1 and 2, which reference N.J.A.C. 7:11-2.2 and set forth the operations and maintenance charge for standby service users.

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

7:11-2.2 General Rate Schedule for Operations and Maintenance

(a) The General Rate Schedule for Operations and Maintenance per million gallons listed at (b) below is based on estimated annual operations and maintenance expenses consisting of all current costs, obligations and expenses of, or arising in connection with, the operation, maintenance and administration of the System, and minor additions or improvements thereof or thereto, or the performance of any water purchase contract, including but not limited to, all of the following.

1.-7. (No change.)

8. Any other current costs, expenses or obligations required to be paid by the Authority under the provision of any agreement or instrument relating to bonds, other indebtedness of the Authority or by law. The current sales base of 151.053 million gallons per day has been used in setting the rate listed in (b) below.

(b) General Rate Schedule for Operations and Maintenance:

Allocation	Rate/Million Gallons
Million Gallons per Day (MGD)	*[$116.99]* ***$115.66***

7:11-2.3 Debt Service Assessments

(a) (No change.)

(b) The debt service assessment rate for the 1969 Water Conservation Bonds shall be based on a sales base of 150.558 million gallons per day. This debt service assessment rate does not apply to Delaware and Raritan Canal customers in the Delaware River Basin.

1. 1969 Water Conservation Bond Funds:

Period	Allocation	Rate/Million Gallons
7/1/93 to 6/30/2002	Million Gallons per Day (MGD)	$14.01

(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 150.983 million gallons per day, in addition to that included in (b) above, will be applied to all customers:

Period	Allocation	Rate/Million Gallons
7/1/93 to 10/30/2006	Million Gallons per Day (MGD)	$33.42

(d) The following Debt Service Assessment rate for the 1988 Water System Revenue Bonds, based on a sales base of 150.983 million gallons per day, in addition to that included in (b) and (c) above, will be applied to all customers:

Period	Allocation	Rate/Million Gallons
7/1/93 to 6/30/95	Million Gallons per Day (MGD)	$57.38
7/1/95 to 6/30/97	Million Gallons per Day (MGD)	$57.34

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.	*[$116.99]* **$115.66** plus annual debt service assessment rate for 1981 Water Supply Bonds and 1988 Water System Revenue Bonds.

2. For Standby Contracts within the Raritan River Basin:

Maximum withdrawal capacity	Charge per month
Each 1 MGD (700 GPM) or fraction thereof.	*[$116.99]* **$115.66** plus annual debt service assessment rate for 1969 Water Conservation Bonds, 1981 Water Supply Bonds and 1988 Water System Revenue Bonds.

(a)

NEW JERSEY WATER SUPPLY AUTHORITY

Schedule of Rates, Charges and Debt Service Assessments for the Sale of Water from the Manasquan Reservoir Water Supply System

Adopted Amendments: N.J.A.C. 7:11-4.3, 4.4 and 4.9

Proposed: December 21, 1992 at 24 N.J.R. 4474(a).
Adopted: April 28, 1993 by Scott A. Weiner, Chairman, New Jersey Water Supply Authority and Commissioner, Department of Environmental Protection and Energy.
Filed: May 3, 1993 as R.1993 d.241, **with substantive changes** not requiring additional public comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 58:1B-7.

DEPE Docket Number: 56-92-11.
Effective Date: June 7, 1993.
Operative Date: July 1, 1993;
Expiration Date: May 3, 1998.

Summary of Public Comments and Agency Responses:

The New Jersey Water Supply Authority (Authority) is adopting amendments to the Schedule of Rates, Charges and Debt Service Assessments for the Sale of Water from the Manasquan Reservoir Water Supply System. In accordance with N.J.A.C. 7:11-4.13(a)4, the Authority held a pre-public hearing meeting with the Authority's contractual water purchasers and interested parties to present and explain the proposed adjustment to the rate schedule embodied in these rules. Notice of the pre-public hearing meeting was provided to the contractual water purchasers and interested parties including the Public Advocate's Office and the Board of Regulatory Commissioners. This meeting was held on January 14, 1993, at the Authority's Manasquan Reservoir System Administration Building, Wall Township, New Jersey, and was attended by two persons representing contractual water users. No representative from the Public Advocate, Division of Rate Counsel or the Board of Regulatory Commissioners attended.

Notice of the proposed rate adjustments and public hearing was published in the Trenton Times, Newark Star Ledger, Asbury Park Press, the Greater Media Newspapers and the Herald. A news release covering the proposed rate adjustments was also distributed to newspapers of general circulation in the water customers' service area. In addition, a direct mailing of the Notice of Public Hearing was made to all water customers and approximately 300 interested parties on the Authority's mailing list.

A public hearing concerning this rule was held on February 10, 1993 to provide interested persons the opportunity to present testimony. Three individuals attended the hearing including a representative from the New Jersey American Water Company, one newspaper reporter and one council member from the Borough of South Belmar. One person presented comments. The Authority received one letter during the public comment period, which closed on March 19, 1993. The comments received at the public hearing are summarized below:

The following person made oral comments related to the proposed amendment:

Charles Whitty, New Jersey American Water Company

The following person submitted written comments related to the proposed amendment.

Robert A. Engle, Revenue Requirement Specialist, New Jersey American Water Company

Potential Budget Surpluses

1. COMMENT: The New Jersey American Water Company noted that several accounts in the Authority's current (FY93) budget are running under budget by approximately $31,000 through November 1992.

RESPONSE: Expenditures in all accounts are not necessarily evenly made throughout the Authority's fiscal year. It is anticipated that most of the budgeted funds will be utilized. Any unexpended year end balances are recommended for future appropriation into the General Fund (Rate Stabilization) to be applied towards the operating expenses in fiscal year 1995 (FY95).

Projected Power Expense

2. COMMENT: The New Jersey American Water Company noted that the Authority's projected FY94 budget includes a 10 percent anticipated base rate increase by the Jersey Central Power and Light Company as well as an increase in the Levelized Energy Adjustment Charge (LEAC). On January 26, 1993 the Administrative Law Judge who presided over the Jersey Central Power and Light Company rate increase application recommended to the Board of Regulatory Commissioners an increase of only seven percent and according to a January 13, 1993 newspaper article, the Jersey Central Power and Light Company does not plan to file for any LEAC adjustment.

RESPONSE: The Authority staff has investigated these matters further and agrees with the New Jersey American Water Company's statements. The Authority staff has recalculated this direct expense item and recommended a reduction of $6,500 from the originally proposed FY94 budget.

Prescription Drugs

3. COMMENT: The New Jersey American Water Company expressed a concern over the projected 42 percent increase in the cost of the Authority's prescription drugs program.

RESPONSE: The FY94 projected prescription expense of $21,200 does represent an increase of 42 percent over the originally projected FY93 net cost of $14,937.00. In FY93 the Authority received a cash dividend of $4,612.84 based on the FY92 experience record of the Authority's employees. The retrospective prescription plan which the Authority had up until October 1992 called for an annual audit of the experience record and then a cash payment or cash dividend based on the premium paid. The current estimated FY93 cost is $18,434.03. The cash dividend received of $4,612.84 understates the true FY93 cost. The FY94 estimate of $21,200 constitutes only a 15 percent increase on the basis of FY93's true premium expense. On November 1, 1992 the Authority negotiated a new prospective prescription plan with Blue Cross/Blue Shield under which there will no longer be an annual experience audit. The new prospective prescription plan, along with the new increased co-pay on the employee's prescription cards from $3.50/1.00 to $5.00/3.50 will help to hold down future rate increases.

Service and Maintenance Contracts

4. COMMENT: The New Jersey American Water Company asked the reason for a 38.3 percent increase in the "Service and Maintenance Contracts" account.

RESPONSE: New line item costs include Electrical Upgrade and Repair, Fertilization and Liming of Dam and Dike Embankments, Potable Well and Septic System, and Heat Trace.

Electrical Upgrade and Repair has been incorporated into service and maintenance contracts because it is necessary for the Authority to accomplish electrical repairs or upgrades by a licensed electrical contractor. This electrical work would include, but not be limited to, such items as adding new circuits, replacement or repair of wiring in electrical panels, preventive maintenance on 480 VAC and lower voltage power panels and transformers. The previously mentioned electrical work cannot be performed by Authority maintenance crews because of the State requirements as specified by the Department of Community Affairs.

Fertilization and Liming of the Dam and Dike Embankment was done during FY92 and will be accomplished again in FY94. Although it was not budgeted in FY93, the work will have to be accomplished since the annual dam inspection report noted deficient grass cover conditions on the reservoir embankment structures.

Potable Well and Septic System has been included to service and maintain the reservoir facilities that utilize potable groundwater wells and septic system.

Heat Trace has been included to service, maintain and upgrade those installations if and when necessary.

The line item costs that were adjusted to reflect actual cost data from the previous FY are the Electrical Service Contract for high voltage equipment, the Overhead Crane Service for annual inspections and the Fire and Intrusion Alarm Service under an annual contract.

Risk Management Costs

5. COMMENT: The New Jersey American Water Company asked why the budget for Risk Management services has increased from $1,000 to $5,000.

RESPONSE: The Authority retains the professional consulting firm of Coopers & Lybrand to provide ongoing risk management consulting services relating to the Authority's insurance program. Coopers & Lybrand was the architect in the successful remarketing of the Authority's insurance program effective March 1, 1992. Actual expenses for the Coopers & Lybrand consultant in FY92 were $12,437.90. The expense in FY92 reflected the remarketing of the Authority's insurance. Actual experience in this area has shown that a $1,000 budget for this category is not enough to cover the work attributable to the Manasquan System. An annual budget of $5,000 is more in line with what the actual assessment should be in the future.

Wetlands Monitoring

6. COMMENT: The New Jersey American Water Company asked why $8,000 has been added to the budget for Wetlands monitoring expenses.

RESPONSE: A wetlands monitoring contract was signed with Metcalf & Eddy, Inc. on December 12, 1991, for professional engineering services to establish wetland monitoring procedures and perform the initial monitoring. The one-year engineering contract was written for an amount not to exceed $21,000.

Metcalf & Eddy is currently under contract to complete the initial wetlands monitoirng requirements consistent with the terms of the U.S. Army Corps of Engineers permit for the freshwater wetlands constructed as a part of the reservoir system. The U.S. Army Corps of Engineers permit requires annual monitoring at the end of each growing season to report on the effectiveness of the wetlands mitigation program. The annual monitoring is required for a five year period to report on the condition and development of the wetlands. Eight thousand dollars is considered to be the required budget to satisfy this permit obligation.

Employee Fringe Benefits

7. COMMENT: The New Jersey American Water Company questioned the 25.9 percent increase in the fringe benefits account.

RESPONSE: The fringe benefit rate for FY93 was based on the State of New Jersey Employee Benefit Reimbursement rate of 29.5 percent. Actual fringe benefit expenses for FY92 were $199,416 against a budget of $194,000. The projected FY93 fringe benefit expenses are $231,587 against a budget underestimating of $214,115. The past two years operating results shows that the Authority was underestimating the fringe benefit cost for the Manasquan Reservoir System. The individual components were analyzed for each employee and projected increases were made for the fringe benefit rate for FY94. The analytical study produced a FY94 total fringe benefit expense of $269,700 which is 26 percent over the FY93 budget amount of $214,115, but only 16 percent over the projected actual fringe benefit expenses for FY93. The Manasquan Reservoir System carries a higher fringe benefit percent of salary cost than the Delaware and Raritan System due to the lower average salaries at the Manasquan System and the fixed costs associated with some of the fringe benefit package.

Fringe Benefits vs. Total Salaries

8. COMMENT: The New Jersey American Water Company asked why the percentage of fringe benefits to total salaries increased from 27.7 percent to 33.6 percent.

RESPONSE: The Authority supplied the New Jersey American Water Company with a detailed comparison of the components of the Authority's fringe benefit package including projected State Unemployment Insurance, Temporary Disability Insurance, Public Employees Retirement System, group medical, dental, vision and prescription expenses. While increases in these fringe benefit expenses have occurred, the Authority employees' wages have been frozen since July, 1992, resulting in an increase in the ratio.

Overtime—General

9. COMMENT: The New Jersey American Water Company questioned the increase in the overtime account from $35,566 (FY93) to $45,000 (FY94).

RESPONSE: Based upon the four months of actual experience, the projected overtime expense for 1993 could be as much as $41,000.

It should be noted that only four Assistant Plant Operators have been hired to provide around the clock shift coverage. Hiring only four people, in lieu of the originally planned five, has greatly contributed to the level of expenses due to overtime coverage resulting from vacations, holidays and sick leave.

In FY91 the overtime overran the budget figure because all positions were not filled and because of start-up of the Water Treatment Plant/ Transmission System.

In FY92 the overtime was also due to position openings in the operations unit. FY92 overtime figures were also influenced by several construction related projects.

FY93 overtime costs reflect an overrun for a four month period. To date, overtime costs have been affected by several lengthy sick leaves among the Assistant Plant Operators requiring overtime for shift coverage.

The FY94 overtime cost projection has also increased because of the five percent contract salary adjustment effective October 2, 1993, annual performance related salary increases, adjustments in operators' position classification to reflect increased levels of experience and increases in employee vacation leave benefits due to length of service.

Overtime—Plant Operators

10. COMMENT: The New Jersey American Water Company questioned the significant increases in overtime budgeted for Plant Operators and Assistant Plant Operators.

RESPONSE: Based upon four months of actual experience, the projected overtime expense for 1993 could be as much as $38,000.

Plant Operator and Assistant Plant Operator overtime was not properly reflected in previous budgets. Budget projections now represent full operational staffing, better knowledge of scheduling impacts and almost two and one-half years of operational experience. The Authority is now more aware of the overtime cost impacts of the decision to hire only four Assistant Plant Operators in lieu of the originally planned five.

Summary of Hearing Officer's Recommendations and Agency Response:

Authority board member Peggy Haskin served as Hearing Officer at the February 10, 1993, public hearing. After reviewing the testimony presented at the public hearing and through the end of the public comment period as required by N.J.A.C. 7:11-4.13(a)8, Hearing Officer Haskin made the following recommendations:

1. For the reasons discussed in the Summary of Agency-Initiated Changes below, the proposed Operations and Maintenance Expense Component of $326.20 per million gallons should be changed to $323.93 per million gallons, effective July 1, 1993, and the proposed Operations and Maintenance Component of the standby charge at N.J.A.C. 7:11-4.9 should similarly be changed from $326.20 to $323.93, effective July 1, 1993.

2. The proposed debt service component should not be changed and should be adopted as follows:

7/1/93-1/31/94 (115 percent coverage) from $745.51/MG to $740.40/MG
2/1/94-6/30/94 (120 percent coverage) from $777.92/MG to $772.82/MG

The Authority accepts these recommendations, and has modified the rule accordingly upon adpotion.

Summary of Agency-Initiated Changes:

N.J.A.C. 7:11-4.3(c)and 4.9

Due to a reduction in the projected expenses for FY94, the projected operations and maintenance component of the rate schedule is changed in this adoption from $326.20 as the charge per million gallons set forth in the proposed rule to $323.93 per million gallons, a reduction of $2.27 per million gallons. This reduced rate is reflected at N.J.A.C. 7:11-4.3(c) which sets forth the operations and maintenance rate itself, and at N.J.A.C. 7:11-4.9 which references N.J.A.C. 7:11-4.3 and sets forth the operations and maintenance charge for standby services.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*.

7:11-4.3 Operations and maintenance expense component
(a)-(b) (No change.)
(c) Operations and Maintenance Expense Component:

Effective Date	Rate/Million Gallons (based upon a 16.097 mg per day sales base)
July 1, 1993	*[$326.20]* ***$323.93***

7:11-4.4 Debt service cost component
(a) (No change.)
(b) The following Debt Service rates apply to all water purchasers who entered into a water purchase contract before July 1, 1990, the date upon which the Authority commenced operation of the Manasquan Reservoir System (Initial Water Purchase Contract) and began to make uninterruptible service available to the purchasers ("System Operation Date").

Period	Rate/Million Gallons
7/1/93 to 1/31/94 (Coverage 115 percent)	$740.40
2/1/94 to 6/30/94 (Coverage 120 percent)	$777.82

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

7:11-4.9 Standby charge
A purchaser classified under standby service shall pay a monthly minimum charge based on the capacity of the purchaser's 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. 7:11-4.3 and 4.4*.*

Maximum withdrawal capacity	Charge per month
Each 1 MGD (700 GPM) or fraction debt thereof.	*[$326.20]* ***$323.93*** plus annual service assessment rate established in N.J.A.C. 7:11-4.4

(a)

NEW JERSEY WASTEWATER TREATMENT TRUST

Financial Assistance Programs for Wastewater Treatment Facilities

Adopted Amendments: N.J.A.C. 7:22-3.4, 3.7, 3.8, 3.9, 3.11, 3.17, 3.20, 3.26, 3.27, 3.32, 3.34, 3.37, 4.4, 4.7, 4.8, 4.9, 4.11, 4.13, 4.17, 4.20, 4.26, 4.29, 4.32, 4.34, 4.37, 4.46, 5.4, 5.11, 5.12, 6.17, 6.27, 10.2, 10.3, 10.8, 10.9, 10.11 and 10.12

Proposed: December 7, 1992 at 24 N.J.R. 4310(b).
Adopted: April 28, 1993 by Scott A. Weiner, Commissioner, Department of Environmental Protection and Energy as to N.J.A.C. 7:22-3, 5, 6 and 10 and the New Jersey Wastewater Treatment Trust, Ellis S. Vieser, Chairman, as to N.J.A.C. 7:22-4 and 5.
Filed: May 3, 1993 as R.1993 d.242, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).
Authority: Wastewater Treatment Bond Act of 1985 (P.L. 1985, c.329); the Stormwater Management and Combined Sewer Overflow Abatement Bond Act of 1989 (P.L. 1989, c.181); Pinelands Infrastructure Trust Bond Act of 1985 (P.L. 1985, c.306); N.J.S.A. 13:1D-1 et seq.; N.J.S.A. 58:11A-1 et seq.; N.J.S.A. 58:10A-1 et seq.; Executive Order No. 215(1989) and any appropriations to the Department of Environmental Protection and Energy for the purpose of providing financing to eligible projects as to N.J.A.C. 7:22-3, 5, 6 and 10 and New Jersey Wastewater Treatment Trust Act (N.J.S.A. 58:11B-1 et seq.) and any appropriations to the New Jersey Wastewater Treatment Trust for the purpose of providing financing to eligible projects as to N.J.A.C. 7:22-4 and 5.
DEPE Docket Number: 51-92-10.
Effective Date: June 7, 1993.
Expiration Date: December 27, 1996.

The New Jersey Department of Environmental Protection and Energy (the Department) and the New Jersey Wastewater Treatment Trust (the Trust) are adopting amendments to N.J.A.C. 7:22, Financial Assistance Programs for Wastewater Treatment Facilities. The amendments to these rules were proposed on December 7, 1992 at 24 N.J.R. 4310(b). A public hearing to accept testimony regarding the proposed amendments was held on January 6, 1993 in the Large Conference Room, Municipal Wastewater Assistance Offices, 1333 Brunswick Avenue, Lawrenceville, New Jersey. The comment period on the proposal closed on January 8, 1993. Three persons made comments regarding the rules at the public hearing (one of whom submitted a written statement representing her testimony at the public hearing). Three additional persons submitted written comments prior to the close of the comment period. The following is a list of the persons and the entities which they represented who made either written or oral comments on the proposed rules:

1. Robert A. Briant, Jr., Utility and Transportation Contractors Association of New Jersey
2. Lynn Combs, Long Hill (Passaic) Township
3. Robert Dalby, Killam Associates
4. Abigail Fair, Association of New Jersey Environmental Commissions
5. Stephen W. Miller, Richard A. Alaimo Associates
6. Lee T. Purcell, Lee T. Purcell Associates

The Department and the Trust have given due consideration to all comments received. No substantive concerns or issues were raised during the public hearing process regarding the proposed rule changes. Given these circumstances, the Department and the Trust have chosen to proceed with the adoption of the amendments to the rules with minor changes as discussed below.

Summary of Public Comments and Agency Responses:

N.J.A.C. 7:22-3.8 and 4.8 Eligibility for State and Federal funding

1. COMMENT: Noting that the Farmers Home Administration (now Rural Development Administration) currently finances wastewater projects with a combination grant and loan, with a loan repayment period of 40 years, one commenter inquired whether the 17 to 20 year loan term under the Wastewater Treatment Financing Program would be extended to be consistent with this practice. (3)

RESPONSE: Under the New Jersey Wastewater Treatment Financing Program, two loan agreements are executed—one for a Trust loan and one for a Fund loan. With respect to the State Revolving Fund (SRF) requirements, which affect both the Fund and Trust loans, the Federal Water Quality Act of 1987 (33 U.S.C. 1251 et seq.) requires that all SRF loan repayments be made within 20 years of the completion of the project. With respect to the Trust loan, the New Jersey Wastewater Treatment Trust Act (N.J.S.A. 58:11B-1 et seq.) requires that the term of the Trust loan shall be the lesser of 20 years or the useful life of the project. If amendments to the Federal SRF requirements are enacted which permit the extension of loan repayment periods, the State would analyze the benefits and drawbacks of extending the loan term and recommend (as appropriate) changes to the applicable State laws. The Department has recommended that amendments to the Clean Water Act be made to allow the loan term to be consistent with the useful life of the facility being funded (that is, 25 years for major treatment facilities, 30 to 40 years for collection systems, interceptor sewers, etc.).

It was noted at the hearing on this proposal that projects which receive financial assistance through the Farmers Home Administration for a portion of a project are eligible under the Wastewater Treatment Financing Program for the project costs not funded by the Farmer's Home Administration to the extent that these costs are allowable under the Wastewater Treatment Financing Program.

N.J.A.C. 7:22-3.17 and 4.17 Loan conditions

N.J.A.C. 7:22-6.17 Grant and loan conditions

2. COMMENT: One commenter expressed support for the Department's and Trust's proposal to amend N.J.A.C. 7:22-3.17, 4.17 and 6.17

to require that a qualified inspector provide coverage at a treatment plant site on a full-time basis. The commenter further recommended that a minimum Level III certification from the National Institute for Certification in Engineering Technologies (NICET) (as sponsored by the National Society of Professional Engineers) be required for any inspector at a wastewater treatment plant project. (5)

RESPONSE: The types of wastewater treatment plant projects which are financed under the Wastewater Treatment Financing Program vary greatly, from the construction of new plants to minor modifications at existing facilities. The Department agrees that the qualifications of an inspector at a construction site are important factors for a project sponsor and the engineer to consider prior to the start of construction on the project. The Department would not object to a project sponsor's requiring a particular level of certification from its inspector(s) where the project sponsor or the engineer determine that the nature of the project warrants such a level of certification. The Department and the Trust do not believe that this should be a requirement under the rules.

3. COMMENT: One commenter expressed concern that under proposed N.J.A.C. 7:22-3.17(a)28, 4.17(a)28, and 6.17(a)28 the inspector would be responsible for checking and verifying all elevations. The commenter noted that it is generally the responsibility of the contractor to provide the necessary engineering and surveyor services to meet the requirements of the contract documents and drawings. (5)

RESPONSE: These amendments state that one of the duties of the qualified inspector is to provide coverage to check all elevations, including footings, piles, slabs and equipment pads. Whether the qualified inspector or the resident engineer is responsible for checking elevations to ensure that the work satisfies specifications varies on a case-by-case basis. The contractor is required to construct the facility in accordance with the project specifications and the inspector and/or responsible engineer (as the owner's representative) is responsible for checking the contractor's work. On adoption, the Department has clarified N.J.A.C. 7:22-3.17(a)28iv(2), 4.17(a)28iv(2) and 6.17(a)28iv(2) to specify that, in lieu of the inspector's checking all elevations, the responsible engineer must perform this function.

4. COMMENT: One commenter supported proposed N.J.A.C. 7:22-3.17(a)31, 4.17(a)31 and 6.17(a)31 which would require a representative of the Department and of the Trust to be present during the testing of mechanical components at treatment plants and pump stations, but expressed concern that requiring their representation could result in project delays, since testing can occur on a daily basis on pipeline projects prior to backfilling. (5)

RESPONSE: The amendments do not require a Department and a Trust representative to be present on a daily basis for visual inspections at all pipeline project sites prior to backfilling. The rules require the Department and the Trust to be notified one week prior to all final visual inspections, pipeline tests and treatment plant operation. A Department representative must be present for all final visual inspections even on those rare occasions when final visual inspections occur daily. It should be noted that the Trust relies upon the Department's representative with regard to attendance at final visual inspections. Neither the Department nor the Trust is aware of any instance in which Department representation at all final visual inspections has resulted in delays. The Department and the Trust believe that the requirement of Department representation at these inspections should remain in the rule in order to ensure that the project is constructed in conformance with project documents.

N.J.A.C. 7:22-5.4 Costs related to subagreements

N.J.A.C. 7:22-5.11 Miscellaneous costs

5. COMMENT: One commenter requested clarification as to whether eligibility for a post-construction supplemental loan is retroactive and whether projects which receive a post-construction supplemental loan for differing site conditions also receive compensation for construction management services and administrative costs. (6)

RESPONSE: Eligibility for a post-construction supplemental loan is retroactive subject to program rerquirements. Thus, any project previously funded through the Wastewater Treatment Financing Program which has encountered increased costs due to differing site conditions may be eligible for a post-construction supplemental loan, as established in the rules at N.J.A.C. 7:22-5.4(a)5. N.J.A.C. 7:22-5.4(b) and 5.11(a) have also been modified to allow projects which encounter increased building costs due to differing site conditions to receive funding for administrative costs and construction management services in the post-construction supplemental loan as well.

6. COMMENT: One commenter expressed concern regarding 5.4(a)9 which generally limits the allowable costs for construction management services to 12 percent of the low bid building cost. The commenter indicated that such a policy benefits contained site-type projects (STP upgrades/expansions) and is detrimental to conveyance system projects. (6)

RESPONSE: The Department and the Trust note that this issue was not a component of this rule amendment proposal. This provision was previously adopted under the program regulations for several reasons: (1) procurement of construction management services is not subject to competitive bidding nor is it subject to Federal procurement regulations at 40 CFR Part 31, and (2) no State-level guidelines exist for acceptable overhead and profit rates for professional firms providing construction management services. The ratio of allowable costs for construction management services to low bid building cost was chosen after consideration of program data compiled over the past four years. The Department and the Trust welcome further input or data on this issue (or any other provision of the rules) and are willing to review their position and propose appropriate changes to the rules.

N.J.A.C. 7:22-10.8 Cultural resource survey requirements

7. COMMENT: One commenter recommended that the phrase "and other knowledgeable members of the public" be deleted from proposed N.J.A.C. 7:22-10.8 since it is very nebulous and difficult to determine what constitutes "knowledgeable." (1)

RESPONSE: The Department has made the requested change to the rule.

Post-construction Supplemental Loans

8. COMMENT: Several commenters commended the Department and the Trust for the proposed rule changes which would allow projects to receive more than one supplemental loan in cases where there are increased costs due to change orders as a result of unforeseen site conditions. (2,6) One commenter indicated that he will be submitting applications on behalf of several of the loan recipients which he represents and that the towns are most appreciative of this opportunity. (6)

RESPONSE: The Department and the Trust appreciate these comments in support of the proposed amendments which allow the fund and the Trust to award post-construction supplemental loans.

Ceiling for Supplemental Loan Amounts

9. COMMENT: One commenter recommended that the Department establish a strict ceiling for any supplemental Fund loan program so that the primary loan capability of the Fund is not impaired. (4)

RESPONSE: While the commenter referenced only the Department and the Fund, the issue is also applicable to the Trust and the Trust Fund. The Department and the Trust offer supplemental loans in two circumstances: (1) in instances where the allowable building costs based on the actual low bid building costs exceed the original Fund and Trust loan amounts based on an engineering estimate of allowable building costs and (2) as a result of the adoption of these amendments, in instances where a recipient encounters differing site conditions. In the first case, the practice of adjusting the level of financial assistance to the actual low bid building costs has been New Jersey's practice since 1982. The Department reduces loan amounts in instances where the low bid is less than the engineer's estimate of allowable building costs and returns these funds to make additional Fund loan awards. In the second case, the Department and the Trust are expanding eligibility for supplemental loans for projects which encounter differing site conditions, with the first of such supplemental projects expected to receive a loan this year. If limits were to be placed on supplemental funding, the ability of a recipient to complete the project, from a financial point of view, may be jeopardized. The Department and the Trust do not believe this provision will significantly impair the primary loan capability of the program since, from the inception of the program in 1987, only a limited number of projects have encountered situations which qualify as differing site conditions.

Summary of Hearing Officers' Recommendations and Agency Response:

Nicholas G. Binder, the Department's Administrator of Municipal Wastewater Assistance, and Dirk C. Hofman, the New Jersey Wastewater Treatment Trust's Executive Director, served as hearing officers at the January 6, 1993 public hearing. After reviewing the testimony presented at the public hearing, the hearing officers recommended that the Depart-

ment and the Trust proceed with the adoption of the proposed amendments with minor changes as noted in their report. The Department and the Trust accept the recommendations of the hearing officers and are proceeding with the adoption as recommended by the hearing officers.

Administrator Binder and Executive Director Hofman's recommendations are set forth in more detail in the hearing officers' report. A copy of the record of the public hearing which includes the hearing officers' report is available upon payment of the Department's normal charges for copying. Persons requesting copies should contact:

Janis E. Hoagland, Esq.
Department of Environmental Protection and Energy
Office of Legal Affairs
CN 402
Trenton, NJ 08625

Full text of the adopted amendments follows (additions to proposal indicated by boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

CHAPTER 22
FINANCIAL ASSISTANCE PROGRAMS FOR WASTEWATER TREATMENT FACILITIES

SUBCHAPTER 3. FUND PROCEDURES AND REQUIREMENTS

7:22-3.4 Definitions

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

...

"Allowance" means a loan amount for planning and design costs based on a percentage of the project's allowable building cost, computed in accordance with N.J.A.C. 7:22-5.12.

...

"Differing site conditions" means conditions at the project site, which:

1. Differ materially from physical conditions (including subsurface and latent conditions) referred to in the plans, specifications and reports submitted under N.J.A.C. 7:22-3.11(d)7; and

2. Were not known to the applicant at the time the building contracts were executed.

...

"Low bid building cost" means the total allowable cost for the project due to the award of all contracts within a project scope to the lowest responsible and responsive bidder(s). Excluded from this cost is any cost due to change orders and any costs due to the award of contracts necessary to address differing site conditions.

...

"Qualified inspector" means a person in the building trades or who has construction experience and who is knowledgeable regarding acceptable construction practices and terminology related to pipe installation, concrete placement and mechanical equipment installation.

...

"Responsible engineer" means the engineer or engineering firm who is contracted by the recipient to ensure that the construction work is performed in accordance with the approved contract documents.

"Right-of-way" means a strip of land or route acquired by the local government unit in which a conveyance pipe will be installed.

...

7:22-3.7 Criteria for project loan priority

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

(e) The Department shall give funding priority over projects on the Project Priority List to a project which has previously received a Fund loan in any previous funding cycle in instances where the allowable loan amount due to low bid building costs as determined by the Department exceeds the Fund loan amount previously awarded or in instances where the allowable loan amount as determined by the Department has increased due to differing site conditions.

7:22-3.8 Eligibility for State and Federal funding

(a) (No change.)

(b) Local government units receiving funding through a Federal grant, State matching funds pursuant to N.J.A.C. 7:22-2, the Sewage Infrastructure Improvement Act pursuant to N.J.A.C. 7:22A-6, or from the Pinelands Infrastructure Trust Fund pursuant to N.J.A.C. 7:22-6 and 7 shall be ineligible for a Fund loan for the same scope of work (planning, design or building) of the wastewater treatment facilities project for which they received a Federal grant, State matching funds, Sewage Infrastructure Improvement Act funding or Pinelands Infrastructure Trust funding. Further, local government units which have executed a loan agreement to receive a Fund loan pursuant to this subchapter shall be ineligible to receive a Federal grant, Pinelands Infrastructure Trust funds, Sewage Infrastructure Improvement Act funding or State matching funds for the same scope of work for the planning, design or building of that wastewater treatment facilities project. Local government units which receive financial assistance from the United States Department of Agriculture's Farmers Home Administration for the same scope of work as the wastewater treatment facilities project for which they receive a Fund loan shall have their Fund loan share reduced by an amount equal to the amount of financial assistance provided by the Farmers Home Administration for project costs allowable under N.J.A.C. 7:22-5. If both a Fund loan (pursuant to this subchapter) and a Trust loan (pursuant to N.J.A.C. 7:22-4) are received, the Fund and Trust loans will be proportionally reduced.

7:22-3.9 Project bypassing

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

(c) Written notice of a bypass action shall be forwarded to the local government unit by certified mail. As a result of such an action, the project on the Project Priority List shall become ineligible to receive a Fund loan in the forthcoming State Fiscal Year. This may allow the next highest ranked project to fall within the fundable range on the Project Priority List.

(d) (No change.)

7:22-3.11 Application procedures

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

(d) The following must be submitted when applying for a Fund loan, as applicable:

1.-6. (No change.)

7. Department-approvable plans, specifications and technical design report, including documentation regarding the evaluation of existing site conditions;

8.-22. (No change.)

(e) (No change.)

(f) The Department shall not accept a recipient's supplemental Fund loan application for increased allowable costs in instances where the low bid building cost is higher than the original Fund loan award unless bids on all project-related contracts have been received.

(g) The Department shall only accept a recipient's post-construction supplemental Fund loan application if all of the following actions have occurred:

1. The Department has approved payment requests whose total equals the allowable project costs based on the low bid building cost, exclusive of payment requests for construction management services related to project start-up and one year project performance certification;

2. The project's building activities are complete;

3. All applicable administrative and legal appeals have been resolved;

4. All costs related to differing site conditions for which cost reimbursement is sought have been incurred; and

5. All documentation for the costs in (g)4 above has been submitted to the Department or submitted concurrently with the post-construction supplemental Fund loan application.

7:22-3.17 Loan conditions

(a) The following requirements, in addition to N.J.A.C 7:22-3.18 through 3.30, as well as such statutes, rules, terms and conditions which may be applicable to particular loans, are conditions to each

Fund loan, and conditions to each disbursement under a Fund loan agreement:

1.-5. (No change.)

6. The recipient shall establish an effective regulatory program pursuant to N.J.S.A. 58:10A-6 and enforce pretreatment standards which comply with 40 C.F.R. Part 403;

7.-23. (No change.)

24. A goal of not less than 10 percent of the total amount of all contracts for building, materials or services for a project shall be awarded to small business concerns owned and controlled by socially and economically disadvantaged individuals as defined in the Small Business Act (15 U.S.C. 637(a) and 637(d)), and any regulations promulgated pursuant thereto. Where a local government unit has Minority Business Enterprise/Women's Business Enterprise (MBE/WBE) goals which exceed 10 percent of the total amount of all contracts, the local government unit's goals shall take precedence over State goals;

25. The recipient shall pay not less than the prevailing wage rate to workers employed in the performance of any contract for the project, in accordance with the rate determined by the Commissioner of the New Jersey Department of Labor pursuant to N.J.S.A. 34:11-56.25 et seq. or the United States Secretary of Labor pursuant to 29 CFR Part 5, whichever is greater;

26. After the award of a contract and prior to the start of work, a preconstruction meeting shall be scheduled by the recipient. The recipient, the responsible engineer, the environmental and construction inspectors, the contractor and one or more representatives of the Department must be present at the preconstruction meeting;

27. Prior to starting construction, the recipient shall provide photographs or videotapes to the Department in conformance with the provisions of N.J.A.C 7:22-10.11(q);

28. The recipient shall provide inspection coverage of the construction work using qualified personnel on a routine basis as follows:

i. A qualified inspector shall be provided at each construction site. There are times when a qualified individual can cover more than one site; however, this must be governed by on-site conditions which determine rate of progress;

ii. Inspection coverage at a treatment plant site shall be on a full-time basis at all times;

iii. For pipeline construction, full-time construction inspections shall be provided during the following operations:

(1) Preparation of trench bottom for placement of bedding and to determine if bottom will support pipe or if additional support must be provided;

(2) Placing of pipe bedding material where required and in the quantity required in conformance with the approved specifications;

(3) Alignment and joining of pipe sections;

(4) Bedding, placement, and alignment of manholes and other appurtenances; and

(5) Placement and compaction of trench backfill material;

iv. Inspection coverage at pump station and metering station sites shall be sufficient to ensure that the work satisfies specifications. The coverage shall include, but not be limited to, the following:

(1) Excavation and spoils disposal;

(2) Checking of all elevations including footings, piles, slabs and equipment pads ***(this function may be performed by the responsible engineer)***;

(3) Installation of all concrete reinforcing bars;

(4) Installation of all electrical conduit, plumbing and piping; and

(5) Installation of all equipment;

v. All concrete shall be checked for truck mix time and temperature prior to placing in forms. Periodic slump tests and test cylinders, per good construction practice, shall be taken. Cold weather and hot weather precautions shall be taken as appropriate. Any additions to the specified concrete mix must be approved by the responsible engineer; and

vi. During the construction period, the construction inspector shall keep a job diary in which he will keep a record of progress, problems encountered, and corrective action taken to rectify any problems. The job diary shall be made available to the Department upon request;

29. The recipient shall provide environmental inspection coverage and ensure completion of environmental restoration in conformance with the provisions of N.J.A.C. 7:22-10.12;

30. During the construction phase of the projects, job meetings shall be held at frequent intervals to review construction and restoration progress and to resolve difficulties which might delay completion of the work. Attendees at these meetings shall include the recipient, the responsible engineer, the recipient's inspectors (construction and environmental), the contractor, and one or more representatives of the Department;

31. The recipient shall provide notification, information and conduct visual inspections and testing of projects as follows:

i. The recipient shall notify the Department one week prior to all final visual inspections and tests of all sewer lines, force mains, mechanical equipment and treatment plant operation;

ii. Copies of all final visual inspections and test reports shall be forwarded to the Department when requested;

iii. Copies of record drawings shall be forwarded to the Department prior to the start of visual inspection and testing of all pipeline projects; and

iv. All visual inspections and testing shall be done in accordance with the following:

(1) All manholes and pipelines shall be completed and flushed prior to the visual inspection. This inspection must be performed with a representative of the recipient and/or the responsible engineer, the contractor and a representative from the Department present. All discrepancies must be noted and a reinspection performed to verify the corrective action;

(2) All manholes and pipelines shall be visually inspected and accepted prior to testing;

(3) Upon acceptance of the visual inspection by the Department, the necessary infiltration, exfiltration, or low pressure air test and deflection tests when applicable shall be performed by the contractor. The test must be witnessed by the recipient and/or the responsible engineer (or representative), the contractor, and a representative from the Department. Upon completion of the test, a copy of the test results must be forwarded to the Department if requested;

(4) Infiltration tests of gravity lines shall be limited to 2000 linear feet per test;

(5) Force mains shall be tested to two times the maximum operating pressure, but not greater than the pipe pressure rating, whichever is less. The length of pipe tested during a force main pressure test is not restricted; however, it is recommended that it be limited for ease in locating leaks if present;

(6) Testing of all mechanical equipment at treatment plants and pump stations must be witnessed by a representative of the Department; and

(7) If required, actual flow tests must be conducted in accordance with parameters established by the Department and performed in the presence of a representative of the Department; and

32. The recipient shall forward a letter to the Department upon completion of all construction and restoration of each contract of a project, stating that the project (or contract) is ready for final inspection. No final inspection will be scheduled until formal notification is received. The final inspection will be a joint inspection with the recipient and/or the responsible engineer, the recipient's inspector(s), the contractor, and one or more representatives of the Department in attendance.

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

(d) Neither the State of New Jersey nor the New Jersey Wastewater Treatment Trust will be a party to any contracts and subcontracts awarded pursuant to this subchapter. All such contracts and subcontracts shall include the following statement:

"This contract or subcontract is expected to be funded in part with funds from the New Jersey Department of Environmental Protection and Energy and the New Jersey Wastewater Treatment Trust. Neither the State of New Jersey, the New Jersey Wastewater Treatment Trust nor any of their departments, agencies or employees is, or will be, a party to this contract or subcontract or

any lower tier contract or subcontract. This contract or subcontract is subject to the provisions of N.J.A.C. 7:22-3, 4, 5, 9 and 10."

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

7:22-3.20 Fund loan agreements/amendments

(a) (No change.)

(b) In the event that additional moneys are needed due to the low bid building cost being higher than the original Fund loan amount, the local government unit may request a supplemental Fund loan. The Department may execute a supplemental Fund loan agreement only after passage of a subsequent legislative appropriations act providing moneys for the specific project of concern. The recipient shall be responsible for all other increased costs.

(c) In the event that additional moneys are needed due to differing site conditions, the local government unit may request a post-construction supplemental Fund loan. The Department may execute a post-construction supplemental Fund loan agreement only after passage of a subsequent legislative appropriations act providing moneys for the specific project of concern. The recipient shall be responsible for all other increased costs.

7:22-3.26 Unused funds

Where the total amount disbursed under a Fund loan due to the low bid building cost is less than the initial Fund loan award, and/or where the total amount disbursed under a Fund loan due to the final building cost is less than the Fund loan amount due to the low bid building cost, the Fund loan shall be adjusted, if necessary, and the difference shall be retained by the Fund to be reallocated, pursuant to the provisions of a legislative appropriations act, to other wastewater treatment facilities projects and shall not be available for increased costs (including increased costs due to differing site conditions). However, where allowable cost overruns occur, Fund moneys may be used to cover these cost overruns up to the loan amount adjusted due to the low bid building cost. Line item adjustments for allowable project costs may be made at the request of the recipient provided the Fund loan amount in the Fund loan agreement is not exceeded and provided all project related contracts have been awarded. However, the Department shall not allow line item adjustments to reallocate funds resulting from cost underruns due to a reduction in project scope.

7:22-3.27 Publicity and signs

(a) (No change.)

(b) A project identification sign, at least eight feet long and four feet high, bearing the emblem of the Department shall be displayed in a prominent location at each publicly visible project site and facility. The sign shall identify the project, State loan support, and other information as required by the Department.

7:22-3.32 Preaward costs

(a) The Department shall not consider allowable those costs incurred for building performed prior to closing the loan for the project, except:

1. Where the local government unit's project is ranked one through 100, inclusive, on the most currently approved Priority System, Intended Use Plan and Project Priority List or is part of the Department's and the Trust's request to the Legislature for inclusion in an appropriations bill providing Fund moneys in the forthcoming fiscal year for that project and of the following conditions has met (a)1i through iii or (a)1iv below:

i.-iv. (No change.)

2. (No change.)

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

7:22-3.34 Planning and design

The costs associated with the planning and design of wastewater treatment facilities are not allowable for reimbursement from the Fund. However, an allowance to assist in defraying the planning and design costs will be provided to a project as a percentage of the allowable building cost in accordance with N.J.A.C. 7:22-5.12. Projects which have received financial assistance through a Federal grant, Pinelands Infrastructure Trust funding, or the Sewage Infrastructure Improvement Act for costs associated with any portion of the project scope or for costs to address the project need, will not be eligible to receive an allowance for planning and/or design as appropriate in accordance with N.J.A.C. 7:22-5.12. An allowance for planning and/or design costs will not be provided as part of a post-construction supplemental Fund loan to address differing site conditions.

7:22-3.37 Value engineering

(a) The applicant shall conduct value engineering if the total estimated building cost exceeds $10 million.

(b) (No change.)

SUBCHAPTER 4. WASTEWATER TREATMENT TRUST PROCEDURES AND REQUIREMENTS

7:22-4.4 Definitions

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

...

"Allowance" means a loan amount for planning and design costs based on a percentage of the project's allowable building cost, computed in accordance with N.J.A.C. 7:22-5.12.

...

"Differing site conditions" means conditions at the project site, which:

1. Differ materially from physical conditions (including subsurface and latent conditions) referred to in the plans, specifications and reports submitted under N.J.A.C. 7:22-4.11(d)7; and

2. Were not known to the applicant at the time the building contracts were executed.

...

"Low bid building cost" means the total allowable cost for the project due to the award of all contracts within a project scope to the lowest responsible and responsive bidder(s). Excluded from this cost is any cost due to change orders and any costs due to the award of all contracts necessary to address differing site conditions.

...

"Qualified inspector" means a person in the building trades or who has construction experience and who is knowledgeable regarding acceptable construction practices and terminology related to pipe installation, concrete placement and mechanical equipment installation.

...

"Responsible engineer" means the engineer or engineering firm who is contracted by the recipient to ensure that the construction work is performed in accordance with the approved contract documents.

...

"Right-of-way" means a strip of land or route acquired by the local government unit in which a conveyance pipe will be installed.

...

"Trust Fund" means the New Jersey Wastewater Treatment Trust Fund created pursuant to the Wastewater Treatment Bond Act.

...

7:22-4.7 Criteria for project loan priority

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

(e) The Trust shall give funding priority over projects on the Project Priority List to a project which has previously received a Trust loan in any previous funding cycle in instances where the allowable loan amount due to low bid building costs as determined by the Trust exceeds the Trust loan amount previously awarded or in instances where a project has been certified by the Trust for Trust financial assistance for costs related to reserve capacity under the provisions of N.J.A.C. 7:22-4.36 or in instances where the allowable loan amount as determined by the Trust has increased due to differing site conditions.

7:22-4.8 Eligibility for State and Federal funding

(a) (No change.)

(b) Local government units receiving funding through a Federal grant, State matching funds pursuant to N.J.A.C. 7:22-2, the Sewage Infrastructure Improvement Act pursuant to N.J.A.C. 7:22A-6, or from the Pinelands Infrastructure Trust Fund pursuant to N.J.A.C.

7:22-6 and 7:22-7 shall be ineligible for a Trust loan for the same scope of work (planning, design or building) of the wastewater treatment facilities project for which they received a Federal grant, State matching funds, Sewage Infrastructure Improvement Act funding or Pinelands Infrastructure Trust funding. Further, local government units which have executed a loan agreement to receive a Trust loan pursuant to this subchapter shall be ineligible to receive a Federal grant, Pinelands Infrastructure Trust funds, Sewage Infrastructure Improvement Act funding or State matching funds for the same scope of work for the planning, design or building of that wastewater treatment facilities project. Local government units which receive financial assistance from the United States Department of Agriculture's Farmers Home Administration for the same scope of work as the wastewater treatment facilities project for which they receive a Trust loan shall have their Trust loan share reduced by an amount equal to the amount of financial assistance provided by the Farmers Home Administration for project costs allowable under N.J.A.C. 7:22-5. If both a Trust loan (pursuant to this subchapter) and a Fund loan (pursuant to N.J.A.C. 7:22-3) are received, the Fund and Trust loans will be proportionally reduced.

7:22-4.9 Project bypassing

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

(c) Written notice of a bypass action shall be forwarded to the local government unit by certified mail. As a result of such an action, the project on the Project Priority List shall become ineligible to receive a Trust loan in the forthcoming State Fiscal Year. This may allow the next highest ranked project to fall within the fundable range on the Project Priority List.

(d) (No change.)

7:22-4.11 Application procedures

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

(d) The following must be submitted when applying for a Trust loan, as applicable:

1.-6. (No change.)

7. Department-approvable plans, specifications and technical design report, including documentation regarding the evaluation of existing site conditions;

8.-22. (No change.)

(e) (No change.)

(f) The Trust shall not accept a recipient's supplemental Trust loan application for increased allowable costs in instances where the low bid building cost is higher than the original Trust loan award unless bids on all project-related contracts have been received.

(g) The Trust shall only accept a recipient's post-construction supplemental Trust loan application if all of the following actions have occurred:

1. The Trust has approved payment requests whose total equals the Trust loan amount, exclusive of payment requests for construction management services related to project start-up and one-year project performance certification;

2. The project's building activities are complete;

3. All applicable administrative and legal appeals have been resolved;

4. All costs related to differing site conditions for which cost reimbursement is sought have been incurred; and

5. All documentation for the costs in (g)4 above has been submitted to the Trust or submitted concurrently with the post-construction supplemental Trust loan application.

7:22-4.13 Evaluation of application

(a) Each application will be subject to:

1. (No change.)

2. Programmatic, technical, and scientific evaluation to determine the merit and relevance of the project to the Trust's program objectives;

3.-4. (No change.)

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

7:22-4.17 Loan conditions

(a) The following requirements, in addition to N.J.A.C. 7:22-4.18 through 4.30, as well as such statutes, rules, terms and conditions which may be applicable to particular loans, are conditions to each Trust loan, and conditions to each disbursement under a Trust loan agreement:

1.-5. (No change.)

6. The recipient shall establish an effective regulatory program pursuant to N.J.S.A. 58:10A-6 and enforce pretreatment standards which comply with 40 C.F.R. Part 403;

7.-23. (No change.)

24. A goal of not less than 10 percent of the total amount of all contracts for building, materials or services for a project shall be awarded to small business concerns owned and controlled by socially and economically disadvantaged individuals as defined in the Small Business Act (15 U.S.C. 637(a) and 637(d)), and any regulations promulgated pursuant thereto. Where a local government unit has Minority Business Enterprise/Women's Business Enterprise (MBE/WBE) goals which exceed 10 percent of the total amount of all contracts, the local government unit's goals will take precedence over State goals;

25. The recipient shall pay not less than the prevailing wage rate to workers employed in the performance of any contract for the project, in accordance with the rate determined by the Commissioner of the New Jersey Department of Labor pursuant to N.J.S.A. 34:11-56.25 et seq. or the United States Secretary of Labor pursuant to 29 CFR Part 5, whichever is greater;

26. After the award of a contract and prior to the start of work, a preconstruction meeting shall be scheduled by the recipient. The recipient, the responsible engineer, the environmental and construction inspectors, the contractor and one or more representatives of the Trust must be present at the preconstruction meeting;

27. Prior to starting construction, the recipient shall provide photographs or videotapes to the Trust in conformance with the provisions of N.J.A.C. 7:22-10.11(q);

28. The recipient shall provide inspection coverage of the construction work using qualified personnel on a routine basis as follows:

i. A qualified inspector shall be provided at each construction site. There are times when a qualified individual can cover more than one site; however, this must be governed by on-site conditions which determine rate of progress;

ii. Inspection coverage at a treatment plant site shall be on a full-time basis at all times;

iii. For pipeline construction, full-time construction inspections shall be provided during the following operations:

(1) Preparation of trench bottom for placement of bedding and to determine if bottom will support pipe or if additional support must be provided;

(2) Placing of pipe bedding material where required and in the quantity required in conformance with the approved specifications;

(3) Alignment and joining of pipe sections;

(4) Bedding, placement, and alignment of manholes and other appurtenances; and

(5) Placement and compaction of trench backfill material;

iv. Inspection coverage at pump station and metering station sites shall be sufficient to ensure that the work satisfies specifications. The coverage shall include, but not be limited to, the following:

(1) Excavation and spoils disposal;

(2) Checking of all elevations including footings, piles, slabs and equipment pads ***(this function may be performed by the responsible engineer)***;

(3) Installation of all concrete reinforcing bars;

(4) Installation of all electrical conduit, plumbing and piping; and

(5) Installation of all equipment;

v. All concrete shall be checked for truck mix time and temperature prior to placing in forms. Periodic slump tests and test cylinders, per good construction practice, shall be taken. Cold weather and hot weather precautions shall be taken as appropriate. Any additions to the specified concrete mix must be approved by the responsible engineer; and

vi. During the construction period, the construction inspector shall keep a job diary in which he will keep a record of progress, problems encountered, and corrective action taken to rectify any problems. The job diary shall be made available to the Trust upon request;

29. The recipient shall provide environmental inspection coverage and ensure completion of environmental restoration in conformance with the provisions of N.J.A.C. 7:22-10.12;

30. During the construction phase of the projects, job meetings shall be held at frequent intervals to review construction and restoration progress and to resolve difficulties which might delay completion of the work. Attendees at these meetings shall include the recipient, the responsible engineer, the recipient's inspectors (construction and environmental), the contractor, and one or more representatives of the Trust;

31. The recipient shall provide notification, information and conduct visual inspections and testing of projects as follows:

i. The recipient shall notify the Trust one week prior to all final visual inspections and tests of all sewer lines, force mains, mechanical equipment and treatment plant operation;

ii. Copies of all final visual inspections and test reports shall be forwarded to the Trust when requested;

iii. Copies of record drawings shall be forwarded to the Trust prior to the start of visual inspection and testing of all pipeline projects; and

iv. All visual inspections and testing shall be done in accordance with the following:

(1) All manholes and pipelines shall be completed and flushed prior to the visual inspection. This inspection must be performed with a representative of the recipient and/or the responsible engineer, the contractor and a representative from the Trust present. All discrepancies must be noted and a reinspection performed to verify the corrective action;

(2) All manholes and pipelines shall be visually inspected and accepted prior to testing;

(3) Upon acceptance of the visual inspection by the Trust, the necessary infiltration, exfiltration, or low pressure air test and deflection tests when applicable shall be performed by the contractor. The test must be witnessed by the recipient and/or the responsible engineer (or representative), the contractor, and a representative from the Trust. Upon completion of the test, a copy of the test results must be forwarded to the Trust if requested;

(4) Infiltration tests of gravity lines shall be limited to 2000 linear feet per test;

(5) Force mains shall be tested to two times the maximum operating pressure, but not greater than the pipe pressure rating, whichever is less. The length of pipe tested during a force main pressure test is not restricted; however, it is recommended that it be limited for ease in locating leaks if present;

(6) Testing of all mechanical equipment at treatment plants and pump stations must be witnessed by a representative of the Trust; and

(7) If required, actual flow tests must be done in accordance with parameters established by the Trust and performed in the presence of a representative of the Trust; and

32. The recipient shall forward a letter to the Trust upon completion of all construction and restoration of each contract of a project, stating that the project (or contract) is ready for final inspection. No final inspection will be scheduled until formal notification is received. The final inspection will be a joint inspection with the recipient and/or the responsible engineer, the recipient's inspector(s), the contractor, and one or more representatives of the Trust in attendance.

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

(d) Neither the State of New Jersey nor the New Jersey Wastewater Treatment Trust will be a party to any contracts and subcontracts awarded pursuant to this subchapter. All such contracts and subcontracts shall include the following statement:

"This contract or subcontract is expected to be funded in part with funds from the New Jersey Department of Environmental Protection and Energy and the New Jersey Wastewater Treatment Trust. Neither the State of New Jersey, the New Jersey Wastewater Treatment Trust nor any of their departments, agencies or employees is, or will be, a party to this contract or subcontract or any lower tier contract or subcontract. This contract or subcontract is subject to the provisions of N.J.A.C. 7:22-3, 4, 5, 9 and 10."

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

7:22-4.20 Trust loan agreements/amendments

(a) (No change.)

(b) In the event that additional moneys are needed due to the low bid building cost being higher than the original Trust loan amount, the local government unit may request a supplemental Trust loan. The Trust may execute a supplemental Trust loan agreement only after passage of a subsequent legislative act providing moneys for the specific project of concern. The recipient shall be responsible for all other increased costs.

(c) In the event that additional moneys in excess of any existing Trust loan award(s) are needed due to differing site conditions, the local government unit may request a post-construction supplemental Trust loan. The Trust may execute a post-construction supplemental Trust loan agreement only after passage of a subsequent legislative act providing moneys for the specific project of concern. The recipient shall be responsible for all other increased costs.

7:22-4.26 Unused funds

Where the total amount disbursed under a Trust loan due to the low bid building cost is less than the initial Trust loan award, and/or where the total amount disbursed under a Trust loan due to the final building cost is less than the Trust loan amount due to the low bid building cost, the difference shall be retained by the Trust to be used for making a recipient's debt service payments until exhausted or for any other purpose as determined by the Trust in accordance with the applicable Trust loan agreement and Trust bond resolution. The difference may also be used to cover a recipient's increased costs due to differing site conditions, as approved by the Trust. Line item adjustments for allowable project costs may be made at the request of the recipient as long as the Trust loan amount in the Trust loan agreement is not exceeded and provided all project related contracts have been awarded. The Trust may allow line item adjustments to reallocate funds resulting from cost underruns due to a reduction in project scope in order to cover costs due to differing site conditions.

7:22-4.29 Project initiation

(a) The recipient shall expeditiously initiate and complete the project in accordance with the project schedule contained in the Trust loan agreement. Failure to promptly initiate and complete a project may result in the imposition of sanctions under this subchapter.

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

7:22-4.32 Preaward costs

(a) The Trust shall not consider allowable those costs incurred for building performed prior to closing the loan for the project, except:

1. Where the local government unit's project is ranked one through 100, inclusive, on the most currently approved priority System, Intended Use Plan and Project Priority List or is part of the Department's and the Trust's request to the Legislature for inclusion in an appropriations bill providing to the Trust authorization to make loans in the forthcoming fiscal year for that project, and of the following conditions has met (a)1i through iv or (a)1iv and (a)1v:

i.-ii. (No change.)

iii. The local government unit has not awarded any contract for which cost reimbursement is being sought without the authorization to award the contracts being given by the Department and the Trust.

iv. The local government unit has taken all required actions consistent with applicable Internal Revenue Service laws, rules and rulings, and provided evidence of such actions in a manner acceptable to the Trust.

v. The local government unit has submitted items required at N.J.A.C. 7:22-4.11(d)3 through 19 to the Department and has received the Department's and the Trust's written approval thereof prior to the issuance of a notice to proceed with building the project and has met the provisions of the New Jersey Wastewater Treatment Privatization Act (N.J.S.A. 58:27-1 et seq.).

2. (No change.)

(b) If the Trust approves preliminary building activities, such approval is not an actual or implied commitment of Trust loan moneys and the local government unit proceeds at its own financial risk. The local government unit shall receive cost reimbursement of approved activities only upon receiving legislative approval in the form of an appropriations act and closing a Trust loan for the project.

(c) (No change.)

7:22-4.34 Planning and design

The costs associated with the planning and design of wastewater treatment facilities are not allowable for reimbursement from the Trust. However, an allowance to assist in defraying the planning and design costs will be provided to a project as a percentage of the allowable building cost in accordance with N.J.A.C. 7:22-5.12. Projects which have received financial assistance through a Federal grant, Pinelands Infrastructure Trust funding, or the Sewage Infrastructure Improvement Act for costs associated with any portion of the project scope or for costs to address the project need, will not be eligible to receive an allowance for planning and/or design as appropriate in accordance with N.J.A.C. 7:22-5.12. An allowance for planning and/or design costs will not be provided as part of a post-construction supplemental Trust loan to address differing site conditions.

7:22-4.37 Value engineering

(a) The applicant shall conduct value engineering if the total estimated building cost exceeds $10 million.

(b) (No change.)

7:22-4.46 Assistance in the administration of Trust rules

In evaluating whether a project has complied with or satisfied any requirement or criteria under these New Jersey Wastewater Treatment Trust Rules, including, but not limited to, N.J.A.C. 7:22-4.11, 4.13, 4.17, 4.29, 4.31, 4.35, 4.36, 4.37, 4.43 or 4.45, or in determining what course of action the Trust may decide upon regarding those sections, the Trust shall be entitled to rely upon any advice, certifications or opinions which may be provided to it by the engineering, professional or legal staff of the Department or of any other State governmental unit upon which it may call for assistance pursuant to N.J.S.A. 58:11B-5(f).

SUBCHAPTER 5. DETERMINATION OF ALLOWABLE COSTS FOR WASTEWATER TREATMENT FUND AND TRUST

7:22-5.4 Costs related to subagreements

(a) Allowable costs related to subagreements include:

1.-4. (No change.)

5. Change orders for increased costs under subagreements as follows:

i. Change orders provided:

(1) The costs are within the scope of the project;

(2) The costs are not caused by the recipient's mismanagement;

(3) The costs are not caused by the recipient's vicarious liability for the improper action of others; and

(4) The costs, when added to the allowable costs due to the final building cost, do not exceed the allowable costs due to the low bid building cost. This limitation does not apply to increased allowable costs due to differing site conditions and such increased allowable cost may be eligible for reimbursement in accordance with the applicable Trust loan agreement and Trust bond resolution or in instances where a post-construction supplemental Fund or Trust loan is awarded.

ii.-iii. (No change.)

6.-8. (No change.)

(b) For projects which received their initial Fund or Trust loan award in State Fiscal Year 1993 or later, the sum total of the allowable cost in (a)2 through 8 above, exclusive of building costs is limited to 12 percent of the low bid building cost. If a project receives a post-construction supplemental Fund or Trust loan for costs arising from differing site conditions, the sum total of allowable costs in (a)2 through 8 above, exclusive of building costs, for the portion of the project funded by the post-construction supplemental Fund or Trust loan is limited to 12 percent of the allowable building costs due to differing site conditions. The 12 percent limit may be exceeded only in instances where the Department, in the case of a Fund loan, and the Trust, in the case of a Trust loan, approve a greater amount through line item adjustments in accordance with N.J.A.C. 7:22-3.26 or 4.26.

(c) (No change.)

7:22-5.11 Miscellaneous costs

(a) Allowable miscellaneous costs include:

1. The costs of salaries, benefits and expendable materials the recipient incurs for the project. However, the allowable portion of these administrative costs will be limited to one percent of the low bid building cost. If a project receives a post-construction supplemental Fund or Trust loan for costs arising from differing site conditions, the allowable administrative costs for the portion of the project funded by the post-construction supplemental Fund or Trust loan is limited to one percent of the allowable building costs due to differing site conditions. The one percent limit may be exceeded only in instances where the Department, in the case of a Fund loan, and the Trust, in the case of a Trust loan, approve a greater amount through line adjustments in accordance with N.J.A.C. 7:22-3.26 or 4.26;

2.-4. (No change.)

(b) Unallowable miscellaneous costs include:

1.-9. (No change.)

10. The cost of wastewater treatment facilities that would provide capacity for new habitation or other establishments to be located on environmentally sensitive land (See N.J.A.C. 7:22-10.5(b)7);

11. The costs of preparing a corrective action report required by N.J.A.C. 7:22-3.30(b)(1) or 7:22-4.30(b)(1), as applicable.

7:22-5.12 Allowance for planning and design

(a) (No change.)

(b) The Fund or Trust share of the allowance may be up to 100 percent of the allowance and shall be based upon the percentage of the Fund or Trust share of the low bid building cost. An increase in the planning and/or design allowance will not be made for increased building costs to address differing site conditions.

(c)-(i) (No change.)

SUBCHAPTER 6. PINELANDS PROCEDURES AND REQUIREMENTS

7:22-6.4 Definitions

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

...

"Qualified inspector" means a person in the building trades or who has construction experience and who is knowledgeable regarding acceptable construction practices and terminology related to pipe installation, concrete placement and mechanical equipment installation.

"Responsible engineer" means the engineer or engineering firm who is contracted by the recipient to ensure that the construction work is performed in accordance with the approved contract documents.

"Right-of-way" means a strip of land or route acquired by the local government unit in which a conveyance pipe will be installed.

...

7:22-6.17 Grant and loan conditions

(a) The following requirements, in addition to N.J.A.C. 7:22-6.18 through 6.30, as well as such statutes, rules, terms and conditions which may be applicable to particular loans, are conditions to each Pinelands grant and loan, and conditions to each disbursement under a Pinelands grant or loan agreement:

1.-23. (No change.)

24. A goal of not less than 10 percent of the total amount of all contracts for building, materials or services for a project shall be awarded to small business concerns owned and controlled by socially and economically disadvantaged individuals as defined in the Small Business Act (15 U.S.C. 637(a) and 637(d)), and any regulations promulgated pursuant thereto. Where a local government unit has Minority Business Enterprise/Women's Business Enterprise

(MBE/WBE) goals which exceed 10 percent of the total amount of all contracts, the local government unit's goals will take precedence over State goals;

25. The recipient shall pay not less than the prevailing wage rate to workers employed in the performance of any contract for the project, in accordance with the rate determined by the Commissioner of the New Jersey Department of Labor pursuant to N.J.S.A. 34:11-56.25 et seq. or the United States Secretary of Labor pursuant to 29 CFR Part 5, whichever is greater;

26. After the award of a contract and prior to the start of work, a preconstruction meeting shall be scheduled by the recipient. The recipient, the responsible engineer, the environmental and construction inspectors, the contractor and one or more representatives of the Department must be present at the preconstruction meeting;

27. Prior to starting construction, the recipient shall provide photographs or videotapes to the Department in conformance with the provisions of N.J.A.C. 7:22-10.11(q);

28. The recipient shall provide inspection coverage of the construction work using qualified personnel on a routine basis as follows:

i. A qualified inspector shall be provided at each construction site. There are times when a qualified individual can cover more than one site; however, this must be governed by on-site conditions which determine rate of progress;

ii. Inspection coverage at a treatment plan site shall be on a full-time basis at all times;

iii. For pipeline construction, full-time construction inspections shall be provided during the following operations:

(1) Preparation of trench bottom for placement of bedding and to determine if bottom will support pipe or if additional support must be provided;

(2) Placing of pipe bedding material where required, as necessary, and in the quantity required in conformance with the approved specifications;

(3) Alignment and joining of pipe sections;

(4) Bedding, placement, and alignment of manholes and other appurtenances; and

(5) Placement and compaction of trench backfill material;

iv. Inspection coverage at pump station and metering station sites shall be sufficient to ensure that the work satisfies specifications. The coverage shall include, but not be limited to, the following:

(1) Excavation and spoils disposal;

(2) Checking of all elevations including footings, piles, slabs and equipment pads ***(this function may be performed by the responsible engineer)***;

(3) Installation of all concrete reinforcing bars;

(4) Installation of all electrical conduit, plumbing and piping; and

(5) Installation of all equipment;

v. All concrete shall be checked for truck mix time and temperature prior to placing in forms. Periodic slump tests and test cylinders, per good construction practice, shall be taken. Cold weather and hot weather precaution shall be taken as appropriate. Any additions to the specified concrete mix must be approved by the responsible engineer; and

vi. During the construction period, the construction inspector shall keep a job diary in which he will keep a record of progress, problems encountered, and corrective action taken to rectify any problems. The job diary shall be made available to the Department upon request;

29. The recipient shall provide environmental inspection coverage and ensure completion of environmental restoration in conformance with the provisions of N.J.A.C. 7:22-10.12;

30. During the construction phase of the projects, job meetings shall be held at frequent intervals to review construction and restoration progress and to resolve difficulties which might delay completion of the work. Attendees at these meetings shall include the recipient, the responsible engineer, the recipient's inspectors (construction and environmental), the contractor, and one or more representatives of the Department;

31. The recipient shall provide notification, information and conduct visual inspections and testing of projects as follows:

i. The recipient shall notify the Department one week prior to all final visual inspections and tests of all sewer lines, force mains, mechanical equipment and treatment plant operation;

ii. Copies of all final visual inspections and test reports shall be forwarded to the Department when requested;

iii. Copies of record drawings shall be forwarded to the Department prior to the start of visual inspection and testing of all pipeline projects; and

iv. All visual inspections and testing shall be done in accordance with the following:

(1) All manholes and pipelines shall be completed and flushed prior to the visual inspection. This inspection must be performed with a representative of the recipient and/or the responsible engineer, the contractor and a representative from the Department present. All discrepancies must be noted and a reinspection performed to verify the corrective action;

(2) All manholes and pipelines shall be visually inspected and accepted prior to testing;

(3) Upon acceptance of the visual inspection by the Department, the necessary infiltration, exfiltration, or low pressure air test and deflection tests when applicable shall be performed by the contractor. The test must be witnessed by the recipient and/or the responsible engineer (or representative), the contractor, and a representative from the Department. Upon completion of the test, a copy of the test results must be forwarded to the Department if requested;

(4) Infiltration tests of gravity lines shall be limited to 2,000 linear feet per test;

(5) Force mains shall be tested to two times the maximum operating pressure, but not greater than the pipe pressure rating, whichever is less. The length of pipe tested during a force main pressure test is not restricted; however, it is recommended that it be limited for ease in locating leaks if present;

(6) Testing of all mechanical equipment at treatment plants and pump stations must be witnessed by a representative of the Department; and

(7) If required, actual flow tests must be done in accordance with parameters established by the Department and performed in the presence of a representative of the Department; and

32. The recipient shall forward a letter to the Department upon completion of all construction and restoration of each contract of a project, stating that the project (or contract) is ready for final inspection. No final inspection will be scheduled until formal notification is received. The final inspection will be a joint inspection with the recipient and/or the responsible engineer, the recipient's inspector(s), the contractor, and one or more representatives of the Department in attendance.

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

(d) Neither the State of New Jersey nor the Pinelands Commission will be a party to any contracts and subcontracts awarded pursuant to this subchapter. All such contracts and subcontracts shall include the following statement:

"This contract or subcontract is expected to be funded in part with funds from the New Jersey Department of Environmental Protection and Energy and the Pinelands Commission. Neither the State of New Jersey, the Pinelands Commission nor any of their departments, agencies or employees is, or will be, a party to this contract or subcontract or any lower tier contract or subcontract. This contract or subcontract is subject to provisions of N.J.A.C. 7:22-6, 7, 9 and 10."

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

7:22-6.27 Publicity and signs

(a) (No change.)

(b) A project identification sign, at least eight feet long and four feet high, bearing the emblem of the Pinelands Commission shall be displayed in a prominent location at each publicly visible project site and facility. The sign shall identify the project, the amount of financial assistance from the Pinelands Infrastructure Trust Fund, and other information as required by the Department.

SUBCHAPTER 10. ENVIRONMENTAL ASSESSMENT REQUIREMENTS FOR STATE ASSISTED WASTEWATER TREATMENT FACILITIES

7:22-10.2 Definitions

Unless otherwise specified, the terms used herein will have the same meanings as those terms are defined in N.J.A.C. 7:22-3 and 4. Additional definitions are as follows:

...

"Endangered species" means a plant or animal species which has been designated as endangered pursuant to either the New Jersey Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq., the Federal Endangered Species Act, 16 U.S.C. 1531 et seq. or the Endangered Plant Species List Act, N.J.S.A. 13:1B-15.151 et seq.

...

"Planning area" means that area for which a wastewater management project is proposed, including the proposed service area, as well as the extent of the area which could be impacted, directly or indirectly, by the proposed project, as determined by the Department.

...

7:22-10.3 Establishing the level and scope of environmental review

(a) To initiate the planning process, the local government unit may be required by the Department to attend a preplanning meeting with the Department. When a preplanning meeting is required, the local government unit shall be required to provide a preplanning summary including a brief written description of the proposed planning area, the wastewater management needs, the preliminary wastewater management alternatives to be considered, and a preliminary appraisal of potential beneficial and adverse environmental and cultural resource impacts of the alternatives. A map of the proposed planning areas shall also be included. The planning area must include the entire area expected to benefit from the proposed project as a whole (that is, at a minimum, the potential service area) without regard to the eligibility of individual project components. The length of the planning period will be 20 years, unless otherwise approved by the Department. On the basis of this information, as well as any other information that may be available to the Department, the Department shall make a preliminary decision regarding the level of environmental review (Level 1, 2, or 3) that shall be required. The scope of the environmental review, including environmental information documentation and the Department's evaluation process, shall include the entire planning area and the comprehensive wastewater treatment project(s) proposed within the planning area.

(b) (No change.)

7:22-10.8 Cultural resource survey requirements

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

(f) The following are the levels of cultural resource survey that the Department may require:

1. The first level of investigation is the Stage IA Documentation Review and Strategy Development Survey which consists of the following:

i. (No change.)

ii. An analysis of the documentation obtained from the State Historic Preservation Officer, the State Archaeologist, State and local libraries and museums, historic and archaeological societies, universities, professional and avocational experts *[and other knowledgeable members of the public]*;

iii.-iv. (No change.)

v. Recommendations for additional surveys, such as the Site Recognition Survey described in (f)2 below, that may be required.

2. The next level of investigation is the State IB Site Recognition Survey which consists of the following:

i. Subsurface testing for the identification of previously undocumented archaeological sites. Subsurface tests, placed at intervals approved by the Department, must be of sufficient depth to sample all soil strata that may potentially contain evidence of past human activity;

ii.-iii. (No change.)

iv. A clear analysis and presentation of the results of the survey; and

v. (No change.)

3. The next level of investigation, the Stage II Site Definition and Evaluation Survey, is required if the potential direct or indirect impacts of the proposed project cannot be reasonably avoided by project modification or when there is insufficient data (extent, depth, significance) about the resource to assess avoidance or preservation alternatives. The Department will determine the need for a Stage II survey based upon an evaluation of the Stage IB survey report in conjunction with planning documentation prepared by the local government unit in support of the project. A Stage II Survey consists of the following:

i. (No change.)

ii. Draft documentation for a request for a determination of eligibility for nomination to the New Jersey and National Registers of Historic Places prepared in accordance with N.J.S.A. 13:1B-15.128 et seq., and the implementing rules at 36 C.F.R. Part 800;

iii.-iv. (No change.)

(g) Where a Stage II survey has been required, then, upon acceptance by the Department of the Stage II survey documentation, the Department will make one of the following determinations:

1. (No change.)

2. It is not practicable to avoid potential impacts to a Register-listed or eligible resource. In this case, the Department will assess the need to obtain a determination of eligibility in accordance with (h) below.

(h) The Department will prepare documentation supporting a determination of eligibility in accordance with N.J.S.A. 13:1B-15.128 et seq. and 36 C.F.R. 800.4.

(i) After the satisfactory completion of the required cultural resource surveys, the Department, after consultation with the appropriate agencies, in accordance with N.J.S.A. 13:1B-15.128 et seq. and 36 C.F.R. Part 800, will issue one of the following determinations of effect:

1.-2. (No change.)

3. Determination of Adverse Effect: An adverse effect is an alteration to a Register-listed or eligible resource that detracts from those characteristics by which it was determined eligible for inclusion on the Register. Examples of adverse effects include, but are not limited to, partial or total destruction of the resource, alteration of the resource's environment, neglect of the resource resulting in its deterioration, or transfer or sale of the property which contains a resource without adequate conditions regarding preservation, maintenance or use.

i. (No change.)

ii. This documentation, submitted to the Advisory Council on Historic Preservation, will be utilized, through a consultation process, in the preparation of a memorandum of agreement in accordance with N.J.S.A. 13:1B-15.128 et seq. and 36 C.F.R. Part 800.

iii.-v. (No change.)

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

7:22-10.9 Environmental coordination

(a) The local government unit shall consult, coordinate with, or apply to those agencies responsible for issuing permits or which have other jurisdiction regarding environmental concerns with respect to the proposed project and its impacts. Those agencies include, but are not limited to, the agencies responsible for administering the following:

1.-19. (No change.)

20. Wild and Scenic Rivers Act, 16 U.S.C. 1271 et seq. as amended;

21. Historic Sites Act, 16 U.S.C. 461 et seq.; and

22. Endangered Plant Species List Act, N.J.S.A. 13:1B-15.151 et seq.

(b) (No change.)

7:22-10.11 Design requirements

(a) The local government unit shall prepare design plans and specifications which include mitigating measures developed during

planning and incorporated in the approved planning documentation. In addition, the design plans and specifications shall conform to the minimum standards for each area of concern which is applicable to the proposed project as set forth below. All activities which are a part of the comprehensive wastewater treatment project(s) for the planning area must conform to the requirements of this section, regardless of the eligibility of individual components of the project.

(b)-(g) (No change.)

(h) Where stream crossings are necessary, adverse impacts shall be minimized by including appropriate mitigating measures and restoration techniques in plans and specifications. At a minimum, mitigating measures and techniques shall include the following requirements:

1.-6. (No change.)

7. Construction through stream corridors, wetlands and other surface waters shall be scheduled to minimize damage to fish populations wherever possible. Recommended periods during which construction is to take place shall be in accordance with N.J.A.C. 7:13-5.6(g) and N.J.A.C. 7:7E; and

8. (No change.)

(i)-(q) (No change.)

7:22-10.12 Construction phase requirements

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

(c) A final inspection shall be required following completion of all construction and restoration work encompassed by each contract. The final inspection shall be conducted as follows:

1. Upon completion of all construction and restoration work of each contract of a project, the loan recipient shall submit a letter to the Department stating that the project (or contract) is ready for final inspection. No final inspection can be scheduled until formal notification is received.

2. (No change.)

(d) (No change.)

(a)

DIVISION OF FISH, GAME AND WILDLIFE

Notice of Administrative Correction

Marine Fisheries

Weakfish Management

N.J.A.C. 7:25-18.12

Take notice that the Department of Environmental Protection and Energy has discovered an error in the text of N.J.A.C. 7:25-18.12(c) as administratively changed through a notice of administrative change published in the May 17, 1993 New Jersey Register at 25 N.J.R. 2001(d). As changed, the first sentence of the subsection should read, "Any person violating the provisions of (a) or (b) above or N.J.A.C. 7:25-18.14(j)2 shall . . ." instead of the published, "Any person violating the provisions of (a) or N.J.A.C. 7:25-18.14(j)2(b) above shall . . ." Through this notice of administrative correction, published pursuant to N.J.A.C. 1:30-2.7, the properly changed text will be inserted into the Code.

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

7:25-18.12 Weakfish management

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

(c) Any person violating the provisions of (a) or **(b) above or** N.J.A.C. 7:25-18.14(j)2[(b) above] shall be liable for a penalty of $20.00 for each fish taken or possessed. Each fish taken or possessed shall constitute an additional separate and distinct offense.

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

(b)

SITE REMEDIATION PROGRAM

Technical Requirements for Site Remediation

Adopted New Rules: N.J.A.C. 7:26E

Proposed: May 4, 1992 at 24 N.J.R. 1695(a).

Adopted: May 3, 1993 by Scott A. Weiner, Commissioner, Department of Environmental Protection and Energy.

Filed: May 4, 1993 as R.1993 d.245, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 13:1D-1 et seq., 13:1E-1 et seq., 13:1K-6 et seq., 58:10-23.11 et seq., 58:10A-1 et seq., and 58:10A-21 et seq.

DEPE Docket Number: 013-92-04.

Effective Date: June 7, 1993.

Operative Date: July 1, 1993.

Expiration Date: June 7, 1998.

Summary of Hearing Officer Recommendations and Agency Response:

On May 4, 1992 at 24 N.J.R. 1695(a), the Department of Environmental Protection and Energy (Department) proposed a new chapter, N.J.A.C. 7:26E, to establish the Department's rules on the remediation of contaminated sites in New Jersey. These rules, together with the adopted Procedures for Department Oversight of the Remediation of Contaminated Sites (N.J.A.C. 7:26C) published at 25 N.J.R. 2002(a) will establish the core of the Department's site remediation program. The Department held two public hearings concerning the new rules. The first public hearing was held on June 3, 1992 in New Brunswick, New Jersey, and the second public hearing was held on June 4, 1992 in Trenton, New Jersey. The Department accepted written comments through July 20, 1992.

In the year that has passed since the Department proposed the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, the Legislature has focused considerable attention toward reevaluating the process to remediate contaminated property in an effort to create a more streamlined and predictable process. The focus of this legislative attention has been Senate Bill No. 1070 (S1070) which would amend and supplement the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., and impact remediation under all other New Jersey statutes. As a result of over a year of deliberations, and with the support of the Department, on March 22, 1993, the Senate passed S1070 by a vote of 39 to 0. The Assembly accepted S1070 in April, and the Department anticipates that the Bill will be voted upon in June, 1993.

S1070 would establish detailed public policy regarding the procedures and the remediation standards that are to be used by the Department when overseeing the remediation of contaminated sites. Consequently, there is some overlap between S1070 and the Technical Requirements for Site Remediation, and in limited instances, differences between the two. Where possible, the Department has modified N.J.A.C. 7:26E on adoption so that it is consistent with the public policy articulated in the Senate's overwhelming approval of this bill. One example of this is that, on adoption, the Department has deleted the phrase "feasibility study" from N.J.A.C. 7:26E and replaced it with the phrase "remedial alternative analysis" to emphasize that the Department is not requiring a Superfund type feasibility study, which has the reputation of being costly and overly complex, when it is seeking an analysis, which can be as short and simple as a one page document, of remedial action alternatives. This modification is consistent with S1070, which lists substantially the same criteria for evaluating remedial action alternatives, but does not define these criteria as a feasibility study to highlight the Senate's intent that the requirements of S1070 are not identical to Federal law.

The Department, however, was unable to make all the changes necessary to make the technical rules consistent with S1070 on adoption since many would be considered substantive changes requiring additional notice and comment pursuant to the Administrative Procedure Act, N.J.S.A. 54:14B-1 et seq. For example, in S1070 the Department's pre-approval of a remedy is conditioned upon the timeframe in which the remedy will be completed. In contrast, the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-6.1(b) require Departmental

approval of all remedies unless they are permanent, regardless of the timeframe in which it can be implemented. The Department could not modify N.J.A.C. 7:26E-6.1(b) on adoption so that it would mirror S1070 as this would involve a substantive change. When S1070 is enacted, the Department will reevaluate all of its rules, including N.J.A.C. 7:26E, to ensure that they are consistent with the legislative direction given in S1070.

Lance R. Miller, Assistant Commissioner for the Department's Site Remediation Program served as the hearing officer at the public hearing held on June 3, 1992. Karl J. Delaney, the Department's Director of the Division of Responsible Party Site Remediation served as the hearing officer at the public hearing held on June 4, 1992.

Assistant Commissioner Miller and Director Delaney recommend that the Department adopt the rule with the changes described in the response to the specific comments as stated in the Summary of Public Comments and Agency Responses below. The Department agrees with the recommendation.

Interested persons may inspect the public hearing record, or obtain a copy upon payment of the Department's normal copying charges, by contacting:

Janis Hoagland
Office of Legal Affairs
Department of Environmental Protection
401 East State Street
CN 402
Trenton, New Jersey 08625-0402

The Department received written and verbal comments from 66 commenters during the public comment period on the proposal ending July 20, 1992. The following is a list of people who made either oral or written comments directly related to the proposed new rules:

Allied-Signal Inc.
American Cyanamid Company
Fred Anderson of New Jersey Petroleum Council
Atlantic Electric
Dwight Bedsole of E.I. du Pont de Nemours and Company
Robert B. Bruns of International Hydronics Corporation
Chemical Industry Council of New Jersey
Chemical Land Holdings, Inc.
Chemical Manufacturers Association
Chevron U.S.A., Inc.
Chrome Technologies
CIBA-GEIGY Corporation
Colonial Pipeline Company
Continental Vanguard, Inc.
Lee Cramer of Laboratory Resources
Rajesh Dave of Laboratory Resources
E.I. du Pont de Nemours and Company
Environmental Liability Management, Inc.
Environmental Testing and Certification Corporation
Envirotech Research, Inc.
Exxon Company, U.S.A.
The General Electric Company
GPU Nuclear Corporation
Groundwater & Environmental Services, Inc.
Hackensack Water Company
Hoffman-La Roche, Inc.
Industrial Corrosion Management, Inc.
International Association of Environmental Testing Laboratories
Jersey Central Power and Light Company
Laboratory Resources, Inc.
Land Resource Recycling Management
Land Tech Remedial, Inc.
Richard Levine of RM Laboratories
Lindabury, McCormick & Estabrook
Wade Miller of the International Association of Environmental Testing Laboratories
Mobil Oil Corporation
Patrick Mulrooney
Robert Mutch, Jr. of Eckenfelder, Inc.
Al Nesheiwat
New Jersey Natural Gas Company
Ellen Pollack
Public Service Electric and Gas Company
Recon Systems, Inc.
Mark Riether of Northeastern Analytical Corp.
Rutgers Environmental Law Clinic on behalf of:
American Littoral Society
Association of New Jersey Environmental Commissions
Clean Ocean Action
Coalition Against Toxics
Delaware Riverkeeper
Environmental Defense Fund
Ironbound Committee Against Toxic Waste
Mansfield Township Environmental Commission
New Jersey Environmental Federation
New Jersey Public Interest Research Group
People United for a Klean Environment
Frank T. Sanclementi
Schering Laboratories
Michael E. Serfes, New Jersey Geological Survey
Shell Oil Company
David Speis of Environmental Testing and Certification Corporation
Tellus Environmental Consultants, Inc.
The Whitman Companies, Inc.
Union Carbide Chemicals and Plastics Company, Inc.
United States Environmental Protection Agency
United States Testing Company, Inc.
Wheaton Industries, Inc.

Summary of Public Comments and Agency Responses:

GENERAL COMMENTS

Comments in Support of the Technical Rules

1. COMMENT: Chemical Waste Management of New Jersey, Inc. commended the Department in its effort to implement a coordinated scheme for site remediation and to provide predictable, consistent yet flexible guidance for remediators.

2. COMMENT: Chemical Manufacturers Association, New Jersey Natural Gas Company, Jersey Central Power & Light Company, and Colonial Pipeline Company supported the Department's efforts to provide comprehensive standards on remediating sites within the State.

3. COMMENT: GPU Nuclear Corporation agreed with the concept of consolidating rules, guidelines, and policies from the various programs into a single set of regulations that will provide a framework for the uniform application of technical requirements throughout the State.

4. COMMENT: The General Electric Company supported the Department's desire to achieve the goals of efficient and effective cleanups by articulating in one document a comprehensive set of procedures for remedial investigation, feasibility study and remedial action.

5. COMMENT: International Association of Environmental Testing Laboratories supported New Jersey's objective of establishing clear, uniform criteria for all remedial activities. These criteria will eliminate the subjectivity of the remedial planning process which has affected cleanup progress in the past.

6. COMMENT: Mobil Oil Corporation supported the Department in its efforts to provide predictable, consistent but flexible guidance on contaminated site investigation and cleanup. Mobil appreciated the level of effort extended by the New Jersey Department of Environmental Protection and Energy in the development of N.J.A.C. 7:26E. The intent to produce predictable, consistent but flexible guidance was commended and Mobil recognizes that the development of a set of rules to apply to any and all site investigations in New Jersey was a difficult task.

7. COMMENT: The General Electric Company commented that the Technical Requirements for Site Remediation proposed on May 4, 1992 constitute a significant and constructive step by the New Jersey Department of Environmental Protection and Energy toward the "predictable, consistent yet flexible guidance" envisioned by the Department.

8. COMMENT: American Cyanamid Company commented that it agrees with the phased approach to a site investigation. By allowing a facility to plan and budget money for each phase of remediation, the cleanup can continue without any major set backs due to poor planning and more efficient utilization of resources.

RESPONSE: The Department appreciates the support for its efforts to provide comprehensive standards on remediating sites within the State.

Rule Development

9. COMMENT: Jersey Central Power & Light Company commented that the timeframe allowed for submitting comments (2½ months) was totally inadequate given the fact that two other major related rules (N.J.A.C. 7:26D and N.J.A.C. 7:26C) were publicly noticed for comment during the same time period. They said that, because of the complexity and importance of those proposed regulations, it was virtually impossible to turn any attention to N.J.A.C. 7:26E until after July 6, 1992. An extension of the comment period was requested by JCP&L. JCP&L feels very strongly that the arbitrary deadlines imposed by the Department do not allow for an adequate evaluation of the proposed regulations.

RESPONSE: The Department believes that there was sufficient opportunity for interested parties to participate in the development of the rules and elected not to extend the comment period. Because of the complexity of these rules, the Department provided a 75 day comment period. Over the last several years, the Department has been working with various interested parties to develop systematic and consistent remediation methodologies. In developing N.J.A.C. 7:26E, the Department has taken into consideration the comments, criticisms, and suggestions which the Department received from these parties. The "Remedial Investigation Guide" and "Cleanup Plan Guide," which have been consolidated into N.J.A.C. 7:26E, were developed in consultation with the Technical Advisory Subcommittee of the Industrial Advisory Committee. The Subcommittee is made up of representatives of the Department, consulting firms and laboratories from around the State. N.J.A.C. 7:26E also incorporated the technical appendices of the Department's Administrative Consent Orders which were developed and revised based on comments which the Department received from the regulated community through hundreds of case interactions.

Statutory Authority

10. COMMENT: The General Electric Company commented that although N.J.A.C. 7:26E makes reference to various New Jersey statutes (for example, in N.J.A.C. 7:26E-1.2), N.J.A.C. 7:26E does not specifically identify the statutory authority for the particular sections. New Jersey's Administrative Procedure Act, N.J.S.A. 52:14B-4(a)(2), and the Rules for Agency Rulemaking, N.J.A.C. 1:30-3.1(d), make clear that Department must identify the "specific legal authority" on which it relies in promulgating each proposed rule.

RESPONSE: The Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Rules for Agency Rulemaking, N.J.A.C. 1:30, do not require the Department to identify the specific legal authority on which it relies for each particular section of the rule. The agency is only required to include a citation to the specific N.J.S.A. statutory authority for the proposed rule. N.J.A.C. 1:30-3.1(d). By listing the various statutory authorities, including the Department's implementing statute at N.J.S.A. 13:1D-1 et seq., the Department believes it has complied with the requirements of the Administrative Procedure Act.

11. COMMENT: The General Electric Company commented that N.J.A.C. 7:26E must distinguish among sites according to the statutory basis for remediation since the Department's authority to control site remediation varies considerably depending on the statute involved. The General Electric Company commented that the New Jersey Spill Compensation and Control Act and the Environmental Cleanup Responsibility Act are the key remedial statutes upon which the Department may rely in promulgating N.J.A.C. 7:26E and that the Department's authority under each of these statutes is tied closely to the prevention or removal of a "discharge" and to the protection of human health and the environment. Under the Spill Compensation and Control Act, the Department's remedial authority is limited to the removal of a discharge, and the party subject to Department's removal authority is the "discharger." The General Electric Company stated that the Department has no authority under the Spill Act to issue regulations governing remedial work unless that work is necessitated by a discharge and is designed to remediate that discharge. The term "discharge" is limited to the release of hazardous substances into the environment, that is, to water or lands within the State or to areas outside the State when this may result in damage to the lands, waters or natural resources of the State. N.J.S.A. 58:10-23.11b. The General Electric Company noted that under the Environmental Cleanup Responsibility Act ("ECRA"), N.J.S.A. 13:1K-6 et seq., no cleanup is required if there has been "no discharge of hazardous substances or wastes on the site, or that any such discharge has been cleaned up." N.J.S.A. 13:1K-8(g). Moreover, the Department's authority under the Environmental Responsibility Cleanup Act is limited to a specified group of sites (industrial establishments) and is triggered only by specific commercial events (transfers and closures). N.J.S.A. 13:1K-9.

The General Electric Company also commented that cleanup standards issued by the Department under Environmental Responsibility Cleanup Act can address only certain environmental media ("soil, groundwater and surface water"), N.J.S.A. 13:1K-10(a) and (c), and must be tied to protection of public health and safety. N.J.S.A. 13:1K-10(a). Furthermore, regulations based on the Water Pollution Control Act ("Water Act"), N.J.S.A. 58:10A-1 et seq., must be designed to protect human health and the environment, and are subject to consideration of technical feasibility.

12. COMMENT: Exxon Company U.S.A. commented that the Department is regulating beyond its statutory authority in N.J.A.C. 7:26E because each statute defines and regulates discharges differently, and provides the State with specific enforcement powers; these powers need to be reflected in this regulation. Currently, the Department is trying to provide a set of "blanket" technical requirements that will apply to all site remediations. However, a remediation in response to a single discharge, or series of discharges, is separate from and in response to a different statute, than an Environmental Responsibility Cleanup Act investigation. This concept needs to be added throughout this rule so that any and all work, outside of Environmental Responsibility Cleanup Act site investigations, addresses only those areas of concern with a known or suspected discharge.

RESPONSE: The Department believes it has ample authority to promulgate a comprehensive set of rules that address how to remediate a contaminated site. As discussed in more detail below, the Department was specifically directed to adopt a Hazardous Substance Contingency Response Master Plan pursuant to N.J.S.A. 58:10-23.24. The Legislature determined that such a Statewide master plan for the cleanup of chemical contamination was essential due to a recognized need for a systematic and consistent approach to the detoxification of various contaminated sites (N.J.S.A. 58:10-23.20). N.J.A.C. 7:26E forms an integral part of the Statewide master plan insomuch as they ensure that human health and the environment will be adequately protected as a result of site remediation efforts.

In addition to the Department's explicit authority to promulgate these rules at N.J.S.A. 58:10-23.20, the Department is authorized to specifically promulgate these rules pursuant to the Spill Compensation and Control Act and the Environmental Cleanup Responsibility Act. For example, N.J.S.A. 58:10-23.11t gives the Department the authority to promulgate rules as it deems necessary to accomplish its purpose and responsibilities under the Spill Compensation and Control Act. The Spill Compensation and Control Act is to be liberally construed to effect its purposes pursuant to N.J.S.A. 58:10-23.11x. Therefore, the Department is authorized to promulgate rules to deal with the prevention of discharges, as well as with containment, cleanup and removal after a spill has occurred. See *GATX Terminals Corp. v. New Jersey Dept. of Environ. Prot.* 86 *N.J.* 46 (1981).

The Department also has broad statutory authority pursuant to the Water Pollution Control Act to promulgate rules to prevent, control or abate water pollution and to carry out the intent of the Water Pollution Control Act (N.J.S.A. 58:10A-4). One of the purposes of the Water Pollution Control Act is to restore, enhance and maintain the chemical, physical, and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water (N.J.S.A. 58:10A-2).

Furthermore, under its enabling statute at N.J.S.A. 13:1D-9, the Department is mandated to formulate policies for the conservation of natural resources, the promotion of environmental protection and the prevention of pollution in the environment. These declarations of public policy in the Department's enabling legislation serve as an additional source for the authorization of comprehensive regulations related to the remediation of contaminated sites.

As the commenters note, various statutes in New Jersey regulate ongoing discharges to the environment differently. Thus, the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., regulates discharges to the surface and ground waters of the State pursuant to the New Jersey Pollutant Discharge Elimination System Permitting System, whereas the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., focuses on preventing discharges from regulated units. Furthermore, varying statutes provide different enforcement mechanisms to the Department. These facts, however, should not lead to the conclusion that the Department

is without statutory authority to promulgate a comprehensive set of rules that deal with the overlapping problems associated with the discharge and disposal of hazardous substances and wastes or pollutants to the land and waters of the State, and the need for the prevention or mitigation of contamination and restoration of natural resources.

With the exception of the Environmental Cleanup Responsibility Act program, for the past two decades the Department has approached site remediation efforts from a media specific basis. For instance, ground water was often remediated pursuant to a New Jersey Pollutant Discharge Elimination System-Discharge to Groundwater Permit, but because the focus of the permit was on ground water, contaminated soil at the site may not have been concurrently remediated. This media specific focus led to a fragmented approach to site remediation efforts. Often times, the Department and the regulated party were required to review remediation work already completed to see if additional action needed to be taken. The Department has determined that this fragmented approach is not efficient or cost effective. Therefore the Department proposed N.J.A.C. 7:26E together with the Procedures for Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C, so that contaminated sites could be remediated in a consistent manner throughout the State. The Department's approach to deal with contaminated sites across statutory lines is consistent with the Legislature's multimedia approach to ongoing discharges as articulated in the recently adopted Pollution Prevention Act, N.J.S.A. 13:1D-35 et seq.

Under the Spill Compensation and Control Act, the Department has broad authority to either cleanup and remove a discharge or direct the discharger to cleanup and remove the discharge. N.J.S.A. 58:10-23.11f(a)1. The Department, in delegating its authority to remediate a discharge may specify how that cleanup is to be conducted so that it is done in a manner that is protective of human health and the environment. Thus, pursuant to the Spill Compensation and Control Act, the Department has the flexibility to effect a cleanup by what it considers to be the most appropriate means. See *Superior Air Products Co. v. N.L. Industries Inc.,* 216 *N.J. Super.* 46 (App. Div. 1987). The Department has appropriately approached this task by establishing one set of requirements applicable to all contaminated sites.

The Department disagrees with the commenter's contention that the Department's authority to control site remediation varies considerably depending on the statute involved. The authorizing legislation for these rules all deal with the same subject matter; the protection of human health and the environment through the prevention and remediation of environmental contamination. As such, all statutes must be read together to effectuate the Legislature's purpose in ensuring that contaminated sites are remediated. Thus, the Department does not have to wait for the Environmental Cleanup Responsibility Act to be triggered in order to require that a discharge be remediated. Nor is the Department limited to focusing on the remediation of an underground storage tank if there happens to be such a tank at the site. The Spill Compensation Control Act, the Water Pollution Control Act, the Environmental Cleanup Responsibility Act, Solid Waste Management Act and the Underground Storage of Hazardous Substances Act must be read in a manner that harmonizes their objectives.

Finally, all environmental statutes, to the extent that they are necessary for the general health, safety and welfare of the people of the State, are to be liberally construed to effectuate their purposes. Thus, while the Department agrees that there may be some minor inconsistencies between the Water Pollution Control Act and the Spill Compensation and Control Act, the Department does not agree that these inconsistencies must dictate that there can be no comprehensive set of rules regarding the remediation of contaminated sites. In enacting all of these statutes, the Legislature's objective was the proper prevention and remediation of environmental contamination in New Jersey. N.J.A.C. 7:26E implements that legislative objective.

13. COMMENT: The General Electric Company commented that any remediation under the Spill Compensation and Control Act must "to the greatest extent possible be in accordance with the National Contingency Plan." N.J.S.A. 58:10-23.11f(a). The National Contingency Plan ("NCP") is the Federal plan requiring, among other things, that cost and practicability be considered in the selection of remedies.

RESPONSE: The Spill Compensation and Control Act does not define the phrase "to the greatest extent possible in accordance with the National Contingency Plan," used at N.J.S.A. 58:10-23.11(f)a. Thus, the Legislature left it to the Department's expert discretion to define the phrase in a manner consistent with the Legislature's objectives. The Department has developed a site remediation regulatory scheme that is in accordance with, but not identical to, the National Contingency Plan. Within the Department's regulatory scheme, the Department has specifically allowed for the consideration of cost and practicability in the process for the selection of remedies. See N.J.A.C. 7:26E-5.2.

14. COMMENT: The General Electric Company commented that N.J.A.C. 7:26E would apply to all site remediation in New Jersey, but many of the most seriously contaminated sites in this State are addressed under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq., which provides that cleanup procedures are determined pursuant to the National Contingency Plan ("NCP"), 40 C.F.R. 300. State remedial requirements which are inconsistent with the NCP cannot apply at Comprehensive Environmental Response, Compensation, and Liability Act sites. Several important provisions in N.J.A.C. 7:26E are inconsistent with the NCP, including the absence of public notice and opportunity for comment on proposed remedies, the requirement for permanent remediation at all sites, the provision waiving the feasibility study when an on-site permanent remedy is proposed, and the requirement that local permits be obtained before initiating on-site remediation. If these provisions are adopted, remediation at Comprehensive Environmental Response, Compensation, and Liability Act sites will fail to comply with the NCP, and private parties will be unable to recover their cleanup costs from responsible entities pursuant to Comprehensive Environmental Response, Compensation, and Liability Act. Therefore, the regulations should be revised to distinguish between remediation of Comprehensive Environmental Response, Compensation, and Liability Act and potential Comprehensive Environmental Response, Compensation, and Liability Act sites (which should be subject to the NCP) and remediation of other spills and discharges.

RESPONSE: The commenter focuses on some differences between N.J.A.C. 7:26E and the National Contingency Plan. All items noted by the commenter are indeed required pursuant to the National Contingency Plan for sites being remediated pursuant to Comprehensive Environmental Response, Compensation, and Liability Act. The Department, however, does not consider these items to be minimum standards that should be required for all sites being remediated in New Jersey. The Department recognizes that some contaminated sites are potentially subject to Comprehensive Environmental Response, Compensation, and Liability Act, but the Department also recognizes that for practical reasons, the vast majority of contaminated sites will not be remediated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. For the remediation of any site on the National Priority List and therefore subject to the National Contingency Plan, the Department will require the missing aspects of the National Contingency Plan as requirements beyond the minimum standards articulated in this rule.

The Department does not agree that if a site is remediated pursuant to N.J.A.C. 7:26E, private parties will be unable to recover their cleanup costs from responsible parties because the cleanup would have been conducted in a manner inconsistent with the National Contingency Plan. The party responsible for conducting the remediation may always go beyond the minimum technical standards. For example, a private party can provide public notice and an opportunity to comment on the proposed remedy for a site. Similarly, a private party can always conduct a remedial alternative analysis or feasibility study, even if the selected remedy is an on-site permanent one. Further, the fact that a private party obtained a permit, where that permit could have been waived pursuant to the National Contingency Plan, should not have any impact on that party's future ability to recover its cleanup expenses. The substantive requirements in that permit would have been the same even if it had been waived pursuant to the National Contingency Plan. Finally, N.J.A.C. 7:26E does not mandate the selection of permanent remedies at N.J.A.C. 7:26E-5, or the use of generic cleanup standards as commented by The General Electric Company. Because the Department does not believe that N.J.A.C. 7:26E is "fundamentally inconsistent" with the National Contingency Plan, the Department does not believe it is necessary to make the commenter's suggested revisions.

15. COMMENT: Public Service Electric & Gas Company commented that although the Department cites several statutory programs in the section labeled Statutory Framework under Regulatory Background, which form the legal basis underlying N.J.A.C. 7:26E, a closer look at these laws shows that questions can be raised as to whether any legal basis for the Department's regulation of building interiors investigations exists. With one exception, none of the statutes to which Department

refers appear to provide the authority to prescribe such technical requirements. The one exception is the Environmental Cleanup Responsibility Act, which is to provide for cleanups at certain industrial establishments prior to cessation, or transfer of operations. Public Service Electric & Gas Company proposed deleting the provision for Building Interior Investigation (N.J.A.C. 7:26E-3.5), and Building Interior Remedial Investigation (N.J.A.C. 7:26E-4.2) throughout the regulation, except as provided for by Environmental Responsibility Cleanup Act.

RESPONSE: The Department continues to reexamine its authority regarding the regulation and remediation of building interiors. The Department does note, however, that it will continue to evaluate building interiors in certain circumstances, and has therefore continued to refer to building interiors and structures in these rules. First, as noted by the commenter, pursuant to Environmental Responsibility Cleanup Act, the Department must address building interiors in a site remediation conducted pursuant to that Act. Second, under some circumstances, the Department will continue to evaluate building interiors to see if releases within them have become, or have the potential to become discharges to the environment. Finally, if requested, the Department will review any remediation of building interiors. To provide guidance as to the minimum standards the Department would apply to any building interior remediation, the Department has adopted N.J.A.C. 7:26E-3.5 and 4.2. For further discussion of the Department's statutory authority to regulate building interiors, please refer to the Department's response to comments on the definition of environmental media, below.

16. COMMENT: Atlantic Electric commented that N.J.A.C. 7:26E should not be presented by regulation, but rather as technical guidance. By placing technical requirements in such a rigid regulatory format, Atlantic Electric stated the following will occur: (a) alternate cleanup standards will not be considered; (b) new advances in remediation technologies will not be considered; (c) excess costs will be incurred by business, consumers, and taxpayers since small (often unavoidable) spills will be treated as large, complex remediation projects; (d) confusion; and (e) inflexibility. Atlantic Electric recommended that the Department hold an open forum with industry, academia, and public officials to produce feasible, workable, reasonable, and economically viable technical guidelines.

17. COMMENT: Allied Signal, Inc. said a more effective approach than these rules would be to convert the proposed rule into selected guidance documents, and then to propose a rule that refers to the guidance, with specific data requirements being made on a site-specific basis. Justified variances from guidance could then be made with less difficulty.

18. COMMENT: Chevron U.S.A., Inc. said N.J.A.C. 7:26E should not be promulgated as a regulation but, instead, should be retained as a guidance document. Chevron U.S.A., Inc. recommended that only the general framework of the remedial process should be promulgated, reserving site specific requirements (such as number, location and depth of soil samples for a specific area of concern) for site specific work plans. The primary objective should remain focused on the end of the "process," that is, effectively remediated sites. How a person proceeds, finally, to this endpoint should remain subordinate to attainment of specific cleanup levels, which represent the desired endpoints. Methodologies are available to confirm that the Department's endpoints have been achieved. A committee should be set up to complete this guidance document. The group should consist of interested parties possessing a technical background and field experience: the regulated community, academia, respected professionals as well as the Department representatives.

19. COMMENT: Hoffman-La Roche, Inc. commented that industry would be better served with sound technical guidance on how to conduct a site investigation and remediation rather than regulations binding such activities to a single, costly and burdensome methodology. The effect of N.J.A.C. 7:26E will be to substantially slow down the pace and increase the cost of cleanup without any real environmental benefit.

20. COMMENT: Chemical Waste Management of New Jersey, Inc. commented that the subject matter of N.J.A.C. 7:26E is currently being dealt with by the Department through general guidelines. These guidelines are flexible, permitting the Department to make site-specific deviations from their requirements. N.J.A.C. 7:26E is deliberately quite comprehensive, dealing with all potential forms and types of contamination, but no mechanism exists to eliminate unnecessary or inapplicable provisions of N.J.A.C. 7:26E.

21. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that the basic outline of the requirements should be included in regulatory form but the technical details should be issued as guidance so that the necessary flexibility is maintained for both Department and responsible parties.

22. COMMENT: E.I. du Pont de Nemours and Company commented that instead of promulgating N.J.A.C. 7:26E as a regulation, the Department should have proposed these requirements as guidance. First, by promulgating detailed technical requirements into regulation, the Department is, in effect promulgating a "one-size-fits-all" regulation which will have the effect of requiring unnecessary investigation and analysis of certain simple situations while potentially prescribing an approach at a complex site that will be less than adequate. Second, by establishing these requirements as regulation, the process of keeping these procedures current with the state of the science will require frequent and significant modification to the regulation, changes that can only be accomplished through formal amendment proceedings.

23. COMMENT: CIBA-GEIGY Corporation commented that N.J.A.C. 7:26E should not be issued as regulations but rather as a "guidance manual," which recommends but does require conformance. Since remediation will be a fast changing field, the Department should maintain maximum flexibility to address and implement these changes. In this context, the Department should also continue to take advantage of the "workshop" approach, meeting with potential responsible parties and consultants on a periodic basis to get their input and assistance on N.J.A.C. 7:26E.

24. COMMENT: Wheaton Industries, Inc. commented that the Department should issue these "Technical Requirements for Site Remediation" in the form of guidance rather than as enforceable regulations. This guidance, which could even be codified, would accomplish the Department's purpose of establishing a benchmark set of procedures for conducting site remediation. Furthermore, procedures in the form of guidance would leave parties free to engage in voluntary investigation or cleanup to the extent practicable within their particular means or circumstances without fear of exposure to enforcement liability. Wheaton Industries, Inc. commented that, alternatively, N.J.A.C. 7:26E could adopt an approach similar to that employed by the Federal National Contingency Plan and describe technical requirements which the Department will follow in conducting site remediation. The Department already has characterized the proposed rules this way in the preamble. See, for example, 24 N.J.R. 1697. Again, this approach would establish a benchmark set of procedures but would leave adequate flexibility and opportunity for voluntary action by private parties.

RESPONSE: N.J.A.C. 7:26E is based for the most part on various Department guidance documents which the Department and the regulated community have been using for many years. In fact, as stated in the Summary to the rule proposal, in many instances the Department worked with various representatives of the regulated community to fine-tune existing guidance documents and develop them into this rule. The Department and the regulated community used their combined experience in transforming the guidance documents into N.J.A.C. 7:26E through the rulemaking process.

The Department does not agree with the commenters that these rules should be issued as guidance rather than as a rule. N.J.A.C. 7:26E meets the criteria for rulemaking as set forth in the Administrative Procedure Act, N.J.S.A. 52:14B-2(e): 1) it is intended to have wide coverage encompassing large segments of the regulated public; 2) it is intended to apply generally and uniformly to all similarly situated persons; 3) it is designed to operate in future cases; 4) it prescribes a standard that is not otherwise expressed by the Legislature; and 5) it reflects administrative policy. As such, the Department is directed to promulgate these requirements as rules, rather than as guidance. See generally, *Metromedia Inc. v. Director, Division of Taxation,* 97 *N.J.* 313 (1984).

The Department agrees that the environmental field is a rapidly changing one. The Department will continually monitor current changes in the field which may require amendments to these rules, and will continue to use the interested party review approach in developing these proposed amendments.

25. COMMENT: Atlantic Electric suggested that the Department reevaluate N.J.A.C. 7:26E, amending it to be more practical. The amended rules should be clear and compatible with other requirements and not counterproductive to the timely remediation of releases.

RESPONSE: In responding to the many comments the Department has received on these rules, the Department has re-evaluated them, and in some instances modified them on adoption. As adopted, the Department believes these rules are compatible with other requirements and are not counter productive to the timely remediation of discharges.

26. COMMENT: Colonial Pipeline Company commented that all three new site remediation rules have been established to enforce procedures developed in accepted guidance documents against reluctant violators at the expense of all industry. N.J.A.C. 7:26E, when combined with N.J.A.C. 7:26D and N.J.A.C. 7:26C, become cumbersome and will not encourage voluntary cleanups of contaminated sites. A responsible party will cautiously move forward to ensure that all procedures and requirements are adhered to, slowing down any remediation. In other words, written Department approval will be obtained prior to any changes in approved work plans (including assessment activities), field work, or remedial efforts. This slow down not only inhibits voluntary remediation of sites, but it will cause contamination to disseminate further throughout the environment. Colonial, therefore, recommends that the Department review its total package of proposed regulations to streamline the remedial process, not hinder it. In the end, the promulgated regulations are only a check list to determine if the "i"s were dotted and the "t"s crossed; there is no guarantee that the content is valid or accurate.

RESPONSE: N.J.A.C. 7:26E was not proposed to "enforce procedures developed in accepted guidance documents against reluctant violators at the expense of all industry." These rules were proposed with the assumption that the regulated community is committed, along with the Department, to conducting environmentally sound remediations. The Department is striving for consistency in its decision making regarding contaminated sites. The Department decided to encourage voluntary cleanups by allowing for remedial work to be done at sites with limited Department oversight (as detailed in N.J.A.C. 7:26C). To allow for remediators to do the work without Department oversight, the Department had to provide regulations which provide what constitutes an acceptable investigation and cleanup of a site. This is detailed in N.J.A.C. 7:26E.

N.J.A.C. 7:26E, in conjunction with N.J.A.C. 7:26C, will greatly expedite and improve the cleanup process in New Jersey. N.J.A.C. 7:26E provides definitive criteria for conducting an environmentally sound remediation of a site. N.J.A.C. 7:26C allows most remediators to choose the level of Department oversight which will be provided at a site. By promulgating as a rule guidance which the Department had been generally applying all along, the Department is removing the uncertainty and the case-by-case decision-making which the regulated community has often complained about in the past. The Department anticipates that this will encourage more and better site remediations.

27. COMMENT: Rutgers Environmental Law Clinic commented that after government agencies have proposed detailed regulations, based on input from all interested parties, the reality of site remediation will be determined in the field, at the site, by the consultants for the responsible parties. Technical and legal oversight must remain a critical Department function if site cleanups are to be conducted in a way that protects human health and the environment. The department should not and cannot rely solely on the technical experts hired by the remediator. These experts are the hired guns for the remediator, whose interests do not coincide with the Department's or the public's interests. The remediator may often be interested in the lowest cost cleanup that he or she may undertake. The remediator does not have an interest in searching out every bit of contamination on the site and cleaning every bit of it up. The remediator does not have an interest in locating every sensitive environmental receptor on the site and adequately assuring that the receptor is fully protected. The Department must thoroughly review every remediation proposal with a highly qualified technical review to assure that the highest standards of sampling for contamination and fully remediating the site are accomplished.

RESPONSE: The Department agrees that technical and legal oversight of the remediation of sites in New Jersey must remain a critical Department function. In fact, the premise of this rule initiative, along with N.J.A.C. 7:26C, is that although voluntary remediations are encouraged, all work must be carefully documented in a specific format so that when the site becomes a priority and comes under the direct scrutiny of the Department, the Department can carefully review all work done by the person conducting remedial activities to determine if it was done in accordance with regulations and is protective of human health and the environment.

In the past, many sites could only be remediated with direct Department oversight. The number of sites which could be remediated at any time was limited due to the length of time it took to negotiate cleanup agreements with the person conducting remedial activities and the case-by-case decision making required for a cleanup strategy at each site. This, coupled with the large number of sites needing remediation, meant that the number of sites which could go through the remediation process was not as great as either the Department or the public would have liked.

In order to increase the number of sites which could go through the remediation process, the Department decided to codify its requirements for what constitutes an environmentally sound remediation of a site in N.J.A.C. 7:26E. In this way case-by-case decision making will be greatly decreased. With the requirements for remediation standardized and codified, a person conducting remedial activities would not require the intensive level of Department oversight required when decisions were made case-by-case. Thus the Department decided to allow for voluntary remediations, that is, to allow a person conducting remedial activities at non-priority sites to proceed with remediation activities at a site with limited or no Department oversight. In this way, sites which would not be remediated until they became a Department priority at some time in the future, could be remediated now through voluntary remediation. Further, if the person conducting remedial activities did choose to have some level of Department oversight, they could do so through executing a standardized oversight document pursuant to N.J.A.C. 7:26C, thus eliminating the lengthy negotiation process.

The Department will still have direct and extensive oversight of remediations at priority sites. Thus, when a site which was the subject of a "voluntary" remediation becomes a priority site, the Department will review the work done at the site to ensure that the regulations were followed and that the site was remediated in such a manner so as to be protective of human health and the environment.

28. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that the Department states that N.J.A.C. 7:26E is intended to reduce cost and accelerate schedules for cleanup. The agency is urged to consider total costs, not just agency oversight costs, and overall schedule, not just the review schedule. In general, N.J.A.C. 7:26E is extremely prescriptive and includes work that is unnecessary in many instances. An alternative to the detailed prescriptive approach is for the agency to scale up its oversight operation with a cadre of skilled technical personnel. The cost of oversight may be shared by the responsible parties through existing mechanisms. Union Carbide Chemicals and Plastics Company, Inc. also noted that casting the technical requirements in such detail inhibits innovation. As new methods, experience, and strategies become available, the rules will inhibit their use. It is important to the State of New Jersey to encourage the most overall economical solution to soil and groundwater contamination problems because developers are concerned with getting stuck with unrealistic and costly remedial requirements during the life of their business. In addition, New Jersey has significant industrial areas abandoned and additional regulations will further impede the recycling/reuse of industrial property. Finally, the citizens of New Jersey pay directly or indirectly for all cleanups within the State. The agency should be striving for striking an overall balance for minimum cost and time, not striking the balance for agency costs and time only.

RESPONSE: In proposing these rules, the Department was not seeking to simply reduce agency time and expense when overseeing remediations of contaminated sites. Without N.J.A.C. 7:26E, the Department had to review each site on a case-by-case basis to determine the appropriate investigatory and remedial requirements applicable to that site. This was a time consuming, costly and cumbersome process for all the parties involved. There are thousands of contaminated sites in New Jersey and providing technical oversight for all these cases on a case-by-case basis, would require a massive increase in staffing and would reduce the level of consistency in site remediation.

The Department believes that N.J.A.C. 7:26E will reduce the cost and time associated with remediating contaminated sites. By codifying what is required for remediation activities at a site and eliminating much of the case-by-case decision making, a person conducting remedial activities will know what will satisfy the Department's criteria for what is protective of human health and the environment. In this way, extensive Department oversight is not required at most sites. Thus much time and expense can be saved by the regulated community in planning for the remediation without having to negotiate each decision point with the Department. In fact, by using N.J.A.C. 7:26E in conjunction with N.J.A.C. 7:26C, further time and expense can be saved by the person conducting remedial activities choosing the level of Department oversight at non-priority sites.

Practical application of N.J.A.C. 7:26E will show that not every requirement of N.J.A.C. 7:26E applies to every site. A person conducting remedial activities must use reasonableness and common sense when applying N.J.A.C. 7:26E.

Furthermore, N.J.A.C. 7:26E allows for flexibility in implementation to encourage the use of innovative methods and technologies. N.J.A.C. 7:26E-1.6(c) allows for alternative methods in certain instances to be used without first receiving Department approval to do so. In addition, in response to many comments received regarding the need for additional flexibility in implementing N.J.A.C. 7:26E, the Department has added a variance procedure at N.J.A.C. 7:26E-1.6(d). As modified, a person conducting remedial activities may apply for a variance from the specific requirements of the rules pursuant to N.J.A.C. 7:26E-1.6(d) in order to use a new innovative technology or to obtain an exemption from a requirement that does not apply to a site. Rulemaking is a dynamic process. If over the course of time, a new technology is accepted as proven, then N.J.A.C. 7:26E can be amended to include new technologies.

29. COMMENT: Shell Oil Company commented that the rule summary should be revised to say that: "The Department is charged ... with ensuring that remediation is conducted as quickly as possible with the goal of protection of human health and environment, and conducted in the most cost effective manner."

RESPONSE: The purpose of the proposal Summary is to explain the intent of the Department in proposing the rule and to discuss any area of the rule which may need more explanation than what is contained in the body of the rule. It does not have the force and effect of law. As such, there is no need to make any changes.

As outlined in N.J.A.C. 7:26E-5, cost is one of many evaluation criteria in the evaluation of potential remedial alternatives. However, it is the Department's belief that cost of a remedial alternative is not the overriding selection criteria. The Department considers other criteria to be important, such as the effectiveness of the alternative to protect human health and the environment.

30. COMMENT: Chemical Industry Council of New Jersey commented that if the Department intends to follow the Superfund process, then sites should be ranked to determine their applicability to these rules. If the Department intends to rank sites, the ranking process, at the very least, should be available for comment. The Department also asserts that the use of the prioritized list for enforcement action requires that the site ranking remain confidential. This may be true if the intent of the Department is to use the list punitively. If the intent of the Department is to encourage Responsible Parties to voluntarily and expeditiously enter into remedial activities, then the list must be a matter of public record.

RESPONSE: Although there may be some similarities with the Superfund process found in N.J.A.C. 7:26E, for example, the use of terms such as site assessment and remedial investigation, N.J.A.C. 7:26E is not intended to mirror the Superfund process.

As part of the New Jersey Hazardous Substance Contingency Response Master Plan, as defined in N.J.S.A. 58:10-23.24, the Department is preparing a Comprehensive Site List of contaminated sites, or master list.

There are three different, but closely related, aspects in the development of the master list. The first is a compilation or inventory of contaminated sites. The second is the evaluation or scoring of each of these sites as to the level of risk they pose to human health and the environment. The third is the scheduling of the sites according to the Department's intent to use public funds to remediate them. Each of these aspects will be the subject of subsequent rulemaking by the Department.

The master list will be a compilation of all known and suspected contaminated sites in New Jersey, not just priority sites. This is in contrast to the Comprehensive Environmental Response, Compensation and Liability Act's National Priority List of the most contaminated sites in the country. Not all known or suspected contaminated sites in the country are put on the National Priority List. Instead, the United States Environmental Protection Agency uses a threshold score to determine whether or not a site is included.

Presently, the Department is still compiling the master list from information in the Department's files. While the Department had hoped to have completed this task by now, the end of this year appears as the likely completion of this project. The Department will continue to add sites to the master list as additional contaminated sites are discovered.

When developed, the Department will make available to the public all information related to the master list required by law to be subject to public review. Any further debate on this issue at this time would be premature since the Department has completed neither the compilation of the list nor its legal review of the extent of the information required to be made available to the public. All interested parties will have sufficient opportunity to further address this issue when the Department proposes the master list.

The second aspect of the master list is the scoring of each site on the list. The Department is currently developing a system of scoring each contaminated site in terms of the relative risk presented. When completed, the Department will promulgate this process in rules as required by law.

The final piece to this segment, and perhaps most difficult to develop, is the ordering of the thousands of sites for public funding. There are three primary pieces of this aspect of the master list. The first is the amount of State resources available to the Department to manage the remediation of publicly conducted remediation projects. The second is the dynamics involved in attempting to maintain a prioritized listing of the worst contaminated sites for the Department to remediate. The third is the length of the planning horizon which the Department can reasonably expect the specific site information to remain constant.

Due to the difficulties inherent in planning for the distant future, the Department has decided to publish on a periodic basis the sites it has scheduled for public funding during each fiscal year. This will represent the Department's priority site list.

The Department is reevaluating its decision on the confidentiality of the priority site list and will publish its decision when it promulgates the master list and the procedures for scoring the sites. It should not matter to a person conducting remedial activities who wants to voluntarily and expeditiously remediate a site where on the master list the site is ranked. The Department will be initiating future rulemaking to codify its site ranking method.

31. COMMENT: Public Service Electric & Gas Company commented the term "all" should be deleted throughout the requirements and replaced with the term "appropriate" or "available." As an example: N.J.A.C. 7:26E-3.2(a)1 should read "Presents and discusses the appropriate information identified, evaluated, or collected pursuant to N.J.A.C. 7:26E-3.1."

RESPONSE: On adoption, the Department has deleted the word "all" from those sections of N.J.A.C. 7:26E where it was not appropriate. For example, in N.J.A.C. 7:26E-3.1(c)vi the Department has deleted the word "all" and replaced it with "at a frequency which provides the evaluator with an historical perspective of site activities." in reference to the review of aerial photographs. However, in the example which Public Service Electric & Gas Company has cited, the word "all" was not deleted as the Department believes that all of the information "identified, evaluated, or collected pursuant to N.J.A.C. 7:26E-3.1" is relevant and appropriate to the preliminary assessment.

32. COMMENT: Public Service Electric & Gas Company commented that, generally, when a conjunction is used at the end of a series that conjunction applies to each member of the series. However, the Department did not consistently apply this usage in interpreting the proposed regulations. As a result, the use of conjunctions needs to be clarified.

RESPONSE: The Department agrees that the word "and" was not always appropriately used throughout N.J.A.C. 7:26E and the appropriate corrections have been made.

Rule Flexibility

33. COMMENT: Chevron U.S.A., Inc. commented that although the objective of a comprehensive set of rules is laudable, the reality seems to be that the Department is reluctant to have the regulated community exercise reasonable professional judgment during site investigations and corresponding remediation programs. The Department must understand that the regulated community would not embark on an expensive program of investigation which was fundamentally at variance with overall Department guidance and good professional practice. Quibbles over detail such as the optimum number of wells to assess a site, are perhaps inevitable, but vast technical know-how and experience are available outside the Department, ready for application. The pursuit of "consistent technical decisions" via N.J.A.C. 7:26E is being purchased at too great an expense in flexibility.

34. COMMENT: Chemical Land Holdings, Inc. commented that contrary to the Department expectation that N.J.A.C. 7:26E will encourage the initiation of numerous cleanups, particularly at less complex contaminated sites, Chemical Land Holdings, Inc. foresees N.J.A.C. 7:26E as a substantial disincentive to voluntary initiation of cleanups. Faced with the prospect of complying with the exorbitant requirements for environmental sampling, many firms with more than

an absolute minimum number of areas of concern will undoubtedly seek the Department's review and approval of alternate sampling plans. Given the risks associated with proceeding in advance of such review and approval, many of these firms will be reluctant to begin any investigative work without the Department's blessing. Moreover, because the Department reserves the right to expand the requirements at will, even for sites that have been investigated in full compliance with N.J.A.C. 7:26E, cleanups at even small, simple sites may well be delayed pending the Department's review and approval.

35. COMMENT: The Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E is quite specific and extremely comprehensive and does not achieve the flexibility needed to address the individual circumstances at each site.

36. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that the Department prediction, that standardization of remediation techniques will result in more sites cleaned up at a faster pace, may not become reality. Stiff templates for action limit the creativity, imagination, flexibility, and optimization necessary to minimize the overall cost and time required for cleanup.

37. COMMENT: Mobil Oil Corporation commented that the regulations as presently drafted are burdensome and go well beyond those steps needed to protect human health and the environment. Thus, instead of providing incentive for voluntary site cleanups, the regulations may actually serve as a disincentive to undertaking such site cleanups.

38. COMMENT: The General Electric Company supported the concept of promoting consistency of technical requirements applicable to New Jersey cleanup activities, provided that sufficient flexibility is allowed to take into account site-specific factors and the development of alternate scientific methods. The overriding goal of the regulations should be the protection of human health and the environment, not rigid adherence to a prescribed methodology.

39. COMMENT: Chemical Land Holdings, Inc. commented that given the myriad variations which one can encounter on even simple site remediation investigations, it is strongly recommended that Department re-focus N.J.A.C. 7:26E to be performance oriented, thereby allowing the flexibility for responsible professionals such as hydrogeologists, chemists, toxicologists and environmental engineers, to make the appropriate determinations based on the particulars of each site situation. This approach will not require major changes in many of the proposed elements, rather the language will need to be modified to remove the rigidity of the requirements for situations where an element is not applicable or can be achieved using another method or approach. It is most important for the benefit of both the regulated community and the Department, that such flexibility be built into N.J.A.C. 7:26E.

40. COMMENT: Exxon Company U.S.A. commented that while the intentions are good, N.J.A.C. 7:26E is burdensome and effectively removes the incentive for a property owner to initiate a site investigation and remediation. The excessive and inflexible sampling requirements will act as a further deterrent and substantially increase costs to the owner, with no incremental benefit to the environment.

41. COMMENT: Chevron U.S.A., Inc. commented that while the regulations do allow a person to petition for exemptions or alternate requirements, they are only allowed in very limited circumstances. Because of the stringent and overly broad requirements, most persons will be routinely forced to request exemptions or alternate methods due to site specific circumstances. All requests for exemptions or alternate methods must be submitted in writing and approved by the Department. This will lead to long delays, increased paper work, increased costs and greater inefficiencies in the remediation process for no added benefit to human health or the environment. This process is especially burdensome to facilities undertaking at-risk remediation or those subject to a memorandum of agreement.

42. COMMENT: Mobil Oil Corporation commented that the Department has created a clear disincentive rather than an incentive to voluntarily remediate. Mobil Oil Corporation strongly urged the Department to re-examine this policy and amend this proposed regulation to recognize a more streamlined approach to investigating and remediating contaminated sites.

RESPONSE: In drafting N.J.A.C. 7:26E, the Department had to strike a balance between limited flexibility, which would account for the general conditions which exist at many (if not most) of the sites in New Jersey and which would allow N.J.A.C. 7:26E to be used broadly, and all decisions being made on a case-by-case basis which would require extensive Department oversight, thus defeating a primary purpose of N.J.A.C. 7:26E (to provide consistent and predictable criteria for the remediation of a site in New Jersey). In striking this balance, the Department had to ensure that human health and the environment were protected without imposing an undue and unnecessary burden on the regulated community.

The rules allow for certain instances in which a person responsible for conducting the remediation can use an alternate method from that prescribed by N.J.A.C. 7:26E and still proceed with the remediation without awaiting prior Department approval. In addition, in response to numerous comments, the Department added a variance provision at N.J.A.C. 7:26E-1.6(d). Pursuant to this provision, a person responsible for conducting the remediation may petition the Department for an exemption from any provision of N.J.A.C. 7:26E. The person must show that site conditions warrant a deviation from the specific requirements of these rules.

43. COMMENT: Public Service Electric & Gas Company agrees that single phase remediation is appropriate where contamination can be delineated with field instrumentation and remediated in a single phase by excavating the obviously contaminated soil and using field analysis to verify clean up. This type of remediation meets the Department strategy for timely and efficient remediation. Additionally, this approach encourages immediate and complete single phase remediation of specific discharge events where the contaminant is known, contamination is visible, limited in areal extent, not in contact with groundwater and where remediation is verifiable by field analysis. As currently worded, the body of the regulations however does not clearly provide for performing such single phased remediations. The language used in the proposed regulations requires all remediations regardless of size to comply with the same scope of work and analyses.

RESPONSE: For small single-phase remediations, a party may begin the remedial action phase at any time during the site investigation after contamination is found pursuant to N.J.A.C. 7:26E-3.3(d). Reports must be prepared, but the size of these reports may be commensurate with the amount of work done.

44. COMMENT: Exxon Company U.S.A. commented that in the sixth paragraph of the Rule Flexibility Summary, the Department refers to "special sampling." This term is meaningless, since all sampling should be performed following recognized methods such as National Institute of Safety and Health, Environmental Protection Agency, and American Society for Testing and Materials, etc.

RESPONSE: The Department intended the use of the term "special sampling" to mean non-routine. In other words, if a person responsible for conducting the remediation complied with all of the minimum requirements of N.J.A.C. 7:26E in remediating a site, and yet it was determined that the contamination at the site was not adequately delineated, the Department would require that sampling of the site, beyond what was minimally required by N.J.A.C. 7:26E, be conducted.

45. COMMENT: Colonial Pipeline Company commented that there are numerous references to Departmental discretion in these rules. Departmental discretion may become a "Departmental requirement" as an individual case officer's work load increases. If the wording in N.J.A.C. 7:26E is not revised to indicate those circumstances that would allow Departmental discretion, work plans and Quality Assurance Project Plans, for example, will soon exceed the requirements described. A party will also be reluctant to enter into a memorandum of understanding, which is a "voluntary" effort, if the party does not know when Departmental discretion will be invoked.

RESPONSE: The Department is unsure as to what references to Department discretion the commenter was referring. The Department notes however, that it is bound by a standard of reasonableness. If a person conducting remedial activities feels that the Department is acting in a manner contrary to that standard, there are legal avenues which he or she can pursue.

46. COMMENT: Public Service Electric & Gas Company commented that throughout N.J.A.C. 7:26E, phrases such as "The Department may require," "The Department determines appropriate," "acceptable to the Department" are used. These phrases imply autonomous decisions by the Department that have major technical, economic and temporal impacts. A process for collaboration prior to decision making and appeal after decision making is necessary to assure fair, consistent, technically appropriate and valid implementation of the proposed regulations. Decisions that are mutually agreeable to the Department and the responsible party conducting the remediation will expedite remediation of contaminated sites throughout the State. Autonomous decisions could delay remediation as the responsible party conducting the remediation

and the Department settle their differences through legal channels. Wherever N.J.A.C. 7:26E refers to autonomous Departmental decisions affecting the scope of work required the text should be changed to provide for the mutual agreement of the person responsible for conducting the remediation.

RESPONSE: The Department encourages private parties to work with the Department to determine appropriate remedial actions at a site. However, the Department wishes to stress that the ultimate decision of whether the contaminated site has been properly remediated rests with the Department.

For a person to obtain the Department's approval for the remediation at a contaminated site, that person must conduct the same remediation which the Department would conduct if it were using public funds. This ensures that once the remediation is completed, whether by the Department or a third party, no additional remediation is necessary to meet the statutory requirements to adequately protect human health and the environment. While the Department is committed to working with the person responsible for conducting the remediation to arrive at mutually agreeable resolutions to issues which may arise during the remediation, the Department cannot abdicate its statutory mandate to ensure the protection of human health and the environment. It is unacceptable and against the public interest for the Department to require only that remediation which the person responsible for conducting the remediation agrees to conduct. The citizens of New Jersey, through the Legislature, have entrusted the Department with the responsibility and mandate to define the acceptable level of remediation of contaminated sites.

Risk Assessment

47. COMMENT: E.I. du Pont de Nemours and Company commented that critical aspect that is conspicuously absent from N.J.A.C. 7:26E is inclusion of risk assessment and risk-based decision making throughout the site restoration process, although the allowance for risk-based decision making is provided in N.J.A.C. 7:26D-7. A baseline risk assessment, which examines the potential for human and ecological exposure and evaluates the significance of the resulting exposure levels, must be included in an adequate remedial investigation. Finally, risk assessment must be included as part of the process to screen remedial alternatives in the feasibility study as outlined in subchapter 7 of N.J.A.C. 7:26D. Each alternative should be considered in light of its potential to reduce risk to acceptable levels, either by reducing exposure or through reduction of constituent concentrations to levels that are of no toxicologic significance. Also, as potential remedies are identified, an evaluation of the risks associated with implementation of these remedies must be considered. Otherwise, an alternative could be selected in spite of the fact that it would result in greater risk to human health and/or the environment than would be presented by electing the no-action alternative.

48. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E should allow the use of a risk assessment for any or all impacted environmental media and receptors. The Department must allow the regulated community the option of developing and proposing site specific cleanup criteria for any contaminants in any media.

49. COMMENT: Shell Oil Company commented that, although a site has concentrations above the State's acceptable limit, the site may not pose a human health risk or even a threat to the environment due to the lack of sensitive receptors and natural degradation.

50. COMMENT: Continental Vanguard, Inc. commented that risk to human health is rarely ever mentioned in N.J.A.C. 7:26E, yet this is exactly what should be considered as each phase is being implemented.

51. COMMENT: Chemical Land Holdings, Inc. commented that the regulations appear to contradict the Department's claim that they allow "... the flexibility required to address the individual circumstances of each site." Rather, the regulations appear to be more of a "cookbook set of rules" that serve to stifle any flexibility and will severely limit the use of professional judgment in site-specific cases. A significant example is the omission of the use of risk assessment.

52. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that N.J.A.C. 7:26E is scientifically weak in that it does not use a risk assessment. Site remediation should be based upon the assessment of the risk posed by each site to human health and the environment. Reliance on the exclusive use of site clean up levels to establish requirements will result in unnecessary cleanup actions and costs.

53. COMMENT: Mobil Oil Corporation commented that, as stipulated in N.J.A.C. 7:26D, cleanup should be based on a specific risk to human health and the environment. The presence of contaminants above an applicable cleanup standard does not, in itself, constitute sufficient reason for further remediation. For example, if no human or environmental receptors are threatened and the contamination will not migrate and/or will naturally degrade or attenuate, no further action should be required.

54. COMMENT: Shell Oil Company believes N.J.A.C. 7:26E-3.3(a) should allow for exposure and risk assessment to set alternate contaminant levels (and natural attenuation to reach selected levels).

55. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.3(a) should be revised to reflect that site investigations are performed to determine the potential risks of contaminants and the parameters affecting their potential remediation and not just for the purpose of comparison to cleanup standards. To determine the extent of a site's contamination, a clear understanding of past practices (manufacturing and waste handling), the geological/hydrogeological systems, pathways for migration and exposure, fate and transport, and other site specific control parameters must be achieved to make conclusions in a site investigation. This is a more complex procedure than strictly a comparison to cleanup standards.

RESPONSE: In general, the Department agrees that remediation at a site requires an analysis of the degree of risk posed by the site. General risk information is critical to the development of remedial actions that are appropriate for a site.

N.J.A.C. 7:26E requires that elements of a site risk assessment be explored. For example, the remedial investigation requires that receptors and potential receptors be identified along with pathways of exposure to those receptors. As the commenters accurately point out, N.J.A.C. 7:26E was meant to be used in conjunction with the proposed cleanup standards, which also took into account elements of a risk assessment to determine appropriate cleanup goals for sites. N.J.A.C. 7:26D was not adopted by the Department but the Department will propose remediation standards in the near future. The new standards will be human health based remediation standards which will be developed based on exposure pathways. In the interim, remediation standards for sites will be developed by the Department on a case-by-case basis.

The Department believes that it is not necessary, as a minimum requirement, to perform a health risk assessment because the Ground Water Quality Standards (N.J.A.C. 7:9-6), which are risk based, and soil cleanup criteria (published in the April, 1993 edition of the Department's "Site Remediation News"), which are also risk based, are currently available. The soil cleanup criteria were derived from the proposed Cleanup Standards for Contaminated Sites (24 N.J.R. 373(a)) with corrections based upon errors identified during the comment period as well as new toxicological information obtained since the rule proposal. The Department believes that these standards and guidelines will provide the necessary information to select an appropriate remediation number for most sites. However, the Department will not preclude the person conducting the remediation from performing a risk assessment to assist in the development of site specific remediation standards.

56. COMMENT: Exxon Company U.S.A. commented that the references to "and the environment" when used in the context of "human health and the environment" should be deleted as there are no ecology-based cleanup standards.

RESPONSE: Among the Department's statutorily mandated duties are the formulation of policies for the conservation of natural resources, the promotion of environmental protection, and the prevention of pollution of the environment. See N.J.S.A. 13:1D-9. The threat of serious, and in some cases irreversible, environmental pollution caused by unremediated contaminated sites throughout the State prompted the Legislature to mandate a systematic and consistent approach to remediation of those sites. N.J.S.A. 58:10-23.20. The restoration of natural resources is an important component in any remediation effort and the Department has the authority to require it as appropriate.

The fact that generic ecological cleanup standards do not yet exist does not mean that the Department cannot require natural resource restoration on a case-by-case basis. The Department's statutorily mandated mission is to protect both human health and the environment. Thus, the restoration of natural resources should not be to a human health based standard unless that standard is also protective of the natural resources.

Technical Regulations as Minimum Requirements

57. COMMENT: GPU Nuclear Corporation commented that further clarification is necessary regarding whether remediation undertaken on a voluntary basis requires the submission of a report to the Department, since N.J.A.C. 7:26E-3.2 requires submission of a preliminary assessment report.

RESPONSE: N.J.A.C. 7:26E-3.2 encourages the person responsible for conducting the remediation to prepare a preliminary report and outlines what needs to be included in that report. There is no need to prepare and submit reports for work being conducted on a voluntary basis unless the person responsible for conducting the remediation of a non-priority site wishes the Department to review the report either at the time the work is being conducted, or at the time the site becomes a Department priority. If reports are prepared at the time the work is being performed, when the site becomes a priority, work conducted prior to the site becoming a priority will not have to be duplicated.

When the site does become a priority site under direct Department oversight and scrutiny, the person responsible for conducting the remediation will be required to submit the reports to the Department. The Department will then be able to review the reports to determine whether or not the work previously conducted on a voluntary basis was done pursuant to N.J.A.C. 7:26E and that the site is protective of human health and the environment.

58. COMMENT: The Chemical Industry Council of New Jersey commented that the Department has created an overly complicated system in these rules. For example, using the definition of "area of concern," replacing a piece of equipment at an operating facility could be interpreted as requiring notification to the Department and the adherence to the entire investigation and remediation process. By defining these rules as minimum requirements, the Department has imposed overly burdensome requirements on someone conducting remediation activities, particularly at a simple and well-defined site.

59. COMMENT: Atlantic Electric was concerned with the Department's comprehensive approach to a wide range of remediation activities via the combination of various statutory programs as every remediation will now be treated as a Superfund type project under N.J.A.C. 7:26E. The commenter believes that small releases (< 20 gallons) should be handled differently by N.J.A.C. 7:26E than larger releases.

60. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. supported the intent of N.J.A.C. 7:26E, but noted that the regulations are sometimes scientifically weak in that they are extremely prescriptive, and they lack a decisive endpoint for permanent remedy. Union Carbide Chemicals and Plastics Company, Inc. recommended that the agency review the overall process and remove every unnecessary step, particularly agency review and approval steps that add little value.

61. COMMENT: New Jersey Natural Gas Company agreed with the Department's stated objective to provide predictable, consistent guidance for application at sites where contamination is suspected and noted that although some progress has been made toward achieving the objective of simplification, the proposed new rules still fall short of these considerations in a number of areas, and unless revised will continue to be overly burdensome and unjustifiably expensive to the regulated community.

62. COMMENT: Shell Oil Company commented that N.J.A.C. 7:26E is complicated, inherently repetitious and laboriously exhaustive. A majority of the requirements are truly for large superfund sites, yet Underground Storage Tanks (including small service stations) are under the same rules. A tremendous simplification would occur if requirements for underground storage tanks were in their own section. This way N.J.A.C. 7:26E could be more specific (and more relevant) and not have to be so general as to cover all the types of sites in one paragraph or section.

63. COMMENT: Allied Signal, Inc. expressed major concern over the State's strategy of developing a generic set of site remediation standards is that such standards do not result in the best investigatory program and optimum design of practical remedial measures at individual sites. It is understood that the approach taken by the Department is in response to a mandate by the State Legislature to adopt a systematic and consistent approach to the remediation of contaminated sites (N.J.S.A. 58:10-23.20). As proposed, N.J.A.C. 7:26E will not permit the Department to meet this legislative mandate and is unlikely to lead to substantial improvement in the Department's performance. Allied Signal, Inc. believes that the Legislature, in mandating a consistent systematic approach, sought the consistent application of fundamental principles to design adequate remedial procedures for contaminated sites rather than the Department's interpretation that identical investigatory requirements be used at all sites. The Department's approach is misguided because it neglects site-specific conditions and inevitably leads to collecting information with no objective and possibly not collecting other, pertinent site data.

64. COMMENT: Chevron U.S.A., Inc. commented that the cookbook approach set forth in N.J.A.C. 7:26E provides little or no room for innovative or creative solutions to the complex technical problems encountered during site remediation. The regulated community will be so burdened with attempting to comply with the specifics of these regulations that they will be distracted from the primary goal of site remediation. Instead of a cleanup project, it will become a compliance with the regulation process.

65. COMMENT: Mobil Oil Corporation commented that, as presently drafted, a single set of rules which apply to all investigations and cleanups is burdensome and goes well beyond that needed to protect human health and the environment. The intent of providing a single set of rules for site investigation is commendable but requires one to account for the differences in the level of investigative rigor needed at various types of sites. As presently drafted, the regulations fail to adequately take these differences into account and one is expected to apply the same structured and complicated set of requirements to a simple service station investigation as to a superfund site. This proposal will escalate dramatically the cost associated with routine projects.

66. COMMENT: Schering Laboratories was concerned that this proposal was based on the Environmental Protection Agency Superfund process and in many ways is more stringent than the Superfund process. The Superfund process is designed for only the worst sites in the country and has been ineffective in remediating sites. In addition, the majority of remedial projects in New Jersey currently do not follow the Superfund process and are not a serious enough threat to justify use of the Superfund process. However this proposal intends to apply the Superfund process to all remedial projects. Therefore, if this proposal is adopted as written it will also contradict the Department claims that these "regulations do not impose any new reporting, recordkeeping or compliance requirements" on small remedial projects.

67. COMMENT: Hoffman-LaRoche, Inc. said that, in general, Roche supports the Department's efforts to standardize, and make consistent, the approach to the investigation and remediation of contaminated sites; however, this regulation will bring about thousands of Superfund-like projects where large sums of money will be spent searching for every molecule of contamination, writing long redundant reports that will ultimately go unread, and studying dozens of remedial alternatives only to wind up with the same three remedial actions (that is, capping, pump-and-treat, and soil vapor extraction). Industry could save millions of dollars in consulting fees and thousands of hours of response time if the Department would get away from issuing comprehensive site investigation and feasibility study regulations.

RESPONSE: N.J.A.C. 7:26E is, for the most part, a compilation of existing Department guidance and policy. Although N.J.A.C. 7:26E at first glance may look complicated and burdensome, once put into practical application the person remediating the site will find that, in the majority of cases, the remediation process is not significantly more burdensome then if these rules were never promulgated. N.J.A.C. 7:26E is meant to be applied reasonably and rationally. If the Department determines that a certain provision in N.J.A.C. 7:26E does not apply to a specific site, the person conducting remedial activities is not expected to implement that provision.

There are certain instances in which N.J.A.C. 7:26E imposes remediation activities at a site which may not have been required before. For example, certain sites may be required to submit a remedial alternative analysis under N.J.A.C. 7:26E where no remedial alternative analysis was previously required. However, the remedial alternative analysis may be a one page document which describes the alternatives which were considered and an explanation as to why the alternative to be implemented will be chosen. The process of developing and evaluating a list of remedial alternatives will encourage a person conducting remedial activities to consider the more innovative or creative remedial solutions to which Chevron U.S.A., Inc. refers. It is through the ongoing evaluation of remedies, including new and emerging technologies, that the state-of-the-art advances. Many alternatives to capping and excavation remedies now exist (such as bioremediation and low temperature thermal technologies) thanks to ongoing evaluations of new innovative alternatives.

Although many of the terms used in N.J.A.C. 7:26E are the same as those used in the Superfund process, it was not the intention of the Department that N.J.A.C. 7:26E exactly mirror the Superfund process. There are many areas where the requirements of N.J.A.C. 7:26E are significantly different than the Superfund requirements. For example, N.J.A.C. 7:26E does not require that a baseline risk assessment be conducted or that a detailed Quality Assurance Project Plan be submitted in all cases before sampling or remediation can be conducted. N.J.A.C. 7:26E also allows for the reporting of "reduced" laboratory deliverables for most samples.

N.J.A.C. 7:26E does not require a small release to be treated as a "superfund site." Application of N.J.A.C. 7:26E should be appropriate to the incident. For example, a discharge of polychlorinated biphenyls from a transformer as a result of a car-pole accident would be considered a specific discharge event. Therefore, the person conducting the remedial activities will not have to conduct a preliminary assessment to remediate the specific discharge. Sampling requirements for small spills are also not onerous because small spills of a known substance would generally only require two post-remediation samples to document removal of the contaminant (see N.J.A.C. 7:26E-6.4(a)2i). Offsite disposal of small quantities of contaminated soil could be easily justified in a simple remedial alternative analysis, as described above, stating that for small volume polychlorinated biphenyl cleanups, offsite disposal is the only feasible alternative. The procedure described above could be presented to the Department as a "generic remedial action workplan" that could be used for small routine spill incidents such as "car-pole" incidents. Detailed guidance on generic remedial action workplans is an issue the Department will be considering for future rulemaking.

The Department has developed these rules so that they could be applied to any contaminated site. The extent of remedial requirements should be commensurate with the magnitude of the site and its associated environmental problems. Several places in N.J.A.C. 7:26E encourage moving expeditiously to the remedial action phase that is appropriate for the site. The person responsible for conducting the remediation need only apply portions of the regulation that is appropriate for their site. Certainly, only the collection of pertinent information will be required for any given site. A site assessment and remedial action plan will be entirely different for one underground storage tank as opposed to a large Superfund site investigation.

In response to Shell Oil's concern about having a separate section in the regulations for underground storage tank requirements, many of the requirements which apply to underground storage tanks apply generically to all types of areas of concern. Therefore, to repeat these many requirements in a separate section for underground storage tanks as well as throughout the rest of the regulations was thought to be unnecessary.

Finally, to increase the flexibility in N.J.A.C. 7:26E, The Department has added a variance section at N.J.A.C. 7:26E-1.6(d) which allows the person responsible for conducting the remediation to petition the Department for an exemption to a requirement which would otherwise apply to a site. Upon showing that the site specific conditions apply, or that an alternate approach is also appropriate, the Department may grant the petition. For example, a person conducting the remediation may demonstrate to the Department's satisfaction that the sample area in a narrow alley in between two buildings may not be easily accessible for the heavy equipment necessary for soil boring or monitoring well installation. In that case the Department may grant the person responsible for conducting the remediation's request for a variance of that requirement and approve an alternate approach to evaluating subsurface conditions.

Interaction with Other Department Rules

68. COMMENT: Frank T. Sanclementi commented that the Department's case managers are currently sending mixed signals telling the regulated community to follow procedures that are not promulgated and ignoring requirements that are. For example the current Underground Storage Tank law requires monitor wells as part of a gasoline tank closure site assessment to determine if ground water has been contaminated by the Underground Storage Tank system, but Bureau of Underground Storage Tank case managers are telling the regulated community that wells are no longer required. The requirement for monitor wells at gasoline underground storage tank closures is clearly stated in the current regulations N.J.A.C. 7:14B-8 and 9. Frank T. Sanclementi asked how the Department in a state where over 50 percent of the population is dependent on ground water for its potable drink water supply, proposed investigations that do not actively investigate ground water? Did the authors of N.J.A.C. 7:26E ignore or forget to review the Department's own Basis and Background Document (dated August 1989) in support of the current Underground Storage and Hazardous Substance corrective action regulations before drafting these regulations?

RESPONSE: N.J.A.C. 7:26E represents the Department's latest technical guidance on the remediation of contaminated sites. Before proposing N.J.A.C. 7:26E, the Department considered comments and suggestions the Department has received over the years from various interested parties, including Department personnel, on all of its rules, guidance and policies from the various statutory programs concerning the investigation and remediation of contaminated sites. The Department also reviewed and considered the 1989 Basis and Background document to the Underground Storage Tank rules. When the Department proposed N.J.A.C. 7:26E, the Department was aware of the fact that there were inconsistencies in the technical guidance given by different programs in the Department based upon programmatic lines. In fact, these inconsistencies were one of the driving forces behind the Department's decision to reorganize and consolidate all site remediation activities under one Assistant Commissioner, and to consolidate all its technical guidance in one rule. These inconsistencies arose for a number of reasons. Some rules regarding the remediation of sites were originally published several years ago and were never updated or revised. Thus, the New Jersey Pollution Discharge Elimination System (NJPDES) Discharge to Ground Water rules at N.J.A.C. 7:14A-6, which describe the conduct for an investigation and remediation of ground water contamination, require the installation and monitoring of four ground water monitor wells to investigate a past or potential discharge to ground water. These rules were originally promulgated in 1981. For various reasons that will be more fully explained below, the Department no longer believes that the installation of four wells is necessary at every site. In addition, the Department recognized that there were inconsistencies in Department guidance on remediating contaminated sites based on the program implementing or overseeing the remediation. Thus, the Department set out to consolidate and update all the guidance given by other regulatory programs administered by the Department.

Frank T. Sanclementi focuses on the inconsistencies between N.J.A.C. 7:26E and the Underground Storage Tank rules at N.J.A.C. 7:14B. For example, N.J.A.C. 7:14B-8.2(a)3 and 9.2(c) require a person investigating a discharge or closing an underground storage tank that contained gasoline, jet fuel or kerosene to install monitoring wells to define the full vertical and horizontal extent of the contamination. At the time these Underground Storage Tank rules were promulgated, the Department's best evidence indicated that the only way to ensure that ground water was adequately protected from an underground storage tank that may have leaked, was through sampling of the ground water. The Department has evaluated the sampling method and data required under the Underground Storage Tank regulations as well as other regulatory programs dealing with petroleum products and no longer believes that the installation of a ground water monitoring well is essential at every site where there was a discharge from an underground storage tank or where an underground storage tank is undergoing closure. The Department has concluded, based upon Department experience and the professional judgement of its staff, that it can rely, in some circumstances, on soil sampling conducted at a site to determine if ground water was threatened from the underground storage tank. The Department will only rely on this soil sampling if it was done in accordance with all the requirements set forth in these rules. For example, discharges to soil may occur where there is a thick soil layer between the discharge and the ground water. This thick soil layer provides for contaminant absorption and degradation so that the contaminant will not impact ground water. When such mitigating conditions exist, the Department does not believe it is necessary to sample the ground water to verify that it has not been impacted.

Furthermore, N.J.A.C. 7:26E represents the minimum technical requirements at a site. In many instances the Department will require the installation of ground water monitoring wells in order to ensure that ground water was not impacted by a discharge. The Department is planning to continually undertake a review of case studies to determine criteria for triggering a ground water investigation. These criteria may be contaminant specific and may also vary based on site specific conditions. If such criteria can be determined, they will be published for public comment as amendments to these rules. In addition, the Department has issued a request for proposal pursuant to the Spill Fund

Research Program to attempt to develop an appropriate method to determine when a ground water investigation needs to be completed, or to confirm the existing approach. When the evaluation is completed and approved, any new methodology will be incorporated into these rules as part of future rulemaking.

After N.J.A.C. 7:26E is adopted, the Department intends to review and where necessary, modify the Underground Storage Tank rules, N.J.A.C. 7:14B, the NJPDES rules, N.J.A.C. 7:14A, Hazardous Waste Rules, N.J.A.C. 7:26 and Environmental Cleanup Responsibility Act rules, N.J.A.C. 7:26B, to ensure that the Department's technical requirements for the remediation of contamination are consistent across program lines. In the interim, a party has the option of following N.J.A.C. 7:26E, which represent the Department's current thinking, and which should result in a "no further action" letter, or pursuing a media specific cleanup pursuant to present programmatic rules. The Department recognizes that by not following a technical requirement that is set forth in a particular programmatic rule, a party may technically be considered to be in violation of that rule. The Department advises persons reluctant to follow the Department's current technical guidance for fear of future enforcement action, that the Department will exercise its enforcement discretion in light of the fact that the Department encourages the use of N.J.A.C. 7:26E.

69. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that it appears that important scientific information may not have been considered when proposing this rule. There are many instances where N.J.A.C. 7:26E differs and even contradicts existing guidance. Furthermore, a detailed technical basis and background document has not been developed for these regulations. Due to the highly technical nature of the proposed requirements, as well as the enormous impact these rules will have on the regulated community, New Jersey Natural Gas believes the development of a technical basis and background document is of crucial importance to the regulatory process.

RESPONSE: As stated in the "Rule Development" section of the Summary to the rule proposal, the Department worked with various interested parties from the regulated community and environmental groups to develop systematic and consistent remediation requirements which were incorporated into the various guidance documents from which these regulations were culled. The Department considered the comments and suggestions which it received from these groups in developing these regulations from those guidance documents. Since the regulated community and environmental groups played such a significant role in the development of the guidance documents which became a part of these rules, the Department did not feel that it was necessary to develop a Basis and Background document. In its response to particular comments below, the Department has provided detail regarding its basis for proposing, or not proposing, a requirement.

70. COMMENT: Chemical Land Holdings, Inc. commented that application of N.J.A.C. 7:26E to industrial facilities will be difficult and unnecessarily time-consuming and expensive because they appear to have been developed with the conceptual model of a typical commercial or limited activity industrial site with relatively few areas of concern in mind. Many industrial facilities often have scores or hundreds of solid waste management units (as defined under the Resource Conservation and Recovery Act) and may have hundreds or even thousands of areas of concern as the Department currently defines that term. The proposed regulations call for soil sampling and would require, in many cases, well construction and ground water sampling at each area of concern. In the case of most industrial facilities, the number of soil samples and, in particular, ground water monitoring wells and samples will be excessive. Soil sampling at every one of hundreds (and possibly thousands) of areas of concern is not necessary to achieve the objectives of a remedial investigation. Similarly construction of ground water monitoring wells at each area of concern with soil contaminants above the cleanup standards and where the solubilities of the contaminants are above 100 mg/L, is clearly unproductive and is a significant, imprudent expenditure of limited resources.

RESPONSE: If a discharge of hazardous substances has occurred, the reponsible person is required to remediate the discharge. N.J.A.C. 7:26E simply provides clear, predictable requirements for site investigation and remediation. N.J.A.C. 7:26E should be applied when a contaminated site is being remediated if the person conducting a remediation wishes to have the Department review the actions and provide an approval or no further action decision for a site or a subsite or as required by a Department oversight document. The Department acknowledges that environmental investigation and remediation at large industrial facilities can be time consuming and costly, but sampling potential areas of concern is the only way to definitively determine if a discharge has occurred and to evaluate the extent of a discharge to ensure protection of human health and the environment.

One approach to remediate very large facilities is to conduct the remediation in phases or by sub-sites. In addition, the Department has provided a provision that will allow a party to deviate from the technical requirements of N.J.A.C. 7:26E at N.J.A.C. 7:26E-1.6(d). However, whatever approach is used at a facility, the person responsible for conducting the remediation must assure that the approach will be protective of human health and the environment.

In regard to Chemical Land Holdings, Inc.'s comment on the requirement for the construction of monitoring wells, the Department refers the commenter to the comments and responses for N.J.A.C. 7:26E-4.4(a)1.

71. COMMENT: Chemical Industry Council of New Jersey and E.I. du Pont de Nemours and Company commented that N.J.A.C. 7:26C implies that all parties wishing to undertake remediation activities at a site are required to execute an oversight document with the Department prior to initiating that effort. Union Carbide Chemicals and Plastics Company, Inc. and Chemical Industry Council of New Jersey recommended that the Department clarify the relationship between N.J.A.C. 7:26C, 7:26E and 7:26D and eliminate duplicative requirements from the regulations.

RESPONSE: N.J.A.C. 7:26C only addresses sites in which the remediator wishes Department oversight, or in cases where the site is a Department priority site, and the Department requires oversight. If a site is not a Departmental priority the remediator may conduct any phase of remediation at a site (except implement a remedial action which does not involve a permanent remedy (without Department oversight.

N.J.A.C. 7:26E provides the technical requirements for conducting an environmentally sound remediation of a site, regardless of whether or not it is being done with Department oversight.

N.J.A.C. 7:26D was not adopted by the Department. Decisions on applicable remediation standards for a site are being made by the Department on a case-by-case basis.

72. COMMENT: Chemical Land Holdings, Inc. commented that the manner in which N.J.A.C. 7:26D will be coordinated with N.J.A.C. 7:26E is not clearly defined. Chemical Land Holdings, Inc. suggested that N.J.A.C. 7:26E be revised to include specific coordination with N.J.A.C. 7:26D. A flexible process should be included that recognizes the site-specific nature of remediation.

RESPONSE: The Department did not adopt proposed N.J.A.C. 7:26D. Until cleanup standards are promulgated, the Department is making the decision as to what constitutes the appropriate remediation standard for a site on a case-by-case basis.

73. COMMENT: The General Electric Company previously submitted extensive comments in the Department's parallel rulemaking regarding "Cleanup Standards for Contaminated Sites" and incorporated them as comments to N.J.A.C. 7:26E by reference.

74. COMMENT: Rutgers Environmental Law Clinic commented that since N.J.A.C. 7:26D, 7:26C, and 7:26E are completely interdependent, that the Department should consider Rutgers Environmental Law Clinic's comments and appendix to N.J.A.C. 7:26E as a supplement to those filed by Rutgers Environmental Law Clinic regarding N.J.A.C. 7:26D on June 24, 1992 and N.J.A.C. 7:26C on July 6, 1992. Rutgers Environmental Law Clinic also requested that all their comments previously filed regarding N.J.A.C. 7:26D and N.J.A.C. 7:26C as having also been filed in response to N.J.A.C. 7:26E.

RESPONSE: To the extent that comments raised by the General Electric Company, and Rutgers Environmental Law Clinic in their comments to N.J.A.C. 7:26D or 7:26C apply to N.J.A.C. 7:26E, the Department has responded in this document. For comments relating to N.J.A.C. 7:26C, the Department refers the commenter to adoption of those rules published in the New Jersey Register at 25 N.J.R. 2002(a) on May 17, 1993. The Department did not adopt N.J.A.C. 7:26D, and the Department does not believe those comments are relevant to this proposal.

75. COMMENT: Public Service Electric & Gas Company commented that when discussing "applicable," "residential," "non-residential," or "ground water" cleanup standards the appropriate reference is not always cited. In order to clarify what standards are being discussed, the appropriate citation (N.J.A.C. 7:26D) should be referenced.

RESPONSE: The Department did not adopt N.J.A.C. 7:26D. Until cleanup standards are promulgated, decisions as to what constitutes the appropriate remediation standard for a site are being made by the Department on a case by case basis. The Department has added a new definition of "applicable remediation standards" to clarify the use of this phrase as it is used in N.J.A.C. 7:26E.

76. COMMENT: Exxon Company U.S.A. commented that the Department's bias for action is unclear since it appears the Department is stating that for immediate health concerns or conditions that may have obvious environmental impacts, interim remedial measures should be employed; while the regulation requires that the interim remedial measure not preclude the remedial investigation, but still be compatible with the final remedial program. An interim remedial measure which addresses immediate health concerns may not be compatible with the final remedial program, but provides a viable and cost-effective solution. Exxon Company U.S.A. recommended that the requirement that the interim remedial measure be compatible with the final remedial program be deleted, as it is overly restrictive and may hinder the remediation effort.

RESPONSE: N.J.A.C. 7:26E does not contain any reference to interim remedial measures. The intent of the Bias for Action section of the summary to which Exxon Company U.S.A. is referring is to highlight the idea that a person responsible for conducting the remediation should conduct any containment or stabilization activities which may be needed prior to the implementation of the final remedy. For example, a person responsible for conducting the remediation should not install an expensive cap as an interim measure to prevent direct contact or runoff because the cap could impede bioremediation or soil flushing as final remedies.

77. COMMENT: Exxon Company U.S.A. commented that no technical requirements or guidance have been provided for off-site methods of remediation/disposal of contaminated material. Disposal methods will depend upon the hazardous nature of the material as defined in N.J.A.C. 7:26-8.8 through 8.12. The Department should provide guidance regarding the nature and extent of waste characterization sampling (ignitability, reactivity, corrosivity and Toxicity Characteristic Leaching Potential) to be conducted, particularly for sites where little or no information is available regarding the types of materials disposed. The Department should require waste characterization sampling on a site specific basis, limited to those areas where there is a strong possibility that the waste may possibly be hazardous and to those tests which will are relevant.

RESPONSE: Detailed waste classification sampling requirements and guidance may be obtained from the Department's Bureau of Advisement and Manifest (609-292-8341). The waste classification process was not incorporated into these rules because it is adequately addressed in N.J.A.C. 7:26.

78. COMMENT: Public Service Electric & Gas Company commented that the proposed rules do not expressly address new discharges (discharges occurring after the effective date of the proposed new rule N.J.A.C. 7:26E). This is inconsistent with existing regulations. A new discharge should be treated as an isolated entity regarding the investigation of and remediation of the affected area(s). Public Service Electric & Gas Company suggested adding a new provision in N.J.A.C. 7:26E-6 for new discharges which allows for remediation of only the area(s) affected by the discharge. This section should state that a new discharge does not trigger a site-wide investigation but only to the applicable area of concern.

RESPONSE: It is unclear to the Department as to what regulations Public Service Electric & Gas Company is referring in its discussion of inconsistencies between N.J.A.C. 7:26E and other regulations. Although the proposed cleanup standards had a reference to "new discharges," the Department has not adopted these cleanup standards. Therefore, the Department is unaware of any such inconsistency between those rules. The remediation of a new discharge is regulated by N.J.A.C. 7:26E. If the discharge is from a specific discharge event, the person responsible for conducting the remediation is exempt from the historical information section of the preliminary assessment, assuming the person conducting the remedial activities is only conducting remediation activities relating to that event.

79. COMMENT: Frank T. Sanclementi commented that the Department is correct in trying to streamline the remediation process and in consolidating the bureaus responsible for site remediations into one program. However, the haste at which this and other recently proposed Departmental rule changes are being made is currently causing a great amount of confusion in the regulated community as to what they should be doing now particularly at sites with remediation activities already under way.

RESPONSE: As stated in the "Rule Development" section of the Summary to the rule proposal, the Department has worked with various interested parties from the regulated community and environmental groups over a period of several years to develop systematic and consistent remediation requirements which were incorporated into the various guidance documents from which these regulations were developed. Therefore, the technical requirements in these rules should be familiar to the regulated community. Furthermore, hundreds of sites are presently being remediated in accordance with these rules. When these rules become effective, the Department will review any phase of remediation commenced prior to the effective date, to see if the work was done in substantial compliance with these requirements. Any new work or phases begun after the effective date of this rule should be done pursuant to these rules.

Meaning of "No Further Action"

80. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that the "no further action" discussions in the Summary to the proposal could be interpreted that the Department will never regard a site closed as long as the responsible party continues to have ownership. If owners cannot free themselves from past transgressions, there is little incentive to participate in a self-driven program since financial liability is never reduced.

81. COMMENT: Exxon Company U.S.A. commented that the Department states that additional remediation will be required if "there are changes to cleanup standards." Two fundamental problems associated with this statement are outlined below. The revision of a cleanup standard may have absolutely no relevance to the site specific conditions. For example, if a standard is revised to be protective of human exposure via ground water use and the site under re-evaluation has contamination that does not impact ground water, or the ground water is not used for consumption, the benefit to require additional remediation at the site is questionable. If the remediation goals were established using a site-specific risk assessment, as allowed in N.J.A.C. 7:26D, the changing of a specific cleanup standard has no relevance. Additional work should only be required where there is supportive data that demonstrates that onsite contamination poses a human health risk based on a realistic exposure/risk assessement that does not rely solely on exposure modelling data.

82. COMMENT: GPU Nuclear Corporation commented that the Department explains that a determination of "no further action" is based on information available to the Department at the time the determination is made. This part of the preamble indicated that a determination of "no further action" is not a release or waiver of liability, even if the responsible party takes all reasonable steps and conducts a cleanup that results in compliance with standards in N.J.A.C. 7:26D. The responsible party may be required to conduct the cleanup once again as a result of more stringent cleanup standards having been adopted, although there may not be a corresponding decrease in the risk to public health or any additional protection of the environment as a result of the additional clean up. This could act as a disincentive for program participants to do the best possible job, if the participant is in constant jeopardy of future regulatory action. This could also increase the Department's workload by requiring additional Department oversight during a remediation. At some point in time it should be deemed that a responsible party has fulfilled all the requirements and no further liability will be incurred.

83. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that the Department's policy that a "no further action" determination may be rescinded whenever the Department amends N.J.A.C. 7:26D to be more stringent, does not allow the regulated community a proper framework within which to manage environmental liability while complying with all applicable laws and regulations. This is extremely burdensome to the business community and will have a further detrimental effect on the health of New Jersey's already fragile economy. The Department's insistence on retaining the right to reevaluate any site at any time provides a climate of complete uncertainty to the regulated community. No matter how much money is spent, no matter how faithfully a corporation may comply with Department requirements, the Department can forever come back and have it done all over again. Rules can be

constantly changed resulting in the effective removal of a corporation's ability to plan for regulatory and environmental expenditures.

RESPONSE: The Department has no intention of continually re-evaluating sites at which "no further action" letters were issued. However, there are instances in which a previously remediated site may have to be re-evaluated to ensure that the site is still protective of human health and the environment. The field of environmental remediation is a rapidly changing and ever improving one. In the past, it was assumed that disposing of solvents in a landfill was an environmentally sound waste disposal practice. It is now recognized that sites which were legally remediated in the past may have to be reopened due to risks to the public and the environment. The same can be said for future cleanups. What is considered state-of-the-art and the most environmentally protective remediation today may change in the future.

The section of the proposal Summary to which the commenters refer is the section entitled "Meaning of No Further Action." The meaning of that section is that if a person conducting remedial activities is also responsible for the discharge which caused the contamination, and the remediation standards change by an order of magnitude or more such that the contaminants remaining on site could cause significant health risks if left unremediated, then the Department would re-evaluate the site and determine if further remediation is necessary. If it is determined that additional remediation activities are necessary at the site to protect human health and the environment, then the Department will look to the person who is responsible for the discharge. This will only be done on a case-by-case basis upon the discovery of new information not available at the time of the initial remediation.

The Department encourages the use of previously remediated older industrial properties, particularly in lieu of natural open spaces throughout the State. In fact, the presence of buildings often acts as a cap that eliminates the direct exposure pathway so that residual contaminants in the soil that are or have been reduced to acceptable levels would unlikely become a source of ground water contamination in the future. Although many older industrial sites are contaminated, much of the contamination is beneath buildings or pavement. In order that such properties may be re-used, and development pressure on "green fields" areas reduced, the Department often allows such contamination to remain in place as long as future operators are advised of the contamination through a "use restriction" or other notification mechanism, and the contamination does not result in ground water contamination or impacts on other receptors. Hence, the site would not be a problem for future development, even if the remediation standard was to change.

Even if the remediation standard for a specific site was based on a risk assessment, the site might still have to be re-evaluated. For example, if based on new scientific data, the Environmental Protection Agency changes the cancer potency factor for a given contaminant, a site-specific remediation standard based on a risk assessment could change. Under this situation, the site would have to be re-evaluated to see if the site now posed a risk to human health.

84. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that the Department states: "The 'no further action' determination for a site must include an evaluation of the historical use of the property." This statement is inconsistent with subchapter 3, which indicates the requirement for historical review is waived for remediation of specific discharge events and underground storage tank systems.

RESPONSE: It is true that historical information is not required as part of a preliminary assessment of a specific discharge event (see N.J.A.C. 7:26E-3.1(c)1). However, a finding of "no further action" can only be applied to that specific discharge event. In other words, the finding will be that no further action is necessary to remediate that specific discharge event, not that the site has been remediated, nor even that the parcel of the site on which the discharge occurred is clean.

85. COMMENT: Rutgers Environmental Law Clinic states that the Department cannot and should not relieve from future liability those who are "not in any way responsible for the discharge." 24 N.J.R. 378. Although the Department may require additional remediation, there will be no one to pay for it if potential sources of that funding have been relieved of future liability. The Department cannot and should not waive future liability. Excusing of some remediators from continuing liability is a violation the Department's duty to provide continuing environmental protection. At the very least the Department should require the responsible parties to contribute to a fund to pay the costs of additional remediation.

RESPONSE: Rutgers Environmental Law Clinic refers to a policy statement made by the Department in the proposed cleanup standards, 24 N.J.R. 378. Although the cleanup standards were not adopted, the Department still agrees with this policy statement. A remediator who was not responsible for contamination retains no future liability if remediation standards change. In fact, the Legislature is presently considering amending the Spill Compensation and Control Act and the Environmental Cleanup Responsibility Act to specifically limit the continuing liability of a remediator who was not responsible for the contamination. See S-1070.

86. COMMENT: Colonial Pipeline Company questioned whether cleanup standards will be lowered as more sensitive analytical equipment becomes commercially available as proposed in N.J.A.C. 7:26D.

RESPONSE: This comment is directed towards the proposed cleanup standards for contaminated sites, 24 N.J.R. 373(a), and, therefore, is beyond the scope of this proposal.

87. COMMENT: Rutgers Environmental Law Clinic raised numerous concerns about the use of incineration to remediate sites. Incinerators should be permitted for site remediation only under the following circumstances. Full disclosure of all information about the proposed use of an incinerator, including but not limited to the data about the operator and operations of the facility, the length of time it will be in operation, the volume of material to be incinerated, the process to be utilized, the emissions and ash which will be generated, and the methods to be used to control and/or dispose of the emissions and ash. Full opportunity for public notice and comment on the proposed use of an incinerator. Receipt of a hazardous waste facility permit pursuant to N.J.A.C. 7:26. The waste to be incinerated shall be limited to only that material at the subject site and a certification to that effect must be submitted by the remediator and verified by the Department. Soil containing metals will not be incinerated unless waste feed and/or emission standards for the relevant metals apply. These standards must be the more stringent of (a) those derived using a health-based approach or (b) those derived using a best-available technology (BAT)-based approach. Other remedial options including but not limited to those described above; for example, thermal desorption, etc., should be considered and reasonably rejected prior to the use of incineration. Community acceptance, which must be demonstrated by either a citizen referendum or a majority vote of the municipal governing body. Community acceptance may only be demonstrated in this manner and only after all of the following has been completed: all of the above information has been circulated, all alternatives have been evaluated, all necessary permit applications have been filed with the Department and determined to be complete by the Department, the Department has made a preliminary decision to go forward with incineration as the remedy and has certified that only on-site wastes are to be incinerated at the facility, and a full opportunity for public notice and comment has taken place. The remedy selected should always be the option with the least possible threat to public health and the environment. To do otherwise is to jeopardize the health and safety of New Jersey citizens.

RESPONSE: The Department encourages and prefers permanent remedies because it eliminates any potential future threat from the contamination. Thermal destruction is an effective and viable permanent remedy for organic contaminants. The Department points out that the remedial action requirements in N.J.A.C. 7:26E-6 state that the remedial action must comply with all applicable Federal, State and local laws, regulations and requirements (N.J.A.C. 7:26E-6.1(b)3). The Department has confidence that if incineration is managed in accordance with Federal, State, and local requirements, the remedial alternative utilizing incineration will be protective of human health and the environment. However, the issue of whether incinceration is an appropriate remedy for a particular site depends on site-specific conditions. Since the Department is not mandating incineration, the Department believes that the comments of Rutgers Environmental Law Clinic requesting that the Department limit the use of incineration as a remedy are beyond the scope of this rulemaking procedure. The Department will, however, take the comments of Rutgers Environmental Law Clinic under advisement. The Department notes that the permitting exemption noted in N.J.A.C. 7:26E-7.1(a)31 is not an exemption from all permitting requirements. Any on-site incinerator would be required to comply with New Jersey air pollution control requirements. The Department will still thoroughly review all pertinent technical information that would have been submitted for the Resource Conservation and Recovery Act Treatment, Storage, Disposal facility (RCRA TSD) permit. The major difference is the review will occur with the case team, which is the staff who are

responsible for all of the different aspects of site investigation and remediation. This will provide a more efficient utilization of staff time, and the Department anticipates, more timely remediation of contaminated sites.

In response to the comments of Rutgers Environmental Law Clinic regarding public notice and comment, the Department will include all contaminated sites on the master list which will be available to the public and sent to each municipality. The Department currently publishes in the New Jersey Department of Environmental Protection and Energy Status Report a list of over 600 major sites on an annual basis. The Department seeks public input on the process and mechanism by which the public is involved and will propose an amendment to this rule in the summer of 1993 requiring a person remediating a site to notify the municipality prior to the implementation of the remedial action. Until the process and mechanism is clarified in this future rule proposal, it is the Department's position that, at a minimum, the municipality should be notified by the person responsible for conducting the remediation of its intentions. This notification should occur regardless of whether the person responsible for conducting the remediation is or is not required to conduct a remedial alternative analysis. (For additional discussion of this point, please see the Department's Response to Comments on N.J.A.C. 7:26E-5.2(d)).

Environmental Impact

88. COMMENT: Wheaton Industries, Inc. commented that the Department should consider the potential environmental impact which could result from these rules if they continue to apply to voluntary remediation and establish disincentives to undertaking such activity.

RESPONSE: The Department does not believe that N.J.A.C. 7:26E will create a disincentive for conducting voluntary remediations. On the contrary, N.J.A.C. 7:26E will provide an incentive for voluntary remediation because the Department's requirements for site remediation have been codified and will therefore be predictable and consistent.

89. COMMENT: Atlantic Electric commented that under N.J.A.C. 7:26E and 7:26C, there are lengthy waiting periods before remediation can begin. The majority of the small releases as mentioned previously occur on non-company owned properties. Atlantic Electric believes that it is not prudent to delay remediation while waiting for approvals from the Department. It is this company's policy to report the release to the Department while immediately terminating, controlling, containing and cleaning up the release. The company feels this is the best and most prudent policy, and strongly objects to any deviation from this procedure. As N.J.A.C. 7:26E is written, it appears counterproductive to minimizing impact to the environment and community.

RESPONSE: The Department commends Atlantic Electric on its policy to report releases to the Department and immediately control, contain and cleanup the release. The Department agrees that this is a prudent policy, and strongly encourages Atlantic Electric to continue implementing this policy. The Department has streamlined N.J.A.C. 7:26E in the case of single discharge events. (For a further discussion of this issue, see response to comments on Technical Rules as Minimum Requirements.) N.J.A.C. 7:26E neither requires nor encourages delay in spill cleanup. In fact, N.J.A.C. 7:26E specifically mandates that the first priority during remedial actions is to contain and stabiilize contaminants (see N.J.A.C. 7:26E-6.3(a)).

Economic Impact

90. COMMENT: The General Electric Company commented that the Department's discussion of N.J.A.C. 7:26E is devoid of any meaningful consideration of the social or economic impact of these new rules, despite the fact that the New Jersey Administrative Procedure Act and the Rules of Agency Rulemaking mandate that these factors be considered. The Department's one-paragraph discussion of "social impact" in the Preamble falls far short of the required analysis. The Department has not estimated the potential social and economic impact of N.J.A.C. 7:26E on New Jersey business establishments, individually or cumulatively. The "Economic Impact" section notes the enormous anticipated cost of remediation ("several billion dollars" over the next five years) but apparently assumes, without explanation, that this burden will be of no concern if the cleanups are performed by private industry. Adherence to all of the detailed procedures set forth in the regulations will, in many instances, be very expensive, without any corresponding benefit to public health and the environment. At a minimum, the Department should estimate "typical" costs of conducting the extensive preliminary assessments and site investigations required by the regulations and the impact of these costs on large, medium-sized and small businesses. The Department has not fulfilled its statutory mandate to weigh these factors.

RESPONSE: Pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-4(a)2, the Department is required to register at the time of proposal a statement setting forth the "expected socio-economic impact of the rule." The rules implementing the Administrative Procedure Act provide that an economic impact statement describes the expected costs, revenues and other economic impact upon ... any segment of the public proposed to be regulated." N.J.A.C. 1:30-3.1(f)3. The social impact statement describes "the expected social impact of the proposed rulemaking on the public ... including any proposed or expected differential impact on different segments of the public, including the rulemaking action and justification therefore." N.J.A.C. 1:30-3.1(f)2. The Department is not required to estimate the possible impacts of this rule, just the expected impacts. In proposing these rules, the Department highlighted that it expected virtually everyone in the State to be impacted, either directly or indirectly by these rules. The Department believes this impact is justified because these rules will lead to expedited cleanups of contaminated sites in New Jersey, and the assurance to both the public and the party remediating the site, that the site is remediated in an environmentally sound manner. The Department, in the Economic Impact Statement, highlighted the fact that the expected costs of the remediation will vary depending upon a number of variables including site complexity, extent and degree of contamination, historical use of the site and remedy selected. The Department believes it complied with the requirements of the Administrative Procedure Act.

The fact that it can be costly to remediate a contaminated site is obvious and well known by members of the regulated community who commented on N.J.A.C. 7:26E and/or are intimately involved in remediating contaminated sites. Independent of N.J.A.C. 7:26E, parties have been required pursuant to State and Federal law to remediate contaminated sites. The same persons impacted by these rules may have been required to conduct a site remediation regardless of whether the rules were issued. The Department would have required, as it has in the past, that these persons remediate their sites to levels that ensure protection of human health and the environment. By issuing these rules, the Department sought to provide greater predictability to the regulated community regarding how to remediate a contaminated site in a manner the Department would approve. The Department anticipates that greater predictability will decrease the costs of site remediation.

When proposing these rules, the Department considered the costs associated with remediating contaminated sites. There are no "typical" costs of remediation. Remediation costs can vary widely depending upon whether the site is a gas station or a large industrial facility and whether the remedy selected is encapsulation, removal or treatment. In response to comments received, however, the Department has provided, more detailed information regarding the costs a party can incur in remediating a site. Please refer to the Department's response to other comments on the Economic Impact Statement below.

91. COMMENT: Colonial Pipeline Company commented that the Department should balance the needs to protect the environment with the needs of the State's citizens and employers for their social and economic welfare. The cost-benefit and economic impacts for the three proposed rules should be re-evaluated as a package to assure that the expected costs for remediation are justified.

92. COMMENT: The General Electric Company commented that the Department is also required to consider practicability and cost-effectiveness when developing environmental regulations. The Spill Act requires that remedial activities must follow the National Contingency Plan to the greatest extent possible. N.J.S.A. 58:10-23.11f(a). The National Contingency Plan, in turn, provides for costs to be considered at three stages of remedy selection: the remedy screening stage (40 C.F.R. 300.430(e)(7)(iii), the evaluation of remedial alternatives (40 C.F.R. 300.430(e)(9)(iii)(G)), and the final remedy selection (40 C.F.R. 300.430(f)(1)(ii)(D)). Similarly, any cleanup plan developed under Environmental Cleanup Responsibility Act must include "recommendations regarding the most practicable method of cleanup" and "a cost estimate of the cleanup plan." N.J.S.A. 13:1K-8(a). Further, the Water Pollution Control Act requires consideration of costs. There is no indication that the Department considered practicability or cost-effectiveness in preparing N.J.A.C. 7:26E. Nor is there any provision requiring that these factors be considered on a site-by-site basis when implementing the remedial investigation and remedy selection procedures. This failure to consider cost-effectiveness and practicability in developing N.J.A.C. 7:26E is a major deficiency.

RESPONSE: The Administrative Procedures Act does not require the Department to engage in a cost/benefit analysis of the rule in the proposal. Further, the Department does not interpret N.J.S.A. 58:10-23.11(f)a of the Spill Compensation and Control Act as requiring it to mimic the Environmental Protection Agency when conducting remediation activities. In any event, as presently articulated by the National Contingency Plan, the cost effectiveness of a remedy only comes into consideration after two determinations are made. One, that the remedy is protective of human health and the environment, 40 C.F.R. 300.430(f)(1)(ii)(A), which is defined to mean "protecting human health and the environment in both short and long term from unacceptable risks posed by hazardous substances ... present at the site." Two, that the remedy must attain certain applicable or relevant and appropriate requirements (ARARS) under the circumstances of the release, or qualify for one of six statutory waivers from ARARS. 40 C.F.R. 300.430(f)(1)(ii)(C). The remedial alternatives that meet these two criteria would then be evaluated to determine if they are cost effective and utilize permanent solutions and alternative treatment or resource recovery technologies to the maximum extent possible. 40 C.F.R. 300.430(f)(1)(ii)(D) and (E). Thus, the National Contingency Plan specifically limits the role of cost considerations in remedial activities to the remedy selection process.

The General Electric Company also inappropriately cites the Environmental Cleanup Responsibility Act for support of its contention that N.J.A.C. 7:26E must provide a mechanism for cost consideration on an industry wide or site specific basis. The Environmental Cleanup Responsibility Act merely requires that the responsible party provide limited information regarding the costs of remediation to the Department. N.J.S.A. 13:1K-8. Under the Environmental Cleanup Responsibility Act statutory scheme, this information is necessary because, upon approval of a cleanup plan, financial security in the amount of the cost estimate of the cleanup plan must be filed with the Department. N.J.S.A. 13:1K-9(b)3. Further, the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. does not specifically require cost to be considered when promulgating rules pursuant thereto.

Nonetheless, the Department did consider practicality and cost effectiveness when developing N.J.A.C. 7:26E. As a result, the Department does not require that each site be investigated and remediated using the most conservative approach because this approach was considered by the Department to be impractical. Instead, the Department chose to develop minimum standards that would be adequate for the large majority of sites. Additional work beyond the minimum standards would be required on some sites and the additional requirements would vary from site to site based on site specific conditions as outlined in N.J.A.C. 7:26E-1.7(a). In this way, most sites could be remediated expeditiously and in a practical and cost effective manner because they could proceed through most of the remediation process with little or no Department oversight. A specific example of the Department's consideration of cost effectiveness is that N.J.A.C. 7:26E does not require that a ground water sample be taken anytime there has been a discharge, to confirm that ground water has not been significantly impacted. Rather, if the extent of contamination is largely confined to the vadose zone, a ground water investigation is generally not required. Similarly, the Department specifically allows for cost to be considered in the remedy selection process at N.J.A.C. 7:26E-5.

93. COMMENT: Colonial Pipeline Company commented that the Department should provide the following cost estimates: consulting fees, capital costs, and Departmental oversight.

94. COMMENT: Chemical Industry Council of New Jersey commented that the Department's estimate of an average cost of $24,000 to perform a preliminary assessment and site investigation is extremely low.

95. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that Department estimates of costs are unrealistically low. Average costs for preliminary assessments and site investigations are rarely completed for less than $24,000. A case in point, the actual remedial investigation costs of one Union Carbide Chemicals and Plastics Company, Inc. site exceeded $5,000,000. The scope did not include all the requirements of the draft technical standards nor the feasibility study. However, the remedial investigation did meet all the requirements of the Department through approved work plans and fully supports the feasibility studies presently being performed.

96. COMMENT: Colonial Pipeline Company commented that the estimated cost of approximately $24,000 appears to be low unless it includes Underground Storage Tank investigations. It would be more appropriate to show the range, average and median assessment/remedial cost, excluding Underground Storage Tank or Environmental Cleanup Responsibility Act driven activities. Since these costs are in accordance with the proposed regulations, what percentage of the cost is associated with Departmental oversight?

97. COMMENT: Schering Laboratories believes that under the Superfund program the preliminary assessment is a simple screening tool. In contrast, Schering believes this proposal goes far beyond determining if contamination may be present. Based on Schering's experience, this data is not easy to obtain and is presently not required on most Department projects. As a result this process will be more expensive than the Department anticipates. For example, Schering completed an Environmental Cleanup Responsibility Act closure of a warehouse distribution center. Unlike this regulation, Schering was not required to obtain aerial photographs. Neither was Schering required to document operations, storage practices, and permits of past owners. This site did not require any remedial work nor was any major sampling required. Yet the work still cost Schering $40,000. In the General Introduction to this proposal, the Department claims this regulation will not add any "new requirements ... on small businesses and that a basic preliminary assessment and site investigation would only cost $24,000." This is clearly erroneous based on this example.

RESPONSE: The cost estimates quoted in the economic impact analysis section of the rule summary for a preliminary assessment and site investigation were based on the Department's cost if it were conducting these phases of a remediation itself. As such the estimates do include the cost of consultants and capital costs. The Department's estimate of an average cost of $24,000 to perform a preliminary assessment and site investigation was based on a survey of selected projects only, including Underground Storage Tank sites, and does not reflect an exhaustive effort by the Department to calculate actual costs associated with various types of cases.

The cost estimate of $24,000 did not include the direct cost of Department oversight. Pursuant to N.J.A.C. 7:26E, no party is required to obtain Department oversight for work conducted at a site. The Department, however, refers the commenters to the fee rules for the Environmental Cleanup Responsibility Act and Underground Storage Tank programs at N.J.A.C. 7:26B-1.10 and N.J.A.C. 7:14B-3, respectively, and the oversight cost reimbursement formula in N.J.A.C. 7:26C, for detailed information regarding how to calculate the Department's oversight costs. On April 5, 1993, the Department proposed modifications to the Environmental Cleanup Responsibility Act, the New Jersey Pollutant Discharge Elimination System regulations and the Underground Storage Tank fees, see 25 N.J.R. 1375(a), 1358(a) and 1363(a), respectively, so that the fees assessed pursuant to these programs would be consistent with the Department's charges pursuant to the oversight cost formula at N.J.A.C. 7:26C. The Department notes that a party's costs for Department oversight will be directly related to the degree to which that party has conducted work in accordance with N.J.A.C. 7:26E.

In general, the costs of site investigations will vary widely. Evidence available to the Department indicates that simple site investigations, for one to three areas of concern may range from $1,000 to $15,000 while complex site investigations for 20 or more areas of concern may range from $20,000 to $300,000. The Department expects that simple remedial investigations for one to three areas of concern may range from $17,000 to $36,000 while complex remedial investigations for 20 or more areas of concern may range from $170,000 to $450,000. The cost of a remedial alternative analysis will also vary widely. A simple remedial alternative analysis may cost as low as $750 while a complex remedial alternative analysis may range from $10,000 to $40,000 or higher.

98. COMMENT: Jersey Central Power & Light Company (JCP&L) commented that the Department has not conducted an adequate social or economic impact assessment of these proposed new rules on the regulated community. One small example of an economic impact obviously not considered is as follows: JCP&L presently estimates that the cost for JCP&L to respond to each car-pole accident (CPA) involving a discharge of dielectric fluid from a JCP&L owned transformer $5,000. Jersey Central Power & Light Company's economic analysis indicates that the inclusion of these incidents under the terms of these proposed regulations would increase the costs to at a minimum $10,000 for each response. This increase is primarily due to the following factors: Analytic sampling estimated at $2,500 will be required to verify the effectiveness of each emergency removal. Jersey Central Power & Light Company presently does not conduct post-excavation sampling and the excavated

area is immediately backfilled. In addition, should JCP&L attempt to comply with these regulations and acquire post-excavation samples, during the period between sampling and the acquisition of lab results the excavation would remain open, requiring round-the-clock security personnel to ensure that persons do not accidentally fall into subject excavations. Security services could cost approximately $2,400. Lastly, additional consulting costs would be incurred. If sampling is required a consultant would be necessary to ensure that the JCP&L rigorous sampling techniques and laboratory chains of custody are followed. In addition, JCP&L would incur additional engineering consulting costs to review data and prepare reports for the Department. These costs are difficult to predict but would probably be in excess of $1,000 per event. JCP&L presently attempts to identify the party responsible for the CPA. When responsible parties cannot be located or where insurance claims cannot be made the costs are borne by JCP&L. Consequently the cost of these incidents are ultimately borne through higher electric or automobile insurance costs by a great many New Jersey citizens. JCP&L currently experiences approximately 160 CPA incidents each year. Consequently, the economic impact of these rules is to increase environmental spending at JCP&L from approximately $5,000 up to at a minimum $10,000 to $11,000 for each incident. Total annual expenditures for CPA could conservatively reach 1.1 million dollars. It is necessary for the Department to evaluate whether there is really a benefit derived from the tremendously increased costs. The mere fact that more money is being spent does not mean that a benefit is being achieved.

99. COMMENT: Atlantic Electric commented that after reviewing the Economic Impact of the proposal, using the Department's own accounting, it now appears that the average cost of remediating a small transformer spill will be, at a minimum, $134,000 rather than $10,000-$15,000 per incident. Average cost of preliminary assessment—$24,000; Minimum cost of remedial investigation—$10,000; Minimum cost of remedial action—$100,000; Minimum Cost—$134,000. This is over a 1,000 percent increase from our current costs. Atlantic Electric spends approximately $1,500,000 per year to clean up small releases that they did not cause. This cost will escalate to a minimum of $20 million per year. Atlantic Electric believes that the Department's numbers are conservative, so the cost is sure to be higher. Since Atlantic Electric voluntarily remediates all small releases to the point that there is no threat to human health or the environment, the advantage of spending the extra $18+ million is non-existent, unreasonable, unnecessary and unrealistic.

100. COMMENT: E.I. du Pont de Nemours and Company commented that they are deeply concerned that the Department has developed these draft regulations without rigorous consideration of their economic impact on the State of New Jersey. As the Department recognizes, there are numerous instances of soil and ground water contamination in the State. The Department estimates cleanup costs will be several billion dollars in the next five years. The restrictive and inflexible nature of N.J.A.C. 7:26E will require extensive sampling and analysis with their attendant costs. The sample collection and analytical costs alone will, in many cases, far exceed the Department's estimate of $24,000 for an average preliminary assessment and site investigation, based on the stringent requirements of the proposed rule. At a single area of concern on a du Pont facility, approximately $350,000 was recently spent on sampling and analysis of a surface impoundment where only 14 samples were collected following a plan similar to that outlined in the proposed rule for site investigation of surface impoundments. The heavy costs of detailed sampling and analysis may not, in fact, generate any data of demonstrable environmental benefit. Many of the requirements and costs associated with the proposed rule may be unnecessary for certain site-specific conditions. In these cases, money required to complete the sampling and analysis could otherwise be spent on productive industrial investment, modernizing plants, creating jobs, and making New Jersey industry more competitive. In order for the Department to balance the cost of the proposed regulation against its benefits more accurately, the economic impact of the proposed regulation must be more realistically and rigorously evaluated.

101. COMMENT: Exxon Company U.S.A. commented that the proposed new rules also do not appear to take into account the size and complexity of large industrial sites. Several aspects of the proposed new rules, especially the sampling frequency and allowable holding times, are simply not practical on a large scale. Consideration must also be given to the intended use of analytical data, so that every sample taken has a clear purpose. We do not believe that the Department has considered the cost implications for large industrial sites since there is no economic impact analysis. Carried to its logical extreme, the cost of sampling for larger sites will become a disproportionately large component of the total remediation cost.

102. COMMENT: Shell Oil Company commented that the requirements as they relate to retail service stations (Underground Storage Tank sites) are not appropriate. Shell has serious concerns that the various plans, assessments, studies, schedules and associated reports are not beneficial and cost-effective. The Department will be inundated with these lengthy and very detailed reports that may receive little or no attention. These reports will also be extremely costly. Due to the nature of their business, Shell will probably have a significant share of contaminated sites as compared to other industries. The cost of these reports combined with number of Shell sites will result in thousands of dollars being spent—dollars which could be spent on some type of "active" remediation more beneficial to the environment. Shell recommended the Department reconsider the need for all of these formal type reports and perhaps devote a section of the requirements to retail service station (Underground Storage Tank) sites.

103. COMMENT: Wheaton Industries, Inc. commented that the Department should consider the full economic impact of these regulations as proposed beyond the specific investigation and cleanup costs involved in addressing contamination at confirmed hazardous waste sites. Additional costs would include (1) the costs of applying N.J.A.C. 7:26E to investigation and cleanup activities at locations other than confirmed hazardous waste sites, (2) the costs in terms of time and money of complying with additional documentation requirements, particularly for voluntary remediation, and (3) the opportunity costs resulting from business transactions delayed or simply not pursued because of the extra burdens or risks imposed by these rules, particularly if they would apply to all voluntary remediation.

RESPONSE: The factors that affect the costs of remediating a contaminated site cleanup are so varied that detailed estimated remediation costs were not included in the summary so as not to mislead the regulated community with respect to the cost of a remediation in the site remediation program, or the impact that these rules would have on such activity. The Department recognizes that costs associated with site remediation, including analytical costs, can be considerable. However, the Department believes that the costs incurred for compliance with N.J.A.C. 7:26E need not be excessive. The high costs in the example cited by Chemical Industry Council of New Jersey seem atypical in that, based on information available to the Department, costs for full priority pollutant analyses can be obtained for as low as $900.00 to $1,100 per sample for multiple samples.

In the car-pole accident example cited by Jersey Central Power & Light Company, compliance with the N.J.A.C. 7:26E need not result in excessive additional cost. For small volume spills where polychlorinated biphenyls are the contaminant of concern, only two post remediation samples would typically be required for polychlorinated biphenyl analysis. Discounted costs for polychlorinated biphenyl analysis which laboratories typically offer high volume users would likely be approximately $200.00 per sample or less for a total of $400.00 or less per incident, far lower than Jersey Central Power & Light Company's $2,500 per incident estimate. Security costs associated with keeping an excavation open for 48 hours could easily be eliminated by field screening soil remaining in the excavation to determine if unacceptable levels of polychlorinated biphenyls remain. By correlating the field screening results with lab analytical results, an adequate degree of certainty that the soil remaining in the excavation is clean could be achieved, allowing the excavation to be filled and eliminating the $2,500 security cost.

To further reduce the economic impact of these rules, data could be submitted to the Department under the variance procedure described in N.J.A.C. 7:26E-1.6(d) to justify the exclusive use of field analysis methods for spills of limited magnitude and known materials. It is also possible that, again under N.J.A.C. 7:26E-1.6(d), the Department may require no laboratory verification sampling if certain specific conditions exist. For example, data for several spill incidents could be presented to the Department indicating that when spills of limited magnitude and low mobility material are excavated within 24 hours and contaminants did not penetrate to depths greater than two feet. If the Department finds such data acceptable, the Department may agree to waive the laboratory sampling requirement for future spills if comparable site conditions to those in the study exist, provided that such spills are always excavated to two feet.

Cost implications of these rules for large facilities was considered by the Department. For example, at N.J.A.C. 7:26E-3.9(a)5ii, the standard sampling frequency for pipelines in excess of 50 feet, which are frequently found at large facilities, may be reduced. Also, at N.J.A.C. 7:26E-3.9(b)2ii, the standard sampling frequency for storage areas in excess of 300 feet in perimeter, which are frequently found at large facilities, may be reduced. Furthermore, the Department has added a variance provision N.J.A.C. 7:26E-1.6(d) which allows any person conducting remedial activities to petition the Department for an exemption from any provision of N.J.A.C. 7:26E. If site conditions warrant a deviation from the specific requirements of these rules, an alternate approach may be approved by the Department pursuant to N.J.A.C. 7:26E-1.6(d).

The Department does not agree with Shell Oil Company's comment that reports that are required pursuant to N.J.A.C. 7:26E will receive "little or no attention" from the Department. Only the minimum information necessary to adequately assess site conditions is required in the reports so that Department staff can conduct efficient and timely reviews of the reports.

Finally, in response to Wheaton Industries, Inc., the Department does not believe it is appropriate to consider the opportunity costs resulting from business transactions delayed because of these rules. First, the Department does not believe these rules will be the cause of such delay. Second, such costs are speculative, and cannot be anticipated by the Department.

104. COMMENT: Atlantic Electric commented that if N.J.A.C. 7:26E and 7:26C are allowed to stand as written and the costs spiral upwards, the parties responsible for the release will not be willing to pay for their proactive response and remediation of such releases. This will become an extreme financial burden on Atlantic Electric, and ultimately its customers.

RESPONSE: The Department does not consider the situation described by Atlantic Electric as an expected economic impact on these rules. As noted in the Department's other responses to comments on the economic impact statement, the Department does not believe these rules make the cost of remediation excessive. It is inappropriate for the Department to factor in speculative costs founded on the premise that a responsible party will not comply with its legal obligation pursuant to N.J.A.C. 7:1E to immediately respond and mitigate a discharge.

105. COMMENT: Atlantic Electric commented that the Department states that "this cost estimate includes the cost of hiring an environmental consultant, which will be needed in most instances." Atlantic Electric is unaware of any State programs to license or certify environmental consultants. Therefore, anyone can be an environmental consultant, regardless of experience, educational background, etc. Atlantic Electric urges the State to delete this statement. At a minimum, Atlantic Electric should be able to use its own resources and experts and should not be required to use a consultant if they do not believe it warranted.

RESPONSE: This statement does not imply that the use of a consultant is required. This statement merely reflects that it is common practice to hire consultants to assist in site remediation and that there are costs associated with this practice. Since the Economic Impact statement is not promulgated as part of the rule, it is inappropriate for the Department to consider deleting a statement made from therein. However, the Department recognizes that some companies have staff that are capable of meeting the requirements of N.J.A.C. 7:26E.

N.J.A.C. 7:26E-1

N.J.A.C. 7:26E-1.1

106. COMMENT: Chevron U.S.A., Inc. questioned the Department's statutory authority to regulate areas (or units) which do not have a known actual or potential discharge. Chevron U.S.A., Inc. stated that neither the New Jersey Water Pollution Control Act nor the Spill Act require remedial activities for all above ground tanks or production areas which have managed hazardous substances or pollutants. Remedial activities under both statutes are required only if there is an actual or potential discharge of a regulated substance. The Department's existing programs such as the Discharge Prevention Compensation and Control program for above ground tanks adequately regulate active units. There is no need for this dual regulation.

RESPONSE: For a person to obtain the Department's approval for the remediation at a contaminated site, that person must conduct the same remediation which the Department would conduct if it were using public funds. This ensures that once the remediation is completed, whether by the Department or a third party, no additional remediation is necessary to meet the statutory requirements to adequately protect human health and the environment. A person performing remediation pursuant to this chapter must, therefore, cleanup and remove any such contaminants which pose an unacceptable threat as defined by the Department. Because of the threat to human health and the environment that such situations pose, the Department was given the authority to spend public funds to cleanup and remove any hazardous substance in order to prevent an imminent discharge and to cleanup and remove hazardous substances which are not satisfactorily stored or contained. N.J.S.A. 58:10-23.11fb. It is sound public policy to act to prevent the uncontrolled release of such contaminants into the environment, rather than being forced to react once a discharge has occurred.

Tanks which have stored hazardous wastes, hazardous substances, hazardous constituents or pollutants have the potential to discharge and thus are potential areas of concern. If during the preliminary assessment, it is determined that there is no evidence of a known or suspected discharge, the tanks would not have to be sampled. For example, N.J.A.C. 7:26E-3.9(a)3i states that underground storage tanks and distribution systems "which have always had double-walled containment with leak detection pursuant to N.J.A.C. 7:14B and no discharge history" are not required to be sampled.

N.J.A.C. 7:26E is not duplicative of the Discharge Prevention Compensation and Control program, N.J.A.C. 7:1E, as Chevron U.S.A., Inc. suggests. The Discharge Prevention Compensation and Control program is a prevention program which regulates the manner in which a tank and tank system is constructed in order to ensure that the incidents of a discharge or release of the contaminant stored in the tank is minimized. N.J.A.C. 7:26E is remedial in nature. In other words, if the tank or tank system fails, or if prior to the safeguards installed in the tank or tank system pursuant to the Discharge Prevention Compensation and Control rules there was a discharge from the tank or tank system, N.J.A.C. 7:26E details how to detect such a discharge and how to remediate any contamination above the applicable remediation standard which resulted from the discharge.

107. COMMENT: Chevron U.S.A., Inc. recommended that N.J.A.C. 7:26E-1.1 be revised so that only those areas of concern which have been identified during the preliminary assessment as having an actual or potential discharge (as defined by the applicable statute) are subject to site investigation requirements, and that only those areas of concern which have had documented discharges as determined during the site investigation phase are subject to remedial investigation requirements. If a media cleanup standard has been exceeded remedial actions for that area of concern are required. As proposed, N.J.A.C. 7:26E-1.1 requires a sitewide investigation of almost all units or areas which stored or otherwise managed a regulated substance regardless of whether there was a known or suspected discharge from a particular unit or area and regardless of what regulation or event triggered the investigation. Additionally, the regulations must allow for the deletion of areas of concern as data becomes available showing that a suspected discharge did not actually occur or the discharge did not result in an exceedance of promulgated cleanup standards or that the discharge was previously remediated to applicable standards.

RESPONSE: The Department's intent of these rules is to allow the person conducting remedial activities to choose whether to conduct the remediation in a phased or step-wise approach, or to conduct several phases of the remediation at the same time, as logic and reasonableness dictates. The preliminary assessment looks at all potential areas of concern and identifies those at which a discharge is known to have occurred or it is suspected that a discharge occurred. The site investigation process then determines which of these actual areas of concern are contaminated. It is necessary, however, to conduct a preliminary assessment for all potential areas of concern. Many times a person conducting remedial activities is not aware that a discharge has occurred in an area of concern since evidence of the discharge is not always immediately obvious. For example, in ground water investigations it sometimes occurs that the levels of contamination do not decrease even after the obvious sources of the contamination were removed. In this case, another area, previously not thought to have had a discharge, is found to be a source of contamination.

The Department has determined that the most efficient way to investigate a potentially contaminated site is to evaluate all potential areas of concern in a phased approach. Thus, as articulated in these rules, in the preliminary assessment phase the person conducting the remediation identifies all potential areas of concern by identifying areas where a discharge is known or suspected to have occurred. In the site

investigation phase, the person conducting the remediation determines which of these areas of concern are contaminated. The Department believes that it is statutorily authorized to establish this phased approach to the investigation of potentially contaminated sites. At the end of each remedial phase, if no contamination is found above the applicable remediation standard for a particular area of concern, then no further action would be required for that area of concern.

If a person conducting remedial activities seeks a "No Further Action" determination for the entire site, then all of the potential areas of concern have to be evaluated to determine which are actual areas of concern where there is evidence of a known or suspected discharge. The language Chevron U.S.A., Inc. proposes concerning the requirements of the chapter only applying to the portions, or areas or units at a site which are the source(s) of the discharge(s) does not reflect the intent of the rules. However, a person conducting remedial activities may choose to investigate the site in a phased approach by conducting remediation activities in one area of concern at a time. If this approach is used, a "No Further Action" determination may be made for each area of concern at which remediation activities were conducted and at which it is appropriate, but not for the entire site.

108. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that N.J.A.C. 7:26E-1.1(a) should specify that N.J.A.C. 7:26E should apply only to the sites where the Department has authority. Voluntary actions outside the Department authority will meet the requirements of the agent causing the change. It is rare, if ever, that all of these requirements would be needed at any site. It is the joint responsibility of the site owner/operator, the State agency staff, and the consultant to select and agree on the appropriate requirements to accomplish the established objectives. Burdening these voluntary cleanups with unnecessary work and cost will serve as a disincentive to performing any cleanup action. Union Carbide Chemicals and Plastics Company, Inc. also noted that it is probable that existing regulations and negotiated agreements will overlap or conflict with the proposed regulations, leaving both the agency and regulated community confused.

RESPONSE: Any environmental cleanup of a contaminated site, whether voluntary or not, comes under the purview of the Department. N.J.A.C. 7:26E clarifies and codifies what constitutes an environmentally sound site remediation. Eventually all sites requiring remediation will be reviewed by the Department through the Comprehensive Site List. All sites which are either known or suspected to be contaminated are ranked and put on the Comprehensive Site List. The Department addresses the cleanup of each site in priority order based on its ranking. As a site is cleaned up, the next site on the list becomes the priority. N.J.A.C. 7:26E specifies what is considered a Departmentally approved remediation, even without direct Department oversight. This should allow for the person conducting remedial activities to have "peace of mind" in that when the site eventually becomes a priority site under Department review, the person who conducted remedial activities at the site pursuant to these regulations, did so pursuant to the Department remediation standards. Of course, any person can obtain departmental review of a non-priority site by utilizing the voluntary cleanup program.

In response to Union Carbide Chemicals and Plastics Company, Inc.'s comment cautioning the Department to examine existing regulations to ensure that there are no inconsistencies with N.J.A.C. 7:26E, the Department is reexamining its other environmental cleanup regulations, and will be proposing the amendments required to ensure consistency among these rules. Until the Department amends existing regulations based upon this review, the Department expects that there will be some overlap between N.J.A.C. 7:26E and other Department rules or administrative consent orders. In anticipation of this overlap, the Department proposed N.J.A.C. 7:26E-1.3(c) which provides that the Department will review remediation conducted prior to the operative date of N.J.A.C. 7:26E, to determine if the remediation was conducted in substantial compliance with N.J.A.C. 7:26E. For further discussion of this issue, please see the Department's responses to comments on N.J.A.C. 7:26E-1.3(c).

109. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that the requirement to comply with more stringent requirements or provisions imposed by local applicable statutes at N.J.A.C. 7:26E-1.1(b)1 could wreak havoc on remediation activities and should therefore be deleted.

110. COMMENT: Public Service Electric & Gas Company commented that N.J.A.C. 7:26E-1.1(b) will undermine the Department's plans for a consistent, coordinated approach to remediation and unnecessarily slow down the process because parties will have to comply with local regulations that are more restrictive than either the federal or state requirements. Public Service Electric & Gas Company proposed that a new section be added limiting the authority of municipalities to enact ordinances regulating remediation of contaminated sites. Specifically the section should: (a) provide that N.J.A.C. 7:26E supersedes any law or ordinance regulating site remediation regulated pursuant to N.J.A.C. 7:26E enacted by any municipality, county or political subdivision prior to the effective date of N.J.A.C. 7:26E and (b) specify that no municipality, county or political subdivision shall enact any law or ordinance regulating site remediation regulated under N.J.A.C. 7:26E without the express permission of the Department.

RESPONSE: The purpose of the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, is to set forth the State's minimum technical requirements to investigate and remediate contamination at any site. One of those minimum requirements is complying with more stringent requirements or provisions imposed by any other Federal, State or local statute or regulation. In proposing these rules, it was not the Department's intent to try to preempt Federal, State or local rules which may be more stringent, nor does the Department believe it has a blanket authorization from the Legislature to do so. Neither has the commenter cited such authority. The Department does not agree with Public Service Electric & Gas Company that complying with more stringent Federal, State or local rules will lead to an inconsistent or uncoordinated approach to site remediation efforts within the State or unduly slow the process. Parties remediating contamination sites in New Jersey have always been required to comply with more stringent Federal, State and local rules. This has not resulted in the speculative consequences that the commenter listed. Consequently, the Department does not believe that by codifying this requirement, N.J.A.C. 7:26E-1.1(b)1 will "wreak havoc" on remediation activities in the state.

111. COMMENT: The General Electric Company and Allied Signal, Inc. commented that N.J.A.C. 7:26E-1.1(b)1 together with N.J.A.C. 7:26E-7.1(a)32, which provide that responsible parties performing remedial work under the proposed regulations are required to obtain "any and all permits required by State, Federal or local statute or regulation" and to comply with any "more stringent" limitations contained in these State and local laws are in conflict with Comprehensive Environmental Response Compensation and Liability Act and the National Contingency Plan. Furthermore, even at non-Comprehensive Environmental Response Compensation and Liability Act sites, this provision would delay remedial efforts as responsible parties attempt to comply with local permitting requirements. The commenters suggested that the Department should follow the policy set by Congress in Comprehensive Environmental Response Compensation and Liability Act and expressly provide that no State or local permits are required for Environmental Protection Agency approved on-site remedial work. The commenter referenced 42 U.S.C. 9621(e)(1); 40 C.F.R. 300.400(e).

RESPONSE: The Department does not believe it is necessary to modify N.J.A.C. 7:26E-1.1(b) because the Department does not agree that this provision is presently inconsistent with Comprehensive Environmental Response Compensation and Liability Act or the National Contingency Plan. N.J.A.C. 7:26E-1.1(b)3 provides only that these rules by themselves do not relieve a person for obtaining any and all permits required by State, Federal or local statutes or regulations. If a permit is not required at a site for any reason, these rules do not mandate that such a permit be obtained. The Department recognizes that New Jersey sites on the National Priority List are entitled to the permit waiver as provided for at 42 U.S.C. 9621(e)1. This section of the Comprehensive Environmental Response Compensation and Liability Act provides that "no Federal, State or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section". 42 U.S.C. 9621(e)(1). To comply with that section of Comprehensive Environmental Response Compensation and Liability Act, the response action must be performed in accordance with a variety of procedural requirements, including the requirement to allow for public notice and comment of a remedial action. Thus, certain activities conducted at Comprehensive Environmental Response Compensation and Liability Act sites will not require a permit. Other parts of remediation activities conducted pursuant to the Comprehensive Environmental Response Compensation and Liability Act however, do require certain permits.

112. COMMENT: Allied Signal, Inc. commented that the Department should waive permit requirements for remediation, especially at Superfund Sites.

RESPONSE: If a site is a Superfund site, the Department does not require certain permits for remediation activities conducted on site. The Department does not agree that all permit requirements should be waived for all remediation activities. Permits provide appropriate oversight of activities conducted at a site. In addition, the permitting process is open to public participation, and thus provides an important element to the overall site remediation efforts at a site. For further discussion of this issue, please refer to the Department's response to comments on N.J.A.C. 7:26E-7 below.

113. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that the Department should provide criteria and a mechanism for requiring additional remediation at N.J.A.C. 7:26E-1.1(c).

RESPONSE: The Department's criteria for requiring additional remediation can be found at N.J.A.C. 7:26E-1.7. The mechanism through which the Department will require additional remediation is through an oversight document executed pursuant to N.J.A.C. 7:26C or pursuant to the applicable regulatory program such as the Underground Storage Tank Act or the Environmental Cleanup Responsibility Act.

114. COMMENT: Exxon Company U.S.A. commented that the requirements at N.J.A.C. 7:26E-1.1(c) which state that a person's liability for any contaminants remaining at a site continue even if additional remediation is required, is in conflict with the discussion of the "Meaning of No Further Action" in the proposal summary which states that a person's continuing liability for any contaminants remaining at the site depends on the person's relationship to the discharge. The discharger, including all those who are in any way responsible for the discharge, remains liable if additional remediation is necessary. Those persons who are not in any way responsible for the discharge, but conduct remediation to the current cleanup standards or get a determination that no further action is required based on the current standards or get a determination that no further action is required based on the current standards, have no continuing liability if the Department amends the cleanup standards to be more stringent. It is recommended that the wording in 7:26E-1.1 be corrected to read the same as that in the "Meaning of No Further Action" narrative section.

RESPONSE: In the Summary of the rule proposal, the Department discussed what it believes to be the current state of the law in New Jersey concerning liability for the cleanup of contaminated sites. Upon completion of remediation in which some contaminants remain in the environment, the discharger, including all those who are in any way responsible for the discharge, remains liable if additional remediation is necessary (that is, more stringent cleanup standards are adopted). Those persons who are not in any way responsible for the discharge, but conduct the remediation to the applicable remediation standards, have no continuing liability if the Department determines additional remediation is required to protect human health and the environment.

The Department did not intend, through the promulgation of N.J.A.C. 7:26E, to either establish, waive or release any person from liability for the remediation of contaminated sites, or to protect innocent landowners under any state or federal statute or pursuant to common law. Such liability issues are beyond the scope of this rule and more appropriately within the jurisdiction of the Legislature or of separate proceedings concerning individual sites. In fact, the Legislature is presently considering these issues in the context of S1070 which, if enacted, will amend the Spill Compensation and Control Act and the Environmental Cleanup Responsibility Act and clarify a person's continuing liability for environmental remediation. The Department does not believe that N.J.A.C. 7:26E-1.1(c) and the Department's discussion of the meaning of no further action are in conflict. N.J.A.C. 7:26E-1.1(c) describes the Department's authority to require additional remediation at a site in order to protect human health and the environment. This section does not articulate who the Department will hold liable for the costs of the additional remediation.

115. COMMENT: Atlantic Electric commented that N.J.A.C. 7:26E-1.1(c) should be deleted because it is not needed unless the Department's plans to hold the regulated community in perpetual liability where no site is ever truly remediated in the Department's eyes.

116. COMMENT: Chemical Land Holdings, Inc. commented that, because the Department reserves the right to expand the requirements at will, even for sites that have been investigated in full compliance with the proposed regulations, cleanups at even small, simple sites may well be delayed pending the Department's review and approval.

117. COMMENT: E.I. du Pont de Nemours and Company commented that it is concerned that N.J.A.C. 7:26E-1.1(c) will have the unintended consequence of making dischargers reluctant to undertake cleanups pursuant to, and independent of, property transfers. Undertaking an environmental remediation is a costly and time-consuming exercise. Moreover, cleanups undertaken in process areas of active facilities usually involve significant logistical considerations, which are required to minimize disruption of normal operations. Individuals contemplating undertaking a remediation must have some assurance that completion of the cleanup will, indeed, mark the completion of fiscal outlays and disruption of operations. Without this assurance, there is little motivation to undertake a site remediation. Second, the potential for repeated reexamination of completed remediation projects impairs the ability of the regulated community to assess the financial impact of site restoration programs adequately and has the potential to stifle economic and social development. Finally, expansion or modification of older industrial facilities, typical of many in the State of New Jersey, often involves construction on remediated property. If the State imposes the possibility of requiring additional future cleanup, industry may choose to not reuse otherwise viable property but seek out green field properties on which to build and expand. Forcing businesses to seek out these non-industrial properties for industrial development would be an unfortunate, and most likely unintended, consequence of this provision. E.I. du Pont de Nemours and Company recognized the Department's desire to be able to reexamine potentially hazardous situations in the light of new information. However, new toxicological information, risk assessment procedures, and/or analytical protocols that precipitate new cleanup standards are overly sensitive triggers for such action. Therefore, DuPont recommends that the Department seek to reopen cleanups only when new information, not available at the time of the initial remediation, demonstrates a significant risk to human health or the environment and that it do so on a case-by-case basis.

RESPONSE: N.J.A.C. 7:26E-1.1(c) provides that the Department has the authority to require additional remediation based upon site specific conditions to protect human health and the environment. The Department may require additional remedial work at any time for a number of reasons, including if new information becomes available on the extent and nature of the contamination, the original remedial investigation was inadequate or when remediation standards change. The Department has the ultimate responsibility for ensuring that contaminated sites are properly remediated, and it would be an improper delegation of that responsibility not to require additional remediation at a site the Department does not consider to be remediated in a manner protective of human health and the environment.

The liability for the remediation of contaminated sites is established by the Legislature and is independent of these rules. At present, the discharger, including all those who are in any way responsible for the discharge, remains liable for additional remediation when necessary. The Legislature is presently considering clarifying when additional remediation will be necessary and who will be liable for it in S1070.

N.J.A.C. 7:26E-1.2

118. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-1.2 should be revised to read as follows "... shall be liberally construed, considering the socio-economic impacts, in order to effectuate the purposes of N.J.S.A. ..." since these considerations are included in the applicable enabling statutes and the regulated community and the Department need flexibility in meeting the intent of the applicable statutes.

RESPONSE: The policy statement at N.J.A.C. 7:26E-1.2 reflects the policy of the authorizing legislation: that environmental statutes are to be liberally construed. For example, N.J.S.A. 58:10-23.11x of the Spill Compensation and Control Act states "[t]his Act, being necessary for the general health, safety and welfare of the people of the State, shall be liberally construed to effect its purposes." See also N.J.S.A. 58:10A-12 of the Water Pollution Control Act. These liberal construction provisions provide that statutes that seek to protect human health and the environment are to be liberally construed so that their beneficial objectives may be accomplished. See, *In the Matter of Kimber Petroleum,* 110 *N.J.* 69 (1988); *Matter of Department of Environmental Protection, Division of Water Resources,* 117 *N.J. Super.* 304 (App. Div. 1981). The underlying statutes to N.J.A.C. 7:26E do not specifically mandate consideration of the socio-economic impacts when remediating

contaminated sites; therefore, the Department did not include such considerations in the policy statement of N.J.A.C. 7:26E. The Department, however, recognizes the importance and necessity of cost effective remediation efforts, and has therefore provided for the flexibility necessary to address variable site conditions in these rules.

N.J.A.C. 7:26E-1.3

119. COMMENT: Jersey Central Power & Light Company commented that N.J.A.C. 7:26E-1.3(a) should be modified because N.J.A.C. 7:26E is not appropriate for de minimis discharges, such as car-pole accidents which are immediately cleaned up.

120. COMMENT: Atlantic Electric commented that N.J.A.C. 7:26E-1.3(a) should exempt de minimis discharges such as discharges of less than 20 gallons of petroleum hydrocarbons as this will allow for the prompt, flexible remediation of small releases which are unavoidable. The commenter further noted that it is unreasonable, burdensome, unjustified and prohibitively expensive to apply this rule to small petroleum hydrocarbon releases which have historically been proactively and voluntarily remediated especially since these requirements will not improve the level of remediation. Atlantic Electric also noted that by making remediation prohibitively expensive, the insurance carriers may not be willing to pay for the Company's proactive voluntary remediation, thus forcing the Company to pass the costs onto its customers and shareholders or look to see if some entity other than the company should handle and be responsible for such remediation activities and costs.

121. COMMENT: Jersey Central Power & Light Company commented that the inclusion of rigorous complex technical requirements for small scale historical discharges is inappropriate and will create an inefficient and burdensome remediation process which is totally unnecessary in most situations.

RESPONSE: The Department does not agree that the remediation of what could be characterized as a new or historical de minimis discharge should be exempt from the requirements of N.J.A.C. 7:26E. The Department has been directed by the Legislature to establish a consistent and systematic approach to the remediation of all contaminated sites in New Jersey. N.J.S.A. 58:10-23.20. The Department has approached this legislative mandate by proposing N.J.A.C. 7:26E, which establish the minimum requirements for remediating a site. The consistent application of N.J.A.C. 7:26E can ensure the thoroughness and reliability of investigations and cleanups of contaminated sites or sites at which contamination is suspected. The Department recognizes that contaminated sites vary in their complexity due to a number of factors, including the size of the discharge. However, a small discharge does not necessarily mean that its threat to human health and the environment is minimal. Further, an exemption of discharges based on their size could result in the remediation of discharges in a manner that is not protective of human health and the environment.

Neither does the Department agree that N.J.A.C. 7:26E is overly burdensome and will not improve the level of remediation. N.J.A.C. 7:26E generally reflects the Department's current as well as historical approach to remediating contaminated sites. Persons remediating sites in New Jersey have had to comply with many of these requirements for years. The Department recognizes that N.J.A.C. 7:26E may constitute an additional burden for minor spill incidents which in the past have not had to comply with these minimum standards. For example, the Department may not have required post remediation sampling for all minor spill incidents in the past. However, this burden is not considered excessive. The Department believes that these post remediation requirements will provide additional assurance that contaminants from minor spills have been appropriately remediated.

Furthermore, the Department does not believe that these rules will be a disincentive to voluntary remediation or cause remediation to be prohibitively expensive because the Department is allowing requirements in these rules to be adjusted based upon certain site-specific considerations. For example, when there is a single discharge event, such as a car pole accident described by Atlantic Electric and Jersey Central Power & Light Company, the persons conducting the remediation need not conduct a full preliminary assessment or site investigation. Furthermore, the Department may accept generic remedial alternative analysis reports and remedial action workplans that can be applied to all similar types of discharges, such as those by car pole accidents. In addition, the Department upon adoption has included a new provision at N.J.A.C. 7:26E-1.6(d) clarifying that any person remediating a site can petition the Department to reduce or modify any requirement in N.J.A.C. 7:26E. In summary, the Department recognizes that the requirements for a cleanup at one site may be inappropriate at another and could result in an excessive process that would unnecessarily increase the cost and time required for the cleanup. For that reason, the Department has incorporated flexibility into the rules and will entertain requests for a reduction of requirements on a case by case basis.

122. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that they had several concerns regarding N.J.A.C. 7:26C, noting that insurance companies may not always be willing to pay or reimburse costs for a voluntary cleanup done by non-responsible party; it may not make sense to enter into a Memorandum of Agreement until the cleanup standard regulations are finalized; and that the Department oversight fees could require payment for unknown amounts of oversight.

RESPONSE: Jersey Central Power & Light Company and New Jersey Natural Gas Company's comments regarding oversight documents are beyond the scope of this rulemaking procedure. The Department refers the commenters to the adoption of N.J.A.C. 7:26C published in the New Jersey Register at 25 N.J.R. 2002(a) on May 17, 1993, wherein the Department responded to extensive comments regarding memoranda of agreement and the oversight cost reimbursement formula.

123. COMMENT: The General Electric Company and Jersey Central Power & Light Company commented that N.J.A.C. 7:26E-1.3(a) is inappropriately broad because the Department does not have the authority to require the remediation of entire sites in all cases. Specifically, the General Electric Company commented that the Department's authority to control the investigation and cleanup of pollutants is limited to sites where there has been a discharge and that even where a discharge has occurred, the Department may not require a site investigation or cleanup action beyond the limitations of the underlying statute.

RESPONSE: The Department disagrees with the General Electric Company's contention that the Department's authority to control the investigation and cleanup of hazardous substances or wastes, or pollutants is limited in the manner described by the commenter. The Department may require the remediation of a discharge of hazardous substances or wastes, or a discharge of pollutants at any time. Both the Spill Compensation and Control Act and the Water Pollution Control Act, for example, give the Department the broad authority to ensure the prompt and effective remediation of all contaminated sites, regardless of their size, source or characterization.

Under the Spill Compensation and Control Act, the Department has broad authority to either cleanup and remove a discharge or direct the discharger to cleanup and remove the discharge. N.J.S.A. 58:10-23.11f(a)1. The Department, in delegating its authority to remediate a discharge may dictate how that cleanup is to be conducted so that it is done in a manner that is protective of human health and the environment. Thus, pursuant to the Spill Compensation and Control Act, the Department has the flexibility to effect a cleanup by what it considers to be the most appropriate means. See *Superior Air Products Co. v. N.L. Industries Inc.*, 216 *N.J. Super.* 46 (App. Div. 1987). The Department has appropriately approached this task by establishing one set of requirements applicable to all contaminated sites.

The Department disagrees with the commenters' contention that the Department's authority to control site remediation varies considerably depending on the statute involved. In addition, one set of circumstances at a site typically triggers more than one of the State's remediation statutes. The authorizing legislation for these rules deals with the same subject matter; the prevention and remediation of environmental contamination. As such, all statutes must be read together to effectuate the legislature's purpose in ensuring that contaminated sites are remediated. Thus, the Department does not have to wait for the Environmental Cleanup Responsibility Act to be triggered in order to demand that a discharge be remediated. Nor does the Department have to focus solely on the remediation of an underground storage tank if there happens to be such a tank at the site. Thus, the Spill Compensation Control Act, the Water Pollution Control Act, the Environmental Cleanup Responsibility Act, Solid Waste Management Act and the Underground Storage of Hazardous Substances Act must be read in a manner that harmonizes their objectives.

Finally, all environmental statues, to the extent that they are necessary for the general health, safety and welfare of the people of the State, are to be liberally construed to effectuate their purposes. Thus, while the Department agrees that there may be some minor inconsistencies between the Water Pollution Control Act and the Spill Compensation and Control Act, the Department does not agree that these

inconsistencies must dictate that there can be no comprehensive set of rules regarding the remediation of contaminated sites. In enacting all of these statutes, the Legislature was concerned with environmental contamination in New Jersey and its proper prevention and remediation.

In effectuating the Legislature's objectives, the Department has proposed N.J.A.C. 7:26C and 7:26E and made a policy decision that if the site is a priority, the Department will require the responsible party to execute an administrative consent order to remediate the entire site, or the Department will conduct the remediation itself. For non-priority sites, the Department will allow a responsible party to conduct the remediation in a phased approach, using a memorandum of agreement. The Department's approach to the timing of a remediation effort is more fully described in N.J.A.C. 7:26C. N.J.A.C. 7:26E describes what the Department will look for when a party seeks approval of remedial work. These two rules are promulgated under the Department's general enabling authority as well as its authority pursuant to specific site remediation statutes.

124. COMMENT: Wheaton Industries, Inc. and Lindabury, McCormick & Estabrook commented that based on N.J.A.C. 7:26E-1.3(a) the rules are unclear on the extent to which they prescribe required behavior for otherwise "voluntary" investigation or cleanup activity, that is, activity performed in the absence of an order from the Department or some other legal authority requiring a party to take such action. These commenters noted that since the term "remediation" is defined to mean "all necessary actions to investigate and cleanup any known or suspected discharge or threatened discharge of contaminants ..." it could be argued that N.J.A.C. 7:26E-1.3(a) requires any contamination investigation or cleanup activity, whether voluntary or not, to be conducted under these proposed rules. The commenters noted that such an interpretation would interfere with or inhibit voluntary actions for several reasons. Wheaton Industries, Inc. and Lindabury, McCormick & Estabrook noted the procedures prescribed by these regulations may restrict the ability and/or desire of prospective lenders and purchasers to conduct pretransaction site assessments. The commenters noted that where investigation is purely precautionary or any contamination is likely to be minor, parties should not be constrained from using generalized procedures and submitting the significant documentation required rather than procedures reasonably tailored to particular circumstances to manage costs as well as to address any possibility of contamination, and they may be subject to enforcement action for failure, however inadvertent, to comply with all the requirements which would be specified in these regulations. In addition, Lindabury, McCormick & Estabrook commented that N.J.A.C. 7:26E-1.3(a) is ultra vires inasmuch as neither a prospective lender nor a prospective purchaser can be considered, according to applicable case law, to be dischargers or persons in any way responsible for a hazardous substance or waste. Lindabury, McCormick & Estabrook and Wheaton Industries, Inc. suggested that N.J.A.C. 7:26E-1.3(a) be revised to indicate that the N.J.A.C. 7:26E does not apply to pre-transaction site assessments or preliminary assessments conducted by prospective lenders and/or prospective purchases. Wheaton Industries, Inc. further suggested that the Department should prescribe the technical requirements applicable specifically to remediation conducted with Department oversight. Such an approach at least would provide a real-time opportunity for a performing party, if it so chose, to obtain the Department's approval of its remediation activities, and would still leave adequate flexibility and incentives for voluntary remediation.

125. COMMENT: Exxon Company U.S.A. commented that N.J.A.C. 7:26E-1.3(a) violates the principle of "at risk" site remediations and should be deleted.

126. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-1.3(a) and 1.3(b)1 should be deleted. A new N.J.A.C. 7:26E-1.3(a) should state, "The requirements of this chapter apply to those sites undertaking applicable compliance activities subject to:" Facilities may wish to conduct work at risk, and present the results of their investigations and/or remediation to the Department for a determination of compliance with applicable cleanup standards. An oversight document will not be necessary for at-risk work. A separate mechanism for Departmental review and approval of site compliance with applicable cleanup standards should be promulgated under N.J.A.C. 7:26C.

127. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested wording modifications to N.J.A.C. 7:26E-1.3(a) as follows: "The requirements of this chapter apply to any person conducting remediation at any site in New Jersey, including those sites and activities subject to ..."

RESPONSE: In proposing N.J.A.C. 7:26E-1.3(a) the Department did not intend to preclude a person from remediating a site "at risk." If a private party, for whatever reason, does not intend to seek Department approval of its remediation efforts, that party does not need to follow N.J.A.C. 7:26E. The Department has, therefore, modified N.J.A.C. 7:26E-1.3(a) to clarify that these rules form the basis of the Department's review of the remediation conducted at any site in New Jersey. The Department will approve remediation work based on the degree to which it was conducted in compliance with these rules.

The Department also wishes to clarify for the commenters that although a party will be allowed to remediate a site "at risk," for a party to obtain the Department's approval for the work conducted, that party must be able to present reports prepared pursuant to this chapter, outlining that the remediation was conducted purusant to the minimum standards outlined herein. The Department will not be able to confirm that a site is in compliance with the applicable remediation standards unless the Department is able to review copies of all the appropriate documentation. Furthermore, the Department will not review work conducted at a site unless the party seeking the Department's approval has entered into an oversight document with the Department. In response to Chevron U.S.A., Inc., a mechanism already exists for the Department's review and approval of work conducted at a site, and in the context of that approval process, the Department determines if the applicable remediation standards have been met as well as if data supporting the conclusion that the remediation standards have been met is satisfactory.

The Department stresses that the detailed requirements the Department has proposed for the preliminary assessments and site investigations are important for prospective lenders or purchasers to consider when conducting pre-transaction site investigations for a number of reasons. First, these rules reflect a consolidation of all prior Department guidance concerning how to conduct an investigation, and incorporate suggestions on how to improve Department guidance made by the regulated community over the last several years. As such, the Department expects these rules to be used in defining what constitutes "due diligence" in a review of work conducted at a contaminated site. As Lindabury, McCormick & Estabrook and Wheaton Industries, Inc. are no doubt aware, the concept of "due diligence" has become extremely important when the liability of innocent purchasers is at issue. The Superfund Amendment and Reauthorization Act amendments to Comprehensive Environmental Response Compensation and Liability Act established an "innocent purchaser defense" for property owners, who, with due diligence, thoroughly investigated a site and found it to be uncontaminated prior to purchasing it. Although at present there is no similar statutory defense available to property owners of contaminated sites in the Spill Compensation and Control Act or Environmental Cleanup Responsibility Act, the Legislature is presently reviewing amendments to these Acts which would incorporate this defense (See Senate Bill No. 1070). Furthermore, even though at present there is no innocent purchaser defense established by State statute, the Department expects this concept to be used by New Jersey courts when called upon to allocate liability for contamination between private parties. As these rules describe what the Department considers to be the minimum requirements necessary to investigate a site, a party following these rules should be able to make a prima facie case that it conducted a site investigation with the proper due diligence. Thus, if a party chooses to purchase property, the Department highly recommends that the provisions of N.J.A.C. 7:26E be followed so that the party adequately protects itself from future liabilities associated with that site.

128. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that the Department has inappropriately broadened the technical requirements to include all remediation activities occurring in New Jersey at N.J.A.C. 7:26E-1.3(a).

RESPONSE: A party is only required to comply with these requirements if they are conducting a remediation of a site pursuant to an oversight document or regulatory program. The Department has modified N.J.A.C. 7:26E-1.3(a) to clarify this point.

129. COMMENT: Exxon Company U.S.A. commented that although five specific regulations are listed at N.J.A.C. 7:26E-1.3(a), the applicability of this proposed regulation to a hazardous waste facility is uncertain. A hazardous waste facility is defined by N.J.A.C. 7:26 as "... all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of

hazardous waste." A hazardous waste facility may undergo remediation and therefore, the requirements for an owner or operator of an existing hazardous waste facility should be specified.

RESPONSE: N.J.A.C. 7:26E-1.3(a) lists five of the statutes pursuant to which a person responsible for conducting the remediation may have to remediate a site in accordance with N.J.A.C. 7:26E. Included in this list is the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., under which the hazardous waste regulations, N.J.A.C. 7:26, were promulgated. N.J.A.C. 7:26 includes the requirements for operating a facility which treats, stores or disposes of hazardous waste. N.J.A.C. 7:26 does not provide detailed requirements specifying the manner in which all remediation activities are to be conducted at a hazardous waste facility. Remediation activities which are to be conducted at a hazardous waste facility must be done pursuant to N.J.A.C. 7:26E.

130. COMMENT: Public Service Electric & Gas Company commented that N.J.A.C. 7:26E-1.3 should include an exemption to the applicability of these regulations for remediation of specific discharge events, underground storage tanks and underground storage tank systems where the contaminant is known, contamination is visible, limited in areal extent, not in contact with ground water, where remediation is verifiable by field screening and immediately cleaned up.

RESPONSE: The Department disagrees with the proposed alteration to the applicability of N.J.A.C. 7:26E to specific discharge events because even if the contaminant is known, visible, limited in areal extent, and remediation is verifiable by field screening, the discharge still needs to be remediated in accordance with N.J.A.C. 7:26E to ensure that the site is being remediated in an environmentally sound manner. However, specific discharge events are exempted from the site history and physical setting requirements at N.J.A.C. 7:26E-3.10(b)1 and 2.

131. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that N.J.A.C. 7:26E-1.3(a) should be revised because the requirements of these rules should not be mandatory for activities not subject to specific New Jersey legislation. The list of State legislation is thorough and leaves few actions not explicitly listed. However, owner/operators should be able to conduct those infrequent limited actions which are not under the jurisdiction of specific laws without having to comply with these detailed prescriptive requirements. It is the owner/operators risk of repeating the work if later it is determined that the actions are within the jurisdiction of the listed laws. The commenter believes that those exposed to the risk should make the determination of the requirements rather than prescribe universal requirements.

RESPONSE: The Department does not anticipate that there can be any contaminated sites or areas of concern that for which the Department cannot require a remediation pursuant to one of the listed statutes. However, the Department has clarified on adoption that "at risk" work can still be conducted by private parties.

132. COMMENT: The Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E-1.3(a) would duplicate or even contradict many existing rules. Under the Spill Act a facility is required to list subcontractors or equipment, personnel, and procedures for responding to a spill. The Spill Act also defines procedures for testing. This regulation would be redundant by requiring a different set of spill response requirements and different methods of assessing tank integrity. Under the Underground Storage Tank Regulations a detailed leak detection and remediation procedure is outlined. This proposed regulation adds unnecessary and conflicting sampling requirements to what is already an adequate program. Under the Clean Water Act a treatment works approval process and a mandatory fine procedure is in place to insure cleanup of any discharges not covered by a permit. Chemical Industry Council of New Jersey recommended that this regulation only apply to remedial work which is not adequately covered under an existing regulation.

133. COMMENT: Schering Laboratories commented that these regulations are redundant or in conflict with most of the acts listed at N.J.A.C. 7:26E-1.3(a). For example, Schering is installing treatment on an existing water discharge. The Water Pollution Control Act regulates the installation through a Treatment Works Approval Process. In addition, a strict fine structure exists to insure compliance. Due to the nature of the discharge, this proposed regulation will also apply. As a result, a preliminary assessment, site investigation, remedial investigation, and feasibility study would be added to the treatment approval process. This would result in redundancy and over regulation. Schering Laboratories suggested that this regulation should only apply to Acts for which an adequate emergency or remedial response mechanism does not exist. Acts such as the Spill Act, Underground Storage Tank Act, and Water Pollution Control Acts have adequate mechanisms for remedial emergencies.

RESPONSE: The Department recognizes that some technical requirements as set forth in N.J.A.C. 7:26E may be inconsistent with other Department regulations. For example, the current Underground Storage Tank Rules, N.J.A.C. 7:14B, and the New Jersey Pollutant Discharge Elimination Rules, N.J.A.C. 7:14A, set forth detailed requirements for investigating potential discharges to ground water, that differ from current Departmental requirements as articulated in these rules. Upon the adoption of N.J.A.C. 7:26E, the Department intends to review all current technical requirements and correct any inconsistencies in future rulemaking. Rather than defer to existing programmatic rules which could be inconsistent, the Department chose to promulgate one comprehensive set of rules for the remediation of contaminated sites.

The Department notes however, that the Discharge Prevention Compensation and Control Act rules, N.J.A.C. 7:1E, Underground Storage Tank rules, N.J.A.C. 7:14B, and Treatment Works Approval rules, N.J.A.C. 7:14A-12, to which the commenters refer, focus on the prevention of discharges, and approval of construction details rather than on the requirements for remediating past discharges. For example, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11(d)3 requires an owner or operator of major facility to submit a discharge response cleanup and removal contingency plan in preparation for emergency response actions. N.J.A.C. 7:1E-4 sets forth the minimum requirements regarding what information must be in this plan. For instance, the Discharge, Cleanup and Removal plan must include a summary of the action plan used in responding to fires, explosions or discharges of hazardous substances, including the deployment of personnel and equipment (see N.J.A.C. 7:1E-4.4). N.J.A.C. 7:26E, in contrast, sets forth detailed minimum requirements for remediating already contaminated sites. Similarly, the treatment works approvals, described at N.J.A.C. 7:14A-12, detail how to build, install, modify or operate any facility for the collection, treatment or discharge of any pollutant. A treatment works approval helps ensure any ongoing discharge is regulated and treated in an environmentally appropriate manner. If a site becomes contaminated from the improper operation of a facility for which a treatment works approval has been issued, the site will be remediated pursuant to N.J.A.C. 7:26E.

134. COMMENT: Jersey Central Power & Light Company and New Jersey Natural Gas Company commented that N.J.A.C. 7:26E-1.3(c) which provides that the Department may evaluate remediation work which "commenced" prior to the effective date of the proposed regulations, is inappropriate because it is unreasonable and burdensome for the Department to be able to revisit past acceptable practice and apply current scientific knowledge. The Department seems to be saying that they are so lacking in confidence of their existing and past policies that investigations and remedial actions conducted pursuant to those policies can be evaluated whenever new rules are adopted or scientific advancements made. This provision will ultimately result in many less cleanups as the regulated community will justifiably fear that their approved remediation activities can be disallowed at any time in the future at the whim of the Department.

135. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that the implication of N.J.A.C. 7:26E-1.3(c) is that the Department may have reviewed and approved remediation prior to the effective date of these rules, but that the agency could then retroactively apply the rules to completed work.

136. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. strongly believes that N.J.A.C. 7:26E-1.3(c) is against the goals of the proposed rules: (1) The Department does not have the resources to revisit all remediated and/or closed sites; (2) Excessive financial burdens are being placed on the business community to maintain a contingency fund for the potential revisiting of remediated and/or closed sites; and (3) Guidance for scientific reevaluation of sites is not provided.

137. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that the Department indicates in N.J.A.C. 7:26E-1.3(c) that remediation efforts initiated prior to the effective date of this regulation may be subject to reevaluation by the Department to: "... determine whether or not the work was in substantial compliance with this chapter" or to ensure that the remediation adequately protects human health and the environment. The criteria for reevaluation must be clear, since prior remediation efforts may not have included administrative requirements that are now specified in this regulation. in

addition, the present wording does not preclude requiring additional remedial actions based on such issues as data presentations and format. Therefore, this section of the regulation must be constructed in a concise manner to preclude interpretation that would be costly to industry and serve no benefit to the public. Additional work should only be required where there is supportive data that demonstrates that on-site contamination poses a human health risk based on a realistic exposure/risk assessment that does not rely solely on exposure modelling data.

138. COMMENT: Altantic Electric commented that N.J.A.C. 7:26E-1.3(c) should be deleted or rewritten since the Department should not revisit sites already cleaned up or being cleaned up in accordance with current requirements, unless the Department has cause to believe that there is substantial and immediate threat to human health or the environment.

139. COMMENT: The Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E-1.3(c) should be modified because if the completed work has been accepted by the Department, then it should not be subject to further evaluation to determine if the work is in substantial compliance with this proposed rule. If a site is forever subject to evaluations as the rules change, then the Department's stated objective of predictable, consistent remediation will never be met.

140. COMMENT: The General Electric Company commented that N.J.A.C. 7:26E-1.3(c) should be revised because a private party should not be required to "reperform" a site remediation simply to eliminate deviations from the technical requirements where the deviations have no material impact on the protection of human health and the environment. These "retroactivity" provisions would dramatically increase cleanup costs, conflict with Federal environment policy, and discourage private parties from agreeing voluntarily to perform remedial work.

141. COMMENT: Mobil Oil Corporation commented that N.J.A.C. 7:26E-1.3(c) should be revised so that where Department approved remediation commenced or was completed prior to rule promulgation, the Department should not conduct an additional evaluation of the site unless there is a human health and environment based reason. If a site is subject to further evaluation as the rules change, the Department's stated objective of predictable, consistent remediation will never be met.

142. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-1.3(c) should be revised to read as follows: "This chapter is not applicable to facilities which are conducting remediation or investigations under an existing regulatory document prior to the effective day of this chapter." Facilities, which have begun investigations or remediation under an existing Administrative Consent Order, permits or other regulatory document prior to the effective date of this chapter should be able to complete the work under the existing regulatory document. It will be overly burdensome, and serve no useful purpose, to require facilities which have already begun investigation or remediation to "revisit" their site, basically restarting work from "ground zero."

143. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that N.J.A.C. 7:26E-1.3(c) should be modified so that N.J.A.C. 7:26E will not apply to sites where agreements (Administrative Consent Orders) already exist between the affected party and the Department. These previously negotiated agreements may be in various stages of completion and have been duly executed by mutual agreement; therefore, it is imperative to GRANDFATHER these sites to meet your social, economic, and environmental goals.

144. COMMENT: Colonial Pipeline Company commented that the statement "... the Department will review such work to determine whether or not the work was in substantial compliance with this chapter," is in direct conflict with the statement allowing alternative methods or use of professional judgement. There is sufficient guidance following Resource Conservation and Recovery Act, Comprehensive Environmental Response Compensation and Liability Act, and underground storage tank guidelines that if investigations/remediations follow these guidelines, additional work will not be necessary. This statement will allow the Department to arbitrarily order additional work without valid or defendable concerns.

145. COMMENT: Exxon Company U.S.A. recommended deleting N.J.A.C. 7:26E-1.3(c) because unless significant technical deficiencies develop subsequent to the execution of an Administrative Consent Order, N.J.A.C. 7:26E should not be applicable to existing site remediations.

146. COMMENT: Ciba-Geigy Corporation and Schering Laboratories commented that the requirement at N.J.A.C. 7:26E-1.3(c) to "evaluate" remediation, which has already been approved and/or is underway, "for substantial compliance" with N.J.A.C. 7:26E will slow down the process even further. The commenters proposed that any remediation plan which is approved or underway prior to the effective date of these regulations be "grandfathered," and not subject to them.

147. COMMENT: Chemical Industry Council of New Jersey and E.I. du Pont de Nemours and Company commented that N.J.A.C. 7:26E-1.3(c) should be revised as follows: "for any site at which a particular phase of remediation was commenced without Department approval, in any manner prior to the effective date of this chapter ..." because work being performed under existing agreements with the Department should be grandfathered. The proposed language ignores the often substantial technical and legal effort that has been applied at sites throughout the state. Some Administrative Consent Orders (Administrative Consent Orders) prohibit any modifications to waivers to the Order except by written amendment, duly executed by both parties. By potentially subjecting all previously executed Administrative Consent Orders to N.J.A.C. 7:26E, the Department is attempting to unilaterally amend these Administrative Consent Orders without agreement of the other parties. Administrative Consent Orders previously negotiated may now have to comply with more extensive technical studies (site investigation, remedial investigation, and feasibility studies), and remedial action requirements. Even without an Administrative Consent Order, all remedial activities that were commenced with Department approval prior to the effective date of the regulations should be grandfathered. For example, a proposed site investigation submitted by a responsible party under Environmental Cleanup Responsibility Act or Underground Storage Tank Act and approved by the Department under these programs should not be additionally subject to the technical requirements set forth in these proposed rules.

148. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following wording modifications to N.J.A.C. 7:26E-1.3(c): for any site at which investigation or remediation was commenced prior to the effective date of this chapter (without oversight and approval and where the Department has authority), the Department may evaluate and determine the acceptability of the work. Union Carbide Chemicals and Plastics Company, Inc. noted that the proposed language ignores previously executed agreements (such as Administrative Consent Orders) where the technical and or legal conditions prohibits modification without mutual agreement. The test for reevaluation should be the adequacy of the investigation and/or remedy for protection of human health and the environment. Test the results, not the method of obtaining the results. This test should have been performed when the agency approved the work. Therefore this section is unnecessary, but if included by the Department, should reflect the suggested wording.

149. COMMENT: The General Electric Company recommended that N.J.A.C. 7:26E-1.3(c), which provides that the Department may review sites at which "a particular phase of remediation was commenced prior to the effective date of this chapter ... to determine whether the work is in substantial compliance with this chapter", should be deleted. When read in conjunction with the Preamble, which provides that "[a]dditional work may be necessary ... [in connection with work initiated prior to issuance of these regulations] to ensure that the remediation adequately protects human health and the environment", these provisions make clear that the Department intends to apply N.J.A.C. 7:26E retroactively. The General Electric vigorously opposes any requirement which would require responsible parties to revise or supplement site investigations or other remedial activities which have already been completed and are sufficient to protect human health and the environment. "Reopening" completed remedial work would drastically increase cleanup costs and divert resources from sites not yet addressed, but would add little or nothing to the protection of human health and the environment. Moreover, the prospect of incurring endless future liability at each site would greatly discourage potentially responsible parties from agreeing to conduct remedial work.

RESPONSE: The Department does not believe that it is appropriate or necessary for sites to be grandfathered from the requirements of N.J.A.C. 7:26E because a party commenced work prior to the effective date of N.J.A.C. 7:26E. If an oversight document is still in effect or a site is being remediated with the Department's oversight pursuant to the Environmental Cleanup Responsibility Act or the Underground Storage Tank Act and a phase of the remediation is not yet complete, pursuant to N.J.A.C. 7:26E-1.3(c) the Department needs to be able to re-evaluate work conducted during that phase to see if it was done in substantial compliance with these rules in order to ensure protection of human health and the environment.

The Department recognizes and agrees with the need to provide certainty to the regulated community that there will be finality to a remediation phase or to an entire cleanup. However, the Department also recognizes that in limited circumstances, remediation methodologies it once considered adequate may be considered inappropriate now. In balancing the need for finality with changing science, the Department proposed N.J.A.C. 7:26E-1.3(c) which provides that the Department has the discretion to evaluate work conducted at a site during a particular phase prior to the effective date of these rules, to determine if it is in substantial compliance with these rules. The Department has limited the scope of reevaluations pursuant to N.J.A.C. 7:26E-1.3(c) to a remedial phase that is in progress if the Department is presently overseeing the work. Thus, if a party remediating a site pursuant to the Environmental Cleanup Responsibility Act submits a cleanup plan for review on the effective date of these rules, the Department will not make that party resubmit, pursuant to N.J.A.C. 7:26E-1.3(c), a preliminary assessment in accordance with N.J.A.C. 7:26E-3. The Department, however, notes that pursuant to N.J.A.C. 7:26E-1.1(c), the Department may require a party to conduct additional remediation even if the case is closed in order to protect human health and the environment.

It should be noted that the Department does not anticipate that there will be substantial differences between work conducted pursuant to an Administrative Consent Order or other oversight documents and work conducted in accordance with these rules because the technical requirements contained in this rule are not new. Rather, the Department consolidated and refined the rules, guidance and policies from its various programs when drafting these rules. These rules represent the consolidation of Division of Responsible Party Site Remediation's Remedial Investigation Guide and Cleanup Plan Guide and Administrative Consent Order technical appendices, the Bureau of Underground Storage Tank's "Scope of Work" and the Division of Publicly Funded Site Remediation's Request for Proposals.

It should also be noted that many oversight documents executed between the Department and private parties for the remediation of contaminated sites provide that the Department may require additional information during the course of the remediation. For example, N.J.A.C. 7:26C, Appendix C, Section III, paragraph 7 states: During the time the Administrative Consent Order is in effect, if the Department determines that additional remedial investigation is required, a person shall conduct additional remedial investigation as required by the Department. Provisions similar to this one have been included in standard Department Administrative Consent Orders for many years. Thus, the Department has insisted that, where appropriate, the Department can require additional work in a particular phase of the remediation even when an Administrative Consent Order is the operative document. Contrary to many of the commenter's statements, signatories to Site Remediation Program Administrative Consent Orders have already acknowledged and agreed that the Department may require additional work at any time during the remediation.

150. COMMENT: Schering Laboratories commented that the statement that the regulations do not impose any new reporting, recordkeeping or compliance requirements on small businesses is erroneous because N.J.A.C. 7:26E-1.3(c) would require closed cases to be reopened if these sites did not undergo the formal remedial investigation/feasibility study process. Schering Laboratories said the Department would be left with a severe bottleneck as old cases would be reintroduced at the beginning of the Environmental Cleanup Responsibility Act process.

RESPONSE: If a remedial action has been selected and implemented for a site, the Department will not make a party conduct a remedial alternative analysis to justify its selection of a remedial action. Thus, projects will not have to be redone, as suggested by the commenter. Moreover, the Department does not anticipate a bottleneck in the Environmental Cleanup Responsibility Act process due to old Environmental Cleanup Responsibility Act cases being reopened and reintroduced into the initial stages of an Environmental Cleanup Responsibility Act review. If a remedial action was selected and implemented, the case will not need to go through the initial stages of an Environmental Cleanup Responsibility Act review unless a new Environmental Cleanup Responsibility Act trigger pursuant to N.J.A.C. 7:26B-1.5 occurs. Even if a new trigger occurs, if there have been no new discharges at the site, the Department will be able to issue a negative declaration to the site within a short period of time.

If, however, cleanup standards applied to a closed Environmental Cleanup Responsibility Act case become more stringent by an order of magnitude or more, or if new areas of concern never previously addressed are identified, the Department will require additional remediation at a site.

151. COMMENT: E.I. du Pont de Nemours and Company commented that Department reevaluation of any remediation which was initiated prior to the effective date of this chapter pursuant to N.J.A.C. 7:26E-1.3(c) has potentially disastrous consequences for both the public and private sectors. Undertaking such an exercise would involve identifying all past remediations that have been conducted. Such a task would be impossible, because many cleanups have taken place voluntarily without being reported to the Department. If the Department were able to identify all previous remediations, then the task of evaluating their technical adequacy would begin. Since the proposed rule purports to afford flexibility in the remediation process, any valid review of previously conducted remediations would necessarily need to consider the site-specific conditions at each site to determine if deviations from the standard investigation/remediation protocol were appropriate. In situations where the Department asserted that a previously conducted remediation fails to meet the standards proposed in the subject rule, the Department would be in the position of attempting to mandate further action. This would no doubt involve legal intervention.

152. COMMENT: Mobil Oil Corporation commented that N.J.A.C. 7:26E-1.3(c) may require existing voluntarily initiated remediation projects to be evaluated under more comprehensive administrative guidelines. The financial burden that may be required to comply with these requirements wil not beneficially add to the impact of remediation. Mobil Oil Corporation recommended that unless scientifically justified, existing projects which are operating with the Department knowledge and/or approval should not be reopened. This will allow the regulated community to dedicate the limited financial resources and manpower to improve the environment rather than conduct unnecessary site investigations or administrative work which provides no increased benefits to the environment.

153. COMMENT: Tellus Environmental Consultants, Inc. commented that N.J.A.C. 7:26E-1.3(c) states that the Department may review any remediation commenced prior to the effective date of the rules but the rules fail to address exactly how this review will be conducted and specific time frames involved in this review process.

154. COMMENT: GPU Nuclear Corporation commented that the Department should indicate how far into the past the re-evaluations referenced at N.J.A.C. 7:26E-1.3(c) will occur.

RESPONSE: The Department will not revisit closed cases unless the cleanup standards used at the site have become more stringent by an order or magnitude or more, or all areas of concern at a site were not identified and addressed. N.J.A.C. 7:26E-1.3(c) provides that the Department may reevaluate any remediation phase commenced but not completed prior to the effective date of N.J.A.C. 7:26E. This section does not mean that every remediation effort begun prior to the effective date of these rules will be re-opened for scrutiny by the Department. The Department has neither the time nor the inclination to do this. Nor does this section mean that the Deprtment intends to review administrative details of each site, such as whether the format of the reports which were prepared prior to the effective date of these rules meet the current requirements. If the remediator is in the remedial investigation phase of a remediation when the rules become effective, the Department may review all work conducted in the remedial investigation phase. The Department will not now require a person to provide historical information at the site from the time the site was naturally vegetated or utilized as farmland pursuant to N.J.A.C. 7:26E-3.1(c).

155. COMMENT: American Cyanamid Company commented that the phrase "substantial compliance" used at N.J.A.C. 7:26E-1.3(c) should be defined.

156. COMMENT: Rutgers Environmental Law Clinic supported the decision by the Department to consider but not require review of previously completed cleanups at N.J.A.C. 7:26E-1.3(c), but noted that the Department must define "substantial compliance."

RESPONSE: The Department did not define substantial compliance as used at N.J.A.C. 7:26E-1.3(c) because substantial compliance with N.J.A.C. 7:26E will vary on a case-by-case basis and it is not possible to contemplate every conceivable variation of every fact pattern that might raise a question of substantial compliance with N.J.A.C. 7:26E. Ultimately, the decision will hinge on whether the Department has confidence in relying on the data generated by the investigation or cleanup to ensure the protection of human health and the environment.

For example, the Department may require additional sampling or analysis of a site if the Department finds that the number of samples taken originally is inadequate to determine the extent and/or type of contamination, or that the analysis was conducted without proper quality assurance/quality control.

It appears that Rutgers Environmental Law Clinic has misinterpreted N.J.A.C. 7:26E-1.3(c). This section does not pertain to previously completed cleanups, only those that have not yet been completed. The Department does not intend to review all completed cleanups subsequent to the effective date of these rules. However, if it comes to the Department's attention, the Department will require additional remediation where a cleanup has been "completed" if the cleanup standards change by an order of magnitude, or areas of concern were not originally addressed. For further discussion of this issue, please see the Department's responses to comments on N.J.A.C. 7:26E-1.1(c).

157. COMMENT: Rutgers Environmental Law Clinic commented that N.J.A.C. 7:26E-1.3(c) should be revised so that the Department is required to determine substantial compliance for all remediation projects which have not been completed on the effective date of these regulations. A separate regulation should be proposed including criteria for determining substantial compliance with the new regulations for all pending projects.

RESPONSE: The Department does not believe that a new regulation should be proposed that would detail the criteria the Department would use for determining substantial compliance with N.J.A.C. 7:26E for all pending cases. Furthermore, the Department does not believe that N.J.A.C. 7:26E-1.3(c) should be broadened so that the Department will be required to review all closed and pending phases in a case. The Department does not anticipate that there will be substantial differences from work conducted with Department oversight prior to these rules because for the most part, the technical requirements contained in this rule are not new. Rather, the Department consolidated and refined the rules, guidance and policies from its various programs when drafting these rules. These rules represent the consolidation of Division of Responsible Party Site Remediation's Remedial Investigation Guide and Cleanup Plan Guide and Administrative Consent Order technical appendices, the Bureau of Underground Storage Tank's "Scope of Work" and the Division of Publicly Funded Site Remediation's Request for Proposals.

N.J.A.C. 7:26E-1.4

158. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that the Department states that it is necessary to proceed with a "bias for action" to expedite any steps necessary and/or possible to contain or stabilize the contamination before initiating long-term remedial activities. This "bias for action" mandate is directly contradicted by the Department's notification requirement at N.J.A.C. 7:26E-1.4(a) that "prior to the start of any remediation at a site pursuant to this chapter, the person responsible for implementing the remedial action shall notify the Department in writing." The overall burdensome requirements detailed in these rules will eliminate any "bias for action" which exists among the regulated community.

159. COMMENT: Atlantic Electric commented that there must be de minimis exemptions to the notification requirements at N.J.A.C 7:26E-1.4. It is unwise and defeats the intent for a timely response to delay or stop a cleanup crew from conducting a small oil release (few gallons) remediation in order to comply with this section.

160. COMMENT: Public Service Electric & Gas Company commented that in the case of emergency response actions or specific discharge events, supplying the written notification specified at N.J.A.C. 7:26E-1.4 is redundant with the existing Discharge Prevention Compensation and Control or Underground Storage Tank regulations. Both programs require phone notification to the Department Hotline with pertinent site and discharge information. Such phone notification should be sufficient in the case of specific discharge events where the contaminant is known, contamination is visible, limited in areal extent, not in contact with groundwater, where remediation is verifiable by field analysis and is immediately cleaned up. Public Service Electric & Gas Company also noted that preparing written notification would delay initiation of emergency response actions. Public Service Electric & Gas Company proposed the addition of a subsection providing for notification to the Department by phone to the Department Hotline (609) 292-7172 in the case of all specific discharge events and especially where the contaminant is known, contamination is visible, limited in areal extent, not in contact with groundwater and where remediation is verifiable by field screening.

161. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-1.4 should be deleted because these requirements are included in N.J.A.C. 7:26C. N.J.A.C. 7:26E sets forth technical requirements and, thus, should not include regulatory notification requirements. Additionally, N.J.A.C. 7:26E-1.4 implies that facilities conducting work at risk must also meet this notification requirement. If this is true, this will serve as a disincentive for conducting at-risk work.

162. COMMENT: Jersey Central Power & Light Company commented that N.J.A.C. 7:26E-1.4 is inconsistent with the Department's premise that many remediations may occur without Department oversight. In addition, this provision contradicts the requirement of Spill Act to immediately address discharges.

163. COMMENT: Exxon Company U.S.A. commented that the requirement of N.J.A.C. 7:26E-1.4 conflicts with the requirements defined in section N.J.A.C. 7:26E-1.3(a) and 1.6(a) and the preamble to the proposed rules, which allow for "at risk" work. A person should be able to initiate an investigation and/or remediation without Department oversight, realizing that the Department may reject any findings which do not follow N.J.A.C. 7:26E, when promulgated.

164. COMMENT: Chemical Industry Council of New Jersey and E.I. du Pont de Nemours and Company commented that the notification requirement at N.J.A.C. 7:26E-1.4 appears to be inconsistent and duplicative of the requirements in N.J.A.C. 7:26C, Procedures for Department Oversight of the Remediation of Contaminanted Sites. The relationship between these two proposed regulations is unclear. N.J.A.C. 7:26C implies that all parties wishing to undertake remediation activities at a site are required to execute an oversight document with the Department prior to initiating that effort. Therefore the Department would already be aware of the remediation activities and notification under N.J.A.C. 7:26E-1.4 would be duplicative.

165. COMMENT: GPU Nuclear Corporation commented that it is unclear the affect that the notification requirement at N.J.A.C. 7:26E-1.4 will have on the regulated community's responsibility under N.J.A.C. 7:1E-5.7. N.J.A.C. 7:1E-5.7 requires that "Any person responsible for a discharge shall take immediate action . . . to contain, mitigate, cleanup and remove the discharge . . .". Under this regulation the responsible party is required to act immediately; however, under N.J.A.C. 7:26E-1.4(a) the responsible party must first submit a written notification before initiating a response. There appears to be a conflict between these two requirements.

166. COMMENT: New Jersey Natural Gas Company commented that N.J.A.C. 7:26E-1.4 is inconsistent with the Department's premise that many remediations may occur without Department oversight. In addition, this provision contradicts the requirement of the Spill Act to immediately address discharges.

RESPONSE: The notification requirements at N.J.A.C. 7:26E-1.4 are for informational purposes. Often the Department receives inquiries from the public as to remediation activities that are ongoing in their area (for example, questions regarding why wells are being sampled at a certain location). To be able to respond to these inquiries, the Department needs to be kept informed of such work, especially if it is being done without Department oversight. N.J.A.C. 7:26E-1.4 was not in any way intended to delay any action which needs to be taken on an emergency basis. To clarify this, the Department has added a new N.J.A.C. 7:26E-1.4(b) so that telephone notification to the Department hotline with written confirmation of the notification will satisfy the notification requirements of N.J.A.C. 7:26E-1.4. Therefore, if stabilization is required at a site, the person conducting the remediation merely has to comply with the notification requirements of N.J.A.C. 7:1E.

N.J.A.C. 7:26E-1.4 applies to all remediations, whether or not being conducted under Department oversight. It should not serve as either an incentive or disincentive to conduct cleanups since it is merely a notification to the Department that an environmental cleanup will be conducted at a site, not a mechanism for requesting Department oversight.

To ensure that the notification requirements at N.J.A.C. 7:26E-1.4 are not duplicative of other regulations, the Department has modified N.J.A.C. 7:26E-1.4(a). A person conducting sampling activities does not need to notify the Deparment pursuant to N.J.A.C. 7:26E-1.4, if that person has already notified the Department that remediation activities are being conducted at the site pursuant to another Department regulatory program. Similarly, a person conducting the remediation need

only notify the Department prior to the implementation of a remedial action pursuant to N.J.A.C. 7:26E-1.4 if the selected remedial action is a permanent remedy as described at N.J.A.C. 7:26E-5.1(c) and the Department is not overseeing the remediation. A party need not separately notify the Department, pursuant to N.J.A.C. 7:26E-1.4, that it is implementing a nonpermanent remedy because pursuant to N.J.A.C. 7:26E-6.1(b), the Department will be notified of this remedy selection because the Department will have to approve it prior to implementation.

Atlantic Electric requested a de minimis exemption from the requirements of N.J.A.C. 7:26E-1.4. A small oil release would be required to be reported to the Department pursuant to N.J.A.C. 7:1E. However, if the spill was reported to the Department pursuant to N.J.A.C. 7:1E, under the changes to the regulations eliminating duplicative reporting, the spill would not have to be reported pursuant to N.J.A.C. 7:26E-1.4. Therefore, there is not need for a de minimis exemption.

Chevron suggested that N.J.A.C. 7:26E-1.4 be deleted from the Technical Requirements for Site Remediation because the requirement to notify is not a technical requirement. The Department recognizes that the notification requirements of N.J.A.C. 7:26E-1.4 are not technical; however, the Department believes that the requirements are essential for the site remediation program. The Department, as an administrative agency, must be able to communicate effectively on matters pertaining to site remediation work in the State. Subchapter 1 of N.J.A.C. 7:26E codifies the administrative requirements of the Technical Requirements for Site Remediation; thus, as N.J.A.C. 7:26E-1.4 is an administrative requirement, it will be adopted in subchapter 1.

167. COMMENT: The General Electric Company suggested that the Department revise N.J.A.C. 7:26E-1.4(a) to exclude from the notification requirement all records searches, background investigations and routine "due diligence" activities which are included in the definition of "remediation."

168. COMMENT: Jersey Central Power & Light Company, E.I. du Pont de Nemours and Company, Chemical Industry Council of New Jersey, New Jersey Natural Gas Company commented that N.J.A.C. 7:26E-1.4(a) is confusing in that it requires written notification to the Department prior to the start of "any remediation" at a site by the person responsible for the "remedial action." The definition of remediation is broader than remedial action and includes preliminary assessments (for example, records review) and site investigation/sampling work. Does N.J.A.C. 7:26E-1.4(a) require notification prior to conducting a preliminary assessment or site investigation?

169. COMMENT: Allied Signal, Inc. commented that under the definition of remediation, the rule at N.J.A.C. 7:26E-1.4(a) would require notification for any activity, including unobtrusive activities like file searches. This requirement will be extremely burdensome for the regulated community and the Department, which will have to manage the large amount of information. The Department should review all activities and provide an exemption for those which notification is not necessary. Examples of two activities that should be exempted are file searches and preliminary field screening activities.

RESPONSE: The Department agrees that the use of "remediation" and "remedial action" at N.J.A.C. 7:26E-1.4 is confusing. The intent of N.J.A.C. 7:26E-1.4 is that the Department be notified prior to the onset of any remediation activities involving field work and the implementation of remedial actions. N.J.A.C. 7:26E-1.4 has been modified to clarify this.

170. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that as proposed in N.J.A.C. 7:26E-1.4, the Department would be required to act upon environmental actions of nearly every sort, which would add unnecessary work to agency staff. Examples of unnecessary notifications include due diligence searches prior to property transactions, and investigations of possible leaks or spills. As written, a site owner would be prohibited from obtaining aerial photographs of his site to determine site industrial history without first notifying the Department, even for a clean site with no actions under direct Department authority. This may be beyond the statutory authority of the Department. The revised rule should include only actions which are under its jurisdiction. Union Carbide Chemicals and Plastics Company, Inc. suggested the following wording modifications: "(a) Prior to the start of any remediation under the jurisdiction of the Department through those Acts listed at 7:26E-1.3 Applicability (a), the person responsible for implementing the remedial action shall notify the Department in writing and include the following information . . ."

RESPONSE: As modified, N.J.A.C. 7:26E-1.4 only requires notification to the Department of any remediation which involves field activities. Therefore, if a due diligence search is being done prior to property transaction, but is not being done as part of remediation activities pursuant to these regulations, then there is no requirement to notify the Department. The notification does not mean that the site will automatically come under Department oversight. Department oversight can only be accomplished through the Oversight Rules, N.J.A.C. 7:26C, or some other regulatory program such as Underground Storage Tank or Environmental Cleanup Responsibility Act.

N.J.A.C. 7:26E-1.5

171. COMMENT: The General Electric Company, Exxon Company, U.S.A., Public Service Electric & Gas Company, and Atlantic Electric suggested that the certification requirements at N.J.A.C. 7:26E-1.5 are inconsistent with other Department rules and that all Department certifications should be consistent.

RESPONSE: The Department agrees with the commenters that certification requirements are more appropriately specified within the specific Departmental regulatory programs. Documents prepared pursuant to N.J.A.C. 7:26E will be submitted to the Department pursuant to the regulatory program such as the Oversight Rules, N.J.A.C. 7:26C, the Environmental Cleanup Responsibility Act, N.J.A.C. 7:26B, or the Underground Storage Tank Rules, N.J.A.C. 7:14B. All three of these regulatory programs detail how documents are to be certified. Rather than repeat the certification language at N.J.A.C. 7:26E-1.5 on adoption the Department has modified this section and referred the regulated community to certification requirements in other rules.

172. COMMENT: The General Electric Company, Jersey Central Power & Light Company, Public Service Electric & Gas Company, Atlantic Electric, Colonial Pipeline Company, New Jersey Natural Gas Company, Mobil Oil Corporation, Exxon Company U.S.A., Union Carbide Chemicals and Plastics Company, Inc., E.I. du Pont de Nemours and Company, Chevron U.S.A., Inc., and the Chemical Industry Council of New Jersey all commented that the certification language at N.J.A.C. 7:26E-1.5 should be deleted or significantly modified.

RESPONSE: The Department has not adopted the specific language for certifications at N.J.A.C. 7:26E-1.5. Therefore, it is not necessary for the Department to respond to specific comments about the language. The Department refers these commenters to the response to comments on the Oversight Rules, 25 N.J.R. 2002(a), for further discussion of the certification language.

N.J.A.C 7:26E-1.6

173.COMMENT: Atlantic Electric and Hackensack Water Company commented that in general, the Department needs to clarify the relationship between N.J.A.C. 7:26C, 7:26D, and 7:26E. For example, in subsection N.J.A.C. 7:26E-1.6(a), it states that all work conducted "whether or not being done with Department oversight . . ." and in N.J.A.C. 7:26C, it is implied that all parties wishing to undertake remediation activities at a sight are required to execute an oversight document with the Department prior to conducting remediation. If the latter is the case, then the notification in the Rule at N.J.A.C. 7:26E-1.4 is duplicative and burdensome.

RESPONSE: Unless the site is a Department priority site for which the Department requires the person conducting remedial activities to execute an administrative consent order pursuant to N.J.A.C. 7:26C, a person conducting remedial activities is not required by N.J.A.C. 7:26E or 7:26C to enter into an oversight document with the Department. It is only when the person conducting remedial activities wishes or is required to obtain review and/or approval of the work being done at the site that an oversight document is required. For example, if a lending institution requires a potential mortgagor to get Department "sign-off" on a preliminary assessment and site investigation, the person conducting remedial activities would have to enter into a memorandum of agreement with the Department. The memorandum of agreement would contain the schedules for when the various workplans (if required) and reports would have to be submitted. If any person conducting remedial activities chooses a nonpermanent remedy, the Department would have to approve the remedy prior to its implementation pursuant to N.J.A.C. 7:26E-6.1(b)1. Therefore, the person conducting remedial activities would have to enter into an oversight document prior to the implementation of the remedial action. Since the Department did not adopt N.J.A.C. 7:26D, it is not necessary to clarify the relationship between that rule, N.J.A.C. 7:26E and 7:26C.

174. COMMENT: Hackensack Water Company commented that a new provision at N.J.A.C. 7:26E-1.6 should be added which would pertain

to all reporting requirements, and allow the Department the discretion to determine what information would be needed up to and including the types of information set forth in each reporting requirement obligation. Hackensack Water Company noted that each phase of remediation has its own, voluminous, often duplicative and minutely detailed set of reporting requirements. While Hackensack Water Company agreed that the technological requirements of remediation should be uniform and specific, the documentation requirements need not be.

175. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-1.6(a) should be revised to read as follows: "All work be conducted at a site pursuant to this chapter shall be documented and included in reports which follow the general format and contain the relevant information required pursuant to the reporting sections . . .".

176. COMMENT: Exxon Company U.S.A. commented that the proposed documentation requirements at N.J.A.C. 7:26E-1.6 are very onerous. While acknowledging a need for a general format, Exxon Company U.S.A. urged the Department to simplify and consolidate these requirements to that which is absolutely needed. As written, it appears that all consultants, laboratories and property owners will have to revise their standard presentations to conform and, if they don't, the entire sampling and analysis can be thrown out by the Department.

177. COMMENT: Exxon Company U.S.A. commented that to provide more flexibility and to reflect the idea that non-Environmental Cleanup Responsibility Act investigations only address specific discharges, the word "general" should be inserted before "format" and "applicable" before "information."

RESPONSE: The Department believes that the requirements in N.J.A.C. 7:26E-1.6(a) are reasonable, and will allow for a more efficient submittal and review of each document. For example, a site investigation report for a single discharge event need only contain a brief technical overview, a "findings" section, a map of the area, and applicable supporting data. The presentation need not be complicated, and, in fact, the Deprtment prefers concise reports.

To alleviate any duplicative reporting requirements, the Department has modified N.J.A.C. 7:26E-1.6(a) to allow a report summary to be submitted when a report has been previously provided to the Department. The rule has also been modified in several places, such as N.J.A.C. 7:26E-3.10(c), 4.9(c)4 and 4.9(c)6, to clarify that the Department will only require submittal of only the "applicable" information. For example, N.J.A.C. 7:26E-4.9(c)6, as proposed, required the inclusion of "All soil boring, piezometer, and monitoring well records, including the State permit numbers and as-built specifications, if applicable" in the remedial investigation report. The Department recognizes that if site conditions did not warrant the installation of monitoring wells that the inclusion of monitoring well records, State permit numbers and as-built specifications in the remedial investigation report would be impossible. Therefore, the Department has clarified N.J.A.C. 7:26E-4.9(c)6 on adoption by adding the term "if applicable" to this requirement.

The Department does not agree that N.J.A.C. 7:26E-1.6 should be modified by inserting the word "general" before "format" and "relevant" or "applicable" before information. A standard report format has been outlined to allow the Department to expend the least amount of resources possible to conduct efficient review of the documentation. The Department believes that consultants, laboratories and property owners can easily revise their standard presentations to meet the reporting requirements of these rules. Requiring all reports to be submitted following the format prescribed by the reporting requirements of these rules will expedite the Department's review process, thus allowing cases to be processed in a more efficient manner. Further, all of the information required pursuant to the reporting sections of N.J.A.C. 7:26E-2 through 7 is relevant to the remediation and, thus, needs to be reported.

178. COMMENT: Exxon Company U.S.A. commented that the Department should delete ". . . (see N.J.A.C. 7:26E-1.3 above) . . ." and replace it with "(pursuant to N.J.A.C. 7:26C)" at N.J.A.C. 7:26E-1.6(b) so that the language is not contradictory.

RESPONSE: N.J.A.C. 7:26E-1.3(b) and 7:26E-1.6(b) do not contain contradictory requirements. Rather, they are complementary sections. N.J.A.C. 7:26E-1.3(b) explains that if a person conducting remedial activities wants to or is required to obtain Department oversight of remediation activities being conducted at a site, that oversight will be provided pursuant to an oversight document which the person conducting remedial activities executes with the Department, or pursuant to Environmental Cleanup Responsibility Act or Underground Storage of Hazardous Substances Act, if applicable. N.J.A.C. 7:26E-1.6(b) references that if remediation activities will be conducted with Department oversight, the schedules for submitting the required workplans and reports shall be specified in the oversight document or shall be submitted pursuant to program requirements (whichever is applicable).

179. COMMENT: New Jersey Natural Gas Company asked what the implications of the Department reviewing documentation for alternate sampling, analytical or investigatory methods "at a later time when the site becomes a Department priority for site remediation" are as stated in N.J.A.C. 7:26E-1.6(c)2.

180. COMMENT: Jersey Central Power & Light Company commented that N.J.A.C. 7:26E-1.6(c)2, which provides that the Department will review documentation for alternate sampling, analytical or investigatory methods "at a later time when the site becomes a Department priority for site remediation" indicates that the Department will not review any submittals unless an oversight document (Memorandum of Agreement or Administrative Consent Order) is executed. The Department should clarify whether an oversight document is a requirement for report review.

181. COMMENT: Exxon Company U.S.A. commented that while N.J.A.C. 7:26E-1.6(c) attempts to provide flexibility in allowing alternative investigatory approaches to be submitted, the details of the procedure at N.J.A.C. 7:26E-1.6(c)2 indicate that the Department will conduct a second review upon receipt of the investigatory report and at that time determine if the alternative approach is satisfactory. The end result is that the State's initial review is meaningless and the use of alternative approaches is entirely at the risk of the property owner.

182. COMMENT: Chemical Industry Council of New Jersey commented that the requirement at N.J.A.C. 7:26E-1.6(c)1ii, where the Department reviews and approves the alternate method, will inhibit the responsible party's ability to independently implement alternate methods. CIC/NJ recommended revising this section to: (ii) The Department reviews and approves the alternate method, when the work is conducted with Department oversight.

183. COMMENT: Wheaton Industries, Inc. commented that tying flexibility in voluntary remediation to Department approval of alternate methods at N.J.A.C. 7:26E-1.6(c) can considerably limit the usefulness of that flexibility because of (1) the time that often is required to obtain such approval and (2) the detrimental impact that such delays can have on conducting the business transactions with which environmental investigation or cleanup may be associated. Indeed, this flexibility requires time and attention from the Department and offsets some of the benefits intended for the Department from broadened use of voluntary cleanups.

184. COMMENT: E.I. du Pont de Nemours and Company commended the Department for recognizing the need for flexibility in the remediation process, but expressed concern that the Department appears to be limiting that flexibility without promulgating any substantive technical or administrative bases for that limitation. E.I. du Pont de Nemours and Company said that the Department should either propose a clear basis for limiting flexibility for public review and comment or allow flexibility in all remediation efforts based on site-specific conditions. Departmental review and approval should only be required when a remediation is performed with Departmental oversight.

RESPONSE: Alternate investigatory approaches may be used by any person conducting remedial activities without prior Department approval in certain limited situations pursuant to N.J.A.C. 7:26E-1.6(c). The intent of N.J.A.C. 7:26E-1.6(c) is to add additional flexibility to the rules by allowing any person conducting remedial activities to use methods other than those prescribed by the rules in certain limited situations, such as N.J.A.C. 7:26E-2.1(a)4 and 3.9(b)2ii, without obtaining prior Department approval. All of the limited situations to which N.J.A.C. 7:26E-1.6(c) apply are specifically identified in subchapters 2 through 6. For example, N.J.A.C. 7:26E-2.1(a)4 allows for the use of analytical methods other than those listed in the regulations without first obtaining the Department's approval to do so if the person conducting remedial activities documents the reason for using the alternative analytical method pursuant to N.J.A.C. 7:26E-1.6(c). These limited situations are those in which alternate technologies are already in wide use, such as field sampling and field analytical methods.

If the alternate method is being conducted pursuant to an oversight document, any deviation from the rules will be addressed through workplan and reports submitted to that oversight document. However,

if an alternate method is used pursuant to N.J.A.C. 7:26E-1.6(c) and the remediation is not being conducted with Department oversight or prior approval, any person conducting remedial activities has to document the reason for using an alternate method so that when the site is reviewed by the Department through an oversight document, the Department will be able to review all the reports which were required to be kept while the remediation activities were ongoing, including the documentation required pursuant to N.J.A.C. 7:26E-1.6(c). At that time, the Department will either approve the report(s), thus accepting the remediation activities conducted previously by the person responsible for conducting the remediation, or reject the report(s), either, in whole or in part, thus requiring the person conducting remedial activities to conduct additional remediation activities at the site.

The Department provides substantive criteria by which it will determine whether or not it will approve the alternate method used during the remediation in N.J.A.C. 7:26E-1.6(c)3. Ultimately, the Department's determination that an alternate method was appropriate will depend on whether or not the Department can make the determination that the cleanup adequately protects human health and the environment.

Exxon Company U.S.A. and Chemical Industry Council of New Jersey appear to have misunderstood the procedure for using an alternate method pursuant to N.J.A.C. 7:26E-1.6(c). The Department will only review and approve or reject the use of an alternate method by the person conducting remedial activities once. The review will take place either when the site becomes a Department priority and comes under the direct oversight and scrutiny of the Department, or, if any person conducting remedial activities at a non-priority site requests Department review. If any person conducting remedial activities requests Department review, the person conducting remedial activities must execute an oversight document, such as a memorandum of agreement, with the Department pursuant to N.J.A.C. 7:26C. The person conducting remedial activities may choose the level of Department oversight it wishes to have for a non-priority site. It can range from having the Department review and comment only on the appropriateness of the use of the alternate method to a review of the entire remedial action report. If the person conducting remedial activities obtains the Department's approval through a Memorandum of Agreement, the Department will not review the appropriateness of the use of the alternate method again when the site does become a Department priority.

185. COMMENT: Exxon Company U.S.A. recommended deleting "... the Department has identified certain limited ..." at N.J.A.C. 7:26E-1.6(c) as the Department has not provided this information; and rewording N.J.A.C. 7:26E-1.6(c), as follows: "Certain situations exist when alternate sampling, analytical or investigatory methods may be used."

186. COMMENT: E.I. du Pont de Nemours and Company and the General Electric Company commented that the Department has not defined the "certain limited situations" where alternate methods may be applied at N.J.A.C. 7:26E-1.6(c), and therefore does not provide the regulated community adequate opportunity for review and comment. As written, this section may allow for arbitrary decision making on the part of the Department.

RESPONSE: The Department agrees with the commenters that the language in N.J.A.C. 7:26E-1.6(c) was unclear as to when alternate methods may be used. N.J.A.C. 7:26E-1.6(c) has been modified on adoption to include language which clarifies that the limited situations when alternate sampling, analytical, or investigatory methods may be used are specified throughout the rule.

187. COMMENT: Exxon Company U.S.A. commented that the Department should be commended for allowing use of state-of-the-art scientific information at N.J.A.C. 7:26E-1.6(c).

RESPONSE: The Department appreciates the support for this approach.

188. COMMENT: The General Electric Company commented that if the Department intends to encourage private parties to conduct remediation without prior Department approval, the regulations should provide assurances that the Department will not subsequently disallow the alternate procedures pursuant to N.J.A.C. 7:26E-1.6(c)3 unless those procedures lack a sound technical basis and are insufficient to protect human health and the environment. Within these constraints, private parties should be allowed to develop alternate procedures based on either site-specific factors or new scientific methods.

189. COMMENT: Allied Signal, Inc. commented that the concept at N.J.A.C. 7:26E-1.6(c) of performing work without direct Department involvement at the time, when the Department has the right to review the work later, is very risky. Specific limitations to such "after-the-fact" reviews should be specified so that the person conducting the remediate activity can proceed with a fair understanding of the potential ramifications. Secondly, there are no clear rules for reviewing remedial actions previously completed. Until the inadequacy of completed actions is identified as a real concern, the commenter recommended that this language be deleted from the proposed rule. The action limits proposed under the proposed Site Cleanup Standards are very conservative. Thus, it is doubtful that cleanups conducted pursuant to those standards will require future reviews.

RESPONSE: N.J.A.C. 7:26E-1.6(c)3 provides the criteria the Department will use to determine if the alternate method used by a person conducting remedial activities pursuant to N.J.A.C. 7:26E-1.6(c) was appropriate.

The Department will not disapprove an alternate method employed pursuant to N.J.A.C. 7:26E-1.6(c) upon its subsequent review unless the alternate method used lacks sound technical basis and is insufficient to protect human health and the environment.

N.J.A.C. 7:26D has not been adopted. Until remediation standards are adopted, the Department will be making determinations as to what the applicable remediation standard is on a case by case basis. The Department only intends to re-evaluate sites which have been previously remediated if the applicable remediation standard has changed by an order of magnitude or greater, thus posing a possible threat to human health and the environment.

190. COMMENT: Atlantic Electric requested that the Department place a 30-day time limit on Department reviews where the Department is obligated to provide a response to a review of alternate methods at N.J.A.C. 7:26E-1.6(c)2. This will help voluntary remediation, since the regulated community will get answers to its requests in a timely manner rather than dragging remediations out due to delays associated with Department review and response.

191. COMMENT: E.I. du Pont de Nemours and Company and Chemical Industry Council of New Jersey commented that reviewing documentation "at a later time when the site becomes a Department priority ..." as stated in N.J.A.C. 7:26E-1.6(c)2 is likely to cause the regulated community to delay remediation activities until that time, preventing voluntary remediation. If the regulated community is to undertake remediation voluntarily, it needs some assurance that its actions will satisfy the Department. Less than timely review of documentation to use alternate methodologies in remediation will cause the regulated community to delay activities until the Department reviews and approves the alternate method. E.I. du Pont de Nemours and Company and Chemical Indsutry Council of New Jersey suggested that the Department modify this section as follows: "The Department will review the documentation, either as part of the Department's oversight during remediation or in a timely manner when any person responsible for conducting remediation requests Departmental review and approval."

192. COMMENT: Chevron U.S.A, Inc. commented that N.J.A.C. 7:26E-1.6(c)2 should be revised to read "... the Department will review the documentation within 45 days of its receipt." The Department should be required to review a request for an alternate method in a timely manner. If not held to reasonable turn-around time, then a cleanup or investigation would be held up by the Department pending its review. Unless this provision is included in the proposed regulations, alternate method selection will, by default, not occur.

193. COMMENT: Mobil Oil Corporation suggested that the Department must approve or identify why the request for approval of an alternate method as per N.J.A.C. 7:26E-1.6(c) has been denied within 60 days. If the Department does not respond within 60 days, the documentation should be deemed approved. Mobil Oil Corporation noted that the Department should be obligated to review documentation no matter what the priority is.

194. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested wording modifications at N.J.A.C. 7:26E-1.6(c)2 as follows: "The Department will review the documentation, as part of the Department's oversight during the remediation." A responsible party who wishes to use an alternate methodology may also request a timely review and approval by the Department. Previously approved alternate methods will be automatically allowed for use in any remediation activity with similar site-specific conditions. Union Carbide Chemicals and Plastics Company, Inc. noted that parties need to know the agency

position on alternate methods before execution. Placing the acceptance of technical work at risk of rejection after completion is an undue burden on responsible parties.

195. COMMENT: Chevron U.S.A., Inc. commented that while the regulations allow a person to petition for exemptions or alternate requirements, they are only allowed in very limited circumstances. Because of the stringent and overly broad requirements, most persons will be routinely forced to request exemptions or alternate methods due to site specific circumstances. All requests for exemptions or alternate methods must be submitted in writing and approved by the Department. This will lead to long delays, increased paper work, increased costs and greater inefficiencies in the remediation process for no added benefit to human health or the environment. This process is especially burdensome to facilities undertaking at-risk remediation or those subject to a memorandum of agreement. In both instances an active case manager may not be available to review these requests.

RESPONSE: The commenters appear to have misunderstood the intent of N.J.A.C. 7:26E-1.6(c). The intent of N.J.A.C. 7:26E-1.6(c) is to allow remediation to proceed using a method other than that which is prescribed by the regulations without obtaining the prior approval of the Department in certain limited situations which are specified in the rules. In this way, the person conducting remedial activities may proceed in the remediation without the delay of awaiting Department review and approval. The Department believes that the criteria listed in N.J.A.C. 7:26E-1.6(c)3 are specific enough to provide any person conducting remedial activities with a reasonable degree of certainty that, if the criteria are followed, the alternate method employed will be approved. However, if any person conducting remedial activities wants absolute certainty that the alternate method which it wishes to employ at the site will be deemed appropriate by the Department, then that person may request that the Department review the alternate method prior to its being implemented by entering into a memorandum of agreement pursuant to N.J.A.C. 7:26C. The schedule for submission of documents and review times are addressed in the context of the negotiation and implementation of the memorandum of agreement. The length of time to review a document is dependent, among other factors, on the nature and quality of the submittal. Therefore, a single time frame for review cannot be established in the rule. This is supported by the three different time frames recommended by the commenters.

196. COMMENT: Allied Signal, Inc. recommended that the Department make the commitment to review, in at least a preliminary fashion, any proposed alternative methods. In this way, the person performing the work can learn ahead of time if there are any significant difficulties with the proposed approach. Also, this change will foster greater innovation and use of new and better sampling and analytical methods.

197. COMMENT: Chemical Land Holdings, Inc. commented that faced with the prospect of complying with the exorbitant requirements for environmental sampling, many firms with more than an absolute minimum number of areas of concern will undoubtedly seek the Department's review and approval of alternate sampling plans at N.J.A.C. 7:26E-1.6(c). Given the risks associated with proceeding in advance of such review and approval, may of these firms will be reluctant to begin any investigative work without the Department's blessing.

198. COMMENT: Schering Laboratories commented that according to N.J.A.C. 7:26E-1.6(c), a responsible party must go through the technical requirement process (preliminary assessment, site investigation, remedial investigation) before obtaining an exception to N.J.A.C. 7:26E. This does not make sense. Schering Laboratories proposed that the Department should approve of the deviation before remedial work begins. Another acceptable alternative is to allow a Professional Engineer to certify the exception.

199. COMMENT: E.I. du Pont de Nemours and Company commented that the mechanism required for documenting compliance and using alternate methods at N.J.A.C. 7:26E-1.6 are highly restrictive and inflexible; that they will not only fail to encourage voluntary remediation but will also delay the remediation process.

RESPONSE: In response to comments to add greater flexibility into these rules, the Department has added a new provision at N.J.A.C. 7:26E-1.6(d) which allows for a person conducting remedial activities to petition the Department for a variance from any provision of N.J.A.C. 7:26E and/or request the use of an alternate method in lieu of what is prescribed by the rules. This new provision may be applied to any section of the rules but it requires the Department's approval before it can be implemented. N.J.A.C. 7:26E-1.6(d) differs from N.J.A.C. 7:26E-1.6(c) in that N.J.A.C. 7:26E-1.6(c) can only be applied in certain limited situations but may be implemented without the Department's prior approval. For example, any "generally acceptable" alternate ground water sampling method may be used without Department pre-approval pursuant to N.J.A.C. 7:26E-1.6(c) because the Department anticipates that, in most cases, the method selected will be appropriate. However, a proposal to use a single well to determine if ground water has been impacted from five areas of concern instead of a well for each area, would require Department pre-approval pursuant to N.J.A.C. 7:26E-1.6(d) because the Department is concerned that an inappropriate degree of latitude may be used to reduce the number of ground water sampling points required to adequately investigate a site.

N.J.A.C. 7:26E-1.6(d)1 lists the information which must be included in a complete petition for a variance request. This information includes such things as the location of the site and the name and address of the person submitting the petiton as well as a description of the site specific conditions and the technical basis for requesting the variance. The information required by N.J.A.C. 7:26E-1.6(d)1 is necessary to evaluate whether or not the site meets the substantive criteria for approving the alternate method which is referred to in N.J.A.C. 7:26E-1.6(d)2. In order to ensure consistency in deciding when to approve an alternate method regardless of whether or not it is pursuant to N.J.A.C. 7:26E-1.6(d) or 1.6(c), the substantive criteria in N.J.A.C. 7:26E-1.6(d)2 is the same as the criteria used to evaluate whether or not to approve an alternate method pursuant to N.J.A.C. 7:26E-1.6(c)3.

Timeframes for submission of documents required at N.J.A.C. 7:26E-1.6(d) are established in either an oversight document or by the regulatory program providing oversight for the variance. The length of time to review a document is dependent, among other factors, on the nature and quality of the submittal. Therefore, a single time frame for review cannot be established in the rule.

In response to Schering Laboratories' proposed language, Professional Engineer certification should not constitute automatic approval for the use of alternate method because the Professional Engineer may not have expertise with the method in question.

200. COMMENT: The General Electric Company commented that N.J.A.C. 7:26E-1.6(c) should be amended to make clear that alternate approaches may be adopted, as appropriate under N.J.A.C. 7:26E-1.6(c)3, with respect to any step or phase of the site investigation or remediation, including the full range of remedial activities. Also, a party should be able to select an alternate procedure based on the development of scientific methods as well as site-specific factors.

RESPONSE: The rule as written already contains the flexibility that the General Electric Company seeks. The Department has added additional flexibility at N.J.A.C. 7:26E-1.6(d). Further, N.J.A.C. 7:26E-1.6(c) does apply to the full range of remedial activities. N.J.A.C. 7:26E-1.6(c)3 states that an alternate method will be evaluated based on the site specific conditions in terms of the scientific factors enumerated in N.J.A.C. 7:26E-1.6(c)3i through vi.

201. COMMENT: Environmental Liability Management, Inc. commented that to facilitate and encourage the use of alternates, minimize the time spent by the Department in reviewing documents and shorten the time a property owner must spend in the remedial process, the following changes to N.J.A.C. 7:26E-1.6(c) should be made: For an alternative methodology that has been used successfully at a site where there was Federal or State regulatory oversight, review and approval by the Department of that methodology is not required. For an alternative methodology that the Department has previously approved, review and approval by the Department of that methodology is not required.

202. COMMENT: E.I. du Pont de Nemours and Company and Chemical Industry Council of New Jersey commented that the Department should allow for grandfathering of alternate methods by adding the following at N.J.A.C. 7:26E-1.6(c)4. "An alternate sampling, analytical, or investigatory method that has been previously approved by the Department or Environmental Protection Agency for other similar site-specific conditions or situations will automatically be allowed for use in any remediation activity. Department review and approval of the alternate methods is not required in these cases." This modification recognizes that the field of remediation is relatively young in terms of science and engineering applications. Methods will, as they have in the past, change and grow rapidly as innovation in science and engineering applications takes place.

RESPONSE: One of the criteria which the Department will use in determining if the alternate method used by any person conducting remedial activities was appropriate is whether or not the alternate

method "has previously been either used successfully or approved by the Department in writing," N.J.A.C. 7:26E-1.6(c)3i. However, "grandfathering" of alternate methods is not appropriate because the applicability of the method may vary from site to site. For example, the use of a certain alternate ground water sampling method may be appropriate on sites with shallow ground water and thick water-bearing zones but not on other sites. In addition, certain field screening methods are not appropriate in heterogeneous soil matrices. Further, the Department would still have to review documentation to ensure that the alternate method was one that was, in fact, previously approved by the Department and that the method was conducted in the previously approved manner.

As the Department and the regulated community gain expertise in the limitations of the alternate methods to the extent that conditions become fairly well standardized, those methods will be incorporated into this rule.

203. COMMENT: Land Tech Remedial, Inc. requested that in accordance with N.J.A.C. 7:26E-1.6, the Expedited Site Closure Approach (ESCA) techniques be approved for general use in New Jersey for all phases of environmental remediation of volatile and lighter semivolatile organic compounds.

RESPONSE: This is a specific request for a generic approval of an alternate investigatory method. Such generic approvals are only done by incorporation of the method into the Field Sampling Procedures Manual or another manual which is referenced in the rule. In the interim, the method may be approved on a case-by-case basis as a variance request pursuant to N.J.A.C. 7:26E-1.6(d).

204. COMMENT: With respect to N.J.A.C. 7:26E-1.6(c), Rutgers Environmental Law Clinic commented that it is obvious that every step taken in a site investigation/remediation cannot be entirely dictated by regulation and the regulations must provide for some flexibility to deal with field conditions.

RESPONSE: The Department acknowledges this comment and has provided for flexibility in N.J.A.C. 7:26E-1.6(d) and 1.6(c).

205. COMMENT: Rutgers Environmental Law Clinic disagreed with N.J.A.C. 7:26E-1.6(c) and commented that the Department must approve all alternate sampling methods before they are used and their use must be limited. Rutgers Environmental Law Clinic noted that providing that the Department will review the alternate sampling method request either during the remediation "or at a later time when the site becomes a Department priority for site remediation," is totally unacceptable. Sampling results will be the basis for all future decisions regarding cleanup at a given site. It is ludicrous for the Department to rely on sampling results in remediation decision-making, only to later consider whether the sampling method used was appropriate. Rutgers Environmental Law Clinic further noted that the deferral of review of the sampling methods will lead to two untenable and undesirable results. The Department will either be disinclined to disapprove an alternate sampling method because the sampling has already been completed often at significant expense to the remediator or the Department will, in fact, disapprove the alternate method, after the fact, forcing additional sampling, delay in the cleanup, and additional expense to the remediator. The Department should not adopt regulations which force it to choose between two unsatisfactory options.

Rutgers Environmental Law Clinic also noted an additional concern with alternate sampling methods at N.J.A.C. 7:26E-1.6(c) because memoranda of agreement which the Department proposes to use for some site cleanups are unenforceable. The Department should make clear in the oversight regulations that the Department has the power to reject alternate sampling methods for memoranda of agreement sites, just as it does for other sites under remediation.

Rutgers Environmental Law Clinic commented that although the Department states that it has identified "certain limited situations when alternate sampling, analytical, or investigatory methods may be used . . ." at N.J.A.C. 7:26E-1.6(c), the language used in this paragraph is so broad that it is hard to imagine any remediator who would not attempt to use it to reduce the extent of required sampling. The Department will be inundated with requests for the use of alternate sampling methods and will be forced to undertake a time-consuming review each such request. This will result in the Department wasting valuable resources in this process and may well mean that virtually no one will comply with the specific standards contained elsewhere in these regulations.

RESPONSE: The purpose of N.J.A.C. 7:26E-1.6(c) is to allow any person conducting remedial activities to proceed using a method other than that prescribed by the rule only in certain limited situations. The Department has clarified N.J.A.C. 7:26E-1.6(c) to reflect that the alternate methods can only be used when specifically stated in the rule by adding language to this effect to N.J.A.C. 7:26E-1.6(c). For example, N.J.A.C. 7:26E-2.1(a)4ii has specific language which refers back to N.J.A.C. 7:26E-1.6(c).

The Department does not relinquish any of its oversight capabilities by N.J.A.C. 7:26E-1.6(c). If a person conducting remedial activities wants absolute assurance that the alternate method being employed is acceptable to the Department, that person may elect to obtain the Department's prior approval of its use through entering into an oversight document pursuant to N.J.A.C. 7:26C. If any person conducting remedial activities proceeds with the use of an alternate method pursuant to N.J.A.C. 7:26E-1.6(c) without obtaining Department prior approval for the use of that method, the Department will still review the method used when the site becomes a Department priority and thus comes under the direct scrutiny of the Department. If at that time, the Department finds that the person conducting remedial activities correctly used the alternate method, and that the site was remediated in substantial compliance with N.J.A.C. 7:26E and is protective of human health and the environment, then the remediation will be approved. In the alternative, if the Department finds that the alternate method was inappropriately used and that the site was remediated in a manner that was not protective of human health and the environment, then the responsible party will be required, through the use of an enforcement document, to conduct additional remediation activities at the site to ensure that the site is protective of human health and the environment.

The Department and the citizens of New Jersey have much to gain by the use of this provision. If the alternate method was correctly used, a site is remediated prior to its becoming a Department priority. If the alternate method was incorrectly used, the Department can still require the site to be remediated properly. In its comments, Rutgers Environmental Law Clinic raises the concern of the Department "wasting valuable resources" in having to review a large number of requests for the use of alternate methods. It is these very "valuable resources" that the Department is trying to conserve by allowing certain limited remediation activities to proceed without prior Department approval.

Rutgers Environmental Law Clinic's comments on memoranda of agreement are beyond the scope of this rulemaking and the Department directs the commenter to the adoption document for N.J.A.C. 7:26C, 25 N.J.R. 2002(a). However, the Department wishes to note that if remediation activities were not done in a manner protective of human health and the environment, the Department will not accept the remediation as complete even if portions of it were completed pursuant to a memorandum of agreement. N.J.A.C. 7:26C-2.1(c), and the standard form of the memorandum of agreement, found in Paragraph IV, at Appendix A, of N.J.A.C. 7:26C expressly reserve the Department's enforcement authority.

206. COMMENT: Exxon Company U.S.A. recommended replacing "and" with "or" at N.J.A.C. 7:26E-1.6(c)3 to clarify the rule.

207. COMMENT: Chevron U.S.A., Inc. commented that the word "and" should be replaced with the word "or" at N.J.A.C 7:26E-1.6(c)3. Of the six criteria given, any and/or all of the criteria may provide reasonable arguments to allow an alternate methodology.

208. COMMENT: Chemical Land Holdings, Inc. commented that the Department should clarify whether the criteria in N.J.A.C. 7:26E-1.6(c)3i to vi are additive or whether a proposal meeting one or several of the criteria would be acceptable. Second, the Department should consider restructuring this section to clearly focus on subparagraphs (c)3iii through vi, with current subparagraphs (c)3i and ii noted as factors which the Department may consider in evaluating an alternative method's compliance with subparagraphs (c)3iii through vi. References to methods previously ". . . approved by the Department . . ." and to "current technology as documented in peer review [sic] professional journals" are unnecessarily restrictive and could serve to stifle innovation. Innovative methods typically appear in the conference literature first; it may take several years for innovative approaches to reach peer reviewed professional journals. Similary, the alternative of using methods approved in the past by the Department may only serve to enshrine the "tried and true" methods of the past. The more relevant criteria are contained in subparagraphs (c)3iii through vi, and relate to the reproducibility of the alternate method, whether it can consistently achieve the same performance results, whether it advances the attainment of the remedial objective, and whether it is consistent with the broad theme of the regulation. One way to utilize a non-peer reviewed method would be to subject it to a pilot scale demonstration to its selection.

209. COMMENT: Hackensack Water Company commented that N.J.A.C. 7:26E-1.6(c)3i and ii leave little room for innovative technology. The Department should allow for alternate methods which have not been previously documented in peer-review journals, nor previously approved by the Department if the remediating party can demonstrate, to the Department's satisfaction, that such methods would allow for the same degree of efficacy and reliability as stated or previously approved methods. In this manner, the Department would have discretion as to whether it will allow such methods, (guarding against the risk that alternate methods without merit would be used) and the remediating party could present new and innovative methods which would allow for remediation to the fullest extent possible, despite the fact that they do not meet the above outlined standards.

210. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-1.6(c)3i should be deleted. The requirement as proposed will only serve to discourage innovative approaches to the complex problems faced during site investigation and remediation. Additionally, if retained in the regulations, the Department would be required to promulgate and continually update the list of acceptable alternative methods. Without a promulgated list the regulated community would not be able to know which alternate methods would be acceptable.

211. COMMENT: Rutgers Environmental Law Clinic commented that the six criteria which the Department will use in evaluating a proposed alternate method at N.J.A.C. 7:26E-1.6(c)3 appear adequate if all six criteria must be satisfied prior to use of an alternate method. Rutgers Environmental Law Clinic emphasized that it must be necessary to satisfy all six criteria in order to get the alternate approved.

RESPONSE: Although the criteria at N.J.A.C. 7:26E-1.6(c)3 are written as if they must all be met, the Department believes that it is not necessary for both N.J.A.C. 7:26E-1.6(c)3i and (c)3ii to be met. For example, if an alternate method was developed and approved for use in a previous remediation, but not documented in a peer-reviewed journal, this method may be approved if it also meets the criteria listed in N.J.A.C. 7:26E-1.6(c)3iii through vi. Conversely, a method that is documented in a peer-reviewed journal but has not been previously approved for use by the Department may be approved if it meets the criteria listed in subparagraph (c)3iii through vi. The rule has been modified to reflect this on adoption.

N.J.A.C. 7:26E-1.6(c)3 is not meant to discourage nor stifle innovative technologies. The intent of N.J.A.C. 7:26E-1.6(c) is to allow for the use of alternate remediation methods without first obtaining the Department's approval in certain limited situations. Innovative technologies would be those that the Department does not have extensive experience or knowledge about, and thus could not be implemented without first obtaining the Department's review and approval. However, the Department does want to encourage the use of innovative technologies in site remediation efforts. Thus, on adoption the Department is clarifying that if a person conducting remedial activities wishes to deviate from a requirement of these rules, that person may petition the Department for prior approval of a variance from the requirement pursuant to N.J.A.C. 7:26E-1.6(d). Any person conducting remedial activities could apply for a variance of any section of N.J.A.C 7:26E and petition to use an alternate, perhaps new and innovative, technology in its place. Over time, as the Department gains experience in the use of what is now an innovative technology, the regulations can be changed to include that technology as one that can be implemented without the Department's prior approval pursuant to N.J.A.C. 7:26E-1.6(d).

212. COMMENT: Chemical Land Holdings, Inc. commented that clarification should be provided regarding the use of the terms "current technology" and "peer-review [sic] professional journals" at N.J.A.C. 7:26E-1.6(c)3.

RESPONSE: The Department does not believe that formal definitions of "current technology" and "peer reviewed" are required as their common usage is adequate. Technology is considered current if it is in general or widespread use as of the time the regulation is being applied. A peer-reviewed journal is one in which technical articles have been reviewed and critiqued by experts in that area. Based on that review, articles not meeting acceptable technical standards may be rejected.

N.J.A.C. 7:26E-1.7

213. COMMENT: Allied Signal, Inc. commented that N.J.A.C. 7:26E-1.7 is so broadly written that it effectually says that the Department can require any additional work anytime it wishes to do so. It is within the Department's authority, however, emphasizing that the Department can require additional work does not promote the Department's stated goal of trying to expedite the remediation process. In order to fulfill that goal, the Department needs to adopt internal rewards for those who can progress a site to the cleanup stage in an expeditious manner.

RESPONSE: The Department considered several options in determining how best to design N.J.A.C. 7:26E. One option was to require that each site be investigated and remediated as if it was in the most sensitive environmental setting and then relax the standard on a case-specific basis upon petition by any person responsible for conducting the remediation. However, this approach was considered onerous by the Department, and would likely have resulted in an unmanageable number of requests for relief from the conservative standards based on site-specific conditions.

Instead, the Department chose to develop minimum standards that would be adequate for the large majority of sites. Additional work beyond the minimum standards would be required on some sites and the additional requirements would vary from site to site based on site-specific conditions as outlined in N.J.A.C. 7:26E-1.7(a). In this way, most sites could be remediated expeditiously because they could proceed through the remediation process with little or no Department oversight until the site became a Department priority.

The commenter suggested that Department staff be provided incentives to move cases quickly through the site remediation process. Such incentives currently exist. Staff are frequently recognized both formally and informally for the expeditious processing of cases. However, the Department's mission is to protect human health and the environment and expeditious case processing does not take precedence over this mission.

214. COMMENT: Jersey Central Power & Light Company and New Jersey Natural Gas Company commented that the Department should acknowledge at N.J.A.C. 7:26E-1.7 the possibility of mitigating circumstances by allowing a provision whereby responsible parties may rebut the Department's conclusions that additional work is necessary and proceed with the minimum requirements.

215. COMMENT: Exxon Company U.S.A. recommended deleting N.J.A.C. 7:26E-1.7(a)1 through 8. Exxon Company U.S.A. recommend adding a new subsection (b): "When the Department requires additional work, they shall notify the responsible party in writing and allow the person to demonstrate if additional work is needed, or not."

RESPONSE: The mechanism by which the Department will require additional work will most likely be through a memorandum of agreement or administrative consent order. If the additional work is required through a memorandum of agreement, it would be the subject of a consensual agreement, thus the concerns of any person conducting remedial activities will have been addressed. If the work is required through an administrative consent order, the person responsible for conducting the remediation can ask for a review and determination by the Department's management with regard to the need or appropriateness of work beyond the minimum technical requirements. This review may continue upon the request of the person responsible for conducting the remediation until the Commissioner or his or her designee has issued a decision on the dispute. The issue of dispute resolution in the context of environmental remediation has also been addressed in legislation (S1070) currently being considered by the Legislature. The bill, as approved by the Senate, requires the Department to develop guidelines that establish a procedure through which the person responsible for conducting the remediation may dispute a Department decision concerning the remediation.

The Department would not require a person responsible for conducting a remediation to perform additional work pursuant to N.J.A.C. 7:26E-1.7 that the Department would not perform if the remediation was conducted using public funds. If through the dispute resolution, as described above, there was no agreement between the Department and the person responsible for conducting the remediation, the Department could assume the remediation of the site using public funds. Upon completion of the remediation, the Department would seek recovery of costs from responsible parties. At this point, if there was still a disagreement over the level of additional work conducted at the site, judicial review could occur.

216. COMMENT: Colonial Pipeline Company commented that N.J.A.C. 7:26E-1.7(a) should be modified to note that additional work may be required for any remediation that was begun prior to, on, or after the effective date of N.J.A.C. 7:26D, or if "more stringent standards are adopted."

RESPONSE: Colonial Pipeline Company refers to N.J.A.C. 7:26D, which is not being adopted by the Department. However, when remediation standards are adopted, the Department may require additional work in response to a change in a remediation standard thus resulting in possible adverse affects on human health and the environment. If S1070 is enacted into law as it passed the Senate, the Department could only require additional work if the change in the remediation standard is of an order of magnitude or greater.

217. COMMENT: Public Service Electric & Gas Company commented that N.J.A.C. 7:26E-1.7(a)7 states that the Department may require additional work based on its review of "data or other information submitted ... to fully evaluate the conditions for which the data or information was submitted." The sources of information listed are not limited to the site being investigated. As such, the Department could require investigation of contamination from a regional or local problem, not having an on-site source. This would result in overlapping investigations without assignment of the responsibility for the investigation to the appropriate responsible person. This would result in delays to remediation while potential responsible parties resolve their various responsibility issues. Public Service Electric & Gas Company proposed deleting the word "conditions" and replace it with "identified on-site contaminant sources."

RESPONSE: The Department's intent at N.J.A.C. 7:26E-1.7(a)7 is to provide notice that the Department may require additional data or information in order to fully evaluate site conditions. The Department has revised this section to clarify this.

218. COMMENT: Environmental Liability Management, Inc. requested that specific language be added to the eight general conditions at N.J.A.C. 7:26E-1.7(a) which would provide predictable and consistent guidance to the regulated community regarding the conditions under which the Department may require additional work.

219. COMMENT: Atlantic Electric commented that N.J.A.C. 7:26E-1.7(a)8 should be deleted as it is overly broad and unclear. At the very least, further clarification is needed.

220. COMMENT: E.I. du Pont de Nemours and Company and Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E-1.7(a)8 is inappropriately broad. The proposed criteria allow the Department unlimited opportunity to require additional work and fail to recognize that the proposed requirements of the entire proposed regulation are far from "MINIMUM technical requirements" (emphasis added). E.I. du Pont de Nemours and Company said that the proposed criteria should be deleted from the regulation.

221. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-1.7(a)8 should be deleted. The Department has provided no specific criteria which the regulated community can comment on to determine when additional site-specific work would be required. This leaves the provision open-ended and subjects the regulated community to potential arbitrary and capricious decisions on the part of the Department. It, therefore, should be deleted.

RESPONSE: As stated in N.J.A.C. 7:26E-1.1(a), "This chapter constitutes the minimum technical requirements to investigate and remediate contamination at any site." In promulgating these rules the Department had to ensure that they were broad enough to be able to be used generically at the many varied sites which exist in New Jersey. At the same time, the Department recognized that there could be certain unique situations at a specific site which may require remediation activities beyond the minimum requirements of these regulations. The criteria at N.J.A.C. 7:26E-1.7(a) need to be broad because it would be impractical to list every circumstance where work beyond the minimum requirements could be required. While the Department cannot in these rules anticipate every possible situation where more than the minimum requirements are necessary, the criteria listed in N.J.A.C. 7:26E-1.7(a) identify conditions under which the Department may require additional work. After the rule has been in use for some time, the Department expects that it will be better able to identify certain specific site conditions which always trigger specific actions beyond the minimum requirements. If such conditions are identified, the Department will amend the rule to include the conditions and actions required.

For example, the minimum sampling frequency for storage pads is one sample per side if the side of the pad is 30 feet long or less, N.J.A.C. 7:26E-3.9(b)1i. However, if high toxicity substances were stored on the pad and the pad is within ten feet of a residential property, sampling at a higher frequency would be appropriate, for example, one sample every 10 feet to ensure that the contaminants were not migrating toward the residence. The Department would require going beyond the minimum requirements by applying N.J.A.C. 7:26E-1.7(a)2 because the nature of the substances discharged is highly toxic, and N.J.A.C. 7:26E-1.7(a)6 because of the close proximity to a sensitive receptor (residential property).

Proximity of potable wells to a site is another condition which should trigger a more conservative approach than the one in the rule when determining if ground water should be investigated on a particular site. Typically, a ground water investigation is conducted if the source investigation during the site investigation indicates that significant discharges to the soil or ground water have occurred. However, for this approach to be successful, complete disclosure or identification of all contaminant sources on the site must occur. If the possibility exists that there may be unknown or undisclosed contaminant sources beneath a large industrial building that has had several operators over a 40 year period, or that there are potable wells in the area, then it would be appropriate to investigate ground water independent of the results of the soils investigation.

These rules are predicated on reasonableness. The Department assumes that any person conducting remedial activities will act reasonably in applying the rules and diligently investigate and remediate a site, even if it must go beyond the minimum requirements to do so. In requiring work beyond the minimum technical requirements, the Department is also held to a standard of reasonableness.

N.J.A.C. 7:26E-1.8

222. COMMENT: Hoffman-La Roche, Inc. commented that the Department should define all words and terms consistent with the proposed Cleanup Standards, N.J.A.C. 7:26D.

RESPONSE: The Department did not adopt N.J.A.C. 7:26D and, therefore, the issue of inconsistent definitions is moot.

223. COMMENT: Atlantic Electric proposed adding the following definition at N.J.A.C. 7:26E-1.8: "De minimis exemption means small amounts (less than 20 gallons) of petroleum hydrocarbons released (oil, used oil, dielectric fluid, fuels, etc.) which are immediately reported to the Department and the release is immediately terminated, contained, controlled and remediated without having to wait for any approvals by the Department. These small releases are exempt from the Rule if the remediated wastes are shipped off site for proper disposal in an appropriate facility permitted to accept such waste."

RESPONSE: The Department does not agree that the remediation of what could be characterized as a new or historical de minimis discharge should be exempt from the requirements of this rule. The Department has been directed by the Legislature to establish a consistent and systematic approach to the remediation of all contaminated sites in New Jersey. N.J.S.A. 58:10-23.20. The Department has approached this legislative directive by proposing the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, which establish the minimum requirements for remediating a site. The consistent application of the requirements in N.J.A.C. 7:26E can ensure the thoroughness and reliability of investigations and cleanups of contaminated sites or sites at which contamination is suspected. The Department recognizes that contaminated sites vary in their complexity due to a number of factors, including the volume of the discharge. However, a small discharge does not necessarily mean that its threat to human health and the environment is minimal. Consequently, the Department has determined that to exempt any discharges based on their volume from these rules could result in the remediation of discharges in a manner that is not protective of human health and the environment.

224. COMMENT: Land Resource Recycling Management raised the concern, in the context of the definition of "landfarms," that N.J.A.C. 7:26E may impede the beneficial use of sludge and sludge derived products because of potential liability for farmers who utilize sludge. Land Resource Recycling Management said that cleanup standards in general, and the Environmental Cleanup Responsibility Act standards and requirements specifically, must provide protection for farmers utilizing sludge as a fertilizer.

RESPONSE: N.J.A.C. 7:26E does not contain a definition of "landfarms."

225. COMMENT: E.I. du Pont de Nemours and Company commented that definitions for "method detection limit" (MDL) and "practical quantitation level" (PQL) are required at N.J.A.C. 7:26E-1.8 for clarification of analyte detection levels, and proposed that the Department use the definitions contained in the Federal Register for both MDL and PQL (40 CFR 100 to 149, Appendix B to Part 136, revised

July 1, 1990, page 537 and 40 CFR 269 to 299, revised July 1, 1990, Appendix IX Ground Water Monitoring List, Footnote Number 6, Part 264, page 308, respectively).

RESPONSE: The Department agrees that definitions for "minimum detection limit" (MDL) and "practical quantitation level" (PQL) should be included in these regulations and has amended N.J.A.C. 7:26E-1.8 accordingly. These definitions are based on the definitions of these terms as contained in the Federal Register, as suggested by the commenter.

226. COMMENT: Exon Company U.S.A. commented that the proposed cleanup standards include both residential and non-residential standards. Therefore, the word "residential" used throughout N.J.A.C. 7:26E to modify the term "cleanup standards" needs to be deleted to be consistent with the cleanup standards rule.

RESPONSE: N.J.A.C. 7:26D was not adopted so there is currently no inconsistentcy with respect to the use of the term "residential."

227. COMMENT: E.I. du Pont de Nemours and Company commented that the process of "determining the problems presented by a discharge" as referenced in the definition of "remedial investigation" is, in effect, a risk assessment. Given that the proposed rule alludes to this process and that the elements of a risk assessment are necessary in order to grant an alternate cleanup standard under subchapter 7 of N.J.A.C. 7:26D, risk assessment should be defined.

228. COMMENT: E.I. du Pont de Nemours and Company and Union Carbide Chemicals and Plastics Company, Inc. proposed that the Department incorporate into the rule a definition for risk assessment.

RESPONSE: In general, the Department agrees with the commenters' thoughts that remediation at a site requires an analysis of the degree of risk posed by the site. General risk information is critical to the development of remedial actions that are appropriate for a site. However, the Department does not believe that a definition of the term "risk assessment" is required because the Department's experience indicates that risk assessments are often too subjective to accurately define the level of remediation required at a site.

These rules require that elements of a site risk assessment be explored. For example, the remedial investigation requires that receptors and potential receptors be identified along with pathways of exposure to those receptors. As the commenters accurately point out, N.J.A.C. 7:26E was meant to be used in conjunction with the proposed cleanup standards, which also took into account elements of a risk assessment to determine appropriate cleanup goals for sites. N.J.A.C. 7:26D was not adopted by the Department but the Department will propose remediation standards in the near future. The new standards will be human health based remediation standards which will be developed based on pathways of exposure to humans. In the interim, remediation goals for sites will be approved by the Department on a case-by-case basis. Such remediation goals should be developed by the person conducting the remediation and should be based on impacts to human and ecological health.

The Department believes that for the vast majority of cases, it will not be necessary to perform a health risk assessment because the Department has developed appropriate cleanup criteria for many contaminants and exposure scenarios. However, the Department will not preclude the person conducting the remediation from performing a risk assessment to assist in the development of site specific remediation standards.

229. COMMENT: E.I. du Pont de Nemours and Company and Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E should include a definition for sediments and solids because there is not a clear distinction in the Cleanup Standards (N.J.A.C. 7:26D) between sediments, solids and soil. E.I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey commented that if these terms are not defined, the criterion/standard for remediation of soils may inappropriately be used for sediments/solids.

RESPONSE: The Department disagrees that the terms "sediments" and "solids" need to be defined in N.J.A.C. 7:26E. The term "sediments" is widely used and generally understood to mean solid or semi-solid matter that settles to the bottom of a liquid and the term "solids" is only used in the context of sample analysis and reporting requirements. The issue of the application of soil remediation standards to sediments will be addressed in future rulemaking which will propose remediation standards.

230. COMMENT: E.I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey commented that the term "stabilization" should be defined as it is used throughout N.J.A.C. 7:26E. E.I. du Pont de Nemours and Company recommended the following definition: "Stabilization means actions to control discharges and stabilize sites to prevent the further spread of contamination in an effort to protect human health or the environment from imminent and substantial endangerment."

RESPONSE: The Department does not agree that the term stabilization needs to be defined because specific stabilization requirements are not put forth in N.J.A.C. 7:26E. The mandate to "contain and stabilize" sites is a general one and is meant to emphasize that preventing contaminants from moving offsite is a first priority in site remediation.

231. COMMENT: Chemical Land Holdings, Inc. commented that "subsurface soil contamination" should be defined at N.J.A.C. 7:26E-1.8 because in the proposed Cleanup Standards for Contaminated Sites, N.J.A.C. 7:26D, "subsurface soil" is defined as "the soil more than two feet below grade and extending downward to the top of the seasonally high water table," thus confined to the vadose zone. Below the groundwater table, only groundwater quality standards apply, consistent with Environmental Protection Agency guidance under the Comprehensive Environmental Response, Compensation, and Liability Act. Chemical Land Holdings, Inc. also commented that subsurface soils should be defined in a manner that is consistent with the definition for surficial soils.

RESPONSE: Due to the confusion generated by the term "surface soils" in the context of remediation standards, the Department decided not to adopt the term "surface soils" in N.J.A.C. 7:26E. As such, the Department will not include a definition for "subsurface soil contamination" in N.J.A.C. 7:26E. However, the commenter should be aware that the Department does not consider that contaminated soil is confined to the vadose zone. Contaminated soil may exist below the water table and therefore require remediation.

232. COMMENT: The Chemical Manufacturers Association commented that some of the definitions used in the regulation, particularly "total petroleum hydrocarbons," "total organic contaminants" and "total volatile organic contaminants" are too broad because each method listed in the definitions, particularly those that are inferred to be equivalent, measure distinctly different things and the results from each method will be different. The Chemical Manufacturers Association also said that there is no single method that will measure the entire range of petroleum hydrocarbons, and the results of the methods overlap in some cases and leaves gaps in other cases. The Chemical Manufacturers Association commented that summations such as the "total organic contaminants" definitions must be viewed and then used with extreme caution.

RESPONSE: The terms "total organic contaminants" and "total volatile organic contaminants" are not used in N.J.A.C. 7:26E. These terms were used and defined in the proposed "Cleanup Standards for Contaminated Sites" (24 N.J.R. 373(a)) which was not adopted. The term "total petroleum hydrocarbons" is not defined in N.J.A.C. 7:26E-1.8.

"Area of concern"

233. COMMENT: Atlantic Electric, Schering Laboratories, E.I. du Pont de Nemours and Company, New Jersey Natural Gas Company, the General Electric Company, Rutgers Environmental Law Clinic, Jersey Central Power & Light Company, Chemical Land Holdings, Inc., Union Carbide Chemicals and Plastics Company, Inc., Public Service Electric & Gas Company, and the Chemical Industry Council of New Jersey stated that the definition of area of concern at N.J..A.C. 7:26E-1.8 was too broad and will result in undue burden on the regulated community.

RESPONSE: The Department intended the definition and the list of areas of concern to be broad. In the Department's extensive experience with site remediation, the areas listed are commonly associated with contamination and often require remedial action. The list of areas of concern is intended to include all potential areas that need to be considered when conducting a preliminary assessment. If there is no reasonable potential for contamination to exist at an area of concern, then no sampling need be conducted, and the documentation supporting the decision not to sample should be provided in the appropriate report. For example, if a loading area was always paved, there is no sign of paving deterioration or repairs, and the site history is well known, then sampling soils beneath the pavement may not be appropriate.

234. COMMENT: E.I. du Pont de Nemours and Company, the General Electric Company, Union Carbide Chemicals and Plastics Company, Inc. and the Chemical Industry Council of New Jersey questioned the Department's statutory authority to develop such a broad and far ranging definition of area of concern.

RESPONSE: The Department has the statutory authority to develop a comprehensive set of rules to ensure a systematic and consistent approach to the investigation and remediation of potentially contaminated sites in New Jersey pursuant to N.J.S.A. 58:10-23.24. The broad definition of area of concern will ensure that all potential areas are appropriately investigated and addressed.

235. COMMENT: E.I. du Pont de Nemours and Company, Chevron U.S.A., Inc., New Jersey Natural Gas company, General Electric Company, Jersey Central Power & Light Company, Chemical Land Holdings, Inc., Union Carbide Chemicals and Plastics Company, Inc., Exxon Company U.S.A. and the Chemical Industry Council of New Jersey stated that the definition of area of concern should be linked to a potential discharge or an area impacted by the migration from a known discharge. Sampling should be determined based upon collaborative evidence gathered in the prelimianry assessment as described at N.J.A.C. 7:26E-3.1.

RESPONSE: The Department does not agree that the definition needs to include any link to a discharge. The definition provides a list of areas of a site that are frequently sources of contamination. This relatively extensive list of areas is provided so that the person conducting a remediation is able to conduct a thorough evaluation of their site regardless of the size of the facility.

236. COMMENT: E.I. du Pont de Nemours and Company, Union Carbide Chemicals and Plastics Company, Inc., Chemical Land Holdings, Inc., and Exxon Company U.S.A. commented that the current definition of area of concern will result in too much sampling and will cause a burden for large facilities who would have numerous logistical problems implementing the rule.

RESPONSE: The Department refers the commenters to the specific sections of N.J.A.C. 7:26E-3 which state that, using professional judgement and the information gathered in the preliminary assessment, the person conducting a remediation is required to draw conclusions about all the potentially contaminated areas of concern and report accordingly pursuant to N.J.A.C. 7:26E-3.2(a)4. The preliminary assessment should be conducted using professional judgement and is based on the site history, review of files and records, visual observations and surveys using appropriate field instruments. The two possible conclusions from a preliminary assessment would be either that an area of concern is contaminated above the applicable remediation standard and thus additional investigation or remediation is required, or that the area is not believed to contain contaminants above the applicable remediation standard. When the area is believed not to be contaminated, the person conducting the remediation is expected to recommend no further action for that area and to provide the appropriate documentation supporting their conclusion pursuant to N.J.A.C. 7:26E-3.2(a)4ii.

With resepct to E.I. du Pont de Nemours and Company, Union Carbide Chemicals and Plastics Company, Inc., Chemical Land Holdings, Inc., and Exxon Company U.S.A.'s concerns regarding the logistical difficulties for large facilities to implement the rules using the broad definition of area of concern, N.J.A.C. 7:26E-3.3(d) states that it is often appropriate to phase the site investigation. With a phased approach and careful planning the remediation of large facilities should be achievable.

237. COMMENT: Atlantic Electric commented that buildings and non-contact cooling water discharges should be deleted from the definition of area of concern because these areas do not represent a threat to the environment.

RESPONSE: The Department disagrees with the suggested deletion of buildings from the definition. The listed areas of concern that relate to building interiors will remain in the rule because they are areas that would require consideration should the person conducting a remediation want or be required to conduct a building interior remediation. In addition, it should be noted that areas inside buildings can be significant sources of contamination to exterior environmental media. Areas such as floor drains, trenches, pits and sumps may leak contaminants to the soils and ground water beneath the building.

Atlantic Electric also suggested that the non-contact discharges be deleted from the list of areas of concern because these discharges are not contaminated as the water does not come in contact with product. The Department does not agree with this deletion because in the Department's experience, non-contact cooling water discharges may become contaminated and result in contamination to the environment.

238. COMMENT: Public Service Electric & Gas Company suggested that the word "transported" be deleted from the definition of area of concern since it significantly broadens the number of areas that would need to be considered during a remediation and that areas that would meet the definition would not be contaminated.

RESPONSE: The Department disagrees with this proposed deletion. The Department included the term "transported" because, for example, leaks in above and below ground pipelines are a common source of contamination to the environment and need to be evaluated.

239. COMMENT: Schering Laboratories, E.I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey suggested that all areas that received a discharge pursuant to other agencies or a regulated permit process be deleted from the definition of area of concern. Mobil Oil Corporation suggested an exemption for bay drains closed and remediated to Environmental Protection Agency specifications.

RESPONSE: The Department disagrees with this proposed deletion. Environmental protection is an evolving scientific field. Over time, the Department and the regulated community have seen numerous situations where waste management methods that were previously thought to be state-of-the-art had actually caused an unacceptable level of contamination. These rules provide a systematic and consistent approach to the investigation and remediation of the environment and, therefore, the Department cannot ignore potentially contaminated areas of concern simply because they were permitted activities in the past.

Mobil Oil Corporation suggested an exemption for bay drains closed and remediated to Environmental Protection Agency specifications. The Department refers the commenter to N.J.A.C. 7:26E-3.2(b) which provides that previously remediated areas of concern may satisfy specific requirements in the preliminary assessment.

240. COMMENT: Environmental Liability Management, Inc. commented that "all surface water areas and associated sediment which receive or may have received any point or non-point source discharge from the site" would be an area of concern. A surface water body and associated sediment should only be an area of concern when there is a drainage pathway from a known area of concern to the surface water body. This qualifying language should be added.

RESPONSE: The list of areas included under the definitions of area of concern are simply areas that need to be evaluated. When an area is believed not to be contaminated, the person conducting a remediation is expected to provide the appropriate documentation supporting their conclusion pursuant to N.J.A.C. 7:26E-3.2(a)4ii.

241. COMMENT: Allied Signal, Inc. commented that the definition of area of concern should be consistent with that in the proposed Cleanup Standards Rules (N.J.A.C. 7:26D, 24 N.J.R. 373(a)).

RESPONSE: N.J.A.C. 7:26D was not adopted so there is currently no inconsistency with respect to the use of the term "area of concern."

242. COMMENT: American Cyanamid Company commented that the definition of area of concern in the proposed regulations is too specific and all encompassing. This does not allow for flexibility. The Department should provide a more broad definition of area of concern.

RESPONSE: The list of areas of concern is both all encompassing and flexible. The use of the phrase "including, but not limited to" gives the definition an all encompassing, broad base. The definition is flexible in that it allows the person conducting a remediation to evaluate the areas that are specific to their individual sites and to conduct a preliminary assessment to determine which areas, if any, require additional investigation or remedial action.

243. COMMENT: Hackensack Water Company commented that the list of "areas of concern" includes "building material and insulation with asbestos." From this definition can it be assumed that every building and home containing asbestos containing material such as floor or ceiling tile, will be labelled a "contaminated site" and subject to the proposed regulations?

RESPONSE: The list of possible areas of concern is provided simply to alert the person conducting a remediation to areas that can potentially cause discharges to the environment. Hackensack Water Company mistakenly interprets the definitions of "area of concern" and "contaminated site" as synonymous. They are not. The purpose of identifying areas of concern is to direct the focus of the site investigation to those areas of a contaminated site which may be the locations of discharges. Contaminated sites, on the other hand, are those sites at which discharges have been confirmed.

"Base neutral organic compound"

244. COMMENT: E.I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey commented that the definition of "base neutral organic compound" should be deleted because base

neutral organic compounds are a subpart of the semivolatile organic compounds as defined elsewhere in N.J.A.C. 7:26E-1.8, and other subparts of semivolatile organic compounds, such as acid extractable compounds, are not also defined.

RESPONSE: A definition of base neutral organic compound was included in the Technical Requirements for Site Remediation as the analysis for this class of compounds is specified in Table 2.2 (recodified and adopted as Table 2-3) under N.J.A.C. 7:26E-2.1(d). As such, the Department will retain this definition in these rules. A definition for "acid extractable organic compounds" was not included in these rules as the analysis for this class of compounds is not directly specified in N.J.A.C. 7:26E. However, for clarification, the Department has included a definition for "acid extractable organic compounds" at N.J.A.C. 7:26E-1.8 on adoption.

"Contaminated site"

245. COMMENT: E.I. du Pont de Nemours and Company commented that the use of the words "any applicable cleanup standards" in the definition of contaminated site is overly broad and vague. Different cleanup standards may apply to different sites when alternate cleanup standards are used or cleanup is deferred; the acceptability of contamination will depend on the specifics of each site. The definition also fails to accommodate the use of engineered remedial measures that reduce the availability of contaminants to levels that achieve risk levels protective of human health and the environment. E.I. du Pont de Nemours and Company suggested the following change to the definition: "Contaminated site means all portions of environmental media that contain one or more contaminants at a concentration that may cause an unacceptable risk to human health and the environment, including all contamination at an individual establishment, facility, or other site."

RESPONSE: The Department disagrees that the definition of contaminated site is overly broad and vague. The inclusion of the term "applicable" makes the definition quite specific. The term "applicable" means the applicable remediation standard which is specific to the medium for a specific site. If a residential standard does not apply to the site which is the subject of the remediation activities, then that is not the applicable cleanup or remediation standard. If a site-specific cleanup or remediation standard is obtained for a certain contaminant at a site, then that is the applicable cleanup or remediation standard.

246. COMMENT: E.I. du Pont de Nemours and Company, the General Electric Company and the Chemical Industry Council of New Jersey commented that the Department does not have the statutory authority to require a responsible party to remediate off-site contamination under Environmental Cleanup and Responsibility Act (ECRA). The commenters noted that the Department has previously attempted by regulation to expand its Environmental Cleanup Responsibility Act jurisdiction to off-site contamination, but this expansion was vacated by the Appellate Division *In re Adoption of N.J.A.C. 7:26B,* 250 *N.J. Super.* 189, (App. Div.), *certif. granted,* 126 *N.J.* 385 (1991).

247. COMMENT: Chevron U.S.A., Inc. commented that the definition of "contaminated site" should be placed with "impacted area" in the definition and that the entire regulation needs to be revised to regulate the "site" or "facility" (that geographic area owned or operated by the person responsible for conducting the cleanup) which is the source of the discharge. The "impacted area" may require remediation by the person responsible for conducting the cleanup, but should not be part of the regulated "site." Only regulated environmental media pursuant to the applicable statute should be included in the definition. Additionally, the term "site" implies a specific location owned or operated by a specific person with a defined boundary. As used in the regulations a contaminated site's boundary could be constantly changing as the plume migrates.

248. COMMENT: Exxon Company U.S.A. and Allied Signal, Inc. commented that the definition of "contaminated site" differs from the more appropriate definition for "contaminated site" found in the proposed Cleanup Standards, N.J.A.C. 7:26D, which does not include off-site areas. Exxon Company U.S.A. recommended that the definition of "contaminated site" be identical to the definition found in the proposed Cleanup Standards.

RESPONSE: After the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, were proposed, the New Jersey Supreme Court rendered its decision in *In Re Adoption of N.J.A.C. 7:26B,* 128 *N.J.* 442 (1992). In that decision the Supreme Court upheld the Department's interpretation of the Environmental Cleanup Responsibility Act (ECRA) N.J.S.A. 13:1K-6 et seq., that a party remediating contamination under the Environmental Cleanup Responsibility Act must remediate contamination that has migrated off-site. The Department further notes that the Department's authority to require the remediation of off-site migration pursuant to N.J.S.A. 58:10-23.11, the Spill Compensation and Control Act, was specifically affirmed by the Supreme Court. 128 *N.J.* at 455. Thus, the Department has the statutory authority to require a party to remediate off-site contamination under the Environmental Cleanup Responsibility Act and these Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

The Department does not agree with the commenters who suggest that the Department should revise the definition of contaminated site so that it does not include contamination that has emanated from a facility or site. The Department has determined that a fragmented approach to site remediation based on separate environmental media is neither efficient nor cost effective. The Department proposed N.J.A.C. 7:26E so that contaminated sites could be remediated in a comprehensive and consistent manner throughout the State. To ignore contamination that has migrated from the facility or site, would be inconsistent with Legislature's intent for remediating contaminated sites in a rational and orderly way so as to mitigate potential risks. N.J.S.A. 13:1K-7. See also N.J.S.A. 58:10-23.11(a) et seq.

The Department does not agree with the Chevron U.S.A., Inc. suggestion that the definition of contaminated site should be limited to environmental media regulated by a particular statute as this would result in a fragmented approach to the remediation of contaminated sites. For further discussion of this point, please see the Department's response to comments above.

Exxon Company U.S.A. and Allied Signal, Inc. commented that the definitions of key phrases in Department rules should be identical. The Department recognizes the need for consistent definitions in its regulations, and has modified certain definitions in these rules on adoption to ensure consistency.

249. COMMENT: E.I. du Pont de Nemours and Company and Union Carbide Chemicals and Plastics Company, Inc. suggested the following modification to the definition of "contaminated site": "Contaminated site means all portions of environmental media that contain one or more contaminants at a concentration that may cause an unacceptable risk to human health and the environment, including all contamination at an individual establishment, facility, or other site." E.I. du Pont de Nemours and Company and Union Carbide Chemicals and Plastics Company, Inc. commented that the classification of a site as contaminated carries a heavy burden and should be used judiciously. Furthermore, contamination should be a function of risk, not just concentration.

RESPONSE: The Department does not agree that the definition needs to be modified as suggested. The definition of "contaminated site" is not meant to define whether or not a site poses a risk to human health and the environment. The definition is used only to define the geographical area to which the Technical Requirements for Site Remediation apply.

250. COMMENT: The General Electric Company commented that by the use of the term "all contamination," in the definition of "contaminated site," the Department extended the regulations to sites whose substances may be present only at levels below cleanup standards. Since "contamination" is undefined, the Department's jurisdiction would include virtually any location where commercial or industrial activity has occurred or vehicles have been present. The General Electric Company recommended that the "contaminated site" definition be rephrased to include only areas where contaminants have been discharged and remain present at levels in excess of cleanup standards.

RESPONSE: As specifically stated in the first clause of the definition of "contaminated site," a site is considered a "contaminated site" if contaminants are present in environmental media at concentrations which fail to satisfy the applicable remediation standards.

251. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following modification to the definition of "contaminated site": "Contaminated site means all portions of environmental media except ambient air that contain one or more contaminants at a concentration that may cause an unacceptable risk to human health and the environment, including all contamination at an individual establishment, facility, or other site." The intent and structure of the standard does not include discharges to the atmosphere.

RESPONSE: The Department did not intend to require a party to "remediate" outdoor air pollution at their facility pursuant to these rules.

However, releases to the atmosphere may be subject to remediation under N.J.A.C. 7:26E if these releases were from discharges to the land or waters of the State. For example, surface soil contaminated with solvents may release vapors to the ambient air. Specific requirements for sample frequency and location have not been provided in these rules because air sampling is generally not conducted for most contaminated sites and, therefore, it was not appropriate to require air sampling as a minimum standard. Acceptable air sampling methods, however, are included in the Department's Field Sampling Procedures Manual which is referenced at N.J.A.C. 7:26E-2.1(a)6.

252. COMMENT: The General Electric Company commented that the definition of contaminated site is overbroad since it applies the technical remediation requirements to substances regardless of whether they were discharged by a responsible party. The General Electric Company noted that the definition of the same term in the proposed cleanup standards was more limited.

253. COMMENT: The Chemical Industry Council of New Jersey commented that the definition of "contaminated site" should be consistent throughout the three proposed rules, N.J.A.C. 7:26C, 7:26D, and 7:26E.

RESPONSE: The Department agrees with these commenters who suggest that the same definition of "contaminated site" be used in all of the Department's Site Remediation Program rules (Procedures for Department Oversight of The Remediation of Contaminated Sites, N.J.A.C. 7:26C, and Technical Requirements for Site Remediation, N.J.A.C. 7:26E). The Department has modified the appropriate definitions to implement this objective.

In establishing the minimum requirements for the remediation of contaminated sites in New Jersey, the Department did not differentiate between various parties who could be conducting the remedial activities. N.J.A.C. 7:26E applies to the Department, when conducting publicly funded cleanups, persons responsible for the discharge, or persons who are not responsible for the discharge but who assume the responsibility for remediating the site. Any private party who remediates a contaminated site stands in the shoes of the Department and the Department may dictate how that remediation is to be conducted. Therefore, the Department does not believe it is appropriate to limit the use of the requirements at N.J.A.C. 7:26E based on who discharged the contamination.

"Diligent inquiry"

254. COMMENT: Chevron U.S.A., Inc. commented that the definition of "diligent inquiry" should be deleted and revised to read as follows: "means such inquiry as a diligent man, intent upon ascertaining a fact, would ordinarily make, and it is inquiry made with good faith and diligence to ascertain the truth, and must be an inquiry as full as the circumstances of the citation will permit." The definition of diligent inquiry presented above is the legal definition accepted by the courts as given in *Liebpelt v. Baird,* 17 *Ill.2d* 428, 161 *N.E.2d* 854, 857.

RESPONSE: The Department disagrees with the suggested definition change because it is not specific to the needs of N.J.A.C. 7:26E.

255. COMMENT: Exxon Company U.S.A. recommended inserting in the definition of "diligent inquiry" after the words "agents," the following: "if known and can be located or contacted."

256. COMMENT: The General Electric Company commented that the definition of "diligent inquiry" would require a responsible party to interview not only current employees but also "former employees or agents who may have information or documents relevant to the inquiry." The General Electric Company said that the burdens imposed by this requirement would far outweigh the additional information produced because there may be hundreds of former employees who worked at or near a site and who, therefore, "may" have knowledge relevant to the site. The General Electric Company recommended that the definition be amended to make clear that the phrase "reasonable inquiries" does not require the responsible party to contact former employees unless those employees possess or are reasonably believed to possess information which is necessary to the site investigation and unavailable from other sources.

RESPONSE: The Department believes that the definition, as proposed, addresses the commenters' concerns about requirements to contact former employees. The definition of "diligent inquiry" does not set a single standard for such inquiries but stresses that inquiries that are reasonable under specific circumstances are considered "diligent." The obligation to make inquiries of former employees and agents is subject to the same requirement of reasonableness.

"Discharge"

257. COMMENT: Atlantic Electric, Mobil Oil Corporation, the General Electric Company and Exxon Company U.S.A., Linden commented that the proposed definition of "discharge" improperly includes spills to a building interior. If the spill does not impact soil or water, it should not be regulated. These commenters suggested removing the wording "including building interiors."

RESPONSE: The Department has deleted the phrase "including building interiors" in the definition of "discharge" so that the definition more closely resembles the statutory definitions of "discharge." However, it remains the Department's position that some spills in a building interior, for example, can be defined as a discharge pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, if the hazardous substance, hazardous waste or pollutant works it way through the floors or the walls of the building and into the ambient environment. For further discussion of this issue, please see the Department's response to comments on the definition of "environmental medium."

258. COMMENT: Exxon Company U.S.A. commented that since the Department's statutory programs relating to the remediation of contaminated sites define "discharge" differently, the use of one definition of "discharge" when outlining technical requirements is inconsistent with the enabling statutes and the preamble. Exxon Company U.S.A. recommended that the definition be revised, as follows: "Discharge means any act defined as a discharge pursuant to the statutory program under which the Department is regulating cleanup of the contaminated site. A discharge does not include a discharge pursuant to and in compliance with a valid State or Federal permit."

RESPONSE: To put this comment in the appropriate context, it is important to review the relevant statutory definitions of discharge.

The Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-22c, defines discharge as "the intentional or unintentional release by any means of hazardous substances from an underground storage tank into the environment."

The Water Pollution Control Act, N.J.S.A. 58:10A-3e, defines discharge as "any intentional or unintentional act or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of a pollutant into the waters or onto the lands or into wells from which it might flow or drain into said waters or into waters or onto lands outside the jurisdiction of the State which pollutant enters the waters of the State." 'Discharge' includes the release of any pollutant into a municipal treatments.

The Spill Compensation and Control Act, N.J.S.A. 58:10A-23.11b, defines discharge as "any intentional or unintentional act or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of a hazardous substance into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State when damage may result to the lands, waters, or natural resources within the jurisdiction of the State."

The Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., does not define discharge.

For the purpose of these rules, particularly given the statutory mandates for the liberal construction of these statutes for the general health, safety and welfare of the people of this State (see, for example, N.J.S.A. 58:10-23.11x and 58:10A-12), these definitions can and should all be read together. This is particularly so since a discharge triggers the requirements of more than one, and generally multiple, statutory remediation programs.

The Department's challenge, then, was to fashion this legislative patchwork approach into a functional garment of whole cloth. To accomplish this, the Department included all of the "substances" identified in the various statutes: hazardous substances (Underground Storage of Hazardous Substances Act), which include hazardous wastes and hazardous constituents (Spill Compensation and Control Act and Environmental Cleanup Responsibility Act), and pollutants (Water Pollution Control Act).

The Department has reevaluated the proposed definition of "discharge" in light of the above noted statutory definitions of "discharge" and the above comments. The last sentence of the proposed regulatory definition: "A discharge does not include a discharge pursuant to and in compliance with a valid State or Federal permit[.]" does not appear in any of the applicable statutory definitions. The Department, therefore, has deleted this sentence from the regulation.

That such a change is in fact consistent with the statutory construct of this term can be illustrated by the analysis of one statutory example. After defining a discharge, N.J.S.A. 58:10-23.11bh, the Spill

Compensation and Control Act then prohibits discharges of hazardous substances, unless the discharge is "pursuant to and in compliance with the conditions of a Federal or State permit." N.J.S.A. 58:10-23.11c. Under this statutory scheme, a discharge of a hazardous substance pursuant to a permit remains a discharge under the Spill Compensation and Control Act, it is, however, not a prohibited discharge.

"Environmental medium"

259. COMMENT: Atlantic Electric, E.I. du Pont de Nemours and Company, Chevron U.S.A., Inc., the General Electric Company, Union Carbide Chemicals and Plastics Company, Inc., Exxon Company U.S.A. and the Chemical Industry Council of New Jersey commented that the word "structures" should be deleted from the definition of "environmental media" because structures are intrinsically different from other environmental media and there is no clear connection with external environmental media.

RESPONSE: The Department intended to provide a broad definition for environmental media so that all media would have to be evaluated to determine whether a discharge of hazardous materials to the environment has occurred and to determine whether remediation of the discharge is necessary to protect human health and the environment. The Department disagrees with the suggested deletion of structures from the definition of environmental media. Structures represent a medium that may require consideration should the person conducting a remediation want to or be required to conduct an interior remediation. In addition, it should be noted that discharges in buildings can be significant sources of contamination to exterior media. Areas such as floor drains, trenches, pits and sumps may leak contaminants to the soils and ground water beneath the building.

260. COMMENT: E.I. du Pont de Nemours and Company, Chevron U.S.A., Inc., the General Electric Company and the Chemical Industry Council of New Jersey commented that the proposed definition for "environmental media" is inappropriately broad and goes beyond the Department's statutory authority.

261. COMMENT: Chevron U.S.A., Inc. commented that only those media specified in other applicable statutes should be included in a site remediation and recommended the following modification to the definition of "environmental media": delete the word "structures" and add the phrase "as specified in the applicable statute." This modification would result in a site undergoing remedial actions pursuant to the Water Pollution Control Act not being required to investigate air discharges.

RESPONSE: The Department has the statutory authority to develop a comprehensive set of rules to assure a systematic and consistent approach to the investigation and remediation of potentially contaminated sites in New Jersey pursuant to N.J.S.A. 58:10-23.24. The inclusion of structures in the definition of environmental medium ensures that all potentially contaminated areas are appropriately investigated and addressed.

The Department referenced structures in the definition of environmental media for three very important reasons. First, any structure at a contaminated site may act as a source or reservoir of contaminants that may subsequently be released in an uncontrolled manner into the environment. As such, the contaminants pose a legitimate concern for the Department in cleaning up and removing contaminants which pose an unacceptable risk to human health and the environment. An example of this would be a building interior floor on which polychlorinated biphenyl containing oil has spilled in a setting which includes regular pedestrian traffic across the oil covered floor prior to exiting the building. A likely result may be the movement of the polychlorinated biphenyl contamination outside, increasing the likelihood of subsequent exposure to other individuals and other parts of the environment. In this way, a spill to the floor of the building can act as part of the exposure pathway from a source to sensitive endpoints (for example, humans who come in contact with the soil outside the building or the soil itself).

Second, it is clear that a spill of certain contaminants inside a structure may work their way through the walls or floors of the structure into the ambient environment. See, for example, *Amland Properties Corp. v. Aluminum Co. of America,* 711 *F.Supp.* 784 (D. N.J. 1989). Because of the threat to human health and the environment that such situations pose, the Department was given the authority to spend public funds to cleanup and remove any hazardous substance in order to prevent an imminent discharge and to cleanup and remove hazardous substances which are not satisfactorily stored or contained. N.J.S.A. 58:10-23.11fb. It is sound public policy to act to prevent the uncontrolled release of such contaminants into the environment, rather than being forced to react once a discharge has occurred.

Third, structures present important concerns in the State's efforts to revitalize the inner cities consistent with the State Master Plan. This is readily apparent in the increasing number of conversions of former industrial facilities to residential and other uses. This issue frequently arises when a developer seeks the Department's approval for the residential conversion of an abandoned building, that is, a structure, with contamination above the acceptable levels.

In addition, the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., includes an indication of the position that the Legislature has taken on this public policy. The Environmental Cleanup Responsibility Act specifically addresses this issue and requires the Department to adopt regulations "for the detoxification of an industrial establishment, including buildings and equipment...." N.J.S.A. 13:1K-10a. This specific statutory reference to buildings and equipment is consistent with the sound public policy concerns articulated in the first two points above.

It is essential, therefore, in developing a set of rules which address the full gamut of statutory remediation programs for the Department to require the cleanup and removal of a contaminant on any structure which fits within the context of the discussion above. Any resolution of this issue by deleting structure from the definition, as the commenters suggest, would be a derogation of the Department's statutory obligation to perform or oversee the remediation of contaminated sites in order to protect human health and the environment.

"Feasibility study"

262. COMMENT: Colonial Pipeline Company commented that an additional statement needs to be added to the definition of feasibility study at N.J.A.C. 7:26E-1.8 indicating that a person may skip or reduce the initial screening process and focus on two or three specific remedial actions.

RESPONSE: The Department disagrees with the suggested definition change. It is not the Department's intent to require extensive listings of technologies and alternatives where such evaluation is not appropriate. As noted in N.J.A.C. 7:26E-5.2(a)1, the initial identification of remedial action alternatives is for those alternatives which may be appropriate for the site or the area of concern. If there are a limited number of alternatives that are appropriate options, then the person conducting a remediation should only address the limited number of alternatives. For example, at the present time, it would not be necessary to identify and evaluate bioremediation of inorganic contaminants.

The Department does not want to automatically limit and restrict remedial options to specific numbers of alternatives. However, if approved by the Department beforehand, the person conducting a remediation can reduce the number of technologies screened and alternatives evaluated in the remedial altenative analysis.

"Fill material"

263. COMMENT: Chemical Land Holdings, Inc. commented that it is unclear why a definition has been provided for "fill material" at N.J.A.C 7:26E-1.8. Chemical Land Holdings, Inc. noted that the presence of fill material should not justify investigation and that the presence of fill material in an area otherwise requiring investigation may result in an inappropriate application of investigation and remediation methods intended for native soils. As an example, Chemical Land Holdings, Inc. explained that asphalt based materials from a former roadway would routinely be expected to yield levels of total petroleum hydrocarbons and polycyclic aromatic hydrocarbons (PAHs) significantly above native soils but such material is not an environmental threat.

Chemical Land Holdings, Inc. acknowledged that the definition of "fill material" provided in N.J.A.C. 7:26E is reasonable but that if it is to remain, it should be modified to recognize the special investigation and remediation methods which may be required to adequately characterize sites which contain fill material. Fill material often consists of a heterogeneous mixture of materials which, by the nature of its composition and placement, results in an essentially random pattern of isolated areas with varying chemical compositon. The investigation methods required for delineation and characterization of soils may, therefore, be inappropriate for fill material and the data obtained using such methods may yield potentially erroneous soil characterizations. Therefore, in certain instances it may be more appropriate to delineate the extent of the fill area visually (for example, using test pits) rather than attempting to delineate the extent of individual constitutents within

the fill. Characterization of the fill may be more appropriately accomplished through the use of professional judgment by determining the typical composition of the fill, analyzing the typical components of the fill, and considering the properties of the constituents of the fill (for example, mobility) rather than just the concentration of specific constituents (for example, level of petroleum hydrocarbons) detected during analysis.

RESPONSE: A definition for "fill material" was included in N.J.A.C. 7:26E-1.8 because such material is very commonly encountered during site remediation and it is important to distinguish such material from native soil. However, Chemical Land Holdings, Inc. is correct in assuming that the Department does not intend to require sampling of an area simply because it was "filled." In many cases, fill material is not contaminated. However, if a filled area is suspected to contain contaminants, the fill material must be sampled. Such fill must be sampled during a site investigation to determine the level of contamination in the fill.

The example the commenter provides, asphaltic particles in soil which yield elevated petrolum hydrocarbon levels in the sample, is problematic. Disposal areas which contain waste asphalt are often disposal areas for other contaminants as well, including waste oils, solvents and polychlorinated biphenyl (PCBs). As such, these areas need to be sampled and analyzed, not just visually characterized, as the commenter suggests. Asphaltic particles should be separated from the soil prior to analysis for other chemical constituents so that the asphalt particles do not artifically elevate the TPHC levels in the soil sample.

"Free product"

264. COMMENT: Chemical Land Holdings, Inc. commented that the definition of "free product" is too broad and may result in confusion and misunderstanding on the part of the regulated community. Chemical Land Holding, Inc. suggested the definition of free product should be revised as follows: "Free product" means a material present in concentrations greater than its residual saturation point and which is liquid at temperatures when encountered in surface and subsurface soils, surface water, or groundwater. Chemical Land Holdings, Inc. cited, as an example of the difficulty associated with the current definition, that aslphalt would inappropriately qualify as a separate phase material.

265. COMMENT: Chevron U.S.A., Inc. commented that the term "free product" should be deleted and replaced with "nonaqueous phase liquid" because free product implies that the material is actually a product and not a waste, and when discharged or spilled, the material is unlikely to meet product specifications.

RESPONSE: The Department disagrees with the suggested definition change. The term, as defined and as used, is meant to apply to the liquid, solid and semi-solid phases of a contaminant in the environment. In the example presented by Chemical Land Holdings, Inc., if waste asphaltic material is discharged, it is subject to remediation because, if the asphalt degrades, contaminants present in the asphalt, such as benzo(a)pyrene, may be released to the soil and pose a direct contact or runoff threat. The Department notes that distinguishing whether the material is a product or a waste is not important because any discharged material is considered a "contaminant" whether or not it meets product specifications.

266. COMMENT: Union Carbide Chemicals and Plastics Comany, Inc. suggested that "free product" be redefined as a mobile nonaqueous liquid phase present in porous media because the definition proposed by the Department could be construed to include material in the gas or vapor phase, which is not consistent with normal use of the term. Also, if the residual saturation point criteria were applied to the water phase, supersaturated solutions would be considered free product, which also is not consistent with normal use of the term.

RESPONSE: The Department disagrees with the suggested definition change. Free product on non-porous media may also be of concern. For example, material discharged onto an impermeable drum storage pad may be a source of contamination for surrounding soils via runoff and must therefore be remediated. Immobile free product may require remediation because it may pose a direct contact or runoff threat. Gas or vapor phase product may also require remediation, particularly if the vapors have the potential to migrate to enclosed areas such as basements.

Although supersaturated solutions would inappropriately be considered free product under this definition, such solutions would not normally be encountered during typical site remediation.

"Ground water"

267. COMMENT: E.I. du Pont de Nemours and Company and Union Carbide Chemicals and Plastics Company, Inc. commented that the definition of "ground water" at N.J.A.C. 7:26E-1.8 is inaccurate because the top of the zone of saturation and the seasonally high water table rarely coincide. They recommended the following definition: "Ground water means the portion of the water beneath the land surface that is within the zone of saturation, i.e., where all pore spaces of the geologic formation are filled."

RESPONSE: The Department agrees with the commenters and has reworded the definition of ground water so that the reference to the "seasonally high water table" is deleted.

"Highly permeable soils"

268. COMMENT: The General Electric Company commented that the definition of "highly permeable soils" uses a measurement of permeability (percentage of silts and clays) which is different from the measurement of permeability specified in the definition of "impermeable" in the same regulations. The two definitions should be made consistent by specifying that "highly permeable soils" are soils having a permeability equal to or greater than 10^{-2} cm/sec.

269. COMMENT: E.I. du Pont de Nemours and Company and Union Carbide Chemicals and Plastics Company, Inc. commented that the definition of "highly permeable soils" is inaccurate because permeability is a function of the capacity of a soil or rock to transmit fluid, which depends on factors other grain size and quantity of soil type. E.I. du Pont de Nemours and Company suggested the following definition: "Highly permeable soils means soils having permeabilities equal to or greater than 10^{-3} cm/sec, as measured by an appropriate and widely accepted method (e.g., ASTM methods)."

270. COMMENT: Environmental Liability Management, Inc. commented that the Department's definition of "highly permeable soils" as "soils having less than 15 percent silts and/or clays" is overly simplistic and requested the basis for the definition. Environmental Liability Management, Inc. also requested an explanation as to why the definitions of "highly permeable soils" and "impermeable" are defined by different technical terms.

271. COMMENT: Colonial Pipeline Company recommended that the definition of "highly permeable soils" be revised so that "highly permeable soils" be defined as having a permeability of greater than 10^{-3} cm/sec.

272. COMMENT: Allied Signal, Inc. commented that the definition of "highly permeable soils" is arbitrary and recommended that the definition be based on a numerical value of permeability.

273. COMMENT: Chevron U.S.A., Inc. commented that the definition of "highly permeable soils" should be wholly revised and should include a specific permeability value.

274. COMMENT: Exxon Company U.S.A. recommended that the definition of "highly permeable soils" be deleted and that soil permeability be determined through actual field or laboratory testing following standard protocols. The commenter stated that the selection of an arbitrary silt percentage to apply to all sites is without scientific basis.

275. COMMENT: Public Service Electric & Gas Company requested clarification of the methodology to determine the percentage of silt and clay as referenced in the definition of "highly permeable soils." Public Service Electric & Gas Company suggested changing all references to soils having less than 15 percent silt/clay throughout the proposed regulations, to "highly permeable soils." Public Service Electric & Gas Company requested that the definition allow for other acceptable methods besides field methodology to determine clay and silt content.

276. COMMENT: Exxon Company U.S.A. requested the Department's basis for 15 percent silts and/or clay in the definition of "highly permeable soils."

RESPONSE: The definition of "highly permeable soils" reflects the technical literature and the Department's practical experience which indicate that soils with high sand or gravel content and little clay, silt, or organic matter are not effective retentive media for organic or inorganic contaminants and particlarly for volatile organics (VO). When investigating a suspected VO discharge area, then, it is not appropriate to sample such "highly permeable soils." The Department needed a definition which would allow such soils to be identified in the field because of sampling logistics and, therefore, numerical criteria such as 10^{-3} cm/second are not appropriate. The standard soil classification systems referenced in the role at N.J.A.C. 7:26E-3.6(a)2ii (Burmeister,

Unified, or United States Department of Agriculture) allow for field classification of soils using soil texture to make rough estimates of soil particle size ratios. Classification schemes generally consider "sands" to consist of at least 85 percent sand particles. The Department used the 15 percent silt/clay remainder as the criteria rather than 85 percent sand because of the wide variety of particles that might have larger diameters than sand such as gravel, cobbles, certain components of fill material, etc. The Department recognizes that there are slight discrepancies between the various classification systems. While there are more accurate methods which may be used to define and identify "highly permeable soils," none are practical for routine, high volume field analyses. However, persons conducting a remediation of a site are not precluded from using more accurate laboratory methods for the determination of silt/clay content.

To clarify that soils can be classified in the field using standard system texture analysis, the definition has been modified on adoption.

"Impermeable"

227. COMMENT: E.I. du Pont de Nemours and Company commented that the anticipated application of the definition of "impermeable" is too broad because, while the proposed definition is appropriate for landfill liners and similar applications, it is not appropriate for geologic formations. E.I. du Pont de Nemours and Company suggested that an additional definition be incorporated into the proposed rule: "Impermeable geologic formation means a layer of natural material of succifient thickness, density, and/or composition so as to prevent the transmission of appreciable quantities of water across the layer under ambient hydrostatic pressure."

278. COMMENT: Exxon Company U.S.A. questioned the basis for using a maximum permeability for water of 10^{-7} cm/sec in the definition of impermeable.

279. COMMENT: Chemical Land Holdings, Inc. commented that the definition of "impermeable" should be modified to conform with basic principles of groundwater hydrology and should not be linked to any consideration of "maximum anticipated hydrostatic pressure." Chemical Land Holdings, Inc. suggested that the term "low permeability" be used instead of "impermeable" to more accurately reflect the criteria.

280. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested that the definition of "impermeable" be revised as follows: "Impermeable" means a layer of natural and/or man-made material of sufficient thickness, density and composition so as to transmit so small a quantity of water through the layer that the transmitted water is of essentially no consequence, considering the entire environmental control system. Union Carbide Chemicals and Plastics Company, Inc. stated that the present definition appears to be incorrect in the application of Darcy's Rule, which is the classic equation to describe permeability.

RESPONSE: The Department disagrees that the definition of "impermeable" should be changed. This definition was taken from the Hazardous Waste Regulations, N.J.A.C. 7:26-8, which define "impermeable" in the context of liners and cover material. The term "impermeable" is used in this same context in these rules and so the consistency of the definition with hydrogeologic principles of geologic formations such as Darcy's Law and hydrostatic pressure is not necessary. The Department disagrees that an additional definition "impermeable geologic formation" is necessary because the term "impermeable" is not used in the rule in the context of geological formation description but rather in the context of liners and cover material.

"Natural resources"

281. COMMENT: Rutgers Environmental Law Clinic commented that the definition "natural resources" only includes resources owned or controlled by the State. It should include all such resources, whether controlled by the State or not.

RESPONSE: The Department has modified the definition of "natural resources" to clarify that natural resources includes all natural resources in the State, whether they are on private or public property.

"Permanent remedy"

282. COMMENT: Atlantic Electric, E.I. du Pont de Nemours and Company, Chevron U.S.A., Inc., New Jersey Natural Gas Company, Union Carbide Chemicals and Plastics Company, Inc., and the Chemical Industry Council of New Jersey requested that the Department delete the concept and definition of permanent remedy from the rule. Atlantic Electric, E.I. du Pont de Nemours and Company, the Chemical Industry Council of New Jersey and Chevron U.S.A., Inc. stated that the concept of permanent remedy is too restrictive, that the definition inappropriately defines what are acceptable remedies, and that the Department forces excavation and disposal particularly for metal contaminated sites. New Jersey Natural Gas Company, specifically, commented that the definition of "permanent remedy" is too broad because it incorporates exposure pathways such as wells and subsurface structures with biological organisms. The commenters suggested that any remedy which addresses risks and exposure pathways at a site and attains applicable remediation standards should be sufficient, regardless of the technology used.

RESPONSE: The Department does not agree that the definition and concept of permanent remedy should be deleted. The permanent remedy concept is based on the important public policy to eliminate contamination in the environment whenever practicable, thereby minimizing the number of sites that would need to be continually controlled and monitored because of contaminants remaining after implementation of the remedial action. The Department believes that a permanent remedy is the most preferable remedy. However, the Department emphasizes it does not require permanent remedies always be selected as the remedial alternative. The Department disagrees that it forces excavation and disposal as the likely remedial action, and disagrees that the Department has defined what are acceptable remedies within the definition of permanent remedy. The remedial alternative analysis process outlined in N.J.A.C. 7:26E-5 enables a person conducting a remediation to examine technologies and remedial alternatives appropriate to the particular characteristics of the area of concern undergoing remediation. The remedial alternative analysis process includes evaluation criteria such as the alternatives ability to meet remediation standards and address threats to human health and the environment. Thus using the remedial alternative analysis process at N.J.A.C. 7:26E-5, the person conducting a remediation can establish a basis for selecting a non-permanent remedy.

283. COMMENT: Atlantic Electric, E.I. du Pont de Nemours and Company, Chevron U.S.A., Inc., New Jersey Natural Gas Company, the General Electric Company, Jersey Central Power & Light Company, Union Carbide Chemicals and Plastics Company, Inc., Allied Signal, Inc., the Chemical Industry Council of New Jersey and Hackensack Water Company commented that the clause "additional remediation may be necessary in order for a previously implemented 'permanent remedy' to meet the amended cleanup standard" in the definition of permanent remedy should be deleted because it contradicts the term "permanent" and ignores the legal, financial and business need for finality in cleanups. E.I. du Pont de Nemours and Company, Chevron U.S.A., Inc., the General Electric Company, Union Carbide Chemicals and Plastics Company, Inc. and the Chemical Industry Council of New Jersey noted that this "retroactivity provision" is a disincentive and would result in no remedy ever being considered a truly permanent remedy because if the remediation standards are lowered, additional remediation may be required.

284. COMMENT: Hackensack Water Company requested clarification on whether a "previously implemented permanent remedy" described in the definition of permanent remedy is one which was instituted prior to new amendments to N.J.A.C. 7:26D, or one which had been completed prior to new amendments.

285. COMMENT: Rutgers Environmental Law Clinic commended the Department on its decision to recognize that the definition of "permanent remedy" provides additional remediation may be required in the future if the applicable cleanup standard is amended to a level which requires additional remediation.

286. COMMENT: E.I. du Pont de Nemours and Company, Union Carbide Chemicals and Plastics Company, Inc. and the Chemical Industry Council of New Jersey commented that the requirement that permanent remedies will always be subject to further cleanup under evolving standards is overly restrictive. Once a remedial action has been completed as approved by the Department or the Environmental Protection Agency, it should be considered a final action. A final action should only be subject to reevaluation when there are substantial changes in site conditions and additional information becomes available that indicates that the final action may no longer be protective of human health and the environment.

287. COMMENT: The Chemical Industry Council of New Jersey suggested that an alternative to revisiting sites would be to issue a closure letter with every closed site stating that if, in the future, there is a significant increase in the risk the human health or the environment, the Department would revisit the site. The closure letter concept would save on the amount of time the Department would need to check closed sites every time new cleanups standards are developed, because the

Department could internally categorize sites that would pose little new risk even if the standards changed substantially. The concept "that those persons that are in no way responsible for the discharge ... having no continuing liability ..." should be made explicit in the form of a closure letter from the Department. In addition, the economic impact of site disruption should be recognized before requiring further action at a closed site.

RESPONSE: The Department has a mandate to protect human health and the environment, and therefore does not concur with suggestions to modify the definition to eliminate the clause "additional remedial action may be necessary in order for a previously implemented 'permanent remedy' to meet the amended cleanup standard."

As defined, "permanent remedy" does not contradict the term "permanent." The definition of "permanent remedy" clearly indicates that it involves a remedy which chemically or biochemically transforms a contaminant from a concentration above a residential cleanup or remediation standard in effect at the time of the remedial action to a concentration below that residential cleanup or remediation standard. The remedy is permanent in the sense that the contaminant(s) has been permanently destroyed at the site to a level below an existing cleanup or remediation standard. As the definition of "permanent remedy" is linked to a cleanup or remediation standard, any change to a given standard could alter the "permanent remedy" status at a given site such that additional remediation may be necessary in order for a previously implemented "permanent ready" to meet the new cleanup or remediation standard.

The Department, however, does not intend to continually reevaluate sites at which no further action letters were issued. The Department points out to the commenters that automatically re-opening all completed sites would be contrary to the Department's "worst case first" approach. The Department anticipates that cases will not need to be re-opened unless new information comes to light after the issuance of the no further action (for example, the Department discovers that an area of concern was unaddressed), or a change in the remediation standard would result in a substantial impact to human health and the environment. If new information comes to light, or if the remediation standards change by an order of magnitude or more such that the contaminants remaining on site could pose a threat if left unremediated, then the Department would reevaluate the site and determine if further remediation were necessary. If it is determined that additional remediation activities are necessary at the site to protect human health and the environment, the Department may require that the person who is in any way responsible for the discharge conduct the additional remediation activities. The Department believes that the issuance of a no further action letter provides the same assurance as the "closure letter" suggested by Chemical Industry Council of New Jersey would.

Regarding the comment of Hackensack Water Company, it is the Department's intent that "previously implemented remedy" means a remedy which has been completed, regardless of when the remedy was completed. The Department concurs with the comment of Hackensack Water Company that sites may be subject to future remediation if new contamination is found. The Department does not agree with the commenter that this is the sole reason for reopening sites, for the reasons previously discussed in this response.

288. COMMENT: Schering Laboratories commented that the definition of permanent remedy is of great concern because permanent remedies are impractical on small remedial projects.

RESPONSE: The Department does not require permanent remedies be always selected as the remedial alternative. The Department acknowledges and recognizes that there are currently few cost effective permanent remedies for small volume cleanups. The Department expects more permanent remedies to become available and as they do, the cost of these remedies are expected to decrease. If there is no requirement for the regulated community to evaluate permanent remedies, cost effective options may become available but the person conducting a remediation may be unaware of them. The Department anticipates that in the future, technology and market forces will change to result in more readily available technologies for small permanent remedies.

289. COMMENT: Schering Laboratories, E.I. du Pont de Nemours and Company, the General Electric Company, the Chemical Land Holdings, Inc., Union Carbide Chemicals and Plastics Company, Inc., Exxon Company U.S.A. and the Chemical Industry Council of New Jersey suggested the Department should include physical treatment of contaminants and isolation of contaminants from receptors (for example, solidification, encapsulation, slurry walls) in the definition of permanent remedy, particularly for metals contamination. Chemical Land Holdings, Inc. also suggested in-situ vitrification be considered a permanent remedy.

RESPONSE: The Department does not concur with the commenters' suggestions because using the examples given, the contaminants are not permanently destroyed. As a result, if the matrix in which the contaminants were encapsulated or isolated from the receptors were to break down, the potential for exposure to the contaminants could occur. For example, the contaminants could pose a direct contact threat if the solidified/stabilized media eroded, and a threat to ground water if the contaminants became leachable. The Department considers vitrification to be a permanent remedy for organic contaminants. However, for the reasons stated above, the Department does not consider vitrification a permanent remedy for inorganic contaminants. The remedial alternative analysis process does not preclude an applicant from evaluating technologies such as solidification, and encapsulation and selecting these technologies as the remedial action for the site.

290. COMMENT: E.I. du Pont de Nemours and Company, Exxon Company U.S.A., the General Electric Company, Union Carbide Chemicals and Plastics Company, Inc., Shell Oil Company, and the Chemical Industry Council of New Jersey commented that the permanent remedy definition needs to acknowledge the applicability of the industrial cleanup standards or the applicability of alternate cleanup standards. The General Electric Company noted that remediation to a level which is equal to or below the non-residential standards at non-residential sites should be considered a "permanent remedy" unless there is a clear showing by the Department that the site will be developed for residential use in the near future. Exxon Company U.S.A. recommended deleting the word "residential" from the definition. Chemical Industry Council of New Jersey and Union Carbide Chemicals and Plastics Company, Inc. specifically requested the Department acknowledge the potential for the development of alternate cleanup concentrations. The Chemical Industry Council of New Jersey noted, for example, that if the ground water pathway is properly defined and the subsurface soils standard can be met by limited treatment under the existing conditions, the alternate cleanup standard should be deemed the "permanent remedy" for the site.

RESPONSE: It is the Department's position that a remedy is not a permanent remedy unless, following remediation, there are no limitations to the future use of the site. Sites that require continual monitoring, institutional controls, etc. clearly do not fall into the category of having no limitations to the future use of a site. Therefore, the Department does not concur with the suggestion to include industrial/restricted use cleanup levels as part of the definition.

The term "applicable" within the definition of permanent remedy means the applicable residential remediation standard which is specific to the environmental medium for a specific site. If a site-specific residential remediation standard is obtained for a certain contaminant at a site, than that is the applicable remediation standard. Therefore, a remedy which results in the chemical or biochemical transformation of that contaminant to a concentration below the site specific residential remediation standard would be considered a permanent remedy.

291. COMMENT: E.I. du Pont de Nemours and Company suggested that permanent remedies should include separation technologies, such as soil vapor extraction.

RESPONSE: It is the Department's intent that permanent remedy include separation technologies, provided that the wastes generated from the separation technology are treated in a permanent manner.

292. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. recommended the use of interim remedies, but stated that permanent remedies will make interim remedies difficult to perform.

RESPONSE: The Department concurs with the commenters' recommendation to use interim remedies when they are needed to quickly control exposure routes, but does not agree that the Department's preference for permanent remedies will make interim remedies difficult to perform. The Department has a "bias for action" policy which encourages applicants to take the actions necessary to contain the source of contamination (such as overpacking leaking drums) and to control the immediate threat to receptors. Concurrent with the interim remedies, the appropriate remedial investigation and remedial alternative analysis should be conducted and a remedial alternative should be selected as a final remedy. As previously emphasized, the Department does not require permanent remedies always be selected as the remedial alternative, either for an interim or a final remedy.

293. COMMENT: Exxon Company U.S.A. requested the Department clarify the phrase "... the then-applicable residential cleanup standard," and suggests inserting the language "at the time the cleanup plan is approved" in the definition of "permanent remedy."

RESPONSE: The Department does not believe that the proposed modification is necessary. The "then-applicable residential cleanup standard" refers to the remediation level applicable at the time the remedy is approved.

294. COMMENT: Land Tech Remedial, Inc. requested clarification of the Department's position on natural biodegradation and attenuation in the context of permanent remedy.

RESPONSE: The Department considers natural biodegradation and attenuation as permanent remedies if there is a chemical or biochemical transformation of the contaminant in question to a concentration that satisfies the applicable residential remediation standard. Although considered a permanent remedy and thus exempts the person conducting a remediation from conducting a remedial alternative analysis (see N.J.A.C. 7:26E-5.1(c)), the selection of natural biodegradation or attenuation as a remedial alternative that is not timely, that is, where the time needed to achieve the applicable remediation standard is grossly excessive compared to the timeliness of other remedial alternatives) will not be considered acceptable to the Department.

295. COMMENT: The Chemical Industry Council of New Jersey requested clarification of the definition of permanent remedy stating it contains both a performance and a technical specification. The commenter questioned whether a remedy will be acceptable to the Department if it meets the performance but not the technical specification.

RESPONSE: It appears that the commenter has misinterpreted the definition. It was not the Department's intent to provide a technical specification or to limit technologies evaluated. Rather, the brief list of technologies in the definition were meant to provide the regulated community with examples. The Department points out to the commenter that the definition clearly provides the list of technologies with the phrase "without limitation." In response to the Chemical Industry Council of New Jersey's question regarding the acceptability of a remedial alternative, the Department emphasizes that the acceptability of remedial alternatives will be determined on a site-by-site basis.

"Priority pollutant plus 40"

296. COMMENT: Rutgers Environmental Law Clinic commented that the definition of "priority pollutant plus 40" (PP+40) should include asbestos and 2,3,7,8-tetrachloro-dibenzo-p-dioxin as part of the PP+40 scan.

RESPONSE: The Department does not believe it is necessary to include asbestos and 2,3,7,8-tetrachloro-p-dioxin as part of a general PP+40 analysis of a sample as the Department has, based on past experience, not found these two contaminants to be commonly occurring contaminants. This, however, does not preclude the person responsible for conducting the remediation at a site from analyzing samples for asbestos and/or 2,3,7,8-tetrachloro-p-dioxin if there is a reason to believe these compounds are present (see N.J.A.C. 7:26E-2.1(c)).

297. COMMENT: E.I. du Pont de Nemours and Company recommended that the words "tentatively identified" replace the term "non-targeted" in the definition of "priority pollutant plus 40" because "non-targeted" compounds are not the only compounds on the analyte list; the term also implies both internal standards and surrogates.

RESPONSE: N.J.A.C. 7:26E contains a definition of "non-targeted compound" which addresses the commenter's concern. With respect to the commenter's suggestion to use the term "tentatively identified compound" in lieu of "non-targeted compound," the Department notes that it has defined "tentatively identified compound" at N.J.A.C. 7:26E-1.8 in a manner that is not synonymous with the definition for "non-targeted compound." Therefore, it would not be appropriate to modify the definition for "Priority pollutant plus 40" as proposed. However, upon further review, the Department has modified the definition of "non-targeted compound" for clarity by indicating that a non-targeted compound is a compound as opposed to only a contaminant and indicating that a system monitoring compound is not a non-targeted compound.

"Receptor"

298. COMMENT: Atlantic Electric, E.I. du Pont de Nemours and Company, Environmental Liability Management, Inc., the General Electric Company, Jersey Central Power & Light Company, Union Carbide Chemicals and Plastics Company, Inc., Exxon Company U.S.A., Colonial Pipeline Company and the Chemical Industry Council of New Jersey commented that the definition of "receptor" at N.J.A.C. 7:26E-1.8 is inappropriately broad and should be deleted or modified. The commenters recommended that structure (for example, basement) be deleted.

299. COMMENT: E.I. du Pont de Nemours and Company and Jersey Central Power & Light Company, Exxon Company U.S.A. and Union Carbide Chemicals and Plastics Company, Inc. stated that the definition of "receptor" should be modified because it currently incorporates exposure pathways, such as wells and subsurface structures, along with biological organisms. E.I. du Pont de Nemours and Company, Exxon Company U.S.A., Union Carbide Chemicals and Plastics Company, Inc. and the Chemical Industry Council of New Jersey suggested that the definition be changed so that receptor means any human, ecosystem, plant, or animal species that may suffer adverse effects due to exposure to contaminants in the environment.

300. COMMENT: Environmental Liability Management, Inc. commented that wells and structures should be deleted from the definition since neither are natural resources nor living organisms which can be injured by exposure to contamination.

301. COMMENT: The General Electric Company commented that the term "structure" be deleted from the definition of "receptor" since the Department has no statutory authority to set cleanup standards for structures, building interiors, or basements absent a discharge to the waters, lands or natural resources of the State.

RESPONSE: The Department intentionally provided a broad definition for the term receptor so as to be protective of human health and the environment in as wide a variety of situations as possible. However, upon reexamination of the definition, the Department agrees that structures and wells are more appropriately exposure pathways rather than receptors. As such, the Department has modified the definition of "receptor" upon adoption by eliminating references to wells and structures.

302. COMMENT: Rutgers Environmental Law Clinic commented that the definition of receptor should specifically include groundwater. While "ecosystem, or part thereof" certainly includes groundwater, since surface water is specifically identified, groundwater should also be included in that manner.

RESPONSE: Upon reexamination of the definition, the Department has modified the definition of "receptor" upon adoption by eliminating references to wells and structures, and replacing the phrase "ecosystem or part thereof, surface water" with "or other ecological component." The Department believes that by using the term "or other ecological component," the definition of receptor clearly includes all waters of the state including surface water and ground water.

303. COMMENT: Exxon Company U.S.A. commented that the definition of "receptor" should be consistent with N.J.A.C. 7:26D.

304. COMMENT: Allied Signal, Inc. commented that the definition of "receptor" is dissimilar to the definition of "potential receptors" cited in N.J.A.C. 7:14B-1.6.

RESPONSE: As noted above, the Department has not adopted N.J.A.C. 7:26D. However, the Department will make sure that definitions provided in this rule are consistent in future rulemaking. The Department is aware that the definitions for receptor at N.J.A.C. 7:26E-1.8 and potential receptor at N.J.A.C. 7:14B-1.6 differ. The Department will strive for consistency in these definitions in future rulemaking. Until then, the person conducting a remediation should use the definition provided at N.J.A.C. 7:26E-1.8.

"Reduced laboratory data deliverables"

305. COMMENT: Public Service Electric & Gas Company noted that in the definition of "reduced laboratory data deliverables" Appendix B is referenced. Appendix B is "well search format." Reduced Laboratory data deliverables are detailed in Appendix A sections III and IV.

RESPONSE: The definition of "reduced laboratory data deliverables" will be changed upon adoption to correct this error.

"Remedial action"

306. COMMENT: E.I. du Pont de Nemours and Company commented that the definition of "remedial action" is too narrow. The proposed definition may restrict remedial actions and, therefore, fail to achieve the stated goal of protection of human health and the environment. A remedial action should include any action capable of achieving protection of human health and the environment based on site-specific considerations. Many of the specific remedial actions listed could

also be considered permanent remedies; however, based on the existing definition of permanent remedy, these actions would not be deemed permanent.

307. COMMENT: Atlantic Electric commented that the definition of "remedial action" is too restrictive in scope and recommended deleting the definition and rewriting as follows: "Remedial Action means those actions taken as a result of a release to terminate, control, contour and remediate the release with the intent to reduce contamination and minimize its impact to a level that does not cause an immediate threat to health or the environment."

RESPONSE: The Department has developed a broad definition of remedial action to provide flexibility to the rule. The Department has provided the term "but is not limited to" to the definition of remedial action to include all actions conducted pursuant to these rules, to protect human health and the environment from a discharge of hazardous substances, hazardous wastes, hazardous constituents or pollutants. The Department has defined what remedial actions it accepts as permanent in the definition of "permanent remedy."

308. COMMENT: E.I. du Pont de Nemours and Company, Chevron U.S.A., Inc. and Exxon Company U.S.A. commented that the definition of "remedial action" appears to exclude voluntary actions from being accepted as remedial actions. There would be little incentive for a responsible party to implement a remedial action voluntarily or otherwise under these definitions. E.I. du Pont de Nemours and Company recommended the definition of remedial action be changed as follows: Remedial action means those actions taken at a site that eliminate exposure pathways to reduce contamination to levels protective of human health and the environment.

RESPONSE: The definition of remedial action states that "remedial action means those actions taken at a contaminated site as may be specified in . . . document the Department determines appropriate." This statement does not preclude voluntary remedial actions, it merely states that the action may be specified in an oversight document.

309. COMMENT: Chevron U.S.A., Inc. commented that the definition of remedial action should only include the more common examples of remedial actions. Relocation is not a typical remedial action.

RESPONSE: The Department agrees that the relocation of businesses and residencies is not a typical form of remedial action. However, the Department determined that it was important to include this action in the definition of remedial action so that responsible parties are adequately notified that relocation may be considered the appropriate remedial action given a certain set of circumstances.

310. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested that the definition of "remedial action" be modified to mean actions taken at a contaminated site that isolate, destroy, reform, detoxify, and/or remove contaminants as may be specified in a decision document, record of decision or other document the Department determines appropriate. The added language makes clear that remedial action excludes those actions which primarily collect information, assess information, or consider alternative actions.

RESPONSE: The Department believes that the definition of remedial action is appropriate for its intended purpose in these rules. The Department's examples of "remedial actions" clearly exclude information collection and assessment and the consideration of alternative actions.

311. COMMENT: Chemical Industry Council of New Jersey recommended substituting the following as the first sentence in the definition of "remedial action": Remedial action means those actions taken at a contaminated site to reduce contaminated levels or the risk to human health and the environment due to said contaminant levels that exceed applicable cleanup standards" and the following modification: ". . . associated contaminated materials, or remedial monitoring required to assure that such actions are continuing to exhibit trends toward meeting their remedial objectives." The Chemical Industry Council of New Jersey commented that a remedial action should be defined as any action taken at a contaminated site to reduce contaminant levels or the risk to human health or the environment based on site-specific conditions. Such remedies include, but are not limited to, institutional controls, such as fencing, and containment controls, such as a groundwater pump and treat system which reduce exposure. These type of remedies should also be considered permanent in accordance with the Environmental Protection Agency's policy. Additionally, by including monitoring in the definition of remedial action, the Department is potentially causing overlap of these regulations with other existing programs, such as the New Jersey Pollutant Discharge Elimination System program (NJPDES), which are designed to include monitoring. It is unclear whether groundwater monitoring, for example, will be handled by the Department's site remediation staff or the staff responsible for the NJPDES program, as the Environmental Cleanup Responsibility Act remedial monitoring has been handled in the past.

RESPONSE: The Department intentionally provided a broad definition for remedial action and included the examples of remedial actions noted by the Chemical Industry Council of New Jersey. The term monitoring was mentioned in the definition because ground water monitoring to determine if natural remediation of ground water is occurring may be a part of site remedial action. The Department recognizes that there is some degree of overlap in its regulations and the Department is reviewing these regulations to eliminate duplication and confusion wherever possible. The issue of risk assessment raised by the Chemical Industry Council of New Jersey has been addressed in the responses to comments under the "General Comment" section above.

"Remedial investigation"

312. COMMENT: E.I. du Pont de Nemours and Company commented that the definition of "remedial investigation" should be revised to clarify that risk-based decision making is an essential element of the remediation process.

313. COMMENT: Chemical Land Holdings, Inc. commented that the definition of "remedial investigation" should be revised in terms of its stated objectives because the objective of a remedial investigation is not simply "to determine the necessity of remedial action" but rather to determine the necessity for remedial action and provide a basis for evaluating potential remedial action in conjunction with results from a site risk assessment, if appropriate, and feasibility study of viable alternatives, if deemed necessary.

RESPONSE: In general, the Department agrees that remediation at a site requires an analysis of the degree of risk posed by the site. However, the Department's experience indicates that risk assessments are often too subjective to accurately define the level of remediation required at the site.

N.J.A.C. 7:26E requires that elements of a site-specific risk assessment be explored. For example, the remedial investigation requires that receptors and potential receptors be identified along with pathways of exposure to those receptors.

Although the Department believes that for the vast majority of cases, risk assessments are unnecessary, a person conducting a remediation is not precluded from using risk assessment to develop site specific remediation standards.

The Department agrees with the comment of Chemical Land Holdings, Inc. that the objectives of the remedial investigation should be clarified, and has therefore modified the definition of remedial investigation accordingly.

314. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested deleting the following clause "and is generally performed concurrently and in an interactive fashion with the feasibility study" in the definition of "remedial investigation" because remedial investigations are usually performed prior to planning and executing feasibility studies and that it is important to understand the site history, geology, hydrogeology, and contaminant hydrogeology before planning the feasibility study. In limited cases it is possible to begin the feasibility study process before completion of the remedial investigation but that generalities should not be included in a definition.

RESPONSE: The Department disagrees with this comment. Completion of the remedial investigation before the remedial analysis is conducted typically results in unnecessary delay in remedy implementation. The remedial investigation process is often lengthy and complex and may be delayed for many reasons including offsite sampling access problems, preparation and approval of complex sampling plans, improperly conducted sampling efforts which necessitate resampling, and improperly conducted analytical methods or the use of an unacceptable laboratory which may necessitate resampling.

The completion of the remedial investigation may take many years in some cases, and to delay the collection of data necessary to determine the appropriate remedy until then would clearly be inappropriate. For example, if a phased "soil to ground water" sampling approach is used, it is likely that the extent of the soil contamination will be known long before the extent of ground water contamination is established, allowing for the evaluation of appropriate soil remedies while the ground water remedial investigation is completed.

"Remedial phase"

315. COMMENT: Exxon Company U.S.A. recommended deleting the term "distinct" in the definition of "remedial phase" because it implies a time-separation of the phases and is contradictory of the definition of "remedial investigation" which "is generally performed concurrently and in an interactive fashion with the feasibility study."

RESPONSE: The Department disagrees that the definition of "remedial phase" contradicts the definition of "remedial investigation." The term "distinct" does not refer to time-separation of remedial phases but rather indicates that each remedial phase has distinct components and goals.

"Remediation"

316. COMMENT: New Jersey Natural Gas Company and Jersey Central Power and Light Company commented that the definition of "remediation" is very broad and includes preliminary assessments, site investigations, remedial investigations, feasibility studies, and remedial actions, which terms are also defined separately in the regulations. The term "remediation" is used in the regulations in many cases when "remedial action" would be more appropriate.

RESPONSE: The term remedial action is a subset of the broader term remediation; therefore, the use of the term remediation would not be wrong if used in the context of a remedial action. The Department has reviewed the rules and has made a number of clarifications to the rule where the use of the term "remediation" was inappropriate. For example, the Department has modified N.J.A.C. 7:26E-1.4 to clarify that "remediation" referenced in that provision was intended to be onsite field activity.

"Semivolatile organic compounds"

317. COMMENT: Exxon Company U.S.A. recommended that the definition of "semivolatile organic compounds" be revised to recognize that the two compound lists referenced in the definition differ in the number and nature of semivolatile organics to be anaylzed.

RESPONSE: The Department agrees that the two lists referenced in the definition differ in the number and nature of semivolatile organics to be analyzed. The definition as proposed acknowledges that the two lists are different by including the two lists in different paragraphs with an "or" in between them. Therefore, the Department does not believe that it is necessary to state within the definition that there is a difference between the two referenced lists.

318. COMMENT: E.I. du Pont de Nemours and Company and Chemical Industry Council of New Jersey commented that the definition of "semivolatile organic compounds" should be expanded by adding ". . . or (3) those included in 40 CFR 264 Appendix IX, or (4) any subset of the previous list methods," because the list of analytes available for investigation and/or monitoring should be more broadly encompassing to include the appropriate Resource Conservation and Recovery Act list in addition to priority pollutant list and target compound list analytes.

RESPONSE: In an attempt to standardize the list of semivolatile organic compounds, the Department has selected two basic lists of compounds: the priority pollutant list (from the Federal Clean Water Act) and the target compound/target analyte list (from the Enviornmental Protection Agency Contract Laboratory Program (CLP)). Hence, the analysis of sample for semivolatile organics means the analysis of the sample for priority pollutant semivolatiles (those base neutral and acid compounds in Appendix B, Table II of N.J.A.C. 7:14A) or target compound list semivolatiles (as listed in the CLP method). The Department's Site Remediation Program has extensively used these two lists in defining the analyte list for the analysis of semivolatile organics in samples. The Department disagrees that remediation regulated by N.J.A.C. 7:26E will primarily apply to sites also regualted under the Resource Conservation and Recovery Act (RCRA) corrective action program. The Department believes that the majority of site remediation regulated by N.J.A.C. 7:26E will not be regulated under the Resource Conservation and Recovery Act corrective action program. Therefore, inclusion of semivolatile organic compounds found in Appendix IX in 40 CFR 264 into the definition of semivolatile organics is not warranted. This, however, does not preclude the person responsible for conducting the definition at a site from analyzing samples for specific semivolatile organic compounds that are not on the priority polluant or target compound lists if there is a reason to believe these compounds are present (see N.J.A.C. 7:26E-2.1(c)). The Department also believes that the addition of the phrase "or (4) any subset of the previous list methods" is counter to the attempt to establish a standardized list of semivolatile organic compounds. Therefore, the phrase proposed by E.I. du Pont de Nemours and Company and Chemical Industry Council of New Jersey will not be included in the definition.

"Site investigation"

319. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested that the definition of "site investigation" be revised to mean the collection and evaluation of data to determine contaminant concentrations, pathways of exposure and migration, contaminant fate, risk to human health and the environment, and media interactions. Additional information that may be necessary includes geologic/hydrogeologic characterization, site history on manufacturing and waste handling practices, and site specific parameters which may limit and/or affect remediation. The relative risk to human health and the environment based on site-specific contaminant exposure pathways may be considered when determining if remedial action is necessary.

RESPONSE: The Department disagrees with the suggested definition change. The purpose of the site investigation is to determine if contamination is present at a concentration which fails to satisfy the applicable remediation standard at an area of concern. When proposed, remediation standards will be risk-based standards which inherently account for the potential or actual exposure to receptors; therefore, the issue of exposure need not be addressed at this time in N.J.A.C. 7:26E. After contamination which fails to satisfy an applicable remediation standard is established, the site enters the remedial investigation, remedial alternative analysis study and remedial action phases where contaminant migration pathways and receptor exposure pathways are evaluated and addressed.

"Soil"

320. COMMENT: Exxon Company U.S.A. commented that the definition of soil be revised, as follows: "Soil means the unconsolidated mineral and organic matter, including naturally weathered geologic and/or fill materials, above the seasonally high water table that has been subjected to and influenced by geologic and other factors" because the Technical Requirements for Site Remediation and Cleanup Standards for Contaminated Sites apply separately to soil and ground water.

RESPONSE: The Department disagrees with the suggested definition change. Including naturally weathered geologic and/or fill material in the definition is not necessary because such material is already included in the definition as "unconsolidated mineral and organic matter." The Department does not consider the soil horizon to stop at the seasonally high water table because soil may be contaminated below the water table and therefore require remediation.

"Surface soil"

321. COMMENT: Colonial Pipeline Company suggested that "and organic debris layers" be added to the definition of "surface soil."

RESPONSE: The definition of surface soil has been withdrawn from N.J.A.C. 7:26E because of the confusion caused by the use of the terms "surface soil" and "subsurface soil."

"Target compound list plus 30"

322. COMMENT: E.I. du Pont de Nemours and Company recommended that the words "tentatively identified" replace the term "non-targeted" in the definition of "target compound list plus 30" because "non-targeted" compounds are not the only compounds on the analyte list; the term also implies both internal standards and surrogates.

RESPONSE: N.J.A.C. 7:26E-1.8 contains a definition of "non-targeted compound" which addresses the commenter's concern. E.I. du Pont de Nemours and Company suggests using the term "tentatively identified compound" in lieu of "non-targeted compound." N.J.A.C. 7:26E-1.8 contains a definition for "tentatively identified compound" which is not synonymous with the definition for "non-targeted compound." Therefore, the definition for "target compound list plus 30" (TCL+30) will not be changed. However, in further review, the Department has modified the definition of "non-targeted compound" for clarity by indicating that a non-targeted is a compound as opposed to only a contaminant and indicating that a system monitoring compound is not a non-targted compound.

323. COMMENT: Mobil Oil Corporation recommended that the definition of the target compound list plus 30 should be changed to omit asbestos and 2, 3, 7, 8-tetrachloro-dibenzo-p-dioxin.

RESPONSE: The target compound list plus 30 (TCL+30) as contained in the Environmental Protection Agency Contract Laboratory

Program Statement of Work for Organics Analysis, Multi-media, Multi-concentration does not include either asbestos or 2,3,7,8-tetrachloro-p-dioxin.

"Tentatively identified compound"

324. COMMENT: The Chemical Manufacturers Association commented that the Department's definition of tentatively identified compound (TIC) is vague and unclear because the definition fails to elaborate on the basis for identifying the TIC, or the qualititative and quantitative aspects of TICs.

RESPONSE: The Department disagrees that the definition is vague and unclear. The definition addresses the qualitative (tentative identification) and quantitative (estimated concentration) aspects of tentatively identified compounds (TICs). The Department does not believe it is necessary to elaborate on how TICs are identified in the definition as this is not the purpose or function of defining the term.

The Department, however, will consider the suggestion of providing additional details and guidance on how to properly identify TICS, and on the criteria used for designating the qualitative and quantitative aspects of TICs as part of future rulemaking.

"Volatile organics"

325. COMMENT: E.I. du Pont de Nemours and Company commented that the definition of volatile organic compounds should be expanded as follows: "or (3) those included in 40 CFR 264 Appendix IX, or (4) any subset of the previous list methods," because the list of analytes available for investigation and/or monitoring should be more broadly encompassing to include the appropriate Resource Conservation and Recovery Act list in addition to priority pollutant list and target compound list analytes.

326. COMMENT: Chevron U.S.A., Inc. commented that the definition of "volatile organic compounds" should be changed to include those compounds amenable to analysis by Environmental Protection Agency methods 8240, 8010/8020 and 601/602. Environmental Protection Agency method 8240 and several gas chromatography only methods are applicable and routinely used to analyze environmental samples for volatile organics.

327. COMMENT: Exxon Company U.S.A. commented that the definition of "volatile organic compounds" specifies two compound lists, which differ in the number and nature of volatile organics to be analyzed. Furthermore, Environmental Protection Agency 500 series methods listed later in the proposed regulation, analyze for a completely different set of volatile organics. Exxon Company U.S.A. recommended that the Department state that there is the difference described above in these reference lists.

RESPONSE: The Department recognizes that similar anlaytical methods may have different lists of compounds amenable for analysis by that method. For example, method 624, method 8240, method 524.2 and Contract Laboratory Program (CLP) multi-media, multi-concentration method for volatile organics are all methods for the analysis of volatile organics using gas chromatography/mass spectrometry (GC/MS). Each method contains a list of compounds which are amenable for analysis by that particular method. Unfortunately, these lists of compounds are not identical. In an attempt to standardize the list of amenable compounds, the Department has selected two basic lists of compounds: the priority pollutant list (from the Federal Clean Water Act) and the target compound/target analyte list (from the Environmental Protection Agency Contract Laboratory Program). Hence, the analysis of a sample for "volatile organics" means the analysis of the sample for priority pollutant volatiles (as listed in method 624) or target compound list volatiles. These two lists have been used extensively in the Department's Site Remediation Program when samples are analyzed for "volatile organics." The Department agrees that the two lists referenced in the definition differ in the number and nature of volatile organics to be analyzed. The Department believes that the definition as proposed implies that the two lists are different. Therefore, the Department does not believe that it is necessary to state within the definition that there is a difference between the two referenced lists.

The Department disagrees that remediation regulated by N.J.A.C. 7:26E will primarily apply to sites also regulated under the Resource Conservation and Recovery Act (RCRA) corrective action program. The Department believes that the majority of site remediation regulated by N.J.A.C. 7:26E will not be regulated under the Resource Conservation and Recovery Act corrective action program. Therefore, inclusion of volatile organic compounds found in Appendix IX in 40 CFR 264 into the definition of volatile organics is not warranted. In addition, the Department believes that the inclusion of the analyte lists from Environmental Protection Agency Methods 8240, 8010, 8020, 601, 602 and various 500 series methods to this definition is not necessary. This, however, does not preclude the person conducting a remediation at a site from analyzing samples for specific volatile organic compounds that are not on the priority pollutant or target compound lists if there is reason to believe these compounds are present (see N.J.A.C. 7:26E-2.1(c)).

The Department also believes that the addition of the phrase "or (4) any subset of the previous list methods" is counter to the attempt to establish a standardized list of volatile organic compounds. Therefore, the phrase proposed by E.I. du Pont de Nemours and Company will not be included in the definition.

328. COMMENT: The Chemical Industry Council of New Jersey commented that the definition of "volatile organic compounds" should be the same as that proposed in N.J.A.C. 7:26D as modified: Volatile Organic Contaminants means organic compounds amenable to analysis by purge and trap techniques. For the purpose of these regulations, analysis of volatile organics means the analysis for either those priority pollutants listed as amenable to analysis using Environmental Protection Agency method 624, method 8240 from publication SW-846 or those target compounds identified as volatiles in the version of the Environmental Protection Agency Contract Laboratory Program Statement of Work for Organics Analysis, Multi-Media, Multi-Concentration in effect as of the date on which the laboratory is performing the analysis.

RESPONSE: The definition of "total volatile organic contaminants" as contained in the proposed "Cleanup Standards for Contaminated Sites" (24 N.J.R. 373(a)) and the definition of "volatile organics" in these proposed rules are different as they have different intents. The definition that was in the proposed "Cleanup Stnadards for Contamianted Sites" (24 N.J.R. 373(a)) is a generic definition of what is a volatile contaminant while the definition of volatile organics in these proposed regulations is to establish a specific list of compounds which should be analyzed when an analysis of "volatile organics" is conducted. The revised definition for "volatile organics" as proposed by the Chemical Industry Council of New Jersey simply adds the phrase "Environmental Protection Agency Method 8240 from SW-846" to the definition of volatile organics at N.J.A.C. 7:26E-1.8. As noted in the response directly above, the Department believes that the addition of the analyte list from method 8240 to this definition is not necessary. This however, does not preclude the person conducting a remediation at a site from analyzing samples for specific volatile compounds that are not on the priority pollutant or target compound lists if there is reason to believe these compounds are present (see N.J.A.C. 7:26E-2.1(c)).

"Wetland"

329. COMMENT: For clarity, Exxon Company U.S.A. recommended adding at the end of the definition of "wetland" the phrase "as defined in N.J.A.C. 7:7A."

330. COMMENT: Colonial Pipeline Company commented that the definition of "wetland" is not adequately defined and suggested that the U.S. Army Corps of Engineers definition of a wetland should be incorporated by reference.

RESPONSE: The Department did not reference the definition of "wetland" to other regulations because some of the regulations have specific exclusionary language that may not apply to N.J.A.C. 7:26E. Since these statutory programs do not provide the sole basis for the Department's inclusion of "wetlands" in these rules, the Department believes that a broader, more inclusive definition of "wetland" is appropriate. On adoption, the Department deleted the definition of "coastal wetland" and "freshwater wetland" as these terms are not specifically used in N.J.A.C. 7:26E.

N.J.A.C. 7:26E-1.9

331. COMMENT: Atlantic Electric commented that N.J.A.C. 7:26E-1.9 should be deleted. This area is already covered by the Federal Occupational Safety and Health Administration and other Federal and State regulations.

332. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that N.J.A.C. 7:26E-1.9, which indicates that any person conducting remediation activities must prepare a site specific health and safety plan, are already addressed adequately through applicable Occupational Safety and Health Administration regulations. This requirement is overly burdensome and inappropriate to these regulations.

RESPONSE: The intent of N.J.A.C. 7:26E-1.9 is to inform persons conducting a remediation that a site-specific health and safety plan shall be prepared and followed in accordance with applicable U.S. Department of Labor, Occupational Safety and Health Administration regulations as well as any other applicable Federal, State or local statutes or regulations. N.J.A.C. 7:26E does not require any health and safety procedures in excess of those contained in the applicable Occupational Safety and Health Administration regulations. As such, the Department does not consider N.J.A.C. 7:26E-1.9 to be overly burdensome or inappropriate.

333. COMMENT: The General Electric Company commented that N.J.A.C. 7:26E-1.9, which requires that "any person conducting remediation activities shall prepare a site-specific health and safety plan," is over broad and burdensome. Because "remediation" is defined to include not just on-site remedial activities but also historical records searches and other preliminary assessment activities, the requirement should be revised to apply only to remediation activities that are subject to regulation by the Occupational Safety and Health Administration.

334. COMMENT: Allied Signal, Inc. commented that N.J.A.C. 7:26E-1.9, which requires a health and safety plan for all those involved in the remediation, is very broad. Because of the definition of remediation, a health and safety plan would be required for inappropriate activities, such as in-office file searches. The health and safety plan requirement should be clarified to apply only to activities for which there is a potential for exposure to hazardous substances.

335. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following wording modification to N.J.A.C. 7:26E-1.9: "Any person conducting remediation activities under the jurisdiction of the Department through those Acts listed at N.J.A.C. 7:26E-1.3 Applicability (a) where unhealthful exposure to contaminants could occur in the course of the remedial action shall prepare a site-specific health and safety plan which shall be adhered to by all personnel involved in the remediation."

Voluntary remedial actions which are also not included in any one of the five criteria at 29 C.F.R. 1910.120 should be excluded from the requirements of a safety and health plan.

Also, some remedial actions are foreseeable where no exposure is possible, and the safety and health plan is of no value. Examples include file searches, preparation of engineering designs and drawings, and aerial photography.

RESPONSE: N.J.A.C. 7:26E-1.9 only requires that a Health and Safety Plan be prepared in accordance with Occupational Safety and Health Administration regulations. If the Occupational Safety and Health Administration does not require that a Health and Safety Plan be prepared for a certain phase of remediation (for example, for a preliminary assessment), then these rules do not require it either.

In response to the concern of Allied Signal, Inc. about voluntary remediations, the Department believes that all remediation activities conducted at contaminated sites shall be performed in accordance with a site-specific health and safety plan as specified in N.J.A.C. 7:26E-1.9. This includes remediation activities conducted pursuant to voluntary remedial activities because N.J.A.C. 7:26E-1.9 merely requires that a health and safety plan be prepared in accordance with the applicable provisions of Occupational Safety and Health Administration. Thus, if voluntary remediation activities are such that Occupational Safety and Health Administration requirement apply, then a health and safety plan is required.

336. COMMENT: Exxon Company U.S.A. commented that the last sentence of N.J.A.C. 7:26E-1.9 invokes "... State or local applicable statutes or regulations" as a requirement for occupational safety and health. State and local municipalities do not have the statutory authority to regulate occupational health and safety in the private sector. Therefore, deletion of the above phrase is recommended. Further, "at the time the Cleanup Plan is submitted" should be inserted following "... most recently adopted."

RESPONSE: There are State and local regulations and codes such as building, electrical and construction codes which include general safety considerations. These regulations and codes could be applicable under certain conditions at contaminated sites (for example, use of temporary electrical systems). As such, the Department believes it is appropriate to include the phrase "... as well as any other Federal, State or local applicable statutes or regulations" in N.J.A.C. 7:26E-1.9 of these rules.

The suggestion to add the phrase "at the time the Cleanup Plan is submitted" is not necessary and is too restrictive. A health and safety plan would be required for any remediation activities conducted at contaminated sites. This would include site investigations and remedial investigations in addition to remedial actions. Also N.J.A.C. 7:26E-1.9 states that the most recently adopted and applicable standards shall be used in the preparation of the time of health and safety plan. This plan shall be up to date as of the time remediation activities are conducted.

N.J.A.C. 7:26E-2

General Comments

337. COMMENT: The Chemical Manufacturers Association suggested that the Department make a clear distinction when referencing method detection limits (MDL) and practical quantitation levels (PQL) for different analytical methods. There should be a clear indication of the relevant matrices and corresponding methods for which they were developed.

RESPONSE: The Department agrees that the terms "method detection limit (MDL)" and "practical quantitation level (PQL)" have different meanings. Definitions for both terms have been included on adoption of these rules which indicate the relevant matrices and the corresponding methods for which they were develped.

338. COMMENT: Schering Laboratories commented that the sentence "Practical quantitation level (PQLs) are used to measure compliance with any concentration which is below a method detection limit (MDL)" is unclear because MDLs are the lowest level that may be reliably detected. Nothing is reported below MDL because of the high probability of a false positive result. PQLs are higher than MDLs and are the lowest level where a reliable number may be obtained.

RESPONSE: This comment refers N.J.A.C. 7:26D, the proposed Cleanup Standards for Contaminated Sites, 24 N.J.R. 373(a), not the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. This comment, therefore, is beyond the scope of this rulemaking procedure. However, in response to this comment, the Department agrees that for a given analyte using a specific analytical method, PQLs are higher than MDLs.

339. COMMENT: The Chemical Manufacturers Association was concerned that the cleanup standards are being based on the lowest possible method detection limits (MDLs) and practical quantitation levels (PQLs) which can be found in the methods, without taking into consideration the technical issues concerning the quantification levels and different matrices. The Chemical Manufacturers Association stated that the method detection limits written into the Environmental Protection Agency (EPA) 500 Series analytical methods (for the analysis of drinking water) are unrealistically low and are unsupported by interlaboratory performance data. The Chemical Manufacturers Association noted it is vitally important that the PQLs are reasonable and achievable by laboratories. The Chemical Manufacturers Association recommended that the cleanup standards be realistic and based on levels that can be routinely measured for the matrix involved.

RESPONSE: The Chemical Manufacturers Association appears to imply that the Technical Requirements for Site Remediation indicate a preference for use of drinking water methods for analysis of organic analytes for site remediation. This is not the intent of these rules nor does the Department believe that the regulations as written imply such a preference. Furthermore, to the extent that this comment is directed to the establishment of Ground Water Quality Standards, N.J.A.C. 7:9-6, or the Cleanup Standards which were proposed by the Department at 24 N.J.R. 373(a) but not adopted, this comment is beyond the scope of this rulemaking.

340. COMMENT: Exxon Company U.S.A. commented that, in general, clarification by the Department is needed on the applicability and responsibility of data validation for each remedial phase in N.J.A.C. 7:26E-2.1. This is needed to clarify the specific requirements prior to sample collection, to ensure sampling and analytical efforts are acceptable and performed in an economical manner.

RESPONSE: It is the responsibility of the person conducting the remediation to ensure that analytical data used in all phases of remediation are of sufficient quality to meet the intended goal or objective of a specific project or activity. This is accomplished, in part, by the evaluation of analytical results and associated raw data to determine if the analysis was conducted in accordance with the specific analytical method used, including all method specific quality control procedures. This evaluation process has been termed data validation.

Data validation is an important process as New Jersey Department of Environmental Protection and Energy (NJDEPE) certification of a laboratory or laboratory participation in contract programs such as the Environment Protection Agency (EPA) Contract Laboratory Program (CLP) and the New Jersey Professional Laboratory Analytical Services

contract does not ensure that all data will be reliable for every sample analysis. N.J.A.C. 7:26E-3.10(b)3i specifies some data validation parameters that must be evaluated. In addition, N.J.A.C. 7:26E-2.2 specifies quality assurance and quality control procedures that must be addressed as part of every phase of remediation where analytical data are generated. Adherence to these procedures is the responsibility of the person responsible for conducting the remediation.

The Department is currently evaluating the possibility of expanding data validation requirements in these regulations. Any such new requirements will be part of future rulemaking efforts.

341. COMMENT: Continental Vanguard, Inc. stated that nowhere in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, or the proposed Cleanup Standards for Contaminated Sites, 24 N.J.R. 373(a), are cleanup levels for Total Petroleum Hydrocarbons (TPH) included. Continental Vanguard, Inc. stated that TPH levels must be included somewhere in this regulatory framework.

RESPONSE: The need for establishing remediation standards for total petroleum hydrocarbons is recognized by the Department. The issue of how and when to promulgate these standards is presently under review.

342. COMMENT: International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation commented that they agree with and support New Jersey's objective of establishing clear, uniform criteria for all remedial activities. They commented that the criteria will eliminate the subjectivity of the remedial planning process which has affected cleanup progress in the past. International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation strongly support rigorous technical requirements for laboratory certification and feel that uniform certification, analysis, and quality control requirements will improve data quality and simplify the remediation decision process.

RESPONSE: The Department acknowledges this comment.

N.J.A.C. 7:26E-2.1

343. COMMENT: Public Service Electric and Gas Company commented that some of the items included in N.J.A.C. 7:26E-2.1 are not quality assurance related but rather relate to sampling methodology and analytical requirements. Public Service Electric and Gas Company suggested moving N.J.A.C. 7:26E-2.1(b) to N.J.A.C. 7:26E-3.6; and N.J.A.C. 7:26E-2.1(c), (d), and (e) into a new section titled "Analytical Requirements."

RESPONSE: The Department agrees that the commenter's suggested movement of certain sections in N.J.A.C. 7:26E-2 is logical. However, the Department believes that the current placement of these sections in N.J.A.C. 7:26E-2 is also logical. Therefore, the Department intends to keep these sections in N.J.A.C. 7:26E-2.

344. COMMENT: E.I. du Pont de Nemours and Company stated it is unclear whether the laboratory must meet all of the first four requirements in N.J.A.C. 7:26E-2.1(a)1i through iv. E.I. du Pont de Nemours and Company proposed that N.J.A.C. 7:26E-2.1(a)1 be changed to read: "Laboratories performing analysis shall conform to one of the following:"

345. COMMENT: Hoffman-La Roche Inc. commented that the laboratory "credentials" requirement at N.J.A.C. 7:26E-2.1(a)1i through iii, requiring laboratories to be (1) a New Jersey Certified Laboratory and (2) a participant in good standing in the Environmental Protection Agency (EPA) Contract Laboratory Program and (3) a New Jersey Department of Treasury Professional Analytical Services Contract awardee in good standing is restrictive to a great number of laboratories. Hoffman-La Roche Inc. stated few environmental testing laboratories currently meet the requirements listed at N.J.A.C. 7:26E-2.1(a)1.

Hoffman-La Roche Inc. recommended that N.J.A.C. 7:26E-2.1(a)1 be revised to read that the laboratory be either (1) a New Jersey Certified Laboratory, or (2) a participant in good standing in the EPA Contract Laboratory Program, or (3) a New Jersey Department of Treasury Professional Analytical Services Contract awardee in good standing.

346. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the requirements at N.J.A.C. 7:26E-2.1(a)1, which are based upon participation in a contract program where awards are based upon low bids, is not a legitimate requirement for the State to impose. A more reasonable wording to N.J.A.C. 7:26E-2.1(a)1 would clarify that the laboratory must be certified by New Jersey, or be a participant in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) or be a contract awardee under the New Jersey Professional Laboratory Analytical Services program for the appicable analyses or have demonstrated capability to perform required analyses according to the CLP or New Jersey Statement of Work.

347. COMMENT: Chemical Land Holdings, Inc. stated that as proposed, N.J.A.C. 7:26E-2.1(a)1 would require analytical laboratories to be New Jersey certified and to be a participant in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and to be an awardee of a New Jersey Professional Laboratory Analytical Services contract. Since having a large number of laboratories that possess all of these certifications is not realistic, Chemical Land Holdings, Inc. recommended that the word "or" be used as the last word in N.J.A.C. 7:26E-2.1(a)1i, ii, and iii, and that the word "or" be replaced by "and" in N.J.A.C. 7:26E-2.1(a)1iv.

348. COMMENT: Exxon Company U.S.A. commented that the statement at N.J.A.C. 7:26E-2.1(a)1 that laboratories shall conform to all the listed criteria is not realistic. This is particularly significant in that there are a limited number of laboratories which are both Department certified and a member of the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP). Exxon Company U.S.A. recommended changing the statement to read as follows: "one or more of the criteria below."

349. COMMENT: International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation commented that of the 482 New Jersey certified environmental laboratories, only three are Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) contract awardees (according to Federal sources) and would be eligible to perform remedial analysis for the tasks that comprise the majority of the work in New Jersey. If the proposed certification requirements were adopted and enforced as written, 99 percent of the environmental laboratories in the State would not qualify for this work—not on the basis of technical or quality shortcomings, but rather because they did not have active laboratory services contracts either with New Jersey or the EPA.

350. COMMENT: Colonial Pipeline Company commented that it was quite concerned that only New Jersey Professional Laboratory Analytical services or Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) contract laboratories could conduct sample analyses pursuant to N.J.A.C. 7:26E-2.1(a)1.

351. COMMENT: Shell Oil Company commented that to the extent that N.J.A.C. 7:26E-2.1(a)1 also requires the use of only laboratories that are actively doing Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) work for government, it is extremely misguided.

352. COMMENT: Recon Systems, Inc. commented that N.J.A.C. 7:26E-2.1(a)1 should be modified because, as written, work would only be acceptable if a laboratory was willing to conform to all the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and New Jersey Professional Laboratory Analytical Services contract requirements.

353. COMMENT: Envirotech Research, Inc. stated that pursuant to N.J.A.C. 7:26E-2.1(a)1 a laboratory cannot work for any private party unless they also work for the government. They believed this to be an unreasonable and probably illegal restriction of trade.

354. Public Service Electric and Gas Company questioned whether the conjunction at N.J.A.C. 7:26E-2.1(a)1iv applies to the two items separated or the entire series. Public Service Electric and Gas Company recommended conjunctions should be placed after each item in the series so as to make the interpretation unambiguous.

355. COMMENT: The Chemical Industry Council of New Jersey commented that the wording of N.J.A.C. 7:26E-2.1(a)1 implies that all of the requirements must be met, and recommended that the wording be changed to: "Laboratories performing analyses shall conform to any one of the following:"

356. COMMENT: CIBY-GEIGY Corporation commented that the word "or" should be added to the end of N.J.A.C. 7:26E-2.1(a)1i to clarify that New Jersey certification is adequate for the analysis of aqueous samples.

357. COMMENT: CIBY-GEIGY Corporation commented that the word "or" should be added to the end of N.J.A.C. 7:26E-2.1(a)1ii to clarify that being a participant in good standing in the Environmental

Protection Agency (EPA) Contract Laboratory Program (CLP) for the applicable Statement of Work is adequate for the analysis of aqueous and non-aqueous samples.

358. COMMENT: CIBY-GEIGY Corporation commented that the word "or" should be added to the end of N.J.A.C. 7:26E-2.1(a)1iii to clarify that being a contract awardee in the applicable analytical task under the version of the Professional Laboratory Analytical Services contract is adequate for the analysis of aqueous and non-aqueous samples.

359. COMMENT: Laboratary Resources commented that the Department will be imposing inappropriate limits by requiring, at N.J.A.C. 7:26E-2.1(a)1, that a laboratory be affiliated with the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) or as a New Jersey contract laboratory in order to perform analysis of aqueous and non-aqueous samples for applicable organics and inorganics. Laboratory Resources noted that since there may only be three dozen EPA CLP laboratories nationwide and that there are less than two dozen State contract laboratories, the number of laboratories that will be available to a regulated party looking for laboratory work will be limited.

RESPONSE: It was never the intent of the Department to require laboratories performing analyses pursuant to these proposed rules to meet all of the qualifications in N.J.A.C. 7:26E-2.1(a)1i through iv. Rather, the intent was to require laboratories to meet at least one of the qualifications in N.J.A.C. 7:26E-2.1(a)1i through iv depending upon the type of analysis performed. N.J.A.C. 7:26E-2.1(a)1 has been modified to clarify this point.

360. COMMENT: United States Testing Company, Inc. stated that since there is a laboratory certification program run by New Jersey, quality assurance requirements need only conform to the requirements of that program.

361. COMMENT: Recon Systems, Inc. suggested that the Department should expand its existing laboratory certification program to include soils and have it subsidized through fees collected from participating laboratories.

362. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that since the Department laboratory certification program is for drinking water, it does not seem reasonable to require non-aqueous samples be analyzed by laboratories certified only for analysis of aqueous samples pursuant to N.J.A.C. 7:26E-2.1(a)1iv.

363. COMMENT: Hoffman-La Roche Inc. commented that procedures related to non-aqueous sample analysis and resulting data acceptability pursuant to N.J.A.C. 7:26E-2.1(a)1iv should be addressed through the implementation of a Department solid waste laboratory certification program which has often been discussed but not yet implemented.

364. COMMENT: The International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytial Corporation proposed that New Jersey revise the laboratory qualifications criteria at N.J.A.C. 7:26E-2.1(a)1ii and iii by removing the two contract-based requirements and replacing them with a fee-based certification program that includes the technical qualification aspects of the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and/or the New Jersey Professional Laboratory Analytical Services contract programs such as performance evaluations, laboratory audits, and frequent data evaluation.

365. COMMENT: The International Association of Environmental Testing Laboratories and Environmental Testing and Certification Corporation proposed that a new N.J.A.C. 7:26E-2.1(a)1iv be written which would provide that alternative certification programs that include technical and administrative criteria similar to the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and/or the New Jersey Professional Laboratory Analytical Services contract or any other Department approved alternative will be established and administered through the Department by a third party contractor by May, 1994.

366. COMMENT: Colonial Pipeline Company stated since the responsible party is paying for oversight, a certification process should be developed to allow smaller laboratories to supply analytical services to specific parties. This will make the system more efficient and at the same time allow for better analytical services.

367. COMMENT: Continental Vanguard, Inc. commented that instead of the requirement at N.J.A.C. 7:26E-2.1(a)1, if the Department is concerned over the qualifications of laboratories and the quality of their analytical performance, the Department should develop some type of certification system for laboratories in the State.

368. COMMENT: Envirotech Research, Inc. requested that the technical requirement for laboratories at N.J.A.C. 7:26E-2.1(a)1 be separated from government contract participation. The State has authority to regulate laboratories under existing laboratory certification regulations at N.J.A.C. 7:18.

369. COMMENT: International Hydronics noted that the Department should not diminish the reputation or the importance of its own well established certification program at N.J.A.C. 7:18, especially since that program, with the single modification of including Environmental Protection Agency publication SW-846 methods for certification, would accomplish the intent of N.J.A.C. 7:26E-2.1(a)1iv.

370. COMMENT: RM Laboratories commented that N.J.A.C. 7:26E-2.1(a)1 should be modified such that clearly defined levels of laboratory certification are established. They noted that laboratory certification should be extended to analyses conducted using Environmental Protection Agency publication SW-846 methods.

371. COMMENT: Mr. Patrick Mulrooney noted that if the Department is interested in increasing the quality of the laboratory work performed pursuant to N.J.A.C. 7:26E-2.1(a)1, the Department should expand its existing certification process to include the analysis of soil samples.

RESPONSE: A problem encountered by the Department is that the Department's laboratory certification program, N.J.A.C. 7:18, is limited to the analysis of aqueous samples and applies to a limited set of analytical methods. The remediation of contaminated sites requires the analysis of non-aqueous samples (for example, soils, sediments, sludges) for which Department laboratory certification does not exist. In addition, many of the analytical methods used in the analysis of samples from contaminated sites (for example, Environmental Protection Agency (EPA) SW-846 methods, EPA Contract Laboratory Program (CLP) methods) are not part of the Department laboratory certification program.

The Department acknowledges that the best way to address laboratory qualifications for the analysis of samples using EPA CLP or EPA SW-846 analytical methods is through the development and implementation of a formal certification program. The Department is drafting regulations which will establish a laboratory certification program which includes the certification of EPA SW-846 methods and is considering drafting regulations which would establish a laboratory certification program for EPA CLP analytical methods. It is the intent of the Department to incorporate any new laboratory certification program requirements into the Technical Requirements for Site Remediation when such certification program requirements are promulgated.

At present, the Department is not considering the use of third-party contractors as a mechanism to operate the Department laboratory certification program.

The Department has determined that until the laboratory certification program is expanded, there must be a mechanism which gives the Department some assurance that a laboratory is capable of performing EPA SW-846 and EPA CLP analytical methods without having the laboratory submit information such as personnel qualifications and standard operating procedures for Departmental review and approval.

The Department believes that the approach adopted in these technical requirements (cross linking EPA SW-846 and EPA CLP analytical methods with existing laboratory certification requirements or laboratory participation in certain analytical contracts) is the appropriate mechanism to establish minimum laboratory qualifications for the analysis of environmental samples.

372. COMMENT: Industrial Corrosion Management, Inc. commented that if the Department seeks better analytical data, then it must deal directly with the laboratories. Industrial Corrosion Management, Inc. urged the Department to establish a means whereby it can communicate its needs directly with qualified laboratory representatives.

RESPONSE: The Department agrees that increased communications between laboratories and the Department will help to improve the quality of analytical data submitted to the Department. Several mechanisms currently exist where the Department interacts directly with laboratories. One such mechanism is the Department's Laboratory Certification Program. The Department also interacts directly with those laboratories who have been awarded contracts under the Professional Laboratory

Analytical Services contract. Working with the Department's Site Remediation Program, laboratories are encouraged to contact the Department if they are having difficulty in conducting analyses pursuant to remediation conducted under the oversight of the Department. The Department has found that joint conversations with all involved parties (the Department, the person responsible for conducting the remediation, consultants to the person responsible for conducting the remediation, the laboratory performing the analyses) is most beneficial in resolving site-specific analytical problems. Finally, all laboratories have an opportunity to comment on proposed regulations affecting laboratories through the public comment process as is being done here.

373. COMMENT: Industrial Corrosion Management, Inc. stated that the Department needs to develop quality laboratories and weed out the poor ones. Laboratories perform well to establish certification and then, turn around and perform to a lesser degree on the actual work itself. If one laboratory can do less quality control meeting less demanding standards and be permitted to compete effectively, then the entire industry suffers.

RESPONSE: While the Department shares the concerns of the commenter, these particular comments are outside the scope of these rules.

374. COMMENT: RM Laboratories stated a desire to see a committee formed by representatives of the Department and representatives from the laboratory community to define objectives for a different type of certification program for State contract work to everybody's benefit.

RESPONSE: While the Department agrees that the suggestion presented has merit, it is outside the scope of these rules.

375. COMMENT: The Chemical Manufacturers Association stated that the Department needs to identify a standard mechanism by which facilities can obtain information regarding the status of laboratories generally conducting analytical testing. Presently, the availability of such information is erratic and sketchy.

376. COMMENT: The Chemical Manufacturers Association stated there is a problem with determining whether a laboratory has been decertified, suspended, has lost a contract, or has completed a contract. This type of information is not readily available from the State or Federal agencies involved. The Chemical Manufacturers Association recommended that a common mechanism be developed for obtaining information on the status of a laboratory's certification status.

RESPONSE: The Department disagrees that laboratory status information is erratic and sketchy. The Department certification status of any laboratory can be determined by contacting the Department's Office of Quality Assurance. The telephone number is (609) 292-3950. In addition, the contract award/contract performance status of any laboratory with regard to the New Jersey Professional Analytical Services contract and EPA Contract Laboratory Program can be obtained from the Office of Quality Assurance.

The Department also wants to emphasize that if analytical data are being used pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, using analytical methods for which Department laboratory certification is required, it is the responsibility of the person responsible for conducting the remediation to be aware of the certification status of the laboratory it employs.

377. COMMENT: Laboratory Resources, Inc. and United States Testing Company, Inc. stated that neither the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) nor the New Jersey Professional Laboratory Analytical Services (NJPLAS) contracts incorporated at N.J.A.C. 7:26E-2.1(a)1ii and iii are certification or accrediting programs, and it is improper to use them as such. United States Testing Company, Inc. stated if the State of New Jersey wishes to implement in its certification program, an audit along the lines of the EPA CLP or NJPLAS contract, that would be proper.

378. COMMENT: United States Environmental Protection Agency commented that inclusion of N.J.A.C. 7:26E-2.1(a)1ii in the proposed rule implies that the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) is a certification program. United States Environmental Protection Agency stated the EPA Superfund program has always stated as a matter of policy that the CLP is not a certification program. United States Environmental Protection Agency further stated that if the State of New Jersey requires EPA CLP participation, State-contracted laboratories would become ineligible depending upon the schedule by which CLP contracts are terminated. It would also make planning for future laboratory analyses demand very difficult.

379. COMMENT: The Chemical Manufacturers Association commented that the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) referred to in N.J.A.C. 7:26E-2.1(a)1 is not a means of laboratory accreditation; it serves only as a contractual arrangement between the EPA and commercial environmental laboratories.

380. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company stated that the New Jersey Professional Laboratory Analytical Services contract referred to at N.J.A.C. 7:26E-2.1(a)1iii is not a certification program, but merely a list of approved bidders.

381. COMMENT: Hoffman-La Roche Inc. commented that treating State and Federal analytical services contract programs as additional forms of required certification at N.J.A.C. 7:26E-2.1(a)1ii and iii in order to do remediation related business in the State of New Jersey is redundant.

382. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the Environmental Protection Agency (EPA) has repeatedly affirmed that the Contract Laboratory Program (CLP) is not a certification program and that it is therefore inappropriate to use it as such at N.J.A.C. 7:26E-2.1(a)1ii. It is a contract mechanism by which the EPA procures analytical services for work on Superfund sites. EPA's oversight of CLP laboratories is limited to their analyses; participation in the CLP carries no warranty for data quality for other clients.

383. COMMENT: Chemical Land Holdings, Inc. stated that N.J.A.C. 7:26E-2.1(a)ii and iii, which require participation in the Environmental Protection Agency and New Jersey contract laboratory programs, should be deleted. The sole criterion for performance of analyses should be that the laboratory be New Jersey Certified as stated in N.J.A.C. 7:26E-2.1(a)1i and iv. Furthermore, participation in a contract laboratory program is not a certification and implies no guarantee of quality.

384. COMMENT: The International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation stated the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) is not a certification program but only a contracting mechanism used by the EPA to procure analytical services. The EPA has consistently advised its regional offices, other Federal agencies, and states not to use the CLP as a defacto certification program.

385. COMMENT: Shell Oil Company noted that the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) is not an accreditation but only a contractual arrangement between the government and a laboratory that does work for the government on Superfund projects. Shell Oil Company stated that the EPA CLP has no regulatory recognition, and is limited to the EPA and therefore should not be referenced at N.J.A.C. 7:26E-2.1(a)1ii.

386. COMMENT: Envirotech Research, Inc. stated that N.J.A.C. 7:26E-2.1(a)1ii and iii would make it a requirement for laboratories to have government contracts in order to perform analytical methods described in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) Statement of Work or the State's Professional Laboratory Analytical Services Contract. In effect this would make participation in a government contract a "certification" required to perform any laboratory work of this type in New Jersey. The EPA has repeatedly taken the position that participation in the CLP is not a certification.

387. COMMENT: The Chemical Industry Council of New Jersey commented that the requirement that the laboratory be a participant in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) at N.J.A.C. 7:26E-2.1(a)1ii is unduly restrictive and imposes unreasonable limitations on selection of laboratories. The EPA CLP is not a certification program.

RESPONSE: The Department acknowledges that analytical services contracts are not laboratory certification programs. The best way to address laboratory qualifications for the analysis of samples using EPA CLP or EPA SW-846 analytical methods is through the development and implementation of a formal certification program. The Department does not currently have such a program. However, the Department is drafting regulations which will establish a laboratory certification program which includes the certification of EPA SW-846 methods and is considering drafting regulations which would establish a laboratory certification program for EPA CLP analytical methods. It is the intent of the Department to incorporate any new laboratory certification program requirements into the Technical Requirements for Site Remediation when such certification program requirements are promulgated. However, until the laboratory certification program is

expanded, there must be a mechanism which gives the Department some assurance that a laboratory is capable of performing EPA CLP analytical methods without having the laboratory submit information such as personnel qualifications and Standard Operating Procedure (SOPs) for Departmental review and approval. The Department believes that the approach in these technical requirements of cross linking EPA CLP analytical methods with laboratory participation in certain analytical contracts or existing NJDEPE laboratory certification is an appropriate mechanism.

388. COMMENT: United States Environmental Protection Agency stated that through its Environmental Monitoring Management Council, it is in the process of evaluating the appropriateness of a National Accreditation program for environmental laboratories. United States Environmental Protection Agency stated that the requirement that Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) participants must be used at N.J.A.C. 7:26E-2.1(a)1ii is not in the spirit of the direction in which EPA is heading.

RESPONSE: The Department acknowledges that the best way to address laboratory qualifications for the analysis of samples using EPA CLP analytical methods is through the development and implementation of a formal certification program. As the commenter notes, the EPA is in the process of evaluating the appropriateness of a National Accreditation program for environmental laboratories. Should such a program become a reality, the Department will consider including such certification requirements in these regulations. It should also be noted that at present, the Department does not have a laboratory certification program which includes the certification of EPA CLP analytical methods. However, the Department is considering drafting regulations which will establish a laboratory certification program for EPA CLP analytical methods. It is the intent of the Department to incorporate any new Department laboratory certification program requirements into the Technical Requirements for Site Remediation when such certification requirements are promulgated. Until such time, the Department will continue to use the approach adopted in these technical requirements (cross linking with existing laboratory certification requirements and laboratory participation in certain analytical contracts as per the modification to N.J.A.C. 7:26E-2.1(a)1) as a mechanism to establish minimum laboratory qualifications for the analysis of environmental samples.

389. COMMENT: Laboratory Resources, Inc. commented that N.J.A.C. 7:26E-2.1(a)1ii and iii are unfair and should be eliminated from the proposed rule. Requirements such as these are damaging to the environmental laboratory industry in the state of New Jersey and do not enhance the quality or reliability of the laboratory services provided.

390. COMMENT: Industrial Corrosion Management, Inc. commented that N.J.A.C. 7:26E-2.1(a)1ii should be deleted because having an Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) contract does not imply quality or performance. In fact, the recent investigations and indictments of EPA CLP laboratories by the EPA for fraud, etc. demonstrates that their "certification" fails miserably.

391. COMMENT: Recon Systems, Inc. commented that conforming to N.J.A.C. 7:26E-2.1(a)1ii and iii are a tremdendous financial investment with questionable return and no guaranteed improvement in the quality of the data reported.

392. COMMENT: Hoffman-LaRoche Inc. commented that N.J.A.C. 7:26E-2.1(a)1ii should be deleted because holding Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) status does not guarantee quality data as shown by the numerous Inspector General investigations and indictments involving several EPA CLP laboratories.

393. COMMENT: The International Association of Environmental Testing Laboratories and Environmental Testing and Certification Corporation commented that linking participation in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and the New Jersey Professional Laboratory Analytical Services (NJPLAS) contract to these rules at N.J.A.C. 7:26E-2.1(a)1 is inappropriate because each contract contains business requirements separate from the technical requirements. These requirements are used by the government to qualify individual laboratories under the terms of the services contract. These items may also be used to disqualify a laboratory yet they bear no relationship to a laboratory's technical competency nor are they of any particular interest to a private party engaging the laboratory's services.

394. COMMENT: Envirotech Research, Inc. stated it is a fallacy for the Department to assume at N.J.A.C. 7:26E-2.1(a)1ii that if a laboratory bids low enough prices to win Environmental Protection Agency (EPA Contract) Laboratory Program (CLP) work that they are in some way more qualified. The EPA CLP program is notorious for rejecting a high percentage of results due to poor quality.

395. COMMENT: The Chemical Industry Council of New Jersey commented that the requirement that the laboratory be a participant in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) at N.J.A.C. 7:26E-2.1(a)1ii is unduly restrictive and imposes unreasonable limitations on selection of laboratories. The EPA CLP is not an indicator of quality.

396. COMMENT: Laboratory Resources, Inc. commented that the requirements at N.J.A.C. 7:26E-2.1(a)1ii are inappropriate because, based on their experience in being affiliated with an Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) laboratory, mere status as participant in the EPA CLP is not a warranty of good data from a laboratory.

397. COMMENT: RM Laboratories commented that the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) has been riddled with fraudulent events causing the EPA to spend excessive money in investigating laboratories and that, therefore, it is not good to include laboratory participation in the EPA CLP as a requirement in N.J.A.C. 7:26E-2.1(a)1ii.

RESPONSE: The Department agrees that mere possession of an EPA CLP or New Jersey Professional Laboratory Analytical Services (NJPLAS) contract does not guarantee quality performance by the laboratory. This statement could also be applied to the Department's laboratory certification program. Simply being certified for a particular analytical method does not guarantee that the analysis of a sample using that method will result in acceptable data. Rather, the Department's certification program establishes that the laboratory has the proper equipment, personnel and internal procedures needed to analyze a sample using a particular analytical method. Likewise, award of a EPA CLP or NJPLAS contract indicates that the laboratory has the proper equipment, personnel and internal procedures needed to perform EPA CLP analytical methods. Therefore, the Department will retain laboratory award of an EPA CLP or NJPLAS contract as an option to demonstrate minimum laboratory qualifications to perform analyses using EPA CLP analytical methods.

398. COMMENT: Laboratory Resources, Inc., the International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation commented that mandatory participation in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and the New Jersey Professional Laboratory Analytical Services (NJPLAS) contract issued by the New Jersey Department of Treasury, Division of Purchase and Property pursuant to N.J.A.C. 7:26E-2.1(a)1ii and iii is inappropriate because participation in these contract programs does not provide any assurances of operational quality that cannot be provided under routine New Jersey Laboratory certification requirements.

RESPONSE: The Department agrees that participation in analytical services contract programs such as the EPA CLP or New Jersey Professional Laboratory Analytical Services (NJPLAS) contract does not provide any assurances of operational quality over that provided under routine New Jersey Laboratory certification requirements. However, the Department does not believe that this is a valid reason to exclude possession of an EPA CLP or NJPLAS contact as an option to demonstrate minimum laboratory qualifications to perform analyses using EPA CLP analytical methods.

399. COMMENT: The General Electric Company and Allied Signal, Inc. commented that since there are currently only three laboratories in New Jersey holding Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) contracts, N.J.A.C. 7:26E-2.1(a)1ii would require that the bulk of New Jersey site work would have to be contracted to out-of-State laboratories. It is unlikely that the out-of-State EPA CLP laboratories could absorb the remainder of the New Jersey site work without serious turnaround and cost implications, delaying remedial work.

400. COMMENT: Colonial Pipeline Company commented that the requirement at N.J.A.C. 7:26E-2.1(a)1ii that a laboratory be in good standing in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) will create massive backlogs and overloading of these laboratories.

401. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the minimum laboratory qualification requirements

proposed at N.J.A.C. 7:26E-2.1(a)1 would narrow the pool of commercial laboratories currently providing support to a small number, stressing the capacity of a few and leading to higher prices for private parties competing for limited resources.

402. COMMENT: Continental Vanguard, Inc. stated that in the State of New Jersey, there are only a few laboratories that meet all of the requirements in N.J.A.C. 7:26E-2.1(a)1 and the number of laboratories with Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) contracts could not possibly be able to handle the case loads of required analysis this proposal generates.

403. COMMENT: The Chemical Industry Council of New Jersey stated that N.J.A.C. 7:26E-2.1(a)1ii effectively excludes, for applicable organics and inorganics, all private laboratories that do not work for the Environmental Protection Agency (EPA). Laboratory turnaround times are already unpredictable as a result of workload. This requirement would further increase the workload on EPA contract laboratories and inhibit the selection of laboratories.

404. COMMENT: Laboratory Resources, Inc. commented that the requirement at N.J.A.C. 7:26E-2.1(a)1ii, that the laboratory must be a participant in good standing in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP), and N.J.A.C. 7:26E-2.1(a)1iii, that the laboratory shall be a contract awardee able to perform analysis in the applicable analytical task under the professional analytical services contract issued by the New Jersey Department of Treasury, Division of Purchase and Property, are inappropriate. Laboratory Resources, Inc. stated that many environmental laboratories within the State of New Jersey have decided against participating in these analytical programs because the prices needed to win a limited number of contracts does not cover the costs associated with performing the analysis. There are many technically qualified laboratories in the State of New Jersey that do not participate in these contract programs because they are not profitable.

405. COMMENT: United States Testing Company, Inc. stated that since there are limits to the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and the New Jersey Professional Laboratory Analytical Services (NJPLAS) contracts, the Department should not require participation in them pursuant to N.J.A.C. 7:26E-2.1(a)1ii and iii. These contracts are generally awarded to the lowest bidders. Businesses in New Jersey, certified by the State, should not be required to participate in programs that may not make economic sense.

406. COMMENT: Industrial Corrosion Management, Inc. noted that under N.J.A.C. 7:26E-2.1(a)1ii and iii, they would be denied the ability to perform certain types of environmental testing for the Department merely because they did not have an active Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) contract. This denial would essentially result not from any technical or procedural fault but would be the result entirely of a monetary consideration.

407. COMMENT: Recon Systems, Inc. commented that as N.J.A.C. 7:26E-2.1(a)1ii and iii are written, work would only be acceptable to the Department if a laboratory was willing to conform to all the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and New Jersey Professional Laboratory Analytical Services (NJPLAS) requirements and was willing to take an additional financial hit by low bidding on projects that are considered "no profit" or even "guaranteed loss" work. Recon Systems, Inc. commented they would be willing to conform to all the EPA CLP and NJPLAS contract requirements but attaching those requirements to a "bidding for work" process is extremely unfair.

408. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company stated that the requirement that laboratories which do not bid on the New Jersey Professional Laboratory Analytical Services (NJPLAS) contract cannot perform work pursuant to N.J.A.C. 7:26E-2.1(a)1iii is unreasonable. Most laboratories do not bid because they would have to dedicate a certain amount of equipment to the program.

409. COMMENT: Hoffman—LaRoche Inc. commented that as a result of the proposed requirements of N.J.A.C. 7:26E-2.1(a)1, environmental testing laboratories will be forced to participate in the contract programs if they want to do remediation monitoring for private sector clients. Hoffman—LaRoche Inc. noted that many environmental testing laboratories have opted to voluntarily drop out of or not apply for participation in regulatory agency contract programs because of low or no profitability, unrealistic deadlines, data results report package requirements, and other excessive demands of contracting agencies. Hoffman—LaRoche Inc. further stated there are internal industry environmental testing laboratories are by nature restricted to providing monitoring services for the corporation only, and therefore, they cannot meet the requirements of N.J.A.C. 7:26E-2.1(a)1, with respect to contract laboratory status but can readily meet Department laboratory certification program requirements.

410. COMMENT: The General Electric Company and Allied Signal, Inc. commented that requiring laboratories to be participants in government contract programs purusant to N.J.A.C. 7:26E-2.1(a)1ii and iii in order to do remediation work for private clients is inappropriate because laboratories are frequently willing to bid to the agencies below cost in order to have an analytical services contract as a marketing tool to private parties. Private parties effectively subsidize the government when they pay significantly higher prices for the same analyses. The General Electric Company and Allied Signal, Inc. stated these regulations would raise this situation to official status which is not fair either to laboratories whose bids are not among the lowest or to the private parties who would bear increasingly higher costs.

411. COMMENT: Chemical Land Holdings, Inc. suggested that N.J.A.C. 7:26E-2.1(a)1ii and iii, which require participation in the Environmental Protection Agency (EPA) and New Jersey contract laboratory programs, be deleted. The sole criterion for performance of analyses should be that the laboratory be New Jersey Certified as stated in N.J.A.C. 7:26E-2.1(a)1i and iv. Laboratory participation in contract laboratory programs is a business decision that is made by an individual laboratory.

412. COMMENT: The International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation commented that the laboratory qualification requirements contained in N.J.A.C. 7:26E-2.1(a)1ii will have a serious adverse impact on New Jersey's environmental laboratory industry by forcing responsible parties to use out-of-State laboratories which are current Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) contractors. The EPA only offers analytical services contracts when additional laboratories are needed or when current contracts expire. Therefore, the pool of available labs cannot be increased quickly. The Department does not control the EPA CLP and thus cannot affect the CLP bidding process.

413. COMMENT: The International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation commented that analytical services contracts are not equally accessible to all technically qualified laboratories and therefore, the requirement for participation in these programs pursuant to N.J.A.C. 7:26E-2.1(a)1ii and iii should be deleted. Many environmental laboratories within the State have decided against participating in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and New Jersey Professional Laboratory Analytical Services contract (NJPLAS) programs.

414. COMMENT: Continental Vanguard, Inc. stated that N.J.A.C. 7:26E-2.1(a)1ii should be deleted because there are many reputable laboratories who do not wish to be part of the Environmental Protection Agency (EPA) Contract Laboratory Program because it may not be economically feasible for them to participate. Continental Vanguard, Inc. stated that, as written, N.J.A.C. 7:26E-2.1(a)1ii is discriminatory to those laboratories which are able to perform the analyses as described in the proposed regulations, but who choose not to be participants in the EPA Contract Laboratory Program.

415. COMMENT: Envirotech Research, Inc. commented that the requirement that laboratories participate in government contract programs, N.J.A.C. 7:26E-2.1(a)ii and iii should be deleted because many laboratories do not wish to work for government organizations due to business related aspects of government procurement procedures. Envirotech Research, Inc. further noted that laboratories can only participate in these contract programs at infrequent intervals when the opportunities to bid for this government work is presented. In addition, government funding for contracts is limited due to budget constraints which limit laboratory access for this proposed qualification.

416. COMMENT: United States Testing Company, Inc. stated that N.J.A.C. 7:26E-2.1(a)1 should be modified as it contains the requirement that laboratories must be participants in the Environmental Protection

Agency (EPA) Contract Laboratory Program (CLP) and/or be a contract awardee in the Professional Laboratory Analytical Services contract issued by the State of New Jersey.

417. COMMENT: Industrial Corrosion Management, Inc. recommended amending N.J.A.C. 7:26E-2.1(a)1 to remove actual contract agreements (both Environmental Protection Agency and Department based) as a requirement.

418. COMMENT: The Chemical Manufacturers Association recommended that prior contract awards in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) or the New Jersey Professional Laboratory Analytical Services program not be included among the criteria for deeming a laboratory "acceptable" pursuant to N.J.A.C. 7:26E-2.1(a)1.

419. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. recommended that N.J.A.C. 7:26E-2.1(a)1iii be deleted. Union Carbide Chemicals and Plastics Company, Inc. stated it is not necessary that a laboratory be an awardee of a contract by the state of New Jersey to perform work paid directly by the private sector. Restricting the number of laboratories available to perform the work will increase laboratory response time and increase costs.

420. COMMENT: The Chemical Industry Council of New Jersey commented that the Department has no basis in N.J.A.C. 7:26E-2.1(a)1iii for requiring that only laboratories currently contracted with the Department (or the Environmental Protection Agency) should be used for the analysis of samples using Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical methods. Chemical Industry Council of New Jersey recommended deletion of N.J.A.C. 7:26E-2.1(a)1iii.

421. COMMENT: Laboratory Resources, Inc. commented that since participation in Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) hinges on being a low bidder, N.J.A.C. 7:26E-2.1(a)1ii, which requires such participation, would be financially burdensome on the various laboratories.

422. COMMENT: Ms. Ellen Pollack commented that with respect to N.J.A.C. 7:26E-2.1(a)1ii, it is very difficult to get into the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) and that unless a laboratory has been in the program or wishes to make a financial decision to go with a low bid, the Department will be forcing commercial laboratories in the region that have absolutely no desire to work under the State contract to jump onto the State contract program in order to perform commercial work in the State.

423. COMMENT: Environmental Testing and Certification Corporation commented that the non-technical contractual requirements for laboratory certification proposed in N.J.A.C. 7:26E-2.1(a)1ii and iii will seriously impact their ability to conduct business in New Jersey.

424. COMMENT: RM Laboratories noted that a laboratory should not be excluded from performing work in New Jersey pursuant to N.J.A.C. 7:26E-2.1(a)1ii simply because its bid to the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) was not low enough.

425. COMMENT: RM Laboratories commented that the technical requirements in the analytical services contract put forth by the Department are extremely vigorous and detailed. They saw no reason why laboratories who are technically qualified to perform such testing be excluded from doing so because they do not have a New Jersey Professional Analytical Services contract pursuant to N.J.A.C. 7:26E-2.1(a)1iii.

426. COMMENT: Mr. Patrick Mulrooney commented that laboratory participation in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) as a requirement to perform analyses pursuant to N.J.A.C. 7:26E-2.1(a)1ii was inappropriate. He noted that the EPA CLP requirement would be a significant impairment to many laboratories, in particular the middle and small sized laboratories who do not have 24 hour automation capability.

427. COMMENT: Chemical Manufacturers Association suggested that the Department reconsider the laboratory qualification requirements contained in N.J.A.C. 7:26E-2.1(a)1 and allow the use of laboratories that can demonstrate compliance with quality assurance/quality control procedures specified by the Environmental Protection Agency.

428. COMMENT: Schering Laboratories stated that N.J.A.C. 7:26E-2.1(a)1 should not require the use of laboratories in the Environmental Protection Agency Contract Laboratory Program. Schering Laboratories stated that N.J.A.C. 7:26E-2.1(a)1 should be modified to require laboratories to follow and certify CLP or other applicable requirements.

429. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the Environmental Protection Agency (EPA) does not require that laboratories performing analyses for private parties at Superfund sites be Contract Laboratory Program (CLP) participants. Regional EPA offices approve laboratories on a case by case basis for Superfund site work. The EPA typically requires that analyses and deliverables be in accordance with the CLP Statement of Work, and EPA may require that these laboratories perform blind performance evaluation samples prepared through the Contract Laboratory Program or have an on-site audit. The General Electric Company and Allied Signal, Inc. stated that both would be valid requirements for the Department to impose upon laboratories for remediation programs.

430. COMMENT: The International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., the Chemical Industry Council of New Jersey, International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation recommended that instead of requiring a laboratory to be a participant in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP), N.J.A.C. 7:26E-2.1(a)1ii should be rewritten to allow a laboratory to analyze aqueous and non-aqueous samples for applicable organics and inorganics including polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans, if the laboratory has demonstrated the capability of meeting all technical requirements and qualifications of the EPA CLP.

431. COMMENT: The International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation proposed that instead of requiring a laboratory to be a contract awardee pursuant to N.J.A.C. 7:26E-2.1(a)1iii, a laboratory need only demonstrate the capability of meeting all technical requirements and qualifications for the applicable analytical task under the version of the Professional Laboratory Analytical Services Contract issued by the New Jersey Department of Treasury, Division of Purchase and Property in effect as of the date on which the laboratory is performing the analysis.

432. COMMENT: Shell Oil Company commented that N.J.A.C. 7:26E-2.1(a)1 is unnecessarily restrictive because it requires only the use of New Jersey certified laboratories. Shell Oil Company stated that the regulation should allow any laboratory that meets equivalent or better accreditation criteria to perform analyses.

433. COMMENT: Laboratory Resources, Inc. suggested that instead of the requirements at N.J.A.C. 7:26E-2.1(a)1ii and iii that a laboratory be a participant in good standing in the Environmental Protection Agency (EPA) and New Jersey contract laboratory programs, the Department accept some type of equivalency to these programs.

434. COMMENT: Ms. Ellen Pollack disagreed with the Department requirement at N.J.A.C. 7:26E-2.1(a)1 that laboratories must be a contractor in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) or a State contractor in the New Jersey Professional Laboratory Services contract to perform analytical work pursuant to the Technical Requirements for Site Remediation. She suggested that a laboratory be allowed to demonstrate its capabilities to run EPA CLP work by actually providing a CLP data package under all the specific requirements of the EPA CLP.

RESPONSE: The purpose of N.J.A.C. 7:26E-2.1(a)1 was to establish minimum laboratory qualifications for environmental sample analyses performed pursuant to the Technical Requirements for Site Remediation without establishing a laboratory certification program within these rules. Therefore, N.J.A.C. 7:26E-2.1(a)1 does not require the submission of information such as laboratory personnel qualifications, laboratory instrumentation/equipment, laboratory Standard Operating Procedures (SOPs), nor does it require the laboratory to analyze performance evaluation (PE) samples or a Department audit of the laboratory. Such procedures are part of the Department's laboratory certification program regulated under N.J.A.C. 7:18. N.J.A.C. 7:26E requires laboratories to be certified pursuant to N.J.A.C. 7:18 for all parameters and analytical methods for which certification exists if samples are being analyzed for such parameters or are using such methods.

A problem encountered by the Department is that the Department laboratory certification program is presently limited to the analysis of aqueous samples and applies to a limited set of analytical methods. The remediation of contaminated sites requires the analysis of non-aqueous samples (for example, soils, sediments, sludges) for which Department laboratory certification does not exist. In addition, many of the analytical methods used in the analysis of samples from contaminated sites (for

example, EPA SW-846 methods, EPA CLP methods) are not part of the Department laboratory certification program. However, the Department is drafting regulations which will establish a laboratory certification program which includes the certification of EPA SW-846 methods and is considering drafting regulations which would establish a laboratory certification program for EPA CLP analytical methods. It is the intent of the Department to incorporate any new laboratory certification program requirements into the Technical Requirements for Site Remediation when such certification program requirements are promulgated.

The Department has determined that until the laboratory certification program is expanded, there must be a mechanism which gives the Department some assurance that a laboratory is capable of performing EPA SW-846 and EPA CLP analytical methods without having the laboratory submit information such as personnel qualifications and standard operating procedures for Departmental review and approval.

In an attempt to resolve this problem with respect to samples analyzed using EPA CLP analytical methods, the Department proposed N.J.A.C. 7:26E-2.1(a)1ii and iii. N.J.A.C. 7:26E-2.1(a)1ii and iii provide that laboratories performing analyses of samples using EPA CLP analytical methods must possess an EPA CLP contract or a New Jersey Professional Laboratory Analytical Services (NJPLAS) contract for the specific analytical methods being used by the laboratory. Laboratories awarded CLP contracts by the EPA are reviewed and audited by the EPA prior to contract award. Similarly, laboratories awarded a NJPLAS contract to perform EPA CLP analytical methods are reviewed and audited prior to contract engagement. Thus, by linking the EPA CLP analytical methods with either EPA CLP or NJPLAS contracts, the Department gains some assurance that the laboratory is capable of performing EPA CLP analytical methods without having the laboratory submit information such as personnel qualifications and SOPs to the Department for review and approval prior to analysis being performed.

It was never the intent of the Department, however, to require laboratories performing analyses pursuant to these proposed rules to meet all of the qualifications in N.J.A.C. 7:26E-2.1(a)1i through iv. Rather, the intent was to require laboratories to meet at least one of the qualifications in N.J.A.C. 7:26E-2.1(a)1i through iv depending upon the type of analysis performed.

Many commenters stated that requiring a laboratory to possess an EPA CLP or NJPLAS contract in order to perform analyses using EPA CLP analytical methods, as described at N.J.A.C. 7:26E-2.1(a)1ii and iii was inappropriate for a variety of reasons including:

a. Such analytical services contracts are not certification programs.

b. Mere possession of an analytical services contract does not guarantee quality performance by the laboratory.

c. Typically, analytical services contracts are awarded to low bidders. Therefore, technically competent laboratories would be barred from performing analyses using EPA CLP analytical methods simply because they were not low bidder on a contract.

d. The number of laboratories possessing either EPA CLP or NJPLAS contracts is quite small compared to the number of Department certified laboratories, thus reducing competition for laboratory services.

e. Restricting analyses to a small pool of laboratories could result in massive sample analysis backlogs.

The Department agrees that these reasons are valid and that there may be many laboratories that do not have EPA CLP or NJPLAS contracts but are nevertheless technically capable of performing sample analyses using EPA CLP analytical methods. Therefore, upon consideration of all the comments submitted, the Department acknowledges that, as proposed, the requirements contained in N.J.A.C. 7:26E-2.1(a)1ii and iii would significantly restrict the number of laboratories eligible to perform analyses using EPA CLP analytical methods. This was not the intent of the Department. As EPA CLP analytical methods are used considerably for the analysis of samples collected as part of site remediation activities, the Department has modified N.J.A.C. 7:26E-2.1(a)1 such that a larger number of potentially qualified laboratories will be allowed to perform EPA CLP analytical methods, thus reducing the potential backlog in sample analyses.

As modified, laboratories will be allowed to use EPA CLP analytical methods if the laboratory is Department certified for the most comparable method(s) for which Department laboratory certification currently exists. This approach is not new in that the Department proposed using this approach at N.J.A.C. 7:26E-2.1(a)1iv (recodified and adopted in N.J.A.C. 7:26E-2.1(a)1ii) for sample analyses using EPA publication SW-846 analytical methods.

By linking the EPA CLP method with the most comparable Department laboratory certification method, the Department gains some assurance that the laboratory is capable of performing the EPA CLP method without having the laboratory submit information such as personnel qualifications and Standard Operating Procedures (SOPs) to the Department for review and approval.

By taking this approach, the potential pool of laboratories qualified to perform EPA CLP analytical methods is greatly expanded, thus minimizing the potential sample backlog problem noted by several commenters. In addition, this approach will also allow technically qualified laboratories to use EPA CLP analytical methods without having to have an EPA CLP or NJPLAS contract, provided the laboratory has the proper Department laboratory certification. This modification addresses the commenters concerns about low bidding on analytical services contracts in order to be qualified to perform EPA CLP methods as laboratories no longer need to possess such contracts in order to use these analytical methods.

However, the Department believes possession of an EPA CLP or NJPLAS contact is still an appropriate option to demonstrate minimum laboratory qualifications to perform analyses using EPA CLP analytical methods and remains as part of N.J.A.C. 7:26E-2.1(a)1.

435. COMMENT: The Chemical Manufacturers Association stated that some consistency needs to exist among the competing programs to ensure that facilities contracting with laboratories will all receive the same quality data.

RESPONSE: The Department believes the approach contained in these technical requirements (cross linking laboratory qualifications with existing laboratory certification requirements and laboratory participation in certain analytical contracts as per the modification to N.J.A.C. 7:26E-2.1(a)1) establishes minimum laboratory qualifications for the analysis of environmental samples which will result in analytical data of acceptable quality to the Department.

436. COMMENT: Colonial Pipeline Company recommended that other Federally approved laboratory programs including the United States Army Corps of Engineers (USCOE), USATHAMA, Battelle, the United States Department of Energy (USDOE)—Oak Ridge (HAZWRAP) and USDOE Richland (PNL), which are equivalent or better than the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) be accepted by the Department.

RESPONSE: The Department will consider expanding the scope of qualified laboratories to include those suggested (that is, USCOE, USATHAMA, USDOE Oak Ridge (HAZWRAP), USDOE Richland (PNL)) in future rulemaking as the Department did not have sufficient time to evaluate these laboratory programs as part of this rule.

437. COMMENT: The Chemical Industry Council of New Jersey stated while standards are desirable for some charaterization sampling and analysis, there are several areas in which these rigorous standards and requirements at N.J.A.C. 7:26E-2.1(a)1 are counter-productive. Three examples are laboratories used for waste characterization for disposal, ecological toxicity testing and for treatability studies. Many of these laboratories do not maintain (nor do they need to maintain) Department laboratory certification or are participants in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP). The Chemical Industry Council of New Jersey suggests that laboratories performing this type of work should be required only to provide their quality assurance and quality control (QA/QC) procedures with the results of analyses. Any laboratory providing these specialized services should have an internal QA/AC plan and procedures before accepting samples.

RESPONSE: The commenter focuses on three types of testing: waste characterization for disposal, ecological toxicity testing and treatability studies. In its modifications to N.J.A.C. 7:26E-2.1(a)1, the Department has clarified how laboratories can analyze a sample using analytical methods not set forth in N.J.A.C. 7:26E-2.1(a)1i through iii. For example, if the analytical method used is not specified in N.J.A.C. 7:26E-2.1(a)1i through iii, the person responsible for conducting the remediation is also responsible for ensuring that the selected laboratory is capable of performing the analysis (N.J.A.C. 7:26E-2.1(a)v recodified and adopted at N.J.A.C. 7:26E-2.1(a)1iv). This must be documented through the preparation and implementation of a Quality Assurance Project Plan (QAPP) as described in N.J.A.C. 7:26E-2.2. Most testing for waste characterization for disposal, ecological toxicity testing or treatability studies will use analytical methods which will fall under the requirements in N.J.A.C. 7:26E-2.1(a)iv as recodified and adopted. It should be noted that certain bioassay methods are a certification category under the

Department's laboratory certification program, N.J.A.C. 7:18. Therefore, any bioassay using a method for which there is certification must be conducted by a Department certified laboratory pursuant to N.J.A.C. 7:26E-2.1(a)1i.

438. COMMENT: The Chemical Industry Council of New Jersey commented that since the protocols for ecological impact analysis are still in development, any laboratory requirements for the performance of these protocols should not be contained in N.J.A.C. 7:26E-2.1(a)1 until such protocols are further developed. The Chemical Industry Council of New Jersey recommended that a section on ecological testing be reserved for the future.

RESPONSE: The Department agrees that except for those bioassay methods, for which there is certification pursuant to N.J.A.C. 7:18, specific laboratory requirements for ecological impact analysis methods should not be contained in these rules. However, in this case, N.J.A.C. 7:26E-2.1(a)1iv (originally proposed as N.J.A.C. 7:26E-2.1(a)1v) would apply. As additional ecological testing protocols become standardized, the Department will consider developing specific minimum requirements for laboratories performing such analyses through the rulemaking process.

439. COMMENT: The Chemical Manufacturers Association stated in terms of certification, N.J.A.C. 7:26E-2.1(a)1 should be modified to ensure consistency among laboratory practices. For instance, since the Department's laboratory certification program does not certify the use of Environmental Protection Agency (EPA) SW-846 analytical methods, there exists no quality control/quality assurance procedures to determine if the methods are being run properly. Likewise, the EPA Contract Laboratory Program (CLP) has distinct methods which are similar, but not identical, to other programs. There are differences in the amount and type of quality assurance required between the methods.

RESPONSE: The Department disagrees that there exists no quality control/quality assurance procedures to determine if EPA SW-846 analytical methods are being run properly. EPA SW-846 analytical methods contain quality control procedures. The results of the quality control procedures will be required as part of the laboratory data deliverables package as specified in N.J.A.C. 7:26E-2.1(a)11. The Department agrees that different analytical methods (that is, 600 series, 500 series, SW-846, CLP) have similar but not identical quality control procedures. These differences, however, are not so great as to preclude the use of any of the analytical methods identified in N.J.A.C. 7:26E-2.1(a)3.

440. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested N.J.A.C. 7:26E-2.1(a)1i be modified to allow the use of non-certified laboratories to allow field analysis for screening and rapid reconnaissance, and so that specialized laboratories, such as those operated by the site owner, may be used. Chemists employed by the site owner may have specialized skills in the analysis and identification of compounds not commonly observed outside their business area.

RESPONSE: It is not the intent of the Department to require the use of a Department certified laboratory to perform field screening analyses pursuant to N.J.A.C. 7:26E-2.1(b). However, all other analyses of aqueous samples applicable under N.J.A.C. 7:26E-2.1(a)1i shall be performed by a Department certified laboratory. The analysis and identification of compounds not commonly found outside a particular business area would most probably fall under N.J.A.C. 7:26E-2.1(a)1iv (originally proposed as N.J.A.C. 7:26E-2.1(a)1v). Under this section, analyses can be conducted by a non-certified laboratory.

441. COMMENT: Environmental Liability Management Inc. commented that to expand the number of laboratories available to the regulated community, it is recommended that N.J.A.C. 7:26E-2.1(a)1i allow the use of laboratories in states which have a certification program comparable to New Jersey's.

RESPONSE: The Department, through the Regulations Governing Laboratory Certification and Standards of Performance, N.J.A.C. 7:18, allows for reciprocal certification for out-of-State laboratories which are certified in a state program which is no less stringent than that of New Jersey (see N.J.A.C. 7:18-2.4). Such out-of-State laboratories would be certified in their state of residence as well as in New Jersey. Therefore, N.J.A.C. 7:18 already allows for an expanded number of laboratories available to the regulated community.

442. COMMENT: The Chemical Manufacturers Association recommended that laboratories be required to immediately notify the client of its loss of certification pursuant to N.J.A.C. 7:18.

RESPONSE: The Department will evaluate the suggestion that laboratories be required to immediately notify their clients of loss of certification pursuant to N.J.A.C. 7:18 as part of any changes to the laboratory certification program regulations.

443. COMMENT: Chemical Land Holdings, Inc. stated that in N.J.A.C. 7:26E-2.1(a)1ii, the Department needs to clarify the phrase "in effect as of the date on which the laboratory is performing the analysis" with regard to the particular version of the Statement of Work under which the Department expects the laboratory to be operating. This is an important consideration because it typically will take a laboratory four to six months to make major changes to its operating procedures, software, etc. in order to conform with significant SOW revisions received from the Environmental Protection Agency (EPA). Laboratories are reluctant to make such modifications unless required under their EPA Contract Laboratory Program (CLP) contract.

444. COMMENT: E.I. duPont de Nemours and Company commented that under N.J.A.C. 7:26E-2.1(a)1ii, the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) contract in effect as of the date of analysis is not always the most apropriate contract to use. The EPA CLP issues numerous contracts and, at any point in time, more than one contract may be in effect. The analytical work should be conducted under the EPA CLP statement of work (SOW) for which agreement is reached or cited in the sampling plan. If the contract changes between the time the sampling plan is accepted and the time the analysis is conducted, the standard of performance should remain the analytical protocols agreed upon in the sampling plan.

RESPONSE: The Department agrees that laboratories participating in the EPA CLP should not be required to operate under any version of the statement of work other than the version for which they have a contract with the EPA. N.J.A.C. 7:26E-2.1(a)1ii has been modified and recodified on adoption at N.J.A.C. 7:26E-2.1(a)1iii(2) to clearly indicate that laboratories that are participants in the EPA CLP shall use the statement of work protocols contained in the contract that they have with the EPA at the time the laboratory is performing analyses pursuant to these regulations. For those laboratories which are performing EPA CLP analytical methods but are not participants in the EPA CLP, the specific CLP methods to be used can be addressed in the Quality Assurance Project Plan submitted pursuant to N.J.A.C. 7:26E-2.2.

445. COMMENT: Colonial Pipeline Company stated following an Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical procedure pursuant to N.J.A.C. 7:26E-2.1(a)1ii does not necessarily produce an accurate and correct result; it only produces a consistent result between different laboratories. The EPA CLP procedure does not require a laboratory to determine the cause of matrix interferences, only that the results be noted that interferences are present. The presence of such interferences may have a significant impact on remedial procedures.

RESPONSE: All analytical methods are designed to produce as accurate and precise results as possible given the analytical objective of a specific method. The use of quality control procedures within a given analytical method is the mechanism by which results are evaluated on the basis of accuracy and precision. The primary analytical methods used in the site remediation process (for example, EPA 200, 500, 600 series methods, EPA SW-846 methods, EPA CLP methods) all have similar ranges of precision and accuracy when examining comparable methods. As such, EPA CLP analytical methods are comparable with the other analytical methods listed above. While the Department agrees that following an EPA CLP analytical procedure does not necessarily produce an accurate and correct result, the same can be said for all of the other analytical methods listed above.

The Department agrees that EPA CLP analytical procedures do not require a laboratory to determine the cause of matrix interferences but only require that the results indicate that interferences are present. However, none of the other primary analytical methods used in the site remediation process (see list above) require a laboratory to determine the cause of matrix interferences either.

The Department also agrees that matrix interferences may have a significant impact on remedial procedures. In those instances where matrix interferences affect analytical results, additional investigation is required to determine if additional sample cleanup procedures are necessary or if another type of analytical method is more appropriate.

Therefore, the Department believes that EPA CLP analytical methods are appropriate for use in site remediation activities.

446. COMMENT: Laboratory Resources noted that the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) has lots of "bugs in its program" particularly in the area of the data "deliverables" format requirements and that, therefore, it would

not be good program for the Department to incorporate in these regulations as was proposed at N.J.A.C. 7:26E-2.1(a)1ii.

RESPONSE: The Department disagrees that the EPA CLP program has lots of "bugs in the program" particularly in the area of the data deliverables format requirements. The Department has reviewed EPA CLP data for the past eight years and has not found any major deficiencies with respect to the data deliverables format requirements. Therefore, the Department will continue to accept the use of EPA CLP methods pursuant to N.J.A.C. 7:26E-2.1(a)1.

447. COMMENT: Shell Oil Company and Chemical Manufacturers Association recommended that the use of the EPA CLP methods at N.J.A.C. 7:26E-2.1(a)1 be removed because they have not been validated, and are not as technically sound because the quality assurance requirements are less stringent than the EPA publication SW-846 analytical methods. In addition, Shell Oil Company commented that Federal Resource Conservation and Recovery Act (RCRA) and Superfund regulations require industry to use the EPA SW-846 analytical methods.

RESPONSE: The commenters imply that EPA CLP methods are not validated, are not technically correct, are not as technically sound as they have less stringent quality assurance requirements than EPA SW-846 methods and are not consistent with EPA SW-846 methods. While EPA CLP methods may not have been formally validated, these methods have been based on validated methods and have been used by both the EPA and the Department over the past several years. The Department disagrees that EPA CLP methods are technically incorrect or are not as technically sound as EPA SW-846 methods. As stated above, these methods are based on validated methods using accepted analytical techniques. After eight years of review of data generated using EPA CLP analytical methods, the Department has found the results from EPA CLP analytical methods to be comparable to results from EPA SW-846 analytical methods.

The Department realizes that EPA CLP methods are not exactly the same as EPA SW-846 methods. However, the differences between comparable methods are minor and the Department believes the use of EPA CLP analytical methods is appropriate. While EPA SW-846 methods may be required under the EPA RCRA corrective action program, the use of EPA SW-846 methods is not required under the Federal Superfund program. Therefore, the Department will continue to accept the use of EPA CLP methods pursuant to these regulations.

448. COMMENT: The Chemical Manufacturers Association and Shell Oil Company commented there are difficulties in using Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical methods pursuant to N.J.A.C. 7:26E-2.1(a)1 because there have been instances when the EPA CLP has attempted to impose contract required quantitation limits and contract required detection limits on industrial facilities. Detection limits and quantification limits associated with methods are functions of the instrumentation employed and more importantly, the matrix involved. One has to accept the method detection limits (MDLs) and practical quantitation levels (PQLs) are different for different matrices. The EPA CLP and its use of these "contract required" detection limits does not appear to recognize this fact.

RESPONSE: The Department agrees that MDLs and PQLs are functions of the method used, instrumentation used and sample matrix involved. The Department disagrees that the EPA CLP does not recognize these functions in its use of "contract required" detection limits. As used in the EPA CLP, contract required detection limits (CRDLs) are really PQLs. These CRDLs are method specific as well as instrumentation specific. In addition, there are separate CRDLs for aqueous and non-aqueous matrices, and CRDLs can be adjusted based on percent moisture content (for non-aqueous samples), sample dilutions and sample cleanup techniques. Therefore, the Department believes the use of CRDLs in the EPA CLP methods is appropriate, and as such, the Department will accept the use of EPA CLP methods pursuant to these regulations.

449. COMMENT: The Chemical Manufacturers Association suggested that Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical methods not be included in these regulations at N.J.A.C. 7:26E-2.1(a)1 because industry has recognized that many of these methods have not been validated and are oftentimes flawed.

RESPONSE: While EPA CLP methods may not have been formally validated, these methods have been based on validated methods and have been used by both the EPA and the Department over the past several years. The Department disagrees that EPA CLP methods are flawed. These methods are based on validated methods using accepted analytical techniques. After eight years of review of data generated using EPA CLP analytical methods, the Department has found the results from EPA CLP analytical methods to be comparable to results from EPA SW-846 analytical methods. Therefore, the Department will continue to accept the use of EPA CLP methods pursuant to these regulations.

450. COMMENT: Ciba-Geigy Corporation commented that there is a typographical error in N.J.A.C. 7:26E-2.1(a)1iii. The word "sampes" should be "samples".

RESPONSE: The Department has corrected the typographical error.

451. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company stated that the phrase "applicable organics and inorganics" at N.J.A.C. 7:26E-2.1(a)1iii is unclear.

452. COMMENT: The Chemical Industry Council of New Jersey stated that N.J.A.C. 7:26E-2.1(a)1iii is unclear about which of the following requirements takes precedence for which parameters. The Chemical Industry Council of New Jersey noted that clarification about the word "applicable" pertaining to organics and inorganics would be useful in understanding the Department's intent.

RESPONSE: The term "applicable organics and inorganics" was meant to specify certain Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical methods and certain analytical methods contained in EPA publication SW-846. Under proposed N.J.A.C. 7:26E-2.1(a)1ii, a laboratory wishing to perform a particular EPA CLP analytical method (for example, Organics Analysis, Multi-media, Multi-concentration) had to possess an EPA CLP contract for that method. Under proposed N.J.A.C. 7:26E-2.1(a)1iii, a laboratory wishing to perform a particular USEPA CLP analytical method (for example, Organics Analysis, Multi-media, Multi-concentration) had to possess a New Jersey Professional Laboratory Analytical Services contract for that method.

N.J.A.C. 7:26E-2.1(a)1ii and iii have been combined and recodified on adoption as N.J.A.C. 7:26E-2.1(a)1iii, and this issue has been clarified to meet the Department's intent as stated above.

453. COMMENT: E.I. duPont de Nemours and Company and Union Carbide Chemicals and Plastics Company, Inc. commented that the specific edition of Environmental Protection Agency (EPA) publication SW-846 must be stipulated in N.J.A.C. 7:26E-2.1(a)1iv. The third edition is widely used throughout the country. It includes updated procedures and is preferable to the second edition. E.I. duPont de Nemours and Company recommended specification of EPA publication SW-846, third edition, or a more recent edition if available.

RESPONSE: The Department agrees with the suggestion to specify the third edition (or most recent edition) of EPA publication SW-846. This change has been incorporated in N.J.A.C. 7:26E-2.1(a)1.

454. COMMENT: E.I. duPont de Nemours and Company commented that the title of the Table 2-1, referenced in N.J.A.C. 7:26E-2.1(a)1iv, is inaccurate. This section defines methodologies for Environmental Protection Agency (EPA) publication SW-846 methods. This Resource Conservation and Recovery Act (RCRA) document was published to define methods applicable to both solid waste and ground water monitoring analysis. E.I. duPont de Nemours and Company recommended adding the word "aqueous" to the title: "Laboratory Requirements for Aqueous and Non-Aqueous Samples Analysis."

RESPONSE: Both proposed N.J.A.C. 7:26E-2.1(a)1iv (recodified and adopted at N.J.A.C. 7:26E-2.1(a)1ii) and Table 2-1 have been modified to clarify that the use of EPA publication SW-846 methods for both aqueous and non-aqueous samples is acceptable.

455. COMMENT: E.I. duPont de Nemours and Company commented that a portion of Table 2-1 is not related to the referenced use of the table. E.I. duPont de Nemours and Company stated the section of the Table dealing with "Required NJDEPE Drinking Water or Water Pollution Method/Category Certification" has no relevance to N.J.A.C. 7:26E-2.1(a)1iv. E.I. duPont de Nemours and Company recommended deleting this portion of Table 2-1.

RESPONSE: The intent of proposed N.J.A.C. 7:26E-2.1(a)1iv (recodified and adopted at N.J.A.C. 7:26E-2.1(a)1ii) and Table 2-1 is to establish minimum laboratory qualifications for the analysis of samples using methods contained in Environmental Protection Agency publication SW-846 by requiring laboratories to be Department certified in comparable drinking water or wastewater analytical methods. Therefore, the right hand column under Table 2-1 is relevant and will remain as part of the Table.

456. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. recommended that Table 2-1 be modified by adding Environmental

Protection Agency (EPA) publication SW-846 analytical method 8240 (volatile organics by gas chromatography) with required Department laboratory certification in EPA analytical method 601; and EPA publication SW-846 analytical methods 8250 and 8270 (semivolatile organics by gas chromatography) with required Department laboratory certification in EPA analytical method 602.

Union Carbide Chemicals and Plastics Company, Inc. stated that the use of gas chromatography/mass spectrometry (GC/MS) is important where the identity of constituents is unknown. After the site constituents of concern have been determined, the use of gas chromatography analytical techniques is technically sound and less costly. Gas chromatography techniques often offer lower detection limits than GC/MS analytical methods.

RESPONSE: The Department disagrees with the proposed modification to Table 2-1. Environmental Protection Agency (EPA) Method 8240 is a method for the analysis of volatile organics using gas chromatography/mass spectroscopy (GC/MS). The suggestion to cross link this method with Department laboratory certification in EPA Method 601 is inappropriate as EPA Method 601 is a gas chromatography method. Table 2-1 links Department laboratory certification in EPA method 601 with the comparable gas chromatography method in EPA publication SW-846, Method 8010. EPA Methods 8250 and 8270 are methods for the analysis of semi-volatile organics using GC/MS. The suggestion to cross link these methods with Department laboratory certification in EPA Method 602 is inappropriate as EPA Method 602 is a gas chromatography method for aromatic volatile compounds. Table 2-1 links Department laboratory certification in EPA Method 602 with the comparable gas chromatography method in EPA publication SW-846, Method 8020.

The Department agrees with the comment to the extent it distinguishes the abilities of gas chromatography and GC/MS analytical techniques. N.J.A.C. 7:26E-2.1(c) specifies the situations where gas chromatography analytical techniques can be used.

457. COMMENT: Exxon Company U.S.A. commented that for increased analytical flexibility, N.J.A.C. 7:26E-2,1(a)1iv should be revised to allow the choosing of the best analytical methodology based upon the "quality" of the media that will be collected for analysis. For example, an investigator may choose to use the Environmental Protection Agency (EPA) Series 500 and 600 methods for the analyses of "polished" water samples and the 8000 series for contaminated waste waters and non-aqueous samples.

RESPONSE: The intent of proposed N.J.A.C. 7:26E-2.1(a)1iv (recodified and adopted at N.J.A.C. 7:26E-2.1(a)1ii) and Table 2-1 was to establish minimum qualifications for laboratories performing methods from EPA Publication SW-846. N.J.A.C. 7:26E-2.1(a)1 does not preclude the person responsible for conducting the remediation from selecting analytical methods. In fact it is the responsibility of the person responsible for conducting the remediation to select the appropriate analytical methods, based on site conditions, pursuant to N.J.A.C. 7:26E-2.1(a)3 and 4. How one determines the appropriate analytical methods will vary from site to site depending upon those contaminants that may be potentially present at a given site. The list of those contaminants that may be potentially present is based on a diligent inquiry of the site history and will determine which analytical methods to be used.

458. COMMENT: Chevron U.S.A., Inc. recommended that N.J.A.C. 7:26E-2.1(a)2ii through v be deleted because a laboratory should only be required to obtain and remain in compliance with applicable New Jersey Laboratory Certification requirements as specified in N.J.A.C. 7:18. As proposed in N.J.A.C. 7:26E-2.1(a)2, a person would not be able to continue to use data from a laboratory which had lost a contract due to reasons such as budget cuts, forcing the Department to cancel a specific contract or other reasons which have no bearing on the laboratories quality.

459. COMMENT: Hoffman-LaRoche Inc., commented that the reasons for rejecting analytical data as provided under N.J.A.C. 7:26E-2.1(a)2 should be revised to reflect the recommended revision of N.J.A.C. 7:26E-2.1(a)1 made by Hoffman-LaRoche Inc.

460. COMMENT: The General Electric Company and Allied Signal, Inc. stated that N.J.A.C. 7:26E-2.1(a)2 should be revised because the loss of a contract for reasons associated with data quality would be a valid reason for the Department to reject data, but other reasons for contract loss may not be relevant to data generated for a New Jersey remediation program.

461. COMMENT: The International Association of Environmental Testing Laboratories, Environmental Testing and Certification Corporation, Recon Systems, Inc., International Hydronics Corporation, RM Laboratories and Northeastern Analytical Corporation stated N.J.A.C. 7:26E-2.1(a)2ii, iii, iv, and v should be removed from the proposed rule because suspensions or losses of contracts can arise from business oriented issues that bear no relevance to technical qualification.

462. COMMENT: International Hydronics commented that some laboratory clients will seek Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) laboratories because of the misconception that simply because the government uses them "they must be good." Laboratories which drop out of the EPA CLP for non-technical reasons may be seen or suspected by potential clients as a decertification. International Hydronics stated that N.J.A.C. 7:26E-2.1(a)2ii-v enhances this perception.

RESPONSE: Upon re-examination, the Department has determined that as originally proposed, N.J.A.C. 7:26E-2.1(a)2 was too restrictive in that it required the rejection of data generated by laboratories which would be technically qualified but lost or chose not to rebid on analytical services contracts for non-technical reasons. Further, the Department has modified N.J.A.C. 7:26E-2.1(a)2 so that it corresponds with modifications to N.J.A.C. 7:26E-2.1(a)1.

Under revised N.J.A.C. 7:26E-2.1(a)2, the rejection of data from the use of a variety of analytical methods is linked to the laboratory's technical ability to perform the analysis. The only exception to this is if the laboratory chooses not to renew its certification. Under this situation, the laboratory may still be technically capable of performing the analysis; however, the Department will not accept any analytical data from the laboratory (except pursuant to N.J.A.C. 7:26E-2.1(a)1iii(2) or (3) as adopted).

The laboratory certification process includes Department review and audit of a laboratory's personnel qualifications, equipment/instrumentation and standard operating procedures as well as performance using proficiency evaluation samples. Without laboratory certification pursuant to N.J.A.C. 7:18, the Department has no basis to determine if the laboratory has the minimum qualifications to perform analyses pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

If a laboratory is performing analyses pursuant to N.J.A.C. 7:26E-2.1(a)1iii(2) or (3) as adopted, the loss of or suspension from either an EPA CLP contract or the New Jersey Professional Laboratory Analytical Services (NJPLAS) contract will result in the rejection of analytical data if possession of such a contract is the only mechanism by which a laboratory is qualified to perform EPA CLP analytical methods. If a laboratory is qualified to perform EPA CLP analytical methods pursuant to N.J.A.C. 7:26E-2.1(a)1iii(1) as adopted, the loss of an EPA CLP contract due to a high bid or a laboratory decision not to bid on a new EPA CLP or NJPLAS contract will not prohibit submission of analytical data by that laboratory to the Department. If, however, the possession of an EPA CLP or NJPLAS contact is the only mechanism by which a laboratory is qualified to perform EPA CLP analytical methods pursuant to these regulations, the loss of or suspension from either of these contracts will result in the rejection of analytical data by the Department. Under this situation, the laboratory may still be technically capable of performing the analysis. However, the award of an EPA CLP or NJPLAS contract includes either EPA or Department review and audit of a laboratory's personnel qualifications, equipment/instrumentation and standard operating procedures. In addition the EPA CLP evaluates laboratory performance through the use of proficiency evaluation samples and the Department evaluates performance through the examination and review of sample data deliverables packages. Without possession of a valid EPA CLP or NJPLAS contract, the Department has no basis to determine if the laboratory has the minimum qualifications to perform analyses pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

463. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. stated that since laboratory decertification or suspension could be the result of many possible actions, the requirement that data be automatically rejected if a laboratory is suspended or decertified at N.J.A.C. 7:26E-2.1(a)2 should be modified to read "The Department may reject all applicable analytical data generated after the date of any of the following events if the cause for rejection, decertification or suspension is direct indication that the data is unreliable." The validity of the data should be determined on a case by case basis. For example,

a laboratory could not be selected by the State of New Jersey because of pricing. Analyses performed for and paid directly by responsible parties should remain acceptable to the Department.

RESPONSE: Laboratory decertification or suspension is linked to the laboratory's technical ability to perform the analysis. If a laboratory has been decertified or suspended, it is because of the laboratory's technical inability to perform the analysis. This performance deficiency is such that data validity/usability is highly questionable. As such, the Department does not believe it is useful to reexamine such data on a case-by-case basis.

The only exception in linking laboratory decertification with the laboratory's technical performance is if the laboratory chooses not to renew its certification. Under this situation, the laboratory may still be technically capable of performing the analysis. However the Department's laboratory certification process includes review and audit of a laboratory's personnel qualifications, equipment/instrumentation and standard operating procedures as well as performance using proficiency evaluation samples. Without laboratory certification pursuant to N.J.A.C. 7:18, the Department has no basis to determine if the laboratory has the minimum qualifications to perform analyses pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. As such, the Department does not believe the suggested modification to N.J.A.C. 7:26E-2.1(a)2 is appropriate.

The example of a laboratory decertification or suspension presented in this comment is, in fact, not an example of a laboratory decertification. The example presented is one of a laboratory failing to receive a contract because of a high bid as opposed to technical ability. This scenario is discussed in earlier responses to comments on this section.

464. COMMENT: United States Testing Company, Inc. stated the stipulations concerning rejection of analytical data upon the loss of an Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) or New Jersey Professional Laboratory Analytical Services (NJPLAS) contract specified at N.J.A.C. 7:26E-2.1(a)2ii and iii would be a logistical nightmare and should be deleted. Site remediation projects would be bid when a laboratory has an EPA CLP contract; projects may not be begun until the contract is near completion. This would then force the laboratory to either bid low to assure another contract or to stop the existing site remediation laboratory work because the contract time is up.

RESPONSE: Upon re-examination, the Department has determined that as originally proposed, N.J.A.C. 7:26E-2.1(a)2 was too restrictive in that it required the rejection of data generated by laboratories which would be technically qualified but lost or chose not to rebid on analytical services contracts for non-technical reasons. Further, the Department has modified N.J.A.C. 7:26E-2.1(a)2 so that it corresponds with modifications to N.J.A.C. 7:26E-2.1(a)1. Therefore, as modified, a laboratory performing analyses using EPA CLP analytical methods can either be Department certified in a comparable method (see N.J.A.C. 7:26E-2.1(a)1iii(1) as adopted), be a participant in good standing in the EPA CLP (see N.J.A.C. 7:26E-2.1(a)1iii(2) as adopted) or have a NJPLAS contract to perform EPA CLP methods (Task 4 methods) (see N.J.A.C. 7:26E-2.1(a)1iii(3)).

If a laboratory is performing analyses pursuant to N.J.A.C. 7:26E-2.1(a)1iii(2) or (3) as adopted, the loss of or suspension from either an EPA CLP contract or the New Jersey Professional Laboratory Analytical Services (NJPLAS) contract will result in the rejection of analytical data if possession of such a contact is the only mechanism by which a laboratory is qualified to perform EPA CLP analytical methods. If a laboratory is qualified to perform EPA CLP analytical methods pursuant to N.J.A.C. 7:26E-2.1(a)1iii(1) as adopted, the loss of an EPA CLP contract due to a high bid or a laboratory decision not to bid on a new EPA CLP or NJPLAS contract will not prohibit submission of analytical data by that laboratory to the Department. If, however, the possession of an EPA CLP or NJPLAS contract is the only mechanism by which a laboratory is qualified to perform EPA CLP analytical methods pursuant to these regulations, the loss of or suspension from either of these contracts will result in the rejection of analytical data by the Department. Under this situation, the laboratory may still be technically capable of performing the analysis. However, the award of an EPA CLP or NJPLAS contract includes either EPA or Department review and audit of a laboratory's personnel qualifications, equipment, instrumentation and standard operating procedures. In addition the EPA CLP evaluates laboratory performance through the use of proficiency evaluation samples and the Department evaluates performance through the examination and review of sample data deliverables packages. Without possession of a valid EPA CLP or NJPLAS contract, the Department has no basis to determine if the laboratory has the minimum qualifications to perform analyses pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

The Department acknowledges that if a laboratory is performing EPA CLP analytical methods pursuant to N.J.A.C. 7:26E-2.1(a)1iii(2) and (3) as adopted, the loss of either an EPA or NJPLAS contract could pose a logistical problem. This is a risk the person responsible for conducting the remediation will assume if such a laboratory is used to perform the analyses. N.J.A.C. 7:26E-2.1(a)1iii(1) as adopted will allow a laboratory to perform EPA CLP analytical methods if the laboratory is Department certified in a comparable method. This eliminates the concern that a laboratory must be in the EPA CLP or have a NJPLAS contract.

As adopted, the Department does not believe N.J.A.C. 7:26E-2.1(a)1 and 2 are detrimental and unfair to the laboratory industry. In fact, the minimum qualifications for laboratories performing analyses using EPA CLP analytical methods have been broadened. Therefore, the Department is not deleting laboratory participation in the EPA CLP or possession of a NJPLAS contract from N.J.A.C. 7:26E-2.1(a)1 and 2.

465. COMMENT: Continental Vanguard, Inc. was concerned that pursuant to N.J.A.C. 7:26E-2.1(a)2, the Department will reject analytical data from qualified laboratories should they not be participants of the Environmental Protection Agency (EPA) Contract Laboratory Program.

RESPONSE: As originally proposed, N.J.A.C. 7:26E-2.1(a)2 did not state that analytical data from laboratories which were not participants of the EPA Contract Laboratory Program (CLP) would be rejected. N.J.A.C. 7:26E-2.1(a)2 stated that if a laboratory was a participant in the USEPA CLP, and the laboratory was suspended from the EPA CLP or lost a CLP contract, any data from that laboratory using EPA CLP analytical methods would be rejected. It was never the intent of the Department to require laboratories performing analyses pursuant to these proposed regulations to meet all of the qualifications in N.J.A.C. 7:26E-2.1(a)1i through iv. Rather, the intent was to require laboratories to meet at least one of the qualifications in N.J.A.C. 7:26E-2.1(a)1i through iv depending upon the type of analysis performed. N.J.A.C. 7:26E-2.1(a)1 has been modified to clarify this point.

466. COMMENT: Chemical Manufacturers Association commented that N.J.A.C. 7:26E-2.1(a)3, which describes those agencies which have developed analytical methods that may be used by facilities for compliance purposes, should be modified to allow the use of alternative methods where a facility has previously received approval of them from the Environmental Protection Agency or another regulatory agency. Many times, facilities will develop analytical procedures and methods independent of the organizations listed. As is always the case when using a new method for compliance purposes, the analytical procedure must undergo a rigorous comparison and validation process before approval for use is granted by the Environmental Protection Agency (EPA) or the governing state agency or organization.

RESPONSE: It is the Department's position that all analyses conducted by laboratories shall, to the greatest extent possible, be conducted using recognized, standardized analytical methods as described at N.J.A.C. 7:26E-2.1(a)3. The use of alternative methods which have received "approval" for use by the EPA or any group listed under N.J.A.C. 7:26E-2.1(a)3 is considered to be in compliance with N.J.A.C. 7:26E-2.1(a)3. This section of the regulation has been amended by adding the words "or approved" to clarify this point.

The use of alternative methods is also permissible under N.J.A.C. 7:26E-2.1(a)4 (analysis of contaminant/parameter/sample matrix not applicable under N.J.A.C. 7:26E-2.1(a)3) and N.J.A.C. 7:26E-2.1(b)4 (field screening methods).

467. COMMENT: Colonial Pipeline Company commented that the use of Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical methods which are permissible pursuant to N.J.A.C. 7:26E-2.1(a)3, will not allow for effective and efficient remedial investigations to proceed. Procedures established by the EPA CLP are meant only to produce consistent analytical results of numerous samples between different laboratories. Under the EPA CLP protocols, if analytical problems occur, the cause of the interference is not determined, only the data is flagged as suspect. There is no requirement in the EPA CLP that the sample be re-analyzed or that the laboratory determine what caused the out-of-control results if the laboratory equipment was properly calibrated and operating within the laboratory Quality Assurance Project Plan.

RESPONSE: The Department disagrees that EPA CLP analytical procedures are only meant to produce consistent analytical results among

different laboratories. All analytical methods are designed to produce as accurate and precise results as possible given the analytical objective of a specific method. The use of quality control procedures within a given analytical method is the mechanism by which results are evaluated on the basis of accuracy and precision. The primary analytical methods used in the site remediation process (for example, EPA 200, 500, 600 series methods, EPA SW-846 methods, EPA CLP methods) all have similar ranges of precision and accuracy when examining comparable methods. As such, EPA CLP analytical methods are comparable to the other analytical methods listed above.

The Department agrees that EPA CLP analytical procedures do not require a laboratory to determine the cause of matrix interferences but only require that the results indicate that interferences are present. However, none of the other primary analytical methods used in the site remediation process (for example, EPA 200, 500, 600 series methods, EPA SW-846 methods, EPA CLP methods) require a laboratory to determine the cause of matrix interferences either.

The Department believes that EPA CLP analytical methods are appropriate for use in site remediation activities, and their approved use will remain in these regulations.

468. COMMENT: The General Electric Company and Allied Signal, Inc. commented that it is not clear within N.J.A.C. 7:26E-2.1(a)4 what the process will be for the addition of a specific compound not covered by the Priority Pollutant or Target Analyte/Target Compound List. The General Electric Company and Allied Signal, Inc. stated the potential implications of such an addition are great. Method selection and development of a standard operating procedure for the implementation of a new method is a time and cost-incentive procedure; the cumulative process of method selection/development and validation with the requirements for Agency review and approval are likely to consume several months, which will further delay remedial work.

RESPONSE: The Department did not intend, pursuant to N.J.A.C. 7:26E-2.1(a)4, to require that a method development/validation study be conducted by the persons responsible for conducting the remediation for every specific contaminant or parameter for which an analytical method pursuant to N.J.A.C. 7:26E-2.1(a)3 does not exist. For example, if an analytical method for a given contaminant is not listed in a source contained in N.J.A.C. 7:26E-2.1(a)3, but has been published in a peer reviewed journal and provides results which are verifiable and reproducible, an additional method development/validation study conducted by the person responsible for the remediation may not be required. Another example is the use of a method from a source listed in N.J.A.C. 7:26E-2.1(a)3 for the analysis of a contaminant that is not a commonly analyzed compound. In this instance, if the person responsible for conducting the remediation can demonstrate that the contaminant is amenable for analysis using that standard method, a comprehensive method development/validation study may not be required. All that may be required is evidence that a calibration curve can be established for that contaminant and that spike recoveries meet acceptable quality control criteria. The Department believes that there will be relatively few instances where comprehensive method development/validation studies will be required.

469. COMMENT: Chrome Technologies commented that N.J.A.C. 7:26E-2.1(a)4 should be expanded to allow for methods developed in response to a particular matrix. As an example, Chrome Technologies referred to Baturay, et al. (1991), "Sample preparation methods for analysis of spent chrome ores," wherein the authors demonstrate the inability of the standard methods for chromium in soils to properly quantify the chromium concentrations found in a spent ore matrix. Use of the standard method, which focuses on acid oxidation of the chromium, is shown to understate the chromium concentration by as much as an order of magnitude.

RESPONSE: The Department agrees with this comment and has modified N.J.A.C. 7:26E-2.1(a)4 to allow for method development in response to the analysis of a parameter in a particular matrix.

470. COMMENT: Land Tech Remedial, Inc. requested that gas chromatograph analysis of soil and groundwater headspace using modified Environmental Protection Agency (EPA) publication SW-846, Method 3810 be approved for use pursuant to N.J.A.C. 7:26E-2.1(a)4 for all investigative and remedial analytical events. Land Tech Remedial, Inc. also commented, in response to N.J.A.C. 7:26E-2.1(a)4iii, that it is currently developing a standard operating procedure for modified Environmental Protection Agency (EPA) publication SW-846, Method 3810 which is being used for the volatile organic compound vial headspace analytical technique. Land Tech Remedial, Inc. stated it also uses purge and trap analysis by standard EPA Method 602 protocol.

RESPONSE: This comment is a request for approval of an analytical technique rather than a comment about the rule provision itself. As such, it is beyond the scope of this rulemaking.

471. COMMENT: Envirotech Research, Inc. commented that pursuant to N.J.A.C. 7:26E-2.1(a)4 laboratories are required to document the rationale for the selection of appropriate alternate analytical methods, but that in actual practice, a consultant or industrial client specifies the testing a laboratory performs. A laboratory will only perform testing that it is requested to perform. Accordingly, it is not appropriate to have the laboratory document the rationale for method selection. Envirotech Research, Inc. recommended that N.J.A.C. 7:26E-2.1(a)4 be modified to clarify that it is the regulated industry or their consultant that is required to document the selection of appropriate analytical methods.

RESPONSE: It was never the intent of the Department to place the responsibility of complying with N.J.A.C. 7:26E-2.1(a)4 on laboratories. The Department agrees with this comment and has therefore modified N.J.A.C. 7:26E-2.1(a)4 by replacing the word "laboratory" with "person responsible for conducting the remediation."

472. COMMENT: Chevron U.S.A., Inc. commented that the phrase "pursuant to N.J.A.C. 7:26E-1.6(c)" should be deleted from N.J.A.C. 7:26E-2.1(a)4ii as the criteria in N.J.A.C. 7:26E-1.6(c) are not applicable to this situation, are overly burdensome and discourage innovation.

RESPONSE: The Department believes that nearly all analytical methods used pursuant to N.J.A.C. 7:26E will be from the sources listed in N.J.A.C. 7:26E-2.1(a)3. The Department, however, realizes that there may be instances where the analysis of a sample for a given contaminant may require the use of a method not found in the sources contained in N.J.A.C. 7:26E-2.1(a)3. The Department will allow the use of such methods provided documentation is submitted pursuant to N.J.A.C. 7:26E-1.6(c). Such documentation is needed by the Department in order to determine if the method is appropriate for its intended use. The Department does not believe the criteria in N.J.A.C. 7:26E-1.6(c) are overly burdensome and discourage innovation. Therefore, the cross reference to N.J.A.C. 7:26E-1.6(c) at N.J.A.C. 7:26E-2.1(a)4ii will not be deleted.

473. COMMENT: Envirotech Research Inc. commented that N.J.A.C. 7:26E-2.1(a)5, which provides that "all quality assurance/quality control requirements and criteria specified in the analytical methods used shall be met," should be modified because achieving criteria of test methods depends on both the sample matrix and the laboratory's procedures. The test methods in common use are fairly rugged and can address a wide variety of sample types. However, for many sample matrices criteria such as matrix spike recoveries or detection limits cannot be achieved when the requested methods are followed. Envirotech Research, Inc. recommended that the regulation be changed to require that laboratories shall follow all quality assurance/quality control procedures specified in the analytical methods.

RESPONSE: The Department agrees with the comment. There will be instances where quality control/quality assurance criteria will not be met and such failure will not be the fault of the laboratory (for example, poor surrogate recovery due to sample matrix interferences). Therefore, the Department has modified N.J.A.C. 7:26E-2.1(a)5 to state that all quality control/quality assurance procedures contained in a given analytical method shall be followed.

474. COMMENT: Colonial Pipeline Company stated the person responsible for conducting the remediation should have the option, without justification, not to conform to the Department's "Field Sampling Procedures Manual" referenced at N.J.A.C. 7:26E-2.1(a)7 for field and trip blanks, and equipment rinseates.

RESPONSE: The Department's Field Sampling Procedures Manual is a compendium of field sampling techniques that have been used in site remediation activities, and reflects the Department's experience in sample collection and handling. The Department has found the use of trip and field blanks to be useful quality control/quality checks for sources of contamination not related to site conditions. Such sources include contaminated sample containers and contaminated sampling equipment. Equipment rinseates are used to decontaminate sampling equipment after the collection of a sample. This is done to prevent cross contamination between samples. The Department believes that the use of trip and field blanks, and the use of equipment rinseates is part of good field sampling technique. However, as specifically stated in N.J.A.C. 7:26E-2.1(a)6, the Department will allow deviations from techniques

contained in the Department's Field Sampling Procedures Manual provided the deviation is documented pursuant to N.J.A.C. 7:26E-1.6(c). Furthermore, the Department will entertain any reduction in requirements pursuant to N.J.A.C. 7:26E-1.6(d) as adopted. Before accepting any deviations from the Department's Field Sampling Procedures Manual, the Department will determine if sample collection and handling has not been significantly impacted.

475. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-2.1(a)7 should be revised to read "Samples shall be submitted to the laboratory so as not to exceed acceptable holding time requirements." Chevron U.S.A., Inc. stated that while submission of samples to a laboratory 24 or 48 hours after collection is a laudable goal, it may create economic inefficiencies for no enhancement of data quality. So long as sample preservation requirements are met, a sample need only meet the additional holding times for analysis.

476. COMMENT: Environmental Liability Management Inc. commented that there is no technical basis for the requirement that all samples must be submitted to a laboratory within 24 hours or 48 hours after collection pursuant to N.J.A.C. 7:26E-2.1(a)7. Environmental Liability Management Inc. suggested that an appropriate technical basis for shipment should be related to the holding time according to the following schedule: within 24 hours (one day sampling event) or 48 hours (overnight carrier to be used or sampling exceeds one day) when the holding time is seven days or less; within 72 hours when the holding time is eight to 14 days; and within six days when the holding time exceeds 14 days.

477. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested N.J.A.C. 7:26E-2.1(a)7 be rewritten as follows: Samples shall be preserved as specified in the appropriate analytical method. Shipment of samples should be scheduled so that holding times prior to analysis are not exceeded. When holding times are exceeded, the reliability of the results should be assessed and discussed in the analytical report; the Department may elect to discard the results.

478. COMMENT: Exxon Company U.S.A. stated that the 24 hour sample shipment requirement at N.J.A.C. 7:26E-2.1(a)7 is not contained in the referenced New Jersey Department of Environmental Protection and Energy Field Sampling Procedures Manual, and thus appears to be an arbitrary requirement. Holding times for respective contaminants should be the only constraint. Exxon Company U.S.A. recommended that N.J.A.C. 7:26E-2.1(a)7 should be modified so that the laboratory receives the samples within 24 hours of shipment, not collection.

479. COMMENT: Colonial Pipeline Company commented that the statement "... and no later than 24 hours after sample collection ... or if either overnight carrier is required ... no later than 48 hours after sample collection" from N.J.A.C. 7:26E-2.1(a)7 is not valid and should be deleted. If the sampling party can insure sample integrity, custody and temperature, and analytical holding times are not exceeded, then quality assurance will be maintained. In addition, there is no hourly restriction for sample delivery within Environmental Protection Agency publication SW-846, and it may exclude Saturday or Sunday sampling.

RESPONSE: The Department's basis for the 24 to 48-hour sample handling time at N.J.A.C. 7:26E-2.1(a)7 is (1) to minimize potential sample contamination from field sources and (2) to prevent samples from arriving at laboratories near the end of sample holding times (for example, samples that are delivered to a laboratory at day six of a seven day holding time which puts the laboratory under pressure to perform the analysis in one day). The 48-hour sample handling time has been suggested for use in the Department's Field Sampling Procedures Manual for over five years. In addition, the 48-hour sample handling time has been specified in Departmental site remediation contracts for over five years and has been used by Department's Site Remediation Program when samples have been collected by Department personnel. Over the course of this time, the Department has not experienced any major difficulty in implementing and complying with the 48-hour sample handling protocol.

While the handling time schedule proposed by Environmental Liability Management Inc. has merit, it still presents a problem in that the longer a sample remains in the field, the greater the potential for sample contamination from field sources.

The recommendation of Exxon Company U.S.A. does not address the problem of potential sample contamination from field sources and samples arriving at laboratories near the end of sample holding times.

The Department agrees with Colonial Pipeline Company that there should be concern to maintain sample integrity, custody and temperature. N.J.A.C. 7:26E-2.1(a)7 addresses these concerns by minimizing the time samples remain in the field. The Department acknowledges that sample handling times are not contained in EPA publication SW-846, but this omission does not preclude the Department from establishing sample handling times in these rules.

Upon further evaluation, the Department has determined that a 24-hour handling time would place an added burden on the sample collector without significantly reducing potential sample contamination from field sources. Therefore, 24-hour handling time clause from N.J.A.C. 7:26E-2.1(a)7 will be deleted but the 48-hour sample handling time requirement will be retained.

480. COMMENT: Chemical Land Holdings, Inc. commented that if in the event that samples are not shipped within the times specified at N.J.A.C. 7:26E-2.1(a)7 or holding times have not been met, one would assume that results would reflect a low bias tendency, for example, individual volatile organic compounds. If such results are greater than a cleanup standard for a particular compound, the data should not be disregarded, rather it should be accepted for use in comparison to the cleanup standard.

481. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. stated it is not necessary to specify the shipping requirements in such detail at N.J.A.C. 7:26E-2.1(a)7. The objective is to analyze the sample before the analyte concentration changes. Holding times are typically used to trigger an assessment of possible change in sample analyte concentration. Union Carbide Chemicals and Plastics Company, Inc. noted that the holding times were established in some cases for expediency in obtaining results, not on the basis of the change in chemistry of the sample. As written, perfectly acceptable samples would be rejected if snags developed in shipment.

RESPONSE: The Department agrees that it is necessary to analyze samples before the analyte concentrations change in samples, and that holding times are typically used to trigger an assessment of possible changes in sample analyte concentration. The Department also agrees that holding times were established in some cases for expediency in obtaining sampling results, not on the basis of potential chemical changes in the sample.

It is not the intent of the Department to outright reject any and all data generated from the analysis of samples that failed to meet the sampling handling times specified in N.J.A.C. 7:26E-2.1(a)7. Rather, the data would be evaluated on a case-by-case basis to determine if the data are acceptable for its intended use or if the data should be rejected.

482. COMMENT: Chemical Land Holdings, Inc. stated as proposed, N.J.A.C. 7:26E-2.1(a)9 would require the analytical laboratory to perform sample matrix "cleanup" procedures after certain specified analytical conditions are observed in an initial analysis of the sample. Chemical Land Holdings, Inc. noted that matrix cleanup and subsequent re-analysis of the sample, in this sequence, is unnecessarily inefficient and costly and may be difficult to achieve within the required holding times. Furthermore, Chemical Land Holdings, Inc. noted the sample matrix cleanup requirement, as written, is completely generic and is too open-ended. Chemical Land Holdings, Inc. recommended that specific cleanup methods be specified for specific sample media as per the Environmental Protection Agency (EPA) Contract Laboratory Program Statement of Work for Organics Analysis, Multi-Media, Concentrations and/or EPA publication SW-846, "Test Methods for Evaluating Solid Waste."

Chemical Land Holdings, Inc. commented that sample matrix "cleanup" procedures set forth at N.J.A.C. 7:26E-2.1(a)9 frequently do not alleviate the problem of analytical interference(s). In recognition of this fact, Chemical Land Holdings, Inc. suggested that the Department allow a certain cleanup procedure to be discontinued from use on a given sample matrix or site if a specified percentage of the preceding analyses have demonstrated that the cleanup procedure is not effective.

Chemical Land Holdings, Inc. commented most cleanup procedures as required at N.J.A.C. 7:26E-2.1(a)9 will cause some loss of surrogate compounds in a given sample matrix. The Department should specifically address how it will deal with situations where the loss of surrogate compounds is appreciable and the surrogate recovery drops below acceptable regulatory criteria.

RESPONSE: N.J.A.C. 7:26E-2.1(a)9 does not preclude the laboratory from performing sample cleanup prior to analysis. Laboratories routinely perform sample or extract cleanup prior to the analysis of samples. Technicians familiar with the extraction of environmental samples frequently can tell which samples or extracts require cleanup. Because of the heterogeneous nature of sample matrices, in instances where the

protocol does not specifically address cleanup procedures, the determination concerning which cleanup to use is appropriately left to the laboratory.

There are instances where cleanup may not eliminate the problem of interferences. However, due to sample heterogeneity, it is not acceptable to cease cleanup activities based on previous cleanup failures. Should sufficient data support a change in this philosophy, the Department will readdress this issue in subsequent revisions to this regulation.

Cleanup procedures could result in the loss of some surrogate compounds. However, for those methods actually citing surrogate recovery acceptance criteria, these criteria have been established from data obtained from interlaboratory studies where a variety of laboratories performed analyses (and cleanups) on numerous matrix types. For those methods where surrogate recovery criteria are not published, best professional judgment shall have to be used by all parties concerning the interpretation of analytical results.

483. COMMENT: Shell Oil Company stated that sample clean-up procedures required at N.J.A.C. 7:26E-2.1(a)9 are of limited utility. All sample clean-up work is conducted by separating molecules with one set of chemical properties from molecules with another set of chemical properties, but in an environmental sample, the molecules one is looking for have similar or identical chemical properties to the molecules that one wants to eliminate in the clean-up. Shell Oil Company commented that it is simply not possible to analyze a sample for a target analyte present in a very tiny amount compared to other target or non-target analytes present in large amounts.

RESPONSE: The Department recognizes that sample and extract cleanup may not eliminate all interferences and the matrix may yield analyte-specific quantitation limits which are above the applicable remediation standard. However, the Department believes that every effort must be made to generate data having analytical sensitivities which meet site remediation requirements. When cleanup is performed on a sample or extract and sample matrix effects still prohibit contaminant quantification at the applicable remediation standard, the options available to the concerned parties shall be addressed on a case by case basis.

484. COMMENT: Envirotech Research, Inc. commented that at N.J.A.C. 7:26E-2.1(a)9 it is proposed that laboratories perform matrix cleanups when detection limits exceed remediation standards but laboratories are not in the position to know if a sample is properly reviewed relative to any of the numerous standards that could possibly be applied.

Envirotech Research, Inc. stated the cleanups that are required will result in additional costs to the laboratory client and should be performed only when requested by the laboratory client (that is, regulated party). Matrix cleanups can also eliminate data that may be required (that is, non-polycyclic aromatic hydrocarbon base neutral compounds are removed by Environmental Protection Agency (EPA) Method 3611). Envirotech Research, Inc. recommended that N.J.A.C. 7:26E-2.1(a) be removed from the laboratory section and be included with "Site Investigation—general sampling requirements" at N.J.A.C 7:26E-3.4 where they can be targeted to the regulated party or their consultant.

RESPONSE: Without sample cleanup, the quality of the data may be significantly compromised. It is the Department's position that it is the joint responsibility of the consultant, the person responsible for conducting the remediation and the laboratory to see to it that the generated data meet the requirements of the Department. The degree to which a site requires remediation is information easily attainable. Acquiring this information should pose no major burden on the laboratory. This may require an increase in communication among the parties concerned to assure the sensitivity of the method can meet the appropriate remediation standard.

Certain methodologies (such as those specified in the EPA Contract Laboratory Program) require the use of cleanup procedures. In these instances, the course of action to be pursued by a laboratory is clearly defined. Other instances may not be as clearly defined. In these instances, the laboratory and not the consultant would most likely be in the best position to determine a) whether sample cleanup is necessary; and b) which cleanup is most appropriate. Therefore, relying on the laboratory's client to specify when matrix cleanup is to be performed would not be effective.

485. COMMENT: The Chemical Industry Council of New Jersey commented that at N.J.A.C. 7:26E-2.1(a)9ii, the interference should be less than about one half times the height of nearest internal standard. Three times internal standard height, as proposed, is extremely poor chromatography.

486. COMMENT: Ciba-Geigy Corporation commented that the description of adequate peak separation as "baseline elevation at the analyte retention time which is greater than three times the peak height of the nearest internal standard" is too restrictive and suggested that this decision should be left to the analyst. Ciba-Geigy Corporation also noted this definiton of adequate peak separation could be circumvented by sample extract dilution plus the addition of more internal standard, or simply increasing the amount of internal standard.

RESPONSE: The Department agrees that the reference of matrix interference greater than three times the height of the nearest internal standard is inappropriate. The Department has revised N.J.A.C. 7:26E-2.1(a)9 such that the decision of inadequate peak separation is left to the professional judgement of the laboratory analyst.

487. COMMENT: Ciba-Geigy Corporation noted the word "interval" should be "internal" at N.J.A.C. 7:26E-2.1(a)9ii.

RESPONSE: The typographical error has been corrected.

488. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-2.1(a)11 should be revised to read as follows: "Laboratory data deliverables should be as follows, unless otherwise specifically required pursuant to a NJPDES permit or other existing regulatory document...". Chevron U.S.A., Inc. stated preexisting regulatory documents other than a NJPDES permit may already be in effect for a site.

489. COMMENT: Exxon Company U.S.A. recommended that N.J.A.C. 7:26E-2.1(a)11 be modified by adding at the end of the sentence: "or work performed pursuant to an existing oversight document."

RESPONSE: The Department does not believe the commenter's recommended change to N.J.A.C. 7:26E-2.1(a)11 is necessary. The Department recognizes that oversight documents in effect prior to the adoption of these regulations may require submission of data deliverables that differ from those specified in N.J.A.C. 7:26E-2.1(a)11. The Department will continue to accept submission of data in the data deliverable formats specified in existing administrative consent orders (ACOs) since they will be in substantial compliance with the requirements of N.J.A.C. 7:26E-2.1(a)11. However, the Department may also accept data submitted pursuant to the requirements of an ACO in the format described at N.J.A.C. 7:26E-2.1(a)11 even though the ACO specifies slightly different requirements. The Department recommends the person responsible for conducting the remediation obtain prior written approval from the Department to submit reduced data deliverables pursuant to N.J.A.C. 7:26E-2.1(a)11 if an ACO specifies a full data deliverables format.

490. COMMENT: Colonial Pipeline Company stated the Department should consider different levels of data requirements at N.J.A.C. 7:26E-2.1(a)11 depending upon the threat to human health and the environment and at what stage the investigation is in. Different levels of quality control are necessary at different stages of the investigation.

RESPONSE: N.J.A.C. 7:26E-2.1(a)11 already considers different levels of data requirements depending upon the threat to human health and the environment and the stage of the investigation. Full data deliverables are required pursuant to N.J.A.C. 7:26E-2.1(a)11 for the analysis of potable water samples (a potentially significant contaminant exposure pathway) and for the analysis of polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans (highly toxic compounds). In addition, data deliverables without all quality control and raw data pursuant to N.J.A.C. 7:26E-2.1(a)11iii are allowed for contaminant delineation samples which indicate that further delineation sampling is required. Also, analyses using field screening methods are allowed under the conditions described in N.J.A.C. 7:26E-2.1(b). The Department agrees that varying data requirements based on the data quality objectives can result in protection and remediation of the environment in a more cost and time effective manner. The Department will continue to examine and evaluate this issue.

491. COMMENT: Shell Oil Company commented that from a technical standpoint, it has no objection to the detailed reporting of deliverables outlined at N.J.A.C. 7:26E-2.1(a)11, but, from a practical standpoint Shell Oil Company believes these requirements to be excessive, the extent of reporting is very expensive, and results in a lot of paper. Shell Oil Company questioned if the Department is actually going to look at all of that information, or is the Department asking for it "just in case" it may want to review the information. Shell Oil

Company stated a more practical solution is to report most of the information except for the raw data and chromatograms as laboratories are capable of retrieving this information at a later date if the need arises.

RESPONSE: Full data deliverables, pursuant to N.J.A.C. 7:26E-2.1(a)11i, are only required for the analysis of potable water samples (a potentially significant contaminant exposure pathway) and for the analysis of polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans (highly toxic compounds). These analytical results undergo extensive data validation conducted by Department personnel. Data deliverables pursuant to N.J.A.C. 7:26E-2.1(a)11iii are allowed for contaminant delineation samples which indicate that further delineation sampling is required. All other analytical data can be submitted to the Department using the reduced data deliverables format pursuant to N.J.A.C. 7:26E-2.1(a)11ii. These data deliverables formats exclude the raw data that is required in the full data deliverables format. These analytical results typically undergo a less extensive data validation compared to that done for potable water samples and samples analyzed for polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans.

492. COMMENT: American Cyanamid Company commented that the proposed rule at N.J.A.C. 7:26E-2.1(a)11 does not indicate whether full laboratory data deliverables means Tier I or Tier II deliverables. The Department should specify which one to use since there is a significant difference in cost. At the same time, the Department should make the determination whether Tier I deliverables are really necessary or whether Tier II could serve the same purpose. This would result in a significant decrease in the paperwork necessary without any decrease in quality or defensiveness of the results.

RESPONSE: With the adoption of N.J.A.C. 7:26E, the Department will no longer use the terms Tier I and Tier II as types of data deliverables formats. The laboratory data deliverables formats contained in Appendix A are, at a minimum, the required formats for all data generated pursuant to the Technical Requirements for Site Remediation.

For general information, however, the full and reduced laboratory data deliverables formats for USEPA/CLP methods were derived from the data deliverables formats specified by the Environmental Protection Agency (EPA) Contract Laboratory Program. The full and reduced laboratory data deliverables formats for non-USEPA/CLP methods were derived in part from the Department's Tier I and Tier II data deliverables formats.

Full data deliverables, pursuant to N.J.A.C. 7:26E-2.1(a)11i are, at a minimum, only required for the analysis of potable water samples (a potentially significant contaminant exposure pathway) and for the analysis of polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans (highly toxic compounds). These analytical results undergo extensive data validation conducted by Department personnel.

Data deliverables pursuant to N.J.A.C. 7:26E-2.1(a)11iii are allowed for contaminant delineation samples which indicate that further delineation sampling is required. All other analytical data can be submitted to the Department using the reduced data deliverables format pursuant to N.J.A.C. 7:26E-2.1(a)11ii. These data deliverables formats exclude the raw data that is required in the full data deliverables format. These analytical results typically undergo a less extensive data validation compared to that done for potable water samples and samples analyzed for polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans.

493. COMMENT: Recon Systems, Inc. commented that N.J.A.C. 7:26E-2.1(a)11 should be rewritten so that full laboratory data deliverables shall be submitted for all other analyses unless the Department directs otherwise because if the quality of the results remains the primary issue there is no better way to insure the accuracy of the results than reviewing the actual raw data.

Recon Systems, Inc. stated this wording will give the Department the ability to scale down the paperwork associated with the full laboratory data deliverables package after it is satisfied that the analytical results are being competently generated.

RESPONSE: The Department agrees that there is no better way to ensure the accuracy of the results than reviewing the actual raw data as would be done in a complete data validation. However, the Department does not have the resources to conduct a complete data validation for all sample results. The Department however, believes that for most samples, the reduced data deliverables format allows for sufficient review to determine if analytical data are acceptable. Full data deliverables, pursuant to N.J.A.C. 7:26E-2.1(a)11i are only required for the analysis of potable water samples (a potentially significant contaminant exposure pathway) and for the analysis of polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans (highly toxic compounds). These analytical results undergo extensive data validation conducted by Department personnel. Should analytical results that were submitted to the Department in a reduced data deliverable format require greater evaluation, the Department has the ability to require the results to be resubmitted in a full data deliverables format at N.J.A.C. 7:26E-2.1(a)11iv. Therefore, the Department does not see the need to modify N.J.A.C. 7:26E-2.1(a)11ii as suggested.

494. COMMENT: Mr. Patrick Mulrooney noted that there was a reference of not supplying as much raw data to the Department. He noted that if the Department wants to focus on quality, then raw data will tell more than mere participation in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP).

RESPONSE: The Department agrees that examination of raw data is a better indicator of data quality than mere participation in the EPA CLP. The comment that the proposed regulations specify less raw data submissions to the Department is not entirely correct. The regulations specify full laboratory deliverables for highly sensitive analyses such as the analysis of potable water samples and the analysis of samples for polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans at N.J.A.C. 7:26E-2.1(a)11i. The reduced data deliverable package, while requiring less raw data than the full data deliverable package, actually requires more raw data to be submitted when compared to the existing Tier II and ECRA Tier II data deliverable package requirements. N.J.A.C. 7:26E-2.1(a)11iii allows for submisson of analytical results without all quality control and raw data in those instances where delineation sampling indicates contaminated areas which will require additional delineation sampling. In all cases, the Department may require that any data deliverable package be upgraded to a full data deliverable package as stated at N.J.A.C. 7:26E-2.1(a)11iv.

495. COMMENT: The General Electric Company and Allied Signal, Inc. stated that laboratory deliverables are defined for delineation sampling at N.J.A.C. 7:26E-2.1(a)11 in a fashion such that the required deliverable will be dependent upon the analytical result. Reduced laboratory deliverables will be required for those samples demonstrated clean, and analytical results only will be required pursuant to N.J.A.C. 7:26E-2.1(a)11iii for those samples which do not define the limits of contamination. This is impractical from a subcontracting perspective; laboratory schedules and costs are directly affected by the deliverable package required. The contracting party will need to request reduced deliverables for all delineation samples or risk substantial delays and cost in later obtaining them for only the clean samples. In addition, data validation through deliverables is typically only done for a subset of sample events when there is a lengthy investigation underway.

RESPONSE: In certain situations the Department agrees that the person responsible for conducting the remediation would have to request a reduced data deliverables package for all delineation samples, as opposed to the data deliverables format specified in N.J.A.C. 7:26E-2.1(a)11ii, if there were substantial delays and cost in later obtaining a reduced data deliverable package for only the clean samples. However, the use of the data deliverable format specified in N.J.A.C. 7:26E-2.1(a)11ii would be advantageous in those situations where the person responsible for conducting the remediation is reasonably sure that the colleted sample is contaminated.

In general, the Department typically validates only a subset of data on projects which are lengthy and have many samples collected. This, however should not preclude the person responsible for conducting the remediation from conducting a more extensive validation of site data.

496. COMMENT: E.I. du Pont de Nemours and Company recommended the replacement of "method detection limit" with "practical quantitation level" at N.J.A.C. 7:26E-2.1(a)11iii(4) because the proposed use of method detection limits is not appropriate. E.I. du Pont de Nemours and Company stated the method detection limit is a statistical number derived from 40 C.F.R. 136, Appendix B. The value does not allow for bias (matrix effects) that is normally encountered in soil, or remediation-type, samples. The practical quantitation level does address this bias (matrix effects).

RESPONSE: The Department agrees with the commenter's discussion of the distinction between method detection limits (MDLs) and practical quantitation levels (PQLs). The Department also agrees that method PQLs should be included as part of this data deliverable format as they represent the lowest quantitation level of a given analyte in a given matrix that can be reliably achieved within specified limits of precision and accuracy of a given analytical method during routine laboratory operating conditions. However, the Department believes that MDLs should remain as part of this data deliverable format as it provides additional

information about laboratory and method performance. Therefore, N.J.A.C. 7:26E-2.1(a)11iii(4) has been modified to incorporate PQLs.

497. COMMENT: Land Tech Remedial, Inc. commented that "Expedited Site Closure Approach," an approach they developed, will usually be used to assess known volatile organics resulting from petroleum hydrocarbon discharges.

RESPONSE: This comment is a statement about how the commenter intends to comply with N.J.A.C. 7:26E-2.1(b) rather than a comment about the rule provision itself. As such, it is beyond the scope of this rulemaking.

498. COMMENT: Mobil Oil Corporation recommends the deletion of N.J.A.C. 7:26E-2.1(b)2 which limits field screening methods because it prohibits the use of field screening methods to verify contaminant identity or clean zones and limits developing technology currently being tested in the field today. Mobil Oil Corporation cites as an example the "Lab in the Bag" technology which is being used in consultation with the Department. This method allows data to be collected faster and more frequently compared to traditional laboratory analysis, and appears to provide very reliable data.

499. COMMENT: Exxon Company U.S.A. recommended that the Department delete the phrase "or clean zones" from N.J.A.C. 7:26E-2.1(b)2.

500. COMMENT: Public Service Electric and Gas Company recommends that N.J.A.C. 7:26E-2.1(b)2 be modified to allow field analytical verification when a specific discharge event occurs where the contaminant is known, contamination is visible, limited in areal extent, not in contact with groundwater and where remedation is verifiable by field screening.

501. COMMENT: The Chemical Industry Council of New Jersey commented that field screening methods, supplemented by laboratory methods should be allowed at N.J.A.C. 7:26E-2.1(b)2 when the contaminant identity is known since they can provide reliable data much faster than can laboratory methods. The Chemical Industry Council of New Jersey also supported the use of field screening techniques to identify clean zones when the contaminant(s) are known.

502. COMMENT: Atlantic Electric commented that the Department must allow for recognized field screening methods at N.J.A.C. 7:26E-2.1(b)2 to determine whether specific contaminants are present, and if specific contaminants are detected, then further laboratory testing may be appropriate.

503. COMMENT: Public Service Electric and Gas Company commented that N.J.A.C. 7:26E-2.1(b)2 should be modified to permit field screening verification of specific discharge event where the contaminant is known, can visibly be seen and can be measured by acceptable field methods (that is, petroleum hydrocarbons) in order to promote single phase cleanups.

504. COMMENT: The General Electric Company and Allied Signal, Inc. commented that N.J.A.C. 7:26E-2.1(b)2 should be revised to consider that (1) field screening methods, if supported by appropriate quality control, can generate reliable data much faster and at significantly lower costs than laboratory analyses, (2) the objectives for the use of the data should be considered, and (3) innovative and new field screening approaches should be encouraged.

505. COMMENT: Groundwater & Environmental Services, Inc. believes when the compounds of concern have been identified, (for example, gasoline at gasoline service stations), the Department should allow use of field screening methods with limited laboratory analysis for confirmatory purposes. The number of laboratory analyzed samples can be reduced with the aid of field screening methods.

RESPONSE: The Department is very interested in expanding the use of field screening methods. However, data generated using field screening methods is currently considered semi-quantitative and, as such, should not be used without some laboratory verification. As the reliability of field screening methods improve, it is likely that they will be used with less laboratory verification, as many commenters suggest. Furthermore, parties may petition the Department to use field screening methods instead of laboratory analyses pursuant to N.J.A.C. 7:26E-1.6(d), as adopted.

In the context of single-phase remediations, it is the Department's position that the clean zone, as measured using field analysis, must be confirmed with laboratory analysis pursuant to N.J.A.C. 7:26E-2.1(b). This is because, as noted above, data generated using field screening methods is currently considered semi-quantitative.

506. COMMENT: The General Electric Company and Allied Signal, Inc. commented that field screening methods are limited by N.J.A.C. 7:26E-2.1(b)2 to situations where up to 50 percent of the samples within the area of concern are not contaminated. Since this cannot be known prior to the sampling and analysis event itself, field screening efforts risk being non-compliant. They suggest laboratory confirmation of a selected percentage of samples (for example, 10 percent) designated clean by the field screening analysis.

RESPONSE: The commenters have apparently misinterpreted the rule. The Department is not saying that field screening methods can only be used if 50 percent of the locations are clean. Rather, the Department is allowing the person responsible for conducting the remediation to designate up to 50 percent of the sampling locations as clean using field screening methods rather than using laboratory analytical methods for large areas of concern, such as those having more than ten sampling locations. As the commenters suggest, this allowance was made to encourage the use of field screening methods.

The 50 percent limit was selected because data generated using field screening methods is currently considered semi-quantitative and, therefore, considerable caution should be exercised when designating areas clean using only field screening methods. As the reliability of field screening methods improves, it is likely that they will be used with less laboratory verification, as many commenters suggest, and petitions to the Department may be made pursuant to N.J.A.C. 7:26E-1.6(d) as adopted to obtain approval of these methods on a case-by-case basis.

507. COMMENT: The Chemical Manufacturers Association stated that N.J.A.C. 7:26E-2.1(c) which specifies the applicable requirements for the selection of analytical parameters should be revised to consider that industry is bound by law to use Environmental Protection Agency (EPA) validated and approved methods (published in the EPA SW-846 methods manual) when conducting testing procedures for Resource Recovery and Conservation Act (RCRA) and Superfund sites.

RESPONSE: While the use of EPA SW-846 methods may be required when conducting analyses pursuant to RCRA-regulated activities, the use of EPA SW-846 methods is not required when conducting site remediations pursuant to Superfund or non-RCRA activities. The Technical Requirements for Site Remediation do not mandate the use of Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical methods over any other analytical methods especially if certain analytical methods are required by regulation. Rather, the Technical Requirements for Site Remediation specify the minimum laboratory qualifications if EPA CLP methods are used. Therefore, the Department will continue to accept the use of EPA CLP methods pursuant to these proposed regulations.

508. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company stated analytical parameter requirements contained in N.J.A.C. 7:26E-2.1(c) are consistent with existing Department remedial investigation (RI) guidelines. New Jersey Natural Gas Company and Jersey Central Power & Light Company also noted the Interim Petroleum Hydrocarbon Guidelines contained in existing remedial investigation guidelines is referenced in N.J.A.C. 7:26E-2.1(c) for analysis of soil and sediment samples for petroleum hydrocarbons.

RESPONSE: New Jersey Natural Gas Company and Jersey Central Power & Light Company have compared N.J.A.C. 7:26E-2.1(c) with old Department guidance documents and have noted that the requirements contained in these regulations are consistent with information contained in the old guidance documents. This is not unexpected as the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, were based, to a large extent, on previous Department guidance.

509. COMMENT: Envirotech Research, Inc. recommended that cleanup standards be provided for all compounds for which monitoring is required at N.J.A.C. 7:26E-2.1(c).

RESPONSE: The Department agrees that remediation standards for all of the targeted compounds contained in the Target Compound List, Target Analyte List and Priority Pollutant List should be established. It is the Department's intent to do this in future rulemaking.

510. COMMENT: Colonial Pipeline Company stated the department should reference the appropriate analytical method to detect vinyl chloride, benzene, and other volatile compounds at N.J.A.C. 7:26E-2.1(c), even as a screening tool for groundwater, at concentrations at or below their respective Maximum Contaminant Level.

RESPONSE: The commenter is referred to N.J.A.C. 7:26E-2.1(a)3 which lists appropriate analytical method references. The person responsible for conducting the remediation is responsible for the selection of the proper analytical technique.

511. COMMENT: Mr. Al Nesheiwat requested that the Department better define what test methods apply to total organic contaminants and to total volatile total contaminants.

RESPONSE: The terms "total organic contaminants" and "total volatile organic contaminants" are not used in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. These terms were used in the proposed Cleanup Standards for Contaminated Sites, 24 N.J.R. 373(a). How one determines the total organic contaminant level will vary from site to site depending upon those organic contaminants that may be potentially present at a given site. The list of those organic contaminants that may be potentially present is based on a diligent inquiry of the site history. The list of those organic contaminants that may be potentially present will determine which analytical methods to be used. Therefore it is not feasible to list specific analytical methodologies to be used to determine the total organic contaminant level in a given sample.

The same logic would apply to total volatile organic contaminants. How one determines the total volatile organic contaminant level will vary from site to site depending upon those volatile organic contaminants that may be potentially present at a given site. The list of those volatile organic contaminants that may be potentially present is based on a diligent inquiry of the site history. The list of those volatile organic contaminants that may be potentially present will determine which analytical methods to be used. Therefore it is not feasible to list specific analytical methodologies to be used to determine the total volatile organic contaminant level in a given sample.

512. COMMENT: E. I. duPont de Nemours and Company proposed that the word "gas" be dropped from the phrase "gas chromatography" at N.J.A.C. 7:26E-2.1(c)1 to allow for gas, liquid, or supercritical fluid chromatography methods. E. I. duPont de Nemours and Company noted the use of supercritical fluid chromotography will be a viable technique in the near future and should be allowed for with proper certifications.

RESPONSE: The vast majority of contaminants associated with the remediation of sites are detected using gas chromatographic techniques. The Department recognizes, however, there may be other chromotographic techiques better suited to analyze certain contaminants. The Department shall continue to require the analyses of commonly found contaminants (such as those described under the target compound list or priority pollutant list) using gas chromatographic techniques. However, in recognition of the fact that chromatographic methods other than gas chromatography may be necessary, the reference to "gas" chromatography with a mass spectrometer detector system in N.J.A.C. 7:26E-2.1(c)1 has been modified to allow for the use of "non-gas" chromatography methods when analysis using gas chromatography is not appropriate. In addition, to be consistent with the modification to N.J.A.C. 7:26E-2.1(c)1, N.J.A.C. 7:26E-2.1(c)2iii has been modified to allow the use of "non-gas" chromatography methods when appropriate.

513. COMMENT: The General Electric Company and Allied Signal, Inc. stated when contaminants of concern have been established, the requirement for continued mass spectral analyses at N.J.A.C. 7:26E-2.1(c)1 adds cost without clear advantages to remediation. Gas chromatographic analyses for a target compound may be biased high by the presence of coeluting compounds, but this high bias does not compromise activities protective of the environment. The potential for false negatives, which would be a concern, is no greater by gas chromatography than by gas chromatography/mass spectrometry. The General Electric Company and Allied Signal, Inc. suggested that gas chromatographic analyses with selective detectors should be allowed at N.J.A.C. 7:26E-2.1(c)1 since they offer lower cost, lower detection limits and better precision than mass spectrometry for many organic analyses.

RESPONSE: Pursuant to N.J.A.C. 7:26E-2.1(c)2, the use of a mass spectrometer is not required when the identity of the contaminant is known, 10 percent of the analyses are confirmed using a mass spectrometer detector system, and adequate resolution is demonstrated.

The Department feels that requiring a 10 percent confirmation of analyses using a mass spectrometer is justified. The potential for misidentification of contaminant chromatographic peaks caused by coelution is significantly reduced when a mass spectrometry is used.

The Department recognizes the potential for false positive exists for both gas chromatography and gas chromatography/mass spectrometer systems. However, mass spectrometry does offer added qualitative benefits. The benefit is observed in instances where a contaminant is suspected but the analytical results come up negative. Qualitative determinations from gas chromatographic systems are performed by matching retention times. In addition to retention time matching also used with mass spectometry, the option to qualitatively search a region of a chromatogram for a particular spectrum from a contaminant exists only with the mass spectrometer system.

The Department believes these advantages of gas chromatography/mass spectrometry outweigh the lower cost, lower detection limit and greater precision offered by gas chromatography analysis.

514. COMMENT: Ciba-Geigy Corporation stated the word "and" should be added to the end of N.J.A.C. 7:26E-2.1(c)2i to explicitly state that 100 percent resolution of the chromatographic peak criteria applies only if the contamination is known.

RESPONSE: The use of "and" at the end of N.J.A.C. 7:26E-2.1(c)2ii infers that "and" belongs at the end of N.J.A.C. 7:26E-2.1(c)2i. Thus, all three requirements, N.J.A.C. 7:26E-2.1(c)2i through 2.1(c)2iii, must be followed to fulfill the requirements of N.J.A.C. 7:26E-2.1(c)2.

515. COMMENT: Environmental Liability Management Inc. noted that N.J.A.C. 7:26E-2.1(c)2ii would require a chromatographic peak be 100 percent resolved from any other peak. Environmental Liability Management Inc. stated this goal is not attainable on a routine basis for environmental samples. Although resolution of 100 percent is an ideal goal when doing chemical analyses, such a goal is impractical (in reality often impossible) when analyzing complex environmental samples in bulk.

Environmental Liability Management Inc. recommended that a resolution of 60 percent or higher be considered acceptable because straight gas chromatography methodology would be used when compounds of concern are known from the facility's records or have been identified by a gas chromatography/mass spectrometry method. This mitigates a less than 100 percent resolution condition.

Furthermore, for cases of less than 100 percent resolution down to 60 percent resolution, area determinations are based on extrapolation to the baseline. This procedure will incorporate a positive bias to the reported result.

516. COMMENT: Exxon Company U.S.A. stated the requirement for 100 percent peak resolution in N.J.A.C. 7:26E-2.1(c)2ii is overly restrictive since positive identification and quantitation of contaminants can be made without 100 percent chromatographic peak resolution, especially, once a laboratory has performed validation via gas chromatography/mass spectroscopy (GC/MS). This requirement will expend additional economic cost without an appreciable gain with regard to data quality. Exxon Company U.S.A. recommended clarification of the 100 percent resolution requirement. Exxon Company U.S.A. also recommended deletion of this requirement for chromatography/mass spectrometry (GC/MS) analysis if surrogate methods of gas chromatography analysis can be proven effective with a one-time validation by GC/MS.

RESPONSE: The Department agrees in principle with Environmental Liability Management Inc. and Exxon Company U.S.A.; while chromatographic peak resolution of 100 percent is an ideal goal, it is not attainable or necessary on a routine basis when analyzing environmental samples.

N.J.A.C. 7:26E-2.1(c)2 addresses the circumstances under which the use of a mass spectrometer detector system can be bypassed; the primary condition allowing this bypass is when the identity of the contaminant(s) is known (see N.J.A.C. 7:26E-2.1(c)2i). When the contaminant(s) is known, the need for 100 percent resolution of chromatographic peaks is not critical. The fact that a contaminant(s) is known to be present indicates that an investigation has previously occurred with data generated or sufficient historical information exists concerning the site. With a list of expected contaminants, a laboratory will be able to predict where the chromatographic peaks of these contaminants will occur on a chromatogram.

When contaminant identity is known, the laboratory is better able to examine the chromatogram and determine if the instrument is providing the correct identification and quantification of the analyte whether or not chromatographic peak resolution is 100 percent. If the region of the chromatogram where the contaminant is expected to appear contains peaks, but none can be identified, or if the contaminant is present but the calculated concentration is not consistent with or reasonable for the size and shape of the peak, the laboratory will be in the position to determine whether or not there is adequate peak resolution and subsequently, whether or not it is acceptable to bypass the use of the mass spectrometer detector. This determination is best accomplished by the laboratory. Therefore, N.J.A.C. 7:26E-2.1(c)2ii has been modified to

state that a contaminant chromatographic peak must be adequately resolved from other chromatographic peaks. The section also includes language which defines adequate resolution.

The Department decided not to incorporate the recommendation of Environmental Liability Management Inc. that a chromatographic peak resolution of 60 percent or greater be considered acceptable. The Department has determined that the laboratory, using best professional judgment in conjunction with the modified wording in N.J.A.C. 7:26E-2.1(c)2ii, will be in the best position to determine whether or not there is adequate peak resolution without having to specify a minimum chromatographic peak resolution percentage.

The Department assumes the term "validation" used by Exxon Company U.S.A. in its comment means confirmation. Based on this assumption, the Department agrees if GC/MS confirmation is conducted, 100 percent chromatographic peak separation is not necessary. The Department, however, disagrees that a one-time confirmation using GC/MS is sufficient to allow for gas chromatography only analysis for all remaining samples at a site. It is the Department's position that a minimum of 10 percent of the sample analyses must be confirmed using mass spectrometer detector systems. This use of mass spectrometry provides both the regulated community and the Department the added assurance that the chromatographic peak chosen as the contaminant has been correctly identified and quantified. This will be particularly important when other analytes yield chromatographic peaks which either closely elute to or coelute with the analyte of concern.

517. COMMENT: E.I. duPont de Nemours and Company commented that the requirement that at least 10 percent of the sample analyses are confirmed using gas chromatography/mass spectrometry (GC/MS) at N.J.A.C. 7:26E-2.1(c)2iii is limiting and inappropriate for some compounds. The use of supercritical fluid chromatography will be a viable technique in the near future and should be allowed for with proper certifications. E.I. duPont de Nemours and Company suggested the word "gas" be dropped from the phrase "gas chromatography" in this citation to allow for gas, liquid, or supercritical chromatography methods.

RESPONSE: The vast majority of contaminants associated with the remediation of sites are detected using gas chromatographic techniques. The Department recognizes, however, there may be other chromatographic techniques better suited to analyze certain contaminants. The Department shall continue to require the analyses of commonly found contaminants (such as those described under the target compound list or priority pollutant list) using gas chromatographic techniques. However, in recognition of the fact that chromatographic methods other than gas chromatography may be necessary, the reference to "gas" chromatography/mass spectrometry in N.J.A.C. 7:26E-2.1(c)2iii has been modified to allow for the use of "non-gas" chromatography methods when appropriate.

518. COMMENT: Environmental Liability Management Inc. stated the need to use gas chromatography/mass spectrometry (GC/MS) on 10 percent of the samples at N.J.A.C. 7:26E-2.1(c)2iii when the identity of a contaminant or contaminants is known and resolution is adequate is technically superfluous. When constitutents of concern have been identified, they are easily distinguishable based on relative retention time analysis. Environmental Liability Management Inc. recommended that the use of GC/MS be required only when the identity of compounds of concern is needed and/or when compound identification is not possible due to coelution of analytes and the calculated concentration of the coeluted analytes is above a standard.

RESPONSE: In response to comments stating that the requirement for 100 percent chromatographic peak resolution at N.J.A.C. 7:26E-2.1(c)2ii was overly restrictive and not attainable on a routine basis, the Department modified that subparagraph on adoption. As modified, N.J.A.C. 7:26E-2.1(c)2ii leaves the determination to the laboratory as to whether there is adequate chromatographic peak resolution so as to allow bypassing the use of the mass spectrometer detector.

As contaminant chromatographic peaks are no longer required to be 100 percent resolved from other peaks, and coelution shall, to the extent described, be permitted, it is the Department's position that it is more important that a minimum of 10 percent of the sample analyses shall be analyzed using mass spectrometer detector systems. This use of mass spectrometry provides both the regulated community and the Department the added assurance that the chromatographic peak chosen as the contaminant and quantified accordingly has been correctly identified. This will be particularly important when other analytes yield chromatographic peaks which either closely elute to or coelute with the analyte of concern.

519. COMMENT: E. I. duPont de Nemours and Company recommeded the inclusion of Resource Conservation and Recovery Act (RCRA) analytical requirements in N.J.A.C. 7:26E-2.1(c)4 since RCRA facility investigations stipulate the use of 40 CFR 261 Appendix VIII and 40 CFR 264 Appendix IX list analyses.

520. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that the analytical protocols at N.J.A.C. 7:26E-2.1(c)4 must be global to include those sites covered under the Resource Conservation and Recovery Act (RCRA) corrective action program. Investigations performed under the RCRA facility investigation program must utilize the analytical protocols stipulated in 40 CFR 264 Appendix VIII and Appendix IX for the list of analyses in lieu of those required under the Contract Laboratory Program or EPA Priority Pollutant list.

RESPONSE: The Department understands that the Environmental Protection Agency (EPA) has proposed regulations which will specify remedial activities under the RCRA corrective action program. These proposed regulations will specify groundwater monitoring of compounds contained in Appendix IX of 40 CFR 264. The Department is not aware of any EPA proposed RCRA corrective action program regulations which specify monitoring of compounds contained in Appendix VIII of 40 CFR 261. At present, the Department does not believe it is appropriate to specify the analysis of Appendix IX compounds in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, as the EPA has not promulgated the RCRA corrective program regulations at this time. In addition, the Appendix IX list of compounds is much larger than either the priority pollutant list or target compound list/target analyte list which is specified in N.J.A.C. 7:26E-2.1(c)4 and, in the opinion of the Department, is beyond the minium requirement scope of these regulations. This, however, does not preclude the person responsible for conducting the remediation at a site from analyzing samples for specific compounds found in Appendix IX of 40 CFR 264 if there is reason to believe such compounds are present.

The Department will consider specifying the analysis of Appendix IX compounds in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, as part of future rulemaking upon the EPA's adoption of the RCRA corrective action program regulations.

521. COMMENT: Chevron U.S.A., Inc. recommended deleting the requirement for the analysis of tentatively identified compounds (TICs) referred to as the "plus 30" in the target compound list plus 30 and the "plus 40" in the priority pollutant plus 40 list in N.J.A.C. 7:26E-2.1(c)4. Chevron U.S.A., Inc. noted that the reporting of TICs is less than 30 percent accurate.

RESPONSE: The Department recognizes that the accuracy of identifying tentatively identified compounds is low. This, however, is not a sufficient reason to eliminate the requirement to attempt to identify non-target compounds detected in samples that have been analyzed using gas chromatography/mass spectroscopy analytical methods. Tentatively identified compounds provide additional information concerning the type and level of contamination in a given sample. The reporting of tentatively identified compounds in environmental samples presents a better representation of the "real" composition of a sample.

522. COMMENT: Environmental Liability Management Inc. recommended the requirement to conduct a petroleum hydrocarbons (PHC) analysis at N.J.A.C. 7:26E-2.1(c)4 be limited to screening situations or to areas of significant petroleum contamination which will not require remediation based on the results from semivolatile analyses. Environmental Liability Management Inc. stated that PHC analysis is most suitable for use as a screen to evaluate the potential for the presence of petroleum related contaminants. When analyses for volatiles and semivolatiles are to be conducted, the PHC analysis provides little or no additional useful information.

523. COMMENT: Exxon Company U.S.A. stated that the analysis of petroleum hydrocarbons may be a duplication of effort at N.J.A.C. 7:26E-2.1(c)4.

RESPONSE: The Department disagrees with the commenter's suggestion to limit petroleum hydrocarbons analysis. Petroleum hydrocarbons (PHCs) are found on nearly all industrial sites as products, raw materials, fuels, or lubricants and it is therefore appropriate to analyze for PHC as a target compound. While constituents of PHC will frequently "drive" cleanups because of the greater toxicity of the constituent, many petroleum products exist which contain relatively small amounts of more toxic constituents such as Number 2 fuel oil. For such substances, PHC itself will "drive" the cleanup.

The requirement to conduct both target compound list + 30/target analyte list compounds (or priority pollutant + 40 list compounds) and

petroleum hydrocarbon analyses is not a duplication of effort. The presence of a petroleum product in other analytical fractions (such as a semi-volatile fraction) is frequently overlooked. The chromatogram may take on the appearance of an excessively broad and short peak with no clear envelop of well defined, significant peaks. Additionally, identification occurs through the reporting of non-target analytes where only a small percentage of the actual number of peaks present are reported and the resultant quantification is questionable.

524. COMMENT: Exxon Company U.S.A. stated that the method for petroleum hydrocarbons (PHCs) analysis (Petroleum Hydrocarbons, Total recoverable (TPH) by infrared spectroscopy (IR) following EPA Method 418.1 as modified for the analysis of total petroleum hydrocarbons) at N.J.A.C. 7:26E-2.1(c)5, is subject to several significant limitations resulting in over or under estimation of actual concentrations and should be deleted. The test is non-specific and may suffer from interference with non-oil contaminants. The IR procedure measures total carbon-hydrogen stretch at apprximately 2900 cm-1 and other compounds (such as proteins, etc.) can interfere with the analysis. Exxon Company U.S.A. commented that the Department should consider the use of alternative methodologies.

Exxon Company U.S.A. further commented that the Freon 113 extraction solvent will be replaced in EPA methods in the 1992/1993 time frame, and therefore it is recommended that replacement methods be selected in such a manner that data precision and accuracy are maximized. Exxon Company U.S.A. also recommended that a methylene chloride extraction followed by a gas chromatographic analysis technique, which defines total mass to a flame ionization detector, be adopted as an acceptable PHC analytical method.

RESPONSE: The Department recognizes that total petroleum hydrocarbon (TPH) determinations (from matrices with contamination from unknown sources) using infrared spectroscopy has the disadvantage of potentially a) yielding both false positive and false negative results; and b) generating both under estimated and over estimated concentrations. However, the Department feels that continued use of this method at this time is justified. The benefits (versatility and cost) associated with the use of infrared spectroscopy outweigh the disadvantages. Also, based on the constituents and sources of contamination most frequently identified during remedial activities in the State, infrared spectroscopy techniques are adequate.

The use of gas chromatography techniques (such as fingerprinting) are useful where the source of contamination has been identified and environmental weathering has not significantly altered the contaminants' composition. This procedure is difficult to implement when the identities of the contaminants are not known. Choosing the correct standards for quantification can prove to be time consuming and arbitrary. Qualitative identification of contaminants and interpretation of chromatograms would require a high degree of experience.

The Department is aware that Freon eventually shall be removed from Environmental Protection Agency methods. At such time when the removal occurs and alternate methods are proposed, the Department will revise N.J.A.C. 7:26E to reflect the necessary changes.

The Department wishes to further direct the commenter to N.J.A.C. 7:26E-2.1(a)3 which allows any total petroleum hydrocarbons analytical method developed from a source listed in N.J.A.C. 7:26E-2.1(a)3 to be used in lieu of the Department's interim petroleum hydrocarbon guideline.

525. COMMENT: Continental Vanguard, Inc. requested clarification of N.J.A.C. 7:26E-2.1(c)5 which states that the analysis for total petroleum hydrocarbons (TPH) may be in accordance with the interim petroleum hydrocarbons guideline. Continental Vanguard, Inc. specifically recommended the interim petroleum hydrocarbons guideline incorporated into this regulation. Continental Vanguard, Inc. further stated that if the analysis for TPH is not in accordance with the Interim Petroleum Hydrocarbons Guideline, then what will it be in accordance to?

RESPONSE: As stated in N.J.A.C. 7:26E-2.1(c)5, soils and sediments may be analyzed for TPHs using the Department's Interim Petroleum Hydrocarbon Guideline. However, any TPH analytical method developed from a source listed in N.J.A.C 7:26E-2.1(a)3 may be used in lieu of the Department's Interim Petroleum Hydrocarbon Guideline. As the petroleum hydrocarbons guide is only in interim form, the Department decided it was not appropriate to include this method in these regulations.

526. COMMENT: E.I. du Pont de Nemours and Company commented that tertiary-butyl alcohol (TBA) is not easily analyzed by conventional methodologies and should be deleted from Table 2-2 (recodified and adopted as Table 2-3).

RESPONSE: TBA can be a significant component of gasoline and because of its high water solubility it is useful as a "marker" compound for ground water plume detection and pathway determination. Although method detection limits will be elevated compared to Environmental Protection Agency (EPA) Priority Pollutant or EPA Target Compound List volatile organics, usable TBA data from the analysis of water samples can be generated using EPA Method 524 or 624.

527. COMMENT: E.I. du Pont de Nemours and Company commented that the Department should recognize the difference between organic and inorganic lead and specify which analysis is required at N.J.A.C. 7:26E-2.1(d).

RESPONSE: The Department requires total lead analysis at N.J.A.C. 7:26E-2.1(d) because suitable environmental analytical methods to distinguish organic lead from inorganic lead are not currently available. A "non-approved" method for organic lead, if available, may be used if the criteria in N.J.A.C. 7:26E-2.1(a)4 are met.

528. COMMENT: Chevron U.S.A,. Inc. commented that Environmental Protection Agency (EPA) Method 418, referenced at Table 2-2 (recodified and adopted as Table 2-3), Footnote 6, should read 418.1. Chevron U.S.A., Inc. also commented that other methods such as gas chromatography methods (that is, EPA Method 8015) should be acceptable for the analysis of total petroleum hydrocarbons (TPHC) because other methods, in addition to EPA Method 418.1, are routinely used by the regulated community, EPA Method 418.1 has many potential problems, and one method may be preferable to the other, depending on site-specific considerations and the specific data quality objectives.

RESPONSE: The Department agrees with this comment. It was not the Department's intent to limit total petroleum hydrocarbon analysis to modified EPA Method 418.1 and the rule has been amended accordingly (see modification to footnote 6 of Table 2-2 (recodified and adopted as Table 2-3)).

529. COMMENT: E.I. du Pont de Nemours and Company said the list of naphthalenes in Table 2-2 (recodified and adopted as Table 2-3), footnote 5 should be more clearly defined.

RESPONSE: The Department requires analysis for total naphthalenes, as stated. Specific naphthalenes were listed in Table 2-2 (recodified and adopted as Table 2-3), Footnote 5, because of their frequency of occurrence in soil samples contaminated with kerosene or jet fuel. However, in response to the comment, the Department modified Footnote 5 to specify "methyl and dimethylnaphthalenes" and to specify an acceptable approach for isomer quantitation.

530. COMMENT: Chevron U.S.A., Inc. commented that the requirement for naphthalene screening for kerosene and jet fuel in Table 2-2 (recodified and adopted as Table 2-3), Footnote 5 should be deleted because these fuels contain only limited quantities of naphthalene as compared to diesel fuel, and volatile organic compound analysis is adequate.

RESPONSE: As indicated in footnote 5 of Table 2-2 (recodified and readopted as Table 2-3), the analytical requirement is for total napthalenes, not just for naphthalene. The Department has data indicating that naphthalenes are often present in significant quantities in soils contaminated with kerosene or jet fuel, therefore naphthalenes analysis is appropriate.

531. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company requested clarification as to why analytical requirements at N.J.A.C. 7:26E-2.1(d), Table 2-2 (recodified and adopted as Table 2-3) for petroleum storage and discharge areas, which are similar to current Department remedial investigation and underground storage tank (UST) requirements, contain certain differences which make them more stringent and costly. Specifically, why is the Department requiring total petroleum hydrocarbon (TPHC) and polycyclic aromatic hydrocarbons (PAH) analyses for No. 4 and No. 6 oil sources at Table 2-2 (recodified and adopted as Table 2-3), whereas current UST requirements include TPHCs with base neutral compounds + 15 (BN+15) required on 25 percent of the samples if the TPHC results are over 100 ppm.

Second, why is the Department requirng TPHCs, volatile organic compounds + 10 (VO+10), BN+15, polychlorinated biphenyls (PCBs), and Priority Pollutant Metals at Tabel 2-2 (recodified and adopted as Table 2-3) for waste oil and unknown hazardous waste sources, when current UST requirements include TPHC analysis, with additional

parameters required only on 25 percent of the samples which show positive TPHC results (for example, above Method Detection Limits, generally 25ppm for TPHCs).

Finally, New Jersey Natural Gas Company and Jersey Central Power & Light Company requested clarification as to whether target compound list (TCL) or priority pollutant (PP) compounds are required for VO or BN parameters.

RESPONSE: Table 2-2 (recodified and adopted as Table 2-3) specified the appropriate screening parameters for petroleum storage and discharge areas but did not specify that every sample had to be analyzed for the screening parameters. N.J.A.C. 7:26E-2.1(d), Table 2-2 (recodified and adopted as Table 2-3) has been modified to also specify the appropriate minimum sample frequency for screening parameter analysis. With regard to clarification as to whether TCL or PP compounds are required for VO or BN parameters, Footnotes 2 and 10 state clearly that either TCL or PP lists may be used.

532. COMMENT: Environmental Liability Management Inc. said sampling for tertiary-butyl alcohol (TBA) and methyl tertiary-butyl ether (MTBE) described in Table 2-2 (recodified and adopted as Table 2-3), Footnote 3 should only be required for tanks operational after 1969 and 1979, the dates they were first used as additives to gasoline.

RESPONSE: The Department agrees with this comment and N.J.A.C. 7:26E-2.1(d), Table 2-2 (recodified and adopted as Table 2-3), Footnote 3 has been amended accordingly.

533. COMMENT: Colonial Pipeline Company commented that N.J.A.C. 7:26E-2.1(d) is inconsistent in that the Department requires analyses following the Environmental Protection Agency (EPA) Target Compound List for volatile organics or the Priority Pollutant volatile organic scan with a library search (VO+10) for a "fuel spill within a petroleum storage and discharge area"; yet the Department requires analyses for only the "stored materials" if a spill occurs in a "non-petroleum storage and discharge area." These requirements, as proposed, penalize the bulk storage facilities.

Colonial Pipeline Company requested that the Department justify its analytical criteria as necessary and complete. Colonial Pipeline Company noted with a virgin gasoline spill, for example, samples should be analyzed for benzene, toluene, ethyl benzene, total xylenes, methyl tertiary-butyl ether (MTBE) and tertiary-butyl alcohol (TBA). To require all samples be analyzed for VO+10 is excessive. Colonial Pipeline Company suggested that the analytical list for known refined petroleum product spills be substituted as follows: benzene, toluene, ethyl benzene, total xylenes for the VO +10 parameter, and EPA SW-846 method 8100 analytes for the BN+15 parameter.

Colonial Pipeline Company also suggested that N.J.A.C. 7:26E-2.1(d) be modified to allow for a "limited contaminant list" as described in N.J.A.C. 7:26E-2.1(c)4. In addition, Colonial Pipeline Company commented that the Department should better describe its decision criteria for review of documentation pursuant to N.J.A.C 7:26E-1.6(c) when considering a petroleum spill. The refusal to even accept this type of request, which is "subject to the Department's review" indicates that the Department will always invoke the strictest discretionary requirement, which in this case, would be VO+10 and BN+15, if the rule is promulgated as currently proposed.

534. COMMENT: Mobil Oil Corporation recommended that the Department provide justification for the analytical requirements at N.J.A.C. 7:26E-2.1(d), Table 2.2. Mobil Oil Corporation recommended removing the "+10" and "+15" requirements for volatile organics (VO) and base neutral organics (BN) analyses, respectively, unless scientifically justified at a specific site.

RESPONSE: The Department requires analysis for contaminants other than the primary contaminants in petroleum products for three reasons:

(1) Although specific volatile organics (VO) or base-neutral organics (BN) may be the primary contaminants of concern for a given petroleum product discharge, the concentration of total organic compounds in the sample is also of concern because of the additive effects of compounds in the sample. Therefore, a method which will detect other organics besides the primary ones is needed.

(2) Chlorinated solvents or other solvents which may have been blended or disposed of in fuel tanks or in other areas used for petroleum product storage or disposal will be detected by the additional analyses.

(3) Analysis for other organic contaminants besides the primary ones does not typically add excessive cost, particularly if gas chromatography/mass spectrometry (GC/MS) methods are used, which is often the case.

The requirements at N.J.A.C. 7:26E-2.1(d), Table 2-2 (recodified and adopted as Table 2-3) do not specifically penalize bulk storage facilities because these requirements are applied to any area where petroleum products may be discharged.

535. COMMENT: Envirotech Research Inc. said that compounds listed in footnote 5 of Table 2-2 cannot realistically be analyzed as volatile organics by packed column gas chromatography/mass spectrometry (GC/MS) because the retention time for the compounds listed would be several hours. Envirotech Research, Inc. recommended that the reference to base neutral organics (BN+15) analysis be retained and the volatile organics (VO) reference be removed.

RESPONSE: The Department acknowledges that analyzing naphthalene, methyl naphthalenes and dimethyl naphthalenes as volatile organics using packed column gas chromatography/mass spectrometry would be an unrealistically time consuming process. However, with the increased use of capillary columns and the likely potential for future method revision allowing for their use, a probable and dramatic reduction in the retention times of analytes will be observed. In fact, the Department will allow the use of capillary columns in Environmental Protection Agency (EPA) Method 624 if the appropriate certification is obtained from the Department's Office of Quality Assurance. The Department did not want to limit the options available to laboratories. Therefore, on adoption, the Department has modified Table 2-2 (recodified and adopted as Table 2-3), Footnote 5, to include the option to analyze naphthalene, methyl naphthalenes and dimethyl naphthalenes using the volatile organics method.

536. COMMENT: Shell Oil Company objected to the requirement at N.J.A.C. 7:26E-2.1(e) to report tentatively identified compounds (TICs). Shell Oil Company referred to a memo which the Department did not receive.

537. COMMENT: Public Service Electric and Gas Company suggested that N.J.A.C. 7:26E-2.1(e) be modified to clarify that tentatively identified compounds (TIC)/unknown concentrations are qualitative and not quantitative, and unless confirmed quantitatively they should not be used to determine cleanup levels.

538. COMMENT: CIBA-GEIGY Corporation commented that the Department should recognize that commercial environmental laboratories do not have the resources required to conduct an investigation to positively identify tentatively identified compounds (TICs). CIBA-GEIGY Corporation said that since the concentration of a TIC cannot be determined with a known precision or accuracy, then it cannot be determined if an applicable remediation standard has been met pursuant to N.J.A.C. 7:26E-2.1(e)2.

539. COMMENT: Chemical Land Holdings, Inc. commented that N.J.A.C. 7:26E-2.1(e)2 should be clarified. Chemical Land Holdings, Inc. said that tentatively identified compounds (TICs) are only presumptively identified, and only if a laboratory has reported a TIC compound for which the Department has an applicable cleanup standard should appropriate calibration and quantitation be pursued. Chemical Land Holdings, Inc. also said that TICs should not be included in any cleanup standards under a general grouping of compounds, such as semivolatiles because it is neither feasible nor appropriate to quantitate or sum all TICs.

540. COMMENT: Rutgers Environmental Law Clinic commented that the Department must establish a procedure whereby tentatively identified compounds (TICs) or unknown compounds are identified and then subjected to the appropriate cleanup standard or otherwise clarify N.J.A.C. 7:26E-2.1(e).

541. COMMENT: American Cyanamid Company commented that tentatively identified compounds (TICs) as discussed in N.J.A.C. 7:26E-2.1(e) should not be included in the regulations unless they are a major contaminant on the site to be remediated because it is very costly and time consuming to pursue positive identification of TICs, which is of no benefit when they do not have any bearing on the remediation.

542. COMMENT: Allied Signal, Inc. and The General Electric Company commented that tentatively identified compounds (TICs) analysis and interpretation pursuant to N.J.A.C. 7:26E-2.1(e) are problematic because a high percentage of TICs cannot be conclusively identified and those that may be are frequently not available as pure chemical standards, leading to variable and inaccurate analysis and reporting practices. They said that the process of compound identification and method validation as described in N.J.A.C. 7:26E-2.1(e) can be expected to be time-consuming and costly and to require analysis for chemicals which are not hazardous, not identifiable, and not accurately measured will lead to discrepancies in implementation of N.J.A.C. 7:26E-2.1(e).

Allied Signal, Inc. and The General Electric Company recommended that the regulation should be limited in application to those chemicals with known properties and accepted analysis methods and that TICs should be reviewed on a case by case basis.

RESPONSE: Many of the commenters incorrectly interpreted the rule to require positive identification of tentatively identified compounds (TICs). Positive identification of TICs is not a requirement. Pursuant to N.J.A.C. 7:26E-2.1(e)1, the person responsible for conducting the remediation has the option to remediate the area and reanalyze area samples to document that the TICs are no longer present above the applicable remediation standard.

The need for TIC reporting is clear. Thousands of different chemicals are used in manufacturing and research processes and some individual facilities have handled thousands of chemicals over the operating life of the facility. It would clearly be onerous to require these facilities to develop and validate analytical methods for each of these compounds. Instead, the Department allows such facilities to screen for "non-target" compounds as TICs. Although TICs are not positively identified, they may be classified as organic compounds or volatile organic compounds based upon the analytical method by which they are detected and are therefore subject to cleanup as "total organics" or "total volatile organics."

The Department recognizes that interpretation of TIC data is difficult. The Department therefore only requires analysis for TICs when "contaminants in an area are unknown or not well documented . . ." (see N.J.A.C. 7:26E-2.1(c)4). In such cases, library searches are utilized to screen for the possible presence of compounds other than the priority pollutant or target compound list compounds.

The General Electric Company and Allied Signal, Inc. suggest that the rule will lead to inconsistent interpretation of TIC data by the Department. The Department disagrees. N.J.A.C. 7:26E was developed to provide the Department staff and the person responsible for conducting the remediation with standard approaches to site investigation to eliminate exisiting inconsistency. Because analysis for TICs will occur on many sites, and therefore be subject to interpretation by many different Department case managers, continuing to use a case by case approach for TIC evaluation would not meet the Department's goal to provide consistent and predictable guidance.

The Department has found that for the vast majority of sites, TICs do not "drive" cleanups. TICs usually do not occur alone but rather are detected along with target compounds which "drive" cleanups. Because TICs are chemically similar to the target compounds they are detected with, the TICs are usually treated effectively by the same remedy selected for the target compounds. However, in the event that the person responsible for conducting the remediation believes that the remedy will not treat the TIC, the person responsible for conducting the remediation may elect to identify and quantify the compound and develop a remediation standard for it.

543. COMMENT: Mobil Oil Corporation, Union Carbide Chemicals and Plastics Company, Inc., Chemical Land Holdings, Inc. and Envirotech Research, Inc. commented that the wording at N.J.A.C. 7:26E-2.1(e) should clarify how to determine if an "unknown" compound was detected above the applicable cleanup standard.

544. COMMENT: Mobil Oil Corporation and Union Carbide Chemicals and Plastics Company, Inc. recommended that the words "or unknown compounds" be deleted from N.J.A.C. 7:26E-2.1(e).

545. COMMENT: Envirotech Research, Inc. commented that since the laboratory will not usually have information on which cleanup standards are appropriate, the requirement to address TICs in excess of the applicable cleanup standard should be moved to subchapter 3, where a regulated party or consultant would be more likely to address the issue.

RESPONSE: The phrase "unknown compounds" needs to be included at N.J.A.C. 7:26E-2.1(e) because, like tentatively identified compounds (TICs), thousands of different chemicals are used in manufacturing and research processes and some individual facilities have handled thousands of chemicals over the operating life of the facility. It would clearly be onerous to require these facilities to develop and validate analytical environmental methods for each of these compounds. Instead, the Department allows such facilities to screen for "non-target" compounds as "unknown compounds." Although "unknown compounds" are not even tentatively identified, they may be classified as organic compounds or volatile organic compounds based upon the analytical method by which they are detected and are therefore subject to cleanup as "total organics" or "total volatile organics."

Compounds listed as "unknown compounds" can often be identified using alternate analytical techniques such as nuclear magnetic resonance (NMR) or infrared spectroscopy (IR). The Department recognizes that such analytical costs may be exorbitant and therefore allows for the alternate approach described in N.J.A.C. 7:26E-2.1(e)1.

The Department considers these requirements appropriate for subchapter 2 because the requirements are related to the use and interpretation of analytical methods and data.

N.J.A.C. 7:26E-2.2

546. COMMENT: American Cyanamid Company commented that N.J.A.C. 7:26E-2.2(a)1 should be deleted. American Cyanamid Company stated that there is no reason why the Department should require a lower level of sampling and analysis for sites with less than 10 areas of concern.

RESPONSE: The intent of N.J.A.C. 7:26E-2.2(a) is not to require a lower level of sampling and analysis for sites with less than 10 areas of concern nor a greater level of sampling and analysis for sites with 10 or more areas of concern. The intent of this section was to require additional information concerning sampling and analysis to be conducted at sites with 10 or more areas of concern. Actual sampling and analysis requirements pursuant to these regulations are independent of the number of areas of concern at a given site.

547. COMMENT: Chevron U.S.A., Inc. commended the Department for recognizing the value of a quality assurance project plan to achieve technically and legally defensible results. However, Chevron U.S.A., Inc. stated that these details belong in a guidance document as opposed to a regulation.

RESPONSE: The Department established by rule the outline for a Quality Assurance Project Plan at N.J.A.C. 7:26E-2.2 because it describes in detail the procedure and practice requirements of the Department when a party remediates a contaminated site. As such, the requirements of a Quality Assurance Project Plan meet the definition of an administrative rule pursuant to N.J.S.A. 52:14B-2, and the Department is required to promulgate these requirements as a rule, allowing for public notice and comment.

548. COMMENT: Environmental Liability Management Inc. commented that since the property owner has contracted with a laboratory which has to meet the technical requirements of N.J.A.C. 7:26E-2.1(a)1i through v, there is no technical basis to require that the names and telephone numbers of individuals be given in a Quality Assurance Project Plan (QAPP) pursuant to N.J.A.C. 7:26E-2.2(a)1iv(1) through (3) and N.J.A.C. 7:26E-2.2(a)2ii(1) through (11). This requirement is arbitrary and inconsistent with the manner in which the Department will accept laboratory data when a QAPP is not utilized. Environmental Liability Management Inc. recommended that N.J.A.C. 7:26E-2.2(a)1iv(1) through (3) and N.J.A.C. 7:26E-2.2(a)2ii(1) through (11) be deleted.

RESPONSE: The Department acknowledges that the person responsible for conducting the remediation bears the ultimate responsibility for its success, and lines of communication should be through that person. In nearly all cases, the Department does communicate directly with the person responsible for conducting the remediation. The purpose of requiring the information in N.J.A.C. 7:26E-2.2(a)1iv(2) and (3) is to provide the Department with information as to who is responsible for coordinating field sampling activities and laboratory activities should questions arise concerning these activities. Therefore, N.J.A.C. 7:26E-2.2(a)1iv will not be deleted from these regulations.

Upon re-examination of N.J.A.C. 7:26E-2.2(a)2ii, however, the Department agrees with the commenter that many of the requirements contained in N.J.A.C. 7:26E-2.2(a)2ii are duplicative and excessive and will not enhance data quality, which is the primary purpose of a Quality Assurance Project Plan (QAPP). Therefore, the Department has modified N.J.A.C. 7:26E-2.2(a)2 so that the person responsible for conducting the remediation shall submit the same information regarding the name and telephone number of each of the individuals responsible for overall project coordination, sampling activities and laboratory activities as part of the QAPP as if the site contained less than ten areas of concern. The Department has deleted N.J.A.C. 7:26E-2.2(a)2ii and incorporated the requirements contained in N.J.A.C. 7:26E-2.2(a)1iv into N.J.A.C. 7:26E-2.2(a)2i.

549. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that it is unclear as to whether Quality Assurance Project Plans are always required or only if requested by the Department depending on the regulatory program or oversight document involved.

550. COMMENT: Atlantic Electric and Mobile Oil Corporation commented that it is unclear as to where and when the Quality Assurance Project Plans would be required.

551. COMMENT: Exxon Company U.S.A., commented that the Department should either delete N.J.A.C. 7:26E-2.2 or propose the criteria the Department will use to determine when it is required.

552. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that N.J.A.C. 7:26E-2.2(a) does not clearly identify when the Quality Assurance Project Plan will be required by the Department.

553. COMMENT: Colonial Pipeline Company stated the Department must clarify under what circumstances a Quality Assurance Project Plan (QAPP) is required and when one is optional.

554. COMMENT: The Chemical Industry Council of New Jersey stated the proposed rule is unclear as to when a Quality Assurance Project Plan (QAPP) will be required and recommended clarification.

RESPONSE: The Department believes it is good practice to always prepare a Quality Assurance Project Plan (QAPP) prior to commencing any sampling activities at a site. Careful consideration should always be given to determine where and how samples will be collected and subsequently analyzed so that the data generated can be used to make decisions concerning the remedial activities being conducted. A QAPP documents the actions to be taken to generate data of appropriate quality and usability.

The Technical Requirements for Site Remediation, N.J.A.C. 7:26E, however, do not require the preparation and submission of a QAPP for all sampling activities. Rather, these rules specify a more limited set of conditions where the preparation and submission of a QAPP is required. Pursuant to these rules, a QAPP prepared in accordance with N.J.A.C. 7:26E-2.2(a) is required for submission to the Department under the following circumstances:

1. If the person responsible for conducting the remediation wants Department approval of a QAPP prior to the commencement of sampling activities. This would be accomplished through a Memorandum of Agreement (MOA) between the person responsible for conducting the remediation and the Department in accordance with the Procedures for Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C.

2. If, as part of an oversight document, the Department wants the submission of a QAPP prior to the commencement of sampling activities by the person responsible for conducting the remediation. If remediation is to be conducted pursuant to Department oversight under a MOA, the need for a QAPP submission would be determined during MOA negotiations. If remediation is to be conducted pursuant to Department oversight under an administrative consent order (ACO), the need for a QAPP submission would be determined during discussion of workplan submittals. The Department will, in most cases, require the preparation and submission of a QAPP as part of the ACO.

3. If, as part of an oversight document, the Department requires the submission of a remedial action workplan, of which a QAPP is part (see N.J.A.C. 7:26E-6.2(a)8).

4. If the preparation and submission of a QAPP is required pursuant to the Department's Environmental Cleanup Responsibility Act (ECRA) and Underground Storage Tank (UST) programs. Current ECRA and UST program regulations do not specify the preparation and submission of a QAPP as described in N.J.A.C. 7:26E-2.2(a). However, the Department intends to amend both the ECRA (N.J.A.C. 7:26B) and UST (N.J.A.C. 7:14B) regulations so that they conform with the Technical Requirements for Site Remediation (N.J.A.C. 7:26E). The preparation and submittal of QAPPs will be required in the ECRA and UST programs (a) when a facility/party wants Department approval of a QAPP prior to the commencement of sampling activities or (b) as part of the remedial action workplan (see N.J.A.C. 7:26E-6.2(a)8) when such a workplan is required by the Department.

It should also be noted that while not required as a formal QAPP document, much of the information specified in N.J.A.C. 7:26E-2.2(a) is required to be submitted to the Department if the person responsible for conducting the remediation desires a no further action determination from the Department. The information described in N.J.A.C. 7:26E-2.2(a)1i, ii, v, and xi is required in a Site Investigation Report (see N.J.A.C. 7:26E-3.10(b)3 and (c)), a Remedial Investigation Report (see N.J.A.C. 7:26E-4.9(a), (b)3 and (c)) and a Remedial Action Report (see N.J.A.C. 7:26E-6.6(b)). It is the submittal of these reports which form the basis of no further action determinations made by the Department.

555. COMMENT: Atlantic Electric stated at the very least, small petroleum hydrocarbon releases should be exempted from the Quality Assurance Project Plan requirements under N.J.A.C. 7:26E-2.2(a).

RESPONSE: The Department does not believe small petroleum hydrocarbon discharges should be specifically exempted from the Quality Assurance Project Plan (QAPP) requirements under N.J.A.C. 7:26E-2.2(a). Rather, it should be determined if a particular small petroleum hydrocarbon release meets the set of conditions where the preparation and submission of a QAPP is required pursuant to these regulations. If those conditions are met, a QAPP prepared in accordance with N.J.A.C. 7:26E-2.2(a) is required for submission to the Department. If not, the preparation and submission of a QAP is not required.

It should also be noted that while not required as a formal QAPP document, much of the information specified in N.J.A.C. 7:26E-2.2(a) is required to be submitted to the Department if the person responsible for conducting the remediation desires a no further action determination from the Department. This information, contained in N.J.A.C. 7:26E-2.2(a)1i, ii, v, and xi is required in a Site Investigation Report (see N.J.A.C. 7:26E-3.10(b)3 and (c)), a Remedial Investigation Report (see N.J.A.C. 7:26E-4.9(a), (b)3 and (c)) and a Remedial Action Report (see N.J.A.C. 7:26E-6.6(b)). It is the submittal of these reports which form the basis of no further action determinations made by the Department.

The Department reiterates that it believes it is good practice to always prepare a Quality Assurance Project Plan (QAPP) prior to commencing any sampling activities at a site. Careful consideration should always be given to determine where and how samples will be collected and subsequently analyzed so that the data generated can be used to make decisions concerning the remedial activities being conducted. A QAPP documents the actions to be taken to generate data of appropriate quality and usability.

556. COMMENT: Mobil Oil Corporation noted it did not believe a detailed Quality Assurance Project Plan pursuant to N.J.A.C. 7:26E-2.2 will aid in protecting the environment.

557. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. stated Quality Assurance Project Plans often do not add value to the validity of analytical data.

RESPONSE: Quality Assurance Project Plans (QAPPs) are prepared to attain data quality goals for monitoring/sampling/analytical activities at a site. A QAPP describes, in specific, succinct terms, the 1) policy, 2) organization, (3) functional activities (sample collection, chemical analyses, etc.) and 4) quality assurance (QA) and quality control (QC) protocols necessary to achieve data quality goals dictated by intended usage(s) of the data. Failure to properly address these items can result in analytical data which cannot be used to make decisions concerning the remedial activities being conducted. Therefore, without a properly prepared QAPP, analytical data of little or no value could be generated which in turn cannot be used by the person responsible for conducting the remediation to cleanup a site and protect the environment.

558. COMMENT: Mobil Oil Corporation recommended the Quality Assurance Project Plan (QAPP) requirements at N.J.A.C. 7:26E-2.2 be streamlined for service stations and other petroleum only contaminated sites, where it is scientifically justifiable that the contaminants of concern are known. Mobile Oil Corporation stated if QAPPs are required for petroleum contaminated sites, it will employ hundreds of manhours and expended tens or hundreds of thousands of dollars to prepare the QAPPs for slightly less than 100 sites throughout the State. The net result will not enhance the ability to improve the environment and will further delay the remediation process.

559. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. stated that Quality Assurance Project Plans as required by N.J.A.C. 7:26E-2.2 are costly.

560. COMMENT: Colonial Pipeline Company stated the writing of a Quality Assurance Project Plan required by N.J.A.C. 7:26E-2.2 is time consuming.

RESPONSE: The Department disagrees that the preparation of QAPPs will employ hundreds of hours and expend tens or hundreds and thousands of dollars to prepare the plans. All of the information listed in N.J.A.C. 7:26E-2.2(a) must be determined prior to any sampling activities if the goal/objective of the sampling activity is to be achieved. A QAPP is merely written documentation of the steps taken to achieve that goal/objective. In addition, portions of a QAPP could be standardized particularly in those instances where different sites have

similar types of activities and potential contamination (that is, gasoline service stations). Such standardization would reduce the time needed to prepare multiple QAPPs.

561. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. stated many of the Quality Assurance Project Plan (QAPP) requirements at N.J.A.C. 7:26E-2.2 are redundant since Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical protocols are stipulated and are covered in the EPA CLP deliverables Statement of Work (SOW).

RESPONSE: The EPA CLP analytical protocols only cover the analysis of samples which is only part of the QAPP requirements contained in N.J.A.C. 7:26E-2.2(a). Important information such as data quality objectives, sampling methods, the number and types of samples to be collected are not addressed in the EPA CLP analytical protocols. In addition, EPA CLP analytical protocols are only one of many analytical methods that can be used pursuant to these rules (see N.J.A.C. 7:26E-2.1(a)3). Therefore, the Department does not believe the QAPP requirements contained in N.J.A.C. 7:26E-2.2(a) to be redundant.

562. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. recommended that all of N.J.A.C. 7:26E-2.2(a) be deleted. Union Carbide Chemicals and Plastics Company, Inc. suggested the laboratory and other consultants involved with data acquisition simply certify the accuracy of their work, the conformance of their work procedures with protocols, and the validity of their reports.

563. COMMENT: Exxon Company U.S.A. commented the Department's certification requirements negate the need for Quality Assurance Project Plans in all but the most complex sites.

RESPONSE: The Department disagrees that the certification of the accuracy of the work performed by a laboratory or consultant negates the need for preparing a Quality Assurance Project Plan (QAPP). The purpose of a QAPP is not to certify that sampling/monitoring and analytical activities were conducted in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. Rather, QAPPs are prepared to document how the person responsible for conducting the remediation will attain (or did attain) site-specific data quality goals for monitoring/sampling/analytical activities. Certifications on documents submitted will not provide the information necessary to determine if sampling and analytical activities will (or did) achieve data quality goals dictated by intended usage(s) of the data. Therefore, N.J.A.C. 7:26E-2.2 will remain part of these rules.

564. COMMENT: Colonial Pipeline Company stated that N.J.A.C. 7:26E-2.2(a)1 should be changed to read as follows: "For each remedial investigation at a site ..."

RESPONSE: The preparation of Quality Assurance Project Plans (QAPPs) is not restricted to remedial investigations. A QAPP could be prepared for any phase of remediation in which environmental samples are collected and analyzed. A QAPP could be required by the Department as part of a site investigation or remedial action in addition to a remedial investigation. Therefore, the phrase "For each remedial phase at a site ..." will remain in N.J.A.C. 7:26E-2.2(a)1.

565. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested that N.J.A.C. 7:26E-2.2(a)1iii be modified as follows: The names and addresses of the laboratories to be used for sample analysis (this shall be updated if changed);

Union Carbide Chemicals and Plastics Company, Inc. suggested this addition as it may be necessary to use an alternate laboratory due to contract, capacity, or other reasons.

RESPONSE: The Department agrees that the name and address of the laboratories used should be updated in the Quality Assurance Project Plan (QAPP) if there is a change. Therefore, N.J.A.C. 7:26E-2.2(a)1iii has been modified to include this addition.

566. COMMENT: The General Electric Company commented that to streamline the process, the Department should coordinate through potential responsible party project coordinators only rather than individuals responsible for specific functions as required in N.J.A.C. 7:26E-2.2(a)1iv. The private party conducting site remediation bears ultimate responsibility for its success and lines of communication should be through them.

567. COMMENT: Allied Signal, Inc. stated that additional requirement that each project Quality Assurance Project Plan include names and telephone numbers for laboratory personnel at N.J.A.C. 7:26E-2.2(a)1iv is not appropriate as it implies that the Department desires direct access to these individuals. Allied Signals, Inc. stated the person responsible for conducting the remediation bears ultimate responsibility for its success. Proper lines of communication should be maintained to ensure that information is transmitted completely and appropriately and that the person responsible for conducting the remediation be informed of all decisions made which potentially impact results of the investigation.

RESPONSE: The Department agrees that the person responsible for conducting the remediation bears the ultimate responsibility for its success, and lines of communication should be through that person. In nearly all cases, the Department does communicate directly with the person responsible for conducting the remediation. The purpose of requiring the information in N.J.A.C. 7:26E-2.2(a)1iv(2) and (3) is to provide the Department information as to who is responsible for coordinating field sampling activities and laboratory activities should questions arise concerning these activities. Typically, however, communication with these individuals would be in conjunction with the person responsible for conducting the remediation.

568. COMMENT: Colonial Pipeline Company suggested N.J.A.C. 7:26E-2.2(a)1iv be changed to read as follows: "The name and office telphone numbers ..."

RESPONSE: The Department believes that the person responsible for conducting the remediation is the best judge in terms of providing an appropriate telephone number. Therefore, the Department does not believe this modification to N.J.A.C. 7:26E-2.2(a)1iv is necessary.

569. COMMENT: The General Electric Company and Allied Signal, Inc. suggested the Analytical Methods/Quality Assurance Summary Table at N.J.A.C. 7:26E-2.2(a)1v also identify the number of samples to be collected for matrix spike/matrix spike duplicate analyses. The General Electric Company and Allied Signal, Inc. suggested the number of field and trip blanks be included as estimates or specified according to calendar frequency (for example, one/day or one/shipment) since field schedules may be adjusted after the plan is written.

RESPONSE: The specification of the number of field and trip blanks per matrix is required pursuant to N.J.A.C. 7:26E-2.2(a)1v(3). The suggestion to specify the number of trip and field blanks as either an estimated number or as a calendar frequency is acceptable to the Department. The Department agrees that the number of samples to be collected for matrix spike and matrix spike duplicate analyses should be included in N.J.A.C. 7:26E-2.2(a)1v. Therefore, the Department has modified N.J.A.C. 7:26E-2.2(a)1v upon adoption to include this.

570. COMMENT: The Chemical Industry Council of New Jersey recommended deletion of N.J.A.C. 7:26E-2.2(a)1iv(10) and (11) and allowing references to applicable industry methods such as those specified in the Department's "Field Sampling Procedures Manual."

RESPONSE: The Chemical Industry Council of New Jersey refers to N.J.A.C. 7:26E-2.2(a)1iv(10) and (11). No such citations exist in these regulations. The Department assumes that Chemical Industry Council of New Jersey was referring to N.J.A.C. 7:26E-2.2(a)1v(10 and (11). These sections require a listing of sample container volume and type that will be used per analytical method and sample matrix, and the sample holding to be used per analytical method and sample matrix. The Department has required this information to be included in Quality Assurance Project Plans (QAPPs) in order to easily and readily determine how samples will be (or were) stored and held prior to analysis. Statements such as "Samples will be collected in containers as per the New Jersey Department of Environmental Protection Agency and Energy Field Sampling Procedures Manual" or "Sample holding times will be in accordance with 40 CFR 136" are of limited value as these references contain the sample container requirements and holding time requirements for a large number of analytical methods. In the past, such statements have been contained in QAPPs, but upon examination after sample analysis it was determined that the incorrect sample container was used or an inappropriate sample holding time was applied resulting in the invalidation of analytical results. Specific listing of sample containers to be used and sample holding times provide added assurance that samples will be collected and analyzed properly.

571. COMMENT: Chevron U.S.A., Inc. stated the requirements in N.J.A.C. 7:26E-2.2(a)1vi through x be deleted or be incorporated by reference. Chevron U.S.A., Inc. stated these requirements are duplicative and redundant as this information had been previously addressed in "N.J.A.C. 7:26E-(a)6."

572. COMMENT: The Chemical Industry Council of New Jersey recommended deletion of items contained N.J.A.C. 7:26E-2.2(a)1vi through xi, and allowing references to applicable industry methods such as those specified in the Department's "Field Sampling Procedures Manual."

RESPONSE: The Department disagrees that the requirements at N.J.A.C. 7:26E-2.2(a)1vi through xi are duplicative and redundant. There are no other sections in these rules where the information contained in N.J.A.C. 7:26E-2.2(a)1vi through xi is required to be included in a document for submittal to the Department other than a Quality Assurance Project Plan (QAPP).

The Department assumes that the reference to "N.J.A.C. 7:26E-(a)6" made by Chevron U.S.A., Inc. is a reference to N.J.A.C. 7:26E-2.1(a)6 which specifies sampling methods, sample preservation, sample handling times, field equipment decontamination and field quality assurance requirements. N.J.A.C. 7:26E-2.1(a)6, however, does not require the submittal of any document to the Department.

The Department has required the information in N.J.A.C. 7:26E-2.2(a)1vi through xi to be included in Quality Assurance Project Plans in order to easily and readily determine how samples will be (or were) collected (including duplicate and split samples) and stored prior to analysis, how field instruments will be (or were) maintained and calibrated, the chain of custody procedures used and the laboratory data deliverables format used. Statements such as "Samples will be collected as per the Department's Field Sampling Procedures Manual" are of limited value as this reference contains a large number of sample collection techniques. Specific listing of the items contained in N.J.A.C. 7:26E-2.2(a)1vi through xi added assurance that samples will be collected and analyzed properly.

573. COMMENT: Colonial Pipeline Company suggested that N.J.A.C. 7:26E-2.2(a)2 be revised to read: "For any remedial investigation at a site involving 10 or more areas of concern, each area containing different contaminants of concern, the following shall be ..." since areas of concern may have the same contaminant constituents (that is, releases from bulk gasoline or fuel oil storage tanks).

RESPONSE: The Department does not accept this suggestion. A site may have several areas of concern which contain the same contaminants. Such areas should be treated as separate areas of concern and not grouped together as a single area of concern because sample frequency requirements are generally dictated by the size of an area of concern, not the type of contaminant, and additional quality assurance/quality control (QA/QC) is appropriate if many samples are collected and analyzed. Therefore, N.J.A.C. 7:26E-2.2(a)2 shall remain as originally proposed.

574. COMMENT: The General Electric Company, Public Service Electric and Gas Company and Allied Signal, Inc. commented that N.J.A.C. 7:26E-2.2(a)2ii, which requires the inclusion in the Quality Assurance Project Plan (QAPP) of the names/telephone numbers for a large number of laboratory personnel for sites with 10 or more areas of concern, should be modified so that the laboratory need only provide the name of this person who will be responsible for the project. There is frequently a time lag of several months between the time a plan is written and implementation actually begins and the laboratory should have the flexibility to assign support personnel at the time the program actually begins. Furthermore, communication with the laboratory works far more effectively if there is one person coordinating the activity.

575. COMMENT: Colonial Pipeline Company stated the inclusion of technical advisory groups as part of a Quality Assurance Project Plan pursuant to N.J.A.C. 7:26E-2.2(a)2ii is not warranted.

576. COMMENT: The Chemical Industry Council of New Jersey stated the requirements contained in N.J.A.C. 7:26E-2.2(a)2ii(8) through (10) are unusually burdensome. Chemical Industry Council of New Jersey recommended deleting N.J.A.C. 7:26E-2.2(a)2ii(8) through (10).

RESPONSE: Upon reexamination of N.J.A.C. 7:26E-2.2(a)2ii, the Department agrees that many of the requirements contained in N.J.A.C. 7:26E-2.2(a)2ii are excessive and will not enhance data quality which is the primary purpose of a Quality Assurance Project Plan (QAPP). The Department, however, believes that it is important to have the name and telephone number of each of the individuals responsible for overall project coordination, sampling activities and laboratory activities as part of the QAPP. Therefore, the Department has deleted N.J.A.C. 7:26E-2.2(a)2ii and incorporated the requirements contained in N.J.A.C. 7:26E-2.2(a)1iv into N.J.A.C. 7:26E-2.2(a)2i.

577. COMMENT: Exxon Company U.S.A. requested clarification of the responsibility of "systems auditing" as used in N.J.A.C. 7:26E-2.2(a)2ii(10).

RESPONSE: Upon adoption, N.J.A.C. 7:26E-2.2(a)2ii(10) has been deleted from these rules.

578. COMMENT: Colonial Pipeline Company recommended N.J.A.C. 7:26E-2.2(a)2ii be changed to read as follows: "The name and office telephone numbers ..."

RESPONSE: The Department has deleted N.J.A.C. 7:26E-2.2(a)2ii and incorporated the requirements contained in N.J.A.C. 7:26E-2.2(a)1iv into N.J.A.C. 7:26E-2.2(a)2i. The Department believes that it is important to have the name and telephone number of each of the individuals responsible for overall project coordination, sampling activities and laboratory activities as part of the QAPP. However, the Department believes that the person responsible for conducting the remediation is the best judge in terms of providing an appropriate telephone number and that it is not appropriate to specifically require submission of an office telephone.

579. COMMENT: The General Electric Company and Allied Signal, Inc. recommended that laboratory audit protocol as set forth at N.J.A.C. 7:26E-2.2(a)2v be required only for those cases where laboratories may be used to perform analyses not covered by the Department's laboratory certification program including select Environmental Protection Agency (EPA) SW-846 analytical methods, the EPA Contract Laboratory Program analytical methods or methods contained in the New Jersey Professional Laboratory Analytical Services contract. The General Electric Company and Allied Signal, Inc. noted that earlier requirements for state certification and/or participation in EPA or New Jersey contract programs at N.J.A.C. 7:26E-2.1(a)1 imply that appropriate laboratory audits have been conducted and that the laboratory has the required systems in place to perform the appropriate analyses. The General Electric Company and Allied Signal, Inc. stated that to require a private party to conduct a laboratory audit would be redundant for all cases except noted above.

580. COMMENT: Exxon Company U.S.A. commented that the Department should clarify the applicability and responsibility of laboratory audits required pursuant to N.J.A.C. 7:26E-2.2(a)2v noting that pursuant to N.J.A.C. 7:26E-2.1(a)1, the laboratories to be used in site remediation projects must be either New Jersey certified as per N.J.A.C. 7:18 or an Environmental Protection Agency (EPA) Contract Laboratory Program laboratory in good standing. Exxon Company U.S.A. noted these programs require an active audit program as part of the certification or contract procedure and stated that laboratories should not undergo multiple audits in order to avoid duplication of effort.

581. COMMENT: The Chemical Industry Council of New Jersey recommended the Department audit laboratories as part of the certification program, and not require the person responsible for conducting the remediation to audit laboratories pursuant to N.J.A.C. 7:26E-2.2(a)2v.

RESPONSE: The Department agrees that the requirement at N.J.A.C. 7:26E-2.2(a)2v is redundant. The Department's intent in including this requirement in the regulations was to have the person responsible for conducting the remediation audit the laboratory to determine if the laboratory was, in fact, capable of performing the necessary analyses and to act as a "double check" of the Department's certification. While the Department believes that it would be in the best interest of the person responsible for conducting the remediation to conduct such an audit prior to sending samples to the laboratory, the Department has determined not to make this a required activity. Therefore N.J.A.C. 7:26E-2.2(a)2v has been deleted.

582. COMMENT: Exxon Company U.S.A. stated no procedures or references are provided to ensure the audit process at N.J.A.C. 7:26E-2.2(a)2v will be acceptable to the Department. Exxon Company U.S.A. recommended that the audit procedures adopted by the Department be selected from "public domain" scientific references.

RESPONSE: As N.J.A.C. 7:26E-2.2(a)2v has been deleted, the Department does not need to specify any laboratory audit procedures.

583. COMMENT: Chemical Manufacturers Association stated the requirements for the Quality Assurance Project Plan at N.J.A.C. 7:26E-2.2(a)2vi(3) are such that a facility must include the laboratory data deliverable formats to be used and also, if required by the department, a description of the laboratory's capability to provide Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical methology data on diskette. Chemical Manufacturers Association stated it was unclear whether the phrase "If required by the department ..." refers to a CLP data package or to a description of the laboratory's capability to provide data on diskette. The Chemical Manufacturers Association recommended that the Quality Assurance Project Plan requirements refers only to a CLP data package.

RESPONSE: Pursuant to N.J.A.C. 7:26E-2.2(a)vi(3), the Department may seek a description of the laboratory's capability to provide EPA Contract Laboratory Program analytical data on diskette.

A full or reduced laboratory data deliverables—USEPA/CLP methods format is only applicable to data generated using EPA CLP analytical methods. Analytical data generated using other methods must use one of the Non-USEPA/CLP data deliverables formats described in Appendix A of these rules. Therefore, the Quality Assurance Project Plan requirements cannot refer only to a full or reduced laboratory data deliverables—USEPA/CLP methods format.

584. COMMENT: The Chemical Industry Council of New Jersey recommended deletion of N.J.A.C. 7:26E-2.2(a)2vi(3) because while the Department's goal to obtain analytical data on diskette is laudable, it is not the responsible party's responsibility to provide this information at their expense. The Chemical Industry Council of New Jersey stated the Department can and should obtain this information on their own when it is desired. The Chemical Industry Council of New Jersey stated it may not be unreasonable for the responsible party to include a "yes" or "no" response to N.J.A.C. 7:26E-2.2(a)2vi(3), instead of a "detailed description." Finally, The Chemical Industry Council of New Jersey was concerned about the proposed language as it suggested that the Department may form a bias toward laboratories that provide data on diskette, which would be unfair.

RESPONSE: N.J.A.C. 7:26E-2.2(a)2vi(3) specifies, that if required by the Department, the QAPP shall contain a description of the laboratory's capability to provide Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical method data results on diskette in accordance with EPA CLP Statement of Work requirements. N.J.A.C. 7:26E-2.2(a)2vi(3) does not require data generated from the use of EPA CLP analytical methods to be submitted on computer diskette but rather a statement of the laboratory's capability to submit data in such a format. The inability to submit data on computer diskette by a laboratory will not "disqualify" the use of the laboratory by the person responsible for conducting the remediation. If, however, the laboratory can submit data on computer diskette, the Department may request such submission in addition to the normal hard copy data deliverables format. As this is restricted to data generated using EPA CLP analytical methods, and commercial software is available which can generate the appropriate data format on diskette, the Department does not believe data delivery on diskette to be onerous or burdensome to either the laboratory or the person responsible for conducting the remediation if the laboratory has such capability. Therefore, the Department is not deleting N.J.A.C. 7:26E-2.2(a)2vi(3).

N.J.A.C. 7:26E-3

585. COMMENT: Chemical Waste Management of New Jersey, Inc. believes the Department should carefully consider to what degree N.J.A.C. 7:26E is appropriate as a framework for Phase I Environmental Assessments, and, if possible, explicitly characterize N.J.A.C. 7:26E as the Departmental understanding of what constitutes "good commercial or customary practice." The Department has recognized in the preamble to N.J.A.C. 7:26E that private parties frequently have a need to undertake preliminary assessments and/or the remediation of sites on a voluntary basis without Department oversight. An example cited by the Department is lenders that want to insure that a piece of property is "clean" before accepting the property as collateral for a loan. There are numerous other situations in which entities desire to undertake an environmental audit of real estate, outside of the ambit of Environmental Cleanup Responsibility Act or other New Jersey environmental statutes. The audits, generally known as "Phase I Environmental Assessments," are generally intended to provide an "innocent landowner" defense against Comprehensive Environmental Response, Compensation and Liability Act liability. Such assessments must constitute "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice." 42 U.S.C.-59601(35)(B). As of yet, no clear industry standard has emerged as to the scope of work for such a Phase I Environmental Assessment. N.J.A.C. 7:26E, for the preliminary site investigation, contains strong parallels to the requirements of a Phase I Environmental Assessment. Although sites subject to a Phase I Environmental Assessment will usually not come within the jurisdiction of the Department, consultants undertaking environmental audits will naturally gravitate towards N.J.A.C. 7:26E for guidance and support in developing their own scope of work.

RESPONSE: The purpose of N.J.A.C. 7:26E is to provide the minimum requirements for conducting all phases of site remediation. These requirements are based on guidance previously used by the Department and constitute the basic information required by the Department, or any individual to make well informed determination of whether or not further action is required at potentially contaminated sites. The Department expects N.J.A.C. 7:26E to be used by private parties to define what constitutes good commercial or customary practice, but that was not the Department's intent when developing N.J.A.C. 7:26E.

586. COMMENT: Allied Signal, Inc. believes little if any authorization has been left for the use of professional scientific judgement when scoping the preliminary investigation for a specific site. It is understood that specific, checklist type requirements within N.J.A.C. 7:26E-3 will provide for prompt review of investigations and documents; however, flexibility is necessary in the proposed rule to allow for professional judgement and site specific experience to be incorporated into the assessment.

587. COMMENT: Atlantic Electric was concerned that the Department, by codifying these requirements as proposed, is ignoring any of the regulated industry's expertise in the area of site remediation.

RESPONSE: By providing these requirements the Department has established clear and attainable objectives allowing individuals to conduct effective site remediations with limited Department oversight. In drafting these requirements, the Department had to strike a balance between limited flexibility, in which case the requirements would not take into account the varying site conditions which exist throughout the state, and making all decisions on a case by case basis which would reduce consistency and require unnecessary Department involvement, thus defeating a primary purpose of N.J.A.C. 7:26E. The Department believes these rules strike that balance between these extremes.

N.J.A.C. 7:26E-3 already provides for the opportunity to exercise professional judgement in the preliminary assessment when determining if areas of concern are potentially contaminated. Professional judgement is also provided for in the site investigation when biasing samples toward the location of greatest contamination. In response to numerous requests for additional flexibility in these rules, the Department has added a new N.J.A.C. 7:26E-1.6(d), which allows a party to deviate from any of the requirements in N.J.A.C. 7:26E based on site-specific conditions. This section, together with N.J.A.C. 7:26E-1.6(c), provides parties with the opportunity to exercise their professional judgement when implementing these rules.

588. COMMENT: Mobil Oil Corporation, the Chemical Industry Council of New Jersey and Atlantic Electric viewed the detailed preliminary assessment requirements pursuant to N.J.A.C. 7:26E-3 as burdensome, unjustified and extremely expensive. Instead of encouraging voluntary cleanup, these requirements will act as a disincentive to initiating voluntary cleanups and the goal of voluntary initiation of cleanups will not be met. Atlantic Electric also urged the Department to make de minimis exemptions for small petroleum hydrocarbon releases.

RESPONSE: N.J.A.C. 7:26E provides the minimum requirements for conducting all phases of site remediation. As the initial and perhaps most critical step in the site remediation process, the preliminary assessment requirements are intentionally broad and comprehensive. These requirements are based on guidance previously used by the Department when conducting publicly funded preliminary assessments or when evaluating sites pursuant to the Environmental Cleanup and Responsibility Act or administrative consent orders, and constitute the basic information required for the Department, or any individual, to make well-informed determinations of whether or not further action is required at potentially contaminated sites. By codifying these requirements, the Department has not added any significant additional burden on persons remediating contaminated sites. Since these rules provide predictable protocols for remediating contaminated sites, the Department believes they will not serve as a disincentive to remediation.

In response to Atlantic Electric, N.J.A.C. 7:26E applies to all remediation conducted in the State. The Department would expect the effort required in accordance with these regulations to be consistent with the degree and extent of the contamination being addressed.

589. COMMENT: GPU Nuclear Corporation asked: If the discharge of a hazardous substance (a subset of the term contaminant within the context of N.J.A.C. 7:26E) occurs at a facility and is reported under N.J.A.C. 7:1E-5.3, is the responsible party now required to conduct the investigations and report as specified in N.J.A.C. 7:26E-3.1, 3.2, and 3.3? If so, GPU Nuclear Corporation believes this will delay immediate action

as required in 7:1E-5.7. The relationship of this proposed regulation, in general, to N.J.A.C. 7:1E and more specifically to N.J.A.C. 7:26E-3.1, 3.2 and 3.3 is unclear.

RESPONSE: As stated in N.J.A.C. 7:26E-3.1(c)1, "Historical information concerning the site history shall be part of the preliminary assessment unless the remediation is directed at either, a specific discharge event, . . ."; therefore, the requirements outlined in N.J.A.C. 7:26E-3.1 do not apply to the situation described. Reports must be submitted to the Department which satisfy the applicable requirements of N.J.A.C. 7:26E-3.10, 4.9, 5.3 (if required) and 6.6.

If there has been a discharge that must be reported to the Department pursuant to N.J.A.C. 7:1E, then that discharge must be remediated pursuant to N.J.A.C. 7:26E. The Department does not believe that N.J.A.C. 7:26E will delay the remediation actions. As noted in the Department's response to comments in the summary on these rules as minimum requirements, the Department encourages the rapid remediation of discharges. N.J.A.C. 7:26E-6.3(a) provides that as a first step during remedial action, contaminants in all media shall be contained and/or stabilized. The remediation requirements for minor spills need not be excessive. The Department expects that the remedial actions conducted pursuant to N.J.A.C. 7:26E will be appropriate to the severity of discharge.

590. COMMENT: E.I. duPont de Nemours and Company was concerned that these extremely detailed requirements will significantly limit flexibility in the remediation process and result in excessive sampling and analysis without benefit to human health or the environment. Many of the requirements are inappropriate, arbitrary, and poorly focused on the stated purposes of the site investigation. E.I. duPont believes that the proper focus of the site investigation is its use as a screening tool for planning the remedial investigation as opposed to the stringent contaminant delineation-type procedures currently outlined.

591. COMMENT: Mobil Oil Corporation, Exxon Company, U.S.A. and the Chemical Industry Council of New Jersey believe many of the requirements at N.J.A.C. 7:26E-3 should be included in the regulations for remedial investigation, not site investigation. Requirements as presented are excessive for a site investigation. The objectives in N.J.A.C. 7:26E-3 should be limited to generally defining contaminated areas and contaminants of concern that may be present and require remediation. The proposed sampling requirements should be streamlined or moved to the section on remedial investigation, where the objectives are to define the extent of the contamination and focus on remediation options.

RESPONSE: The purpose of the site investigation is to determine if contaminants are present above an appropriate remediation standard. It is imperative that the representative sample(s) for a particular area of concern reflect the highest contaminant concentrations, both horizontally and vertically, for that particular area of concern considering the importance of the decision being based on those samples (whether or not further remediation is required). Based on the Department's experience, the number of samples required constitutes the minimum number necessary to adequately characterize each area of concern, determine if contaminants are above an appropriate remediation standard and subsequently determine the need for further remediation. Sampling to define the complete extent of contamination is conducted in the remedial investigation. If a party believes that any sampling in the site investigation is excessive for a particular site, that party may petition the Department for a waiver of requirements pursuant to N.J.A.C. 7:26E-1.6(d). The Department notes that pursuant to N.J.A.C. 7:26E-3.3(d), any party may discontinue the site investigation and proceed with the remedial investigation when contamination is detected above an applicable remediation standard.

592. COMMENT: In the proposed cleanup standards, a differentiation between surface and subsurface soil is made. The Chemical Industry Council of New Jersey believes this differentiation should be continued in the technical rules and sampling in the site investigation should be limited to sampling for surface contamination. If after the site investigation there is a potential for subsurface contamination, then the soil column should be sampled as part of the remedial investigation.

RESPONSE: Due to the confusion generated by the term "surface soils" in the context of remediation standards, the Department decided not to adopt the term "surface soils" in N.J.A.C. 7:26E. As such, the Department will not include a definition for "subsurface soil contamination" in N.J.A.C. 7:26E. However, site investigation sampling should not be limited to surface soils because restricting sampling to surface soil inappropriately limits the scope of the site investigation. For example, if highly permeable soils exist at the surface, and volatile organic contamination is suspected, sampling only surface soil will significantly reduce the probability of collecting a sample in the location of greatest contamination because volatile organic contaminants in highly permeable soils would not persist near the surface but may be present in deeper soil zones.

593. COMMENT: Chevron U.S.A., Inc. believes the N.J.A.C. 7:26E-3 should be changed to provide for less sampling in areas of known contamination. Additionally, the regulations should encourage and provide for the use of statistical approaches to evaluating data. The proposed regulations generally utilize a biased sampling approach for site investigation and remedial investigations. Areas with known contamination receive the most sampling. This is not always a reasonable or cost effective approach nor does it represent minimum standards. If an area is known to be contaminated, (perhaps, due to obvious visual contamination or other observations) little additional information will be gathered by sampling the same contaminated area at a very high density. What is more important is the extent or boundary of the contamination. Additionally, the type of biased sampling proposed in the regulations distorts a true statistical evaluation of an area or enviromental media. The regulations should be revised to allow a statistical evaluation of potential contaminated areas to give a more realistic view of the situation. The Department, in their proposed regulations, Cleanup Standards for Contaminated Sites, N.J.A.C. 7:26D, provides for a statistical evaluation of environmental data to determine if a site is in compliance with applicable cleanup standards. This same statistical approach should be utilized during the investigation phase of the remediation process.

594. COMMENT: Mr. Mutch commented that investigations in New Jersey tend to be fixated on areas of concern to the exclusion of areas of the site. He noted that he has seen a number of investigations where a number of areas of concern have been identified with some initial samples and thereafter the study and remediation of the site focuses on these "hot spots." Mr. Mutch believes that approach is a mistake, especially in larger industrial sites where there are many areas of concern or areas of contamination that are not detected through the conventional approach of identifying areas of concern. He noted that in his experience at older industrial plants one rarely identifies all the areas of concern and that several sites may have been only partially remediated based on the Department's current approach to areas of concern. Instead of focusing on areas of concern, Mr. Mutch suggested that the Department balance between biased samples and random samples. Mr. Mutch noted that the time has come to abandon a complete preoccupation with biased samples rather than combining both biased and random sampling in order to develop a true portrayal of a site.

595. COMMENT: Mobil Oil Corporation believes the sampling requirements specified in this regulation are excessive. Sampling requirements biased to known or expected areas of concern should achieve the objectives of site and remedial investigations but with far fewer sample requirements. Provisions must be made in the regulations for taking site specific conditions into account. The goal is to voluntarily expedite cleanup for the increased protection of human health and the environment. The goal should not be defeated by excessive requirements that are not site specific.

RESPONSE: N.J.A.C. 7:26E is intended to provide for a natural progression from preliminary assessment, through the data collection requirements of the site investigation and then into the remedial investigation and remediation. This progression is practical and logical particularly when site conditions are virtually unknown. In those cases where contamination is found, the Department allows the person responsible for the remediation to continue the investigation at either the remedial investigation or remedial action phase. See N.J.A.C. 7:26E-3.3(d).

N.J.A.C. 7:26E-3 relies more heavily on biased rather than random sampling because, for the majority of sites, suspected discharge areas can be readily identified through an evaluation of current and historic site use in the preliminary assessment. N.J.A.C. 7:26E-3 does, however, require a combination of biased and non-biased samples in some situations. For example, where the area of concern has been regraded, or if physical evidence in soil borings indicate the possible presence of contaminants, depths other than those specified in the standard sampling requirements must be sampled pursuant to N.J.A.C. 7:26E-3.6(a)6. The rule also calls for random sampling in the case of areas of concern away from process areas in accordance with N.J.A.C. 7:26E-3.9(f).

To allow for more technical discretion by the person responsible for the remediation and to allow for site specific condition, the Department has expanded the flexibility of the rule pursuant to N.J.A.C. 7:26E-1.6(d). A combination of biased and random samples, as Mr. Mutch suggested, may be appropriate for some sites.

596. COMMENT: Rutgers Environmental Law Clinic believes the technical requirements should include an evaluation of the potential ecological impact as part of the preliminary assessment/site investigation. Ecological impact evaluation is a critical component of site investigation and remediation. Rutgers Environmental Law Clinic noted the publication of two Environmental Protection Agency documents on this issue: USEPA Report on the Ecological Risk Assessment Guidelines Strategic Planning Workshop, February 1992, EPA/630/R-92/002, (Appendix A); and USEPA, Peer Review Workshop Report on a Framework for Ecological Risk Assessment, February 1992, EPA/625/3-91/022, (Appendix B). These documents show that ecological risk assessments are feasible with the current state of knowledge in the field. In addition, the following documents were cited: a) Office of Pesticides and Toxic Substances, USEPA, State of the Practice Ecological Risk Assessment Document, USEPA, March 14, 1990, (Appenmix C); b) van Straalen, N.M. and C.A.J. Denneman, Ecotoxicological Evaluation of Soil Quality Criteria, 18 Ecotoxicology and Environmental Safety 241-251 (1989), (Appendix D); c) Suter II, G.W. and J.M. Loar, Weighing the Ecological Risk of Hazardous Waste Sites, The Oak Ridge Case, 26 Eviron. Sci. Technol. 432-438 (1992), (Appendix E).

For the remedial investigation, the Department has "reserved" technical requirements for ecological impact evaluation. N.J.A.C. 7:26E-4.7. Rather than "reserving" the issue altogether, the Department should have at least included the requirements in the first round of standards and used the ample literature to develop an ecologically protective, methodology and standard. Furthermore, the inventory of sensitive ecological receptors should be done at the preliminary assessment/site investigation phase. In addition, all nearby wells should be inventoried and sensitive lands, such as wetlands, should be identified at this phase.

RESPONSE: The purpose of a preliminary assessment is to identify the presence of any potentially contaminated areas of concern. The purpose of the site investigation is to determine if contaminants are present above an applicable remediation standard. The performance of an ecological impact evaluation is inconsisent with the intent of N.J.A.C. 7:26E-3 and serves no purpose at these preliminary phases of the site remediation process.

The Department does not dispute the need for nor the value of the ecological impact evaluation. A purpose of the remedial investigation as required by N.J.A.C. 7:26E-4.1(a)3 is the identification of actual or potential receptors of contaminants. The evaluation of ecological receptors during that phase is extremely valuable and consistent with the intent of the subchapter. The Legislature is also considering legislation (S-1070) that addresses the issue. Senate Bill 1070 would, if enacted, require the creation of a task force comprised of the scientific community, industry and the Department to develop requirements for ecology-based remediation standards. Until then, the Department will be determining ecology-based remediation standards on a case-by-case basis.

597. COMMENT: Chemical Lands Holdings, Inc. suggested that the Department consider a major re-focus in the technical requirements for site remediation so that they are more performance oriented. Allowing responsible professionals, including hydrogeologists, chemists, toxicologists, environmental engineers, etc. to use their professional judgment to make the appropriate decisions regarding the remediation of the particular site could provide the real flexibility that is intended to be provided by these rules. This re-orientation would involve the prioritization of the investigation and cleanup. The initial phases would not focus on definitive identification of all areas of concern, as are currently embodied in the rules. Rather, the initial focus would be on the rapid characterization and interim remedial control of the key contaminants of concern. This characterization would rely heavily on the use of various innovative field screening technologies and the use of compositing. This would have the effect of substantially decreasing the time to reduce potential health risks and minimize the dispersion of contaminants from the source(s) at a particular site, and would provide a significant increase in resource optimization. The initial characterization and implementation of interim remedial measures would prioritize certain classes of chemical constitutents. This priority would be as follows: (1) compounds that are highly volatile; (2) compounds that are particularly mobile in any media; and (3) compounds that can be carriers for other contaminants.

A detailed historic determination would be conducted upon the completion of the initial characterization and implementation of interim remedial measures, as necessary. The historical assessment would include the review of available historical documents and aerial photographs, and should include interviews with present long term and former employees. This work would also involve research of the product flow process from raw materials to final product distribution, including waste generation and disposal practices. Auxiliary material use would also be researched including the use of materials such as transformer oils, cleaning solvents, etc. A historical assessment of this type may identify previous uses of the site that may provide guidance to target further investigation that otherwise may not have been conducted. For example, the determination that a particular site was used for a number of otherwise unknown industrial uses could lead to the investigation and subsequent identification of polychlorinated dibenzodioxins (PCDDs) and polychlorinated dibenzofurans (PCDFs). Industrial site uses that might lead one to investigate for the presence of PCDDs and PCDFs would include foundries, dye and pigment plants, metal refiners, manufacturers of chlorinated organics including herbicides, pesticides and chloranils, and sites which have produced municipal incinerator ash. A detailed site investigation and final remediation of the site would be conducted upon completion of the historic data assessment. As stated previously, conducting a site investigation and cleanup remediation in this sequential manner has the advantage of rapidly reducing the risk of contaminant exposure while addressing the site in a timely and resource-conscious manner.

598. COMMENT: The Chemical Industry Council of New Jersey commented that the degree of uncertainty in hazardous site remediation are orders of magnitude greater than the uncertainties in designing more traditional projects. This uncertainty begins with site characterization, particularly of contaminated soils which, being heterogeneous, often confound the best efforts of geologists and engineers in determining the extent and concentration of contaminants. This is caused not only by heterogeneity but is also caused by the dynamic nature of most sites with respect to chemical volatilization, ground water movement and biological transformations. Under these conditions, the traditional approach of screening, detailed investigation, feasibility study, design and implementation, does not work. Further the time spent in reaching a conclusion at each stage virtually insures that the conclusion will be incorrect. When that appears, the usual Department response is to call for additional study, further adding to the cost and delaying positive action. This delay is exacerbated by the lag time in obtaining samples and analytical results, and in interpreting these results. The normal regulatory and engineering response to uncertainty is to over-design (that is, over-excavate), leading to significant potential cost increases with no corresponding decrease in risk exposure. Because of these problems with the standard approach to project analysis and design, the Department should encourage alternative methods of planning, design and implementation which will accelerate remediation projects. The Chemical Industry Council of New Jersey recommended the following observational method of design by Karl Terzaghi, a soils engineer:

- Base the design on whatever information can be secured.
- Make a detailed inventory of the possible differences between reality and the assumptions.
- Compute, on the basis of the original assumptions, various quantities that can be measured in the field. For example, if assumptions have been made regarding pressure in the soilwater beneath a structure, compute the pressure at various easily accessible points, measure, and compare the results with the forecast.
- On the basis of the differences between the measurements and the computed values, adjust the model and recalculate.
- If necessary, modify the design during construction.

These principles of the observational method have been applied to Superfund projects by engineers at CH2M-Hill (Brown, et al., 1989; Wallace, 1991). In their work, the principles of the observational method have been applied to the case of remediation of contaminated ground water. In their approach, the basic elements of initial investigation, site characterization and remediation are preserved, but the explicit recognition of uncertainty is also maintained. The final result is that remediation is implemented quicker and at a lower cost without losing the possibility of modification as new data is obtained.

RESPONSE: The Department has codified the "traditional" remediation approach in N.J.A.C. 7:26E for several reasons. The Department and private parties have been using this approach for several years with success. A large body of expertise exists (for example, consultants, laboratories), which can be drawn upon by parties seeking to expedite remediation efforts at a site. The traditional approach can assure that a site is remediated in a cost effective manner. Further, the traditional approach provides a systematic and consistent method of remediation which is applicable for all sites in the State.

N.J.A.C. 7:26E provides a natural progression from preliminary assessment, through the data collection requirements of the site investigation and then into the remedial investigation and remediation. This progression is most practical and logical when site conditions are virtually unknown. In those cases where site conditions are already known or the person performing the remediation chooses to move immediately into the remedial investigation, implementing this phased approach may not be necessary. The Department acknowledges that as remediation proceeds through the traditional approach as outlined in N.J.A.C. 7:26E, conditions at the site may change so that the final report may not reflect current site conditions. For this reason, the Department has attempted to streamline the remedial process by providing these rules so that regulated parties may proceed with limited Department review. More specifically, the Department has allowed for and encouraged the use of rapid site assessment techniques including field screening methods and alternate ground water sampling methods.

With respect to prioritizing investigations for contaminant control, the Department requires that remediation proceed with a "bias for action" (N.J.A.C. 7:26E-4.1(a)8 and 6.3(a)) to expedite any steps necessary and/or possible to contain or stabilize contamination before initiating long-term remedial activities. The Department's objective is to stabilize and/or contain the source of contamination and to control the threat to human and ecological receptors. The Department has further clarified this approach by adopting at N.J.A.C. 7:26E-1.11 a statement for codifying "Bias for Action."

The Department believes the rules as adopted are flexible enough to allow for different approaches to the remediation of contaminated sites. The Department will accept, pursuant to N.J.A.C. 7:26E-1.6(d), alternate approaches to conducting a site investigation so long as the objectives of the site investigation are met. Thus, if the observational method of design described by the Chemical Industry Council of New Jersey can determine if any contaminants are present at the site above any of the applicable remediation standards, then the Department may accept this approach for a particular site.

599. COMMENT: Chevron U.S.A., Inc. believes the regulations should provide a mechanism to combine multiple areas of concern at a site into one common unit, as appropriate for purposes of investigation and monitoring (including ground water and soil sampling), as well as remedial action and waste management. Often, particularly at larger facilities, several areas of concern may be identified, some of which may be proximate or adjacent to each other. Based on their location and the types of material stored or managed at each area, it will often be appropriate and advantageous to group selected individual areas of concern into a single common unit for the purposes of investigation and remediation. For example, several surface impoundments located adjacent to each other may rely on one common ground water monitoring network. Other advantages would include ease of waste management. If the same group of impoundments were undergoing remediation and were considered a common unit then waste movement and management within the common unit would not trigger complex Resource Conservation and Recovery Act placement and permitting issues. This process introduces efficiency and cost savings into the remediation process. Chevron noted that the Department recognizes the utility of this approach in the existing rules N.J.A.C. 7:14A-6 et seq., wherein the regulations allow the designation of waste management areas. Additionally, the Environmental Protection Agency is attempting to utilize this approach in the proposed Resource Conservation and Recovery Act Corrective Action rules 40 CFR Parts 264, 265, 270 and 271 (July 27, 1990 proposal) by introducing the concept of the Corrective Action Management Unit (CAMU). Chevron recommended that the Department use the CAMU approach as a model for inclusion in the proposed technical regulations.

RESPONSE: The Department believes that combining areas of concern as described in the Resource Conservation and Recovery Act citation above is primarily for the purpose of conducting remedial actions, rather than during the site investigation. However, a proposal to combine areas of concern during the site investigation can be made pursuant to N.J.A.C. 7:26E-1.6(d), which allows for deviations from N.J.A.C. 7:26E on a site specific basis.

600. COMMENT: Mr. Mutch commented that many industrial facilities may have identical areas of concern and it may be reasonable to take representative samples as opposed to samples of every one of these similar areas of concern.

RESPONSE: In general, each distinct area of concern must be sampled individually because, although some areas of concern may have similar characteristics, the discharge history associated with these areas may be very different. However, proposals for alternate investigative approaches based on site specific conditions may be required pursuant to N.J.A.C. 7:26E-1.6(d).

N.J.A.C. 7:26E-3.1

601. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company believe the requirements for conducting a preliminary assessment should not be applied to historical discharges of known dimensions. The preparation of a rigorous historical review document for every site containing a historical discharge is an extremely burdensome requirement and will greatly reduce the efficiency of remediation activities.

602. COMMENT: Public Service Electric and Gas believes an exemption to conducting a preliminary assessment for remediation of specific discharge events, underground storage tanks and underground storage tank systems should be included where the contaminant is known, contamination is visible, limited in areal extent, not in contact with ground water, where remediation is verifiable by field screening and is immediately cleaned up.

603. COMMENT: CIBA-GEIGY Corporation questioned whether a preliminary assessment is necessary where contamination is known to exist on a site. An applicant should be given the option to proceed to the "site investigation" immediately based upon submittal of a letter certifying that contamination is "known to exist on site." This should save time in the process. Much of the same information required for the "preliminary assessment" would be included in the "site investigation," as noted under N.J.A.C. 7:26E-3.3(b).

RESPONSE: The purpose of a preliminary assessment is to identify the presence of potentially contaminated areas of concern. Remedial actions may be undertaken for a specific discharge event or well-defined area of concern such as an underground storage tank without a preliminary assessment. However, before the Department will provide a "no further action" determination for a site, a comprehensive investigation of the site, which includes a preliminary assessment in accordance with these technical requirements, shall be conducted to ensure that all areas of concern, current or historical, have been identified.

604. COMMENT: Exxon Company, U.S.A. recommended the wording of N.J.A.C. 7:26E-3.1(b) should be made consistent with that of N.J.A.C. 7:26E-3.1(a), that a preliminary assessment is the first step in the process to determine whether or not a site is "potentially" contaminated.

RESPONSE: The purpose of the preliminary assessment is to evaluate all areas of concern and to focus the efforts of the site investigation on those areas of concern which are "potentially contaminated." This is the first step in the site investigation process, the ultimate goal of which is to determine whether or not a site is contaminated. The Department does not believe that modification to either citation relative to this comment is required.

605. COMMENT: Jersey Central Power and Light and New Jersey Natural Gas Company commented that the preliminary assessment requirements should only be applied to Environmental Cleanup Responsibility Act or large hazardous waste sites. Jersey Central Power and Light and New Jersey Natural Gas Company questioned why a review of site ownership and operational history from the time the site was naturally vegetated or farmland is required, whereas existing the Department's remedial investigation guidelines and Environmental Cleanup Responsibility Act requirements require a review of site history since 1940.

606. COMMENT: Schering Laboratories commented that in contrast to the Superfund program, where the preliminary assessment is a simple screening tool designed to take no more than two man-weeks, the preliminary assessment requirements at N.J.A.C. 7:26E-3.1(c) go far beyond determining if contamination may be present. Based on Schering's experience, this data is not easy to obtain and is presently

not required on most Department projects. As a result this process will take far more time than the Department anticipates. Schering proposed that the list of requirements be reduced. Only present site owner permits and operations should be reviewed in detail. Past owner review should be reduced to dates of occupancy and short general narratives on site operations. This is adequate for the preliminary assessment objective.

RESPONSE: The preliminary assessment requirements outlined in N.J.A.C. 7:26E-3.1 are based on guidance currently used by the Department when conducting publicly funded preliminary assessments or when evaluating sites pursuant to the Environmental Cleanup Responsibility Act. The required information is readily accessible and constitutes the basic information required for the Department, or any individual, to make well-informed determinations of whether or not further action is required at potentially contaminated sites. The Environmental Protection Agency has published similar preliminary assessment requirements and allocates approximately 120 man-hours, or three man-weeks, per preliminary assessment.

Furthermore, many of the site historical informational requirements listed at N.J.A.C. 7:26E-3.1(c) have been required to be evaluated pursuant to the Environmental Cleanup Responsibility Act program rules, and in Department administrative consent orders. For example, in the Environmental Cleanup Responsibility Act Site Evaluation Submission (which together with the General Information Submission is equivalent to the preliminary assessment/site investigation) the responsible party must review the site history including operations, storage practices and permits of past operations (See N.J.A.C. 7:26B-3). While the Environmental Cleanup Responsibility Act required a historical review only to 1940, N.J.A.C. 7:26E requires that the historical review date back to when the site was naturally vegetated or farmland. This is because many industrial operations predated 1940 and the Department is concerned that discharge areas at a site may have been overlooked. The Department also sought to remove the burden to review the site history back to 1940 if the site was more recently farmland or naturally vegetated.

607. COMMENT: Rutgers Environmental Law Clinic believes N.J.A.C. 7:26E-3.1(c)1 should require the remediator to gather historical information about the site when the remediation concerns an underground tank system. Historical information may be helpful in identifying the contents of a tank and the length of time they have been there, information that is especially important if the tank has leaked and should therefore be included.

RESPONSE: The purpose of a preliminary assessment is to identify the presence of any potentially contaminated areas of concern. If remediation is directed at a specific discharge event or underground tank, the location has already been identified as an area of concern and the contaminants already identified, therefore, an evaluation of historical site information would serve no purpose. Pursuant to N.J.A.C. 7:26E-3.9(a)3, former as well as present underground storage tanks must be investigated. Furthermore, remediation approved for a specific discharge event or underground tank as stated above does not preclude the need for further investigation before a no further action determination is issued by the Department. The approval is limited to the particular discharge event or tank and cannot be extended to an area of concern without a completed preliminary assessment, which includes the requisite historical information.

608. COMMENT: Exxon Company, U.S.A. commented that the statement, "A preliminary assessment shall be based on diligent inquiry and include an evaluation of the following" at N.J.A.C. 7:26E-3.1(c) does not allow adequate flexibility in the collection of information, particularly that required by paragraph N.J.A.C. 7:26E-3.1(c)1v for containers and bulk storage areas (which can be an enormous task). After the words "diligent inquiry," the Department should add the phrase "to the extent available and necessary" to allow more flexibility in the collection of the information required in the following subsections.

609. COMMENT: The Chemical Industry Council of New Jersey commented that since historical data may not be available or germane, the alternative of site investigation be available for defining data needs depending on the availability of such historical data. Often records are lost or disposed according to a records retention policy. In the event that a firm is bankrupt or has gone out of business, such records may be sealed or unavailable for review. The focus should be on actual present site conditions requiring remediation. The Chemical Industry Council of New Jersey noted that during prior years, waste disposal to soil was poorly documented if documented at all. In addition, the former owners of multi-owner sites usually have reason not to be forthcoming, and if their ownership predates the Resource Conservation and Recovery Act, may have no legal obligation for disclosure.

610. COMMENT: Activities at a site which are independent of the facility operation may also result in a discharge such as illegal disposal of off-site materials. Atlantic Electric recommended rewriting N.J.A.C. 7:26E-3.1(c)1 as follows: "Historical information shall include the following items to the extent available and as applicable and appropriate to the site for identifying potentially contaminated areas of concern, from diligent inquiry. . ." Atlantic Electric took the position that the items in this section should be supplied as seen fit by the professional judgement of the person responsible for conducting the remediation. In essence, some items may be necessary for some sites while other items may be more appropriate for others. In either case, it should be a professional judgement call and not a codified requirement.

611. COMMENT: Union Carbide Chemicals and Plastics Company recommended that N.J.A.C. 7:26E-3.1(c)1 be revised as follows: "Historical information concerning the site history shall be part of the preliminary assessment unless remediation is directed at either, a specific discharge event, rather than a particular area of the site, or any underground tank or underground tank system. The site history shall include an evaluation of the following to the extent available, applicable, and appropriate to the site for identifying potentially contaminated areas of concern from diligent inquiry: . . . ."

The site history details that are critical for the preliminary assessment are only those structures, manufacturing/waste handling practices, and significant events where a discharge may have occurred into the environment and may be regarded as a potential area of concern at the site. The value added by the broad and potentially inappropriate listings of information to be gathered in subparagraphs (c)1i through xii is marginal for the costs associated in this information gathering phase.

612. COMMENT: Chevron U.S.A., Inc. suggested the following revision to N.J.A.C. 7:26E-3.1(c)1: "Historical information concerning the site history shall be submitted only for those sites which are required to complete a site wide investigation. The site history may include an evaluation of the following, as appropriate, to the extent available from diligent inquiry. The following items are appropriate if they are related to a known or suspected discharge event." Additionally, not all of the information listed in N.J.A.C. 7:26E-3.1(c)1i through xii is appropriate for all sites. Many times some or all of the information listed will provide little or no useful information. Obtaining all of the information listed is time consuming and costly.

613. COMMENT: E.I. du Pont de Nemours and Company and Mobil Oil Corporation believed the proposed list of sources of information to be reviewed at N.J.A.C. 7:26E-3.1(c)1 is extremely broad, is not always readily available, may not be pertinent to some sites, and not necessarily appropriate for identifying the presence of contaminated areas of concern.

Mobil and E.I. du Pont recommended the following revision: "The site history shall include an evaluation of the following to the extent available and as applicable and appropriate to the site for identifying potential areas of concern, from diligent inquiry . . ."

614. COMMENT: The General Electric Company commented that the preliminary assessment provisions at N.J.A.C. 7:26E-3.1(c)1 require far too much historical information to be gathered during the preliminary assessment. Specifically, the requirements of N.J.A.C. 7:26E-3.1(c)1iii are overbroad, unnecessary and burdensome. It has been well over 100 years (and in some cases 200 years) since many areas in New Jersey were "naturally vegetated or utilized as farmland." Thus, this section calls for a massive historical inquiry despite the fact that most of the information which might be recovered would be entirely irrelevant to determining the need for remediation at the site. N.J.A.C. 7:26E-3.1(c)1 should be revised to limit the scope of the historical inquiry to proper uses that may have resulted in the discharge of hazardous substances at the site to the extent that those substances are known or suspected to remain on site above the cleanup standard levels. The assessment should not be required to include historical information unrelated to the discharge of hazardous substances or the feasibility of remediating a discharge.

RESPONSE: N.J.A.C. 7:26E provides the minimum requirements for conducting all phases of site remediation. As the initial and perhaps the most critical step in the site remediation process, the preliminary assessment requirements are intentionally broad and comprehensive. These requirements are based on guidance currently used by the Department when conducting publicly funded preliminary assessments and when evaluating sites pursuant to the Environmental Cleanup

Responsibility Act, and constitute the basic information required for the Department, or any individual, to make well-informed determinations of whether or not further action is required at potentially contaminated sites.

The Department recognizes that, in the past, records may not have been kept as diligently or completely as today; therefore, N.J.A.C. 7:26E-3.1(c)1 requires an evaluation the regulations state "to the extent available from diligent inquiry," providing the necessary flexibility. Information or records which are no longer available would, by the definition of diligent inquiry, not be required.

Not all information required is related to the occurrence of a discharge; however, the required information is related to previous operations which may lead to the identification of potentially contaminated areas of concern, the purpose of the preliminary assessment. The Department does not believe that a review of site history to the time of natural vegetation or farmland is irrelevant because any industrial operations during this time period may have resulted in discharges.

615. COMMENT: Colonial Pipeline Company suggested changing "concerning the site history" to "... concerning the facility history ..." at N.J.A.C. 7:26E-3.1(c)1. Furthermore, because it is not clear if "a particular area of a site" is the same as an "area of concern" at a facility, the Department should clarify this sentence. In addition, to require a "diligent inquiry" of usage by each past owner or operator and their addresses (N.J.A.C. 7:26E-3.1(c)1ii(4) and (5)), and permits for all previous and current owner/operators, applied for or received (N.J.A.C. 7:26E-3.1(c)1xi) is excessive and does not add significant data on existing contamination. This is especially true if a responsible party accepts liability for a release and it is easily documented that detected contaminants of concern is theirs (that is, benzene, toluene, ethyl benzene and xylene at a gasoline spill).

RESPONSE: The Department agrees that use of the phrase "rather than a particular area of the site" at N.J.A.C. 7:26E-3.1(c)1 is unclear and the citation has been clarified. The Department agrees that obtaining current addresses of past owners or operators at N.J.A.C. 7:26E-3.1(c)1ii is burdensome, and has deleted this requirement; however, determining past usage of a site is essential for the Department, or any individual, to make well-informed determination of whether or not further action is required at potentially contaminated sites. Similarly, current and former permits provide valuable information regarding historical operations at a site. Therefore, the Department has not deleted these requirements on adoption.

616. COMMENT: Union Carbide Chemicals and Plastics Company was concerned that N.J.A.C. 7:26E-3.1(c)1i through xii will become the benchmark for completeness decisions by the Department, lenders, and potential buyers of an industrial site. This would result in more difficulty when transferring property in the future.

617. COMMENT: E.I. du Pont de Nemours and Company was concerned that this broad listing at N.J.A.C. 7:26E-3.1(c) may become the standard by which lenders and buyers judge the completeness of an Environmental Cleanup Responsibility Act activity, making it increasingly difficult to transfer property.

RESPONSE: The Department believes that the information required at N.J.A.C. 7:26E-3.1(c)1 is essential when a party conducts a preliminary assessment at a potentially contaminated site. Only by investigating previous site conditions can a party assess site conditions. Furthermore, this information is not substantially different from that presently required for site assessments under the Environmental Cleanup Responsibility Act. Therefore, the Department believes that this information is an appropriate standard for preliminary assessment.

618. COMMENT: E.I. du Pont de Nemours and Company and Atlantic Electric were concerned that the Department will challenge a responsible party's "diligent inquiry" on the basis of these requirements, particularly when the responsible party concludes that there are potentially no contaminated areas of concern at a site.

RESPONSE: If a preliminary assessment is conducted in accordance with these requirements and the preliminary assessment report is properly signed and certified, then the Department will assume that a diligent inquiry has been conducted. The Department will only challenge a responsible party's "diligent inquiry" for cause.

619. COMMENT: E.I. du Pont de Nemours and Company commented that the list of information required in the preliminary assessment at N.J.A.C. 7:26E-3.1(c)1 includes items that may be considered proprietary information by the responsible party. The Department should recognize and allow for claims of Confidential Business Information.

RESPONSE: A party may claim confidential or proprietary information pursuant to N.J.A.C. 7:26B, N.J.A.C. 7:14B or the appropriate oversight document pursuant to the Procedures for Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C.

620. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company commented that N.J.A.C. 7:26E-3.1(c)1i should be amended to read "site history information from sources including but not limited to the following:" as this would provide for greater flexibility and a wider array of sources.

RESPONSE: The Department agrees and has modified N.J.A.C. 7:26E-3.1(c)1i accordingly.

621. COMMENT: Colonial Pipeline Company commented the historic information will not be complete pursuant to N.J.A.C. 7:26E-3.1(c)1i(5) because the Department's ranking will not be made available. This ranking is important because it will assist in insuring that the correct level of quality control is applied at an individual facility.

RESPONSE: The site's relative rank on the Department's priority list has no bearing on the Department's determination for further action or amount of quality control and is, therefore, not required for the preliminary assessment.

622. COMMENT: Chevron U.S.A., Inc. believes N.J.A.C. 7:26E-3.1(c)1iv should be revised as follows: "Present and past production processes (if production process areas are known or suspected to have discharged), including ..."

RESPONSE: The purpose of the preliminary assessment is to evaluate all areas of concern and identify those which are potentially contaminated for further investigation in the site investigation phase. The information collected, reviewed and evaluated is essential for making determinations for further action at potentially contaminated sites (that is, whether or not a discharge has occurred). The suggested wording changes are unacceptable because the person conducting the remediation would decide whether a production process has the potential to result in a discharge. The Department believes that all production processes have the potential to result in discharges.

623. COMMENT: Chevron U.S.A., Inc. believes information and records regarding past processes may no longer be available, particularly for older facilities. N.J.A.C. 7:26E-3.1(c)1iv, left unchanged, could become unreasonably burdensome.

624. COMMENT: Public Service Electric and Gas Company (PSE&G) commented that since requiring permits from all previous owners at N.J.A.C. 7:26E-3.1(c)1xi is onerous. Many of these permits may not be available especially where past owners and expired permits are involved. PSE&G recommended that the word "all" be changed to "available" with regard to Federal, State and local environmental permits. Similarly, the words "for all" should be changed to "as available for" previous and current owners or operators.

RESPONSE: N.J.A.C. 7:26E-3.1(c)1 requires an evaluation of historical information "to the extent available for diligent inquiry." Information or records which are no longer available would, therefore, not be required.

625. COMMENT: Chevron U.S.A., Inc. suggested that N.J.A.C. 7:26E-3.1(c)1v should be revised to read as follows: "... vessels, conveyances or units that contain or previously contained regulated substances if known or suspected to have discharged, which includes the information listed below, as appropriate. If the unit was known to have previously discharged and said discharge was cleaned up in accordance with Departmental approval then that unit need not be listed."

RESPONSE: N.J.A.C. 7:26E-3.2(b) provides that previous submissions or previously remediated areas of concern may satisfy specific items required for the preliminary assessment. However, the Department will make that determination because cleanups previously approved by the Department may not meet current Department standards.

626. COMMENT: Environmental Liability Management, Inc. believes a blanket requirement of historical aerial analysis for all sites over two acres at N.J.A.C. 7:26E-3.1(c)1vi should not always be necessary. Environmental Liability Management, Inc. believes that aerial reviews should be required only when there has been long term industrial use of a property and significant soil movement. Otherwise, the use of aerials should be decided on a case-by-case basis depending on the completeness of other background documents.

627. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company believe interpretation of historical aerial photography at N.J.A.C. 7:26E-3.1(c)1vi may be costly and burdensome particularly for sites in older urban areas that may have numerous coverage available which could cost thousands of dollars to obtain and review. It may be more practical and reasonable to require the use of best professional judgement or, for example, have less stringent requirements if documentation can be provided on the date of facility construction.

628. COMMENT: Colonial Pipeline Company noted that various public agencies and private enterprises have aerial photographs covering numerous facilities over long periods of time. To obtain all photographs is not warranted; therefore, the following modification to N.J.A.C. 7:26E-3.1(c)1vi was suggested: "... history of the site will be based on annual photographs (scale 1: 18,000)...".

629. COMMENT: The Chemical Industry Council of New Jersey believes the requirement that all available aerial photographs be obtained and reviewed is unreasonable and unnecessary. Although often there is not a multitude of photos available, in other cases this could entail purchasing and reviewing 20 or more photos, many of which may be fairly recent and disclose little about past practices. Reviewing one photo for every five to 10 years of operation at changes in ownership/operation would be more reasonable. The Chemical Industry Council of New Jersey recommended the following modification: "At least one photo for every 10 years shall be reviewed, if available, or aerial photograph sufficient to trace site history, whichever is applicable on a site specific basis."

630. COMMENT: The General Electric Company commented that N.J.A.C. 7:26E-3.1(c)1vi places an unnecessary burden on parties to review every type of aerial photo and to submit scaled drawings that do not relate to the remediation. The assessment should be focused on prior uses that may have resulted in the discharge of hazardous substances that are known or suspected to remain on site above cleanup standard levels. This section should be revised to allow a technically competent photographic land use history taking into account the size and complexity of the facility and its operations over the years.

631. COMMENT: Mobil Oil Corporation agreed that review of aerial photographs is necessary and often useful. However, the requirement at N.J.A.C. 7:26E-3.1(c)1vi that all available aerial photographs be obtained and reviewed is unreasonable and unnecessary. Although often there is not a multitude of photos available, in other cases this could entail purchasing and reviewing 20 or more photos, many of which may be fairly recent and disclose little about past practices. The following wording was suggested: "At least one photo for every 10 years shall be reviewed, if available. If at least one aerial photograph for each 10 years is not available, all aerial photographs reasonably available shall be reviewed in an effort to trace site history to the extent possible."

632. COMMENT: Public Service Electric and Gas Company commented that N.J.A.C. 7:26E-3.1(c)1vi requires obtaining all available current and historical aerial photographs of a site. It is not feasible to obtain all photographs that may include the site. Many photographs may be duplicates or may not have any applicability to the site assessment procedure. Public Service Electric and Gas recommended deleting the word "all" from N.J.A.C. 7:26E-3.1(c)1vi so that the wording reads "If the site area exceeds two acres, an interpretation of the aerial photographical history of the site, based on available current and historical color, black and white and infrared aerial photographs (scale 1:18,000 or less) of the site and surrounding area must be made."

633. COMMENT: Chevron U.S.A., Inc. believes an interpretation of "the aerial photographic history" should not be mandated at N.J.A.C. 7:26E-3.1(c)1vi. A sentence should be added to state that "Historical aerial photographs will only be required if site historical records reveal the prior existence of past units or areas which were known or suspected to have discharged." Additionally, the word "all" should be deleted from the first sentence, and N.J.A.C. 7:26E-3.1(c)1vi revised to read "... based on appropriate available current and historical ... aerial photographs." Most investigations will not require reference to the photographic record since site history and visual and other evidence will be ample to define areas of concern. Assessment of most site histories, moreover is unlikely to require review of the entire available photographic archive, but, instead, will rely on a specific time interval of known or suspected on-site activities.

634. COMMENT: Allied Signal, Inc. believes using aerial photographs is appropriate for preparing a land use history of a site, but that to require a photographic review based on site size exceeding two acres at N.J.A.C. 7:26E-3.1(c)1vi is not appropriate. Some smaller sites with complex operational history may warrant a photographic review more than some large sites with very simple history. Decisions as to the necessity, quantity, and type of aerial photographs to be reviewed should be based on a site visit and professional scientific judgment. Further, the proposed rule states that "all" available color, black and white and infrared photographs are to be reviewed. These categories cover an extensive amount of material and should be limited to provide, where appropriate, a technically sound photographic land use history.

RESPONSE: Aerial photographs, many times, are the only method for determining historical land use and identifying historical areas of concern, and are therefore a requirement of the preliminary assessment. Aerial photographs also provide a means of verifying the completeness of the historical record. The Department agrees that locating, procuring and evaluating all existing aerial photographs for a particular site may be excessive. N.J.A.C. 7:26E-3.1(c)1vi has been revised to require a review of readily available aerial photographs at a frequency which provides the evaluator with an historical perspective of site activities back to 1932 or the earliest photograph available. The year 1932 was selected because that is the earliest date of widespread availability of aerial photographs for many areas of the State. The Department believes sufficient aerial photographic coverage is available to comply with this requirement at the New Jersey Department of Environmental Protection and Energy, Tidelands Management Progam, Aerial Photo Library, 9 Ewing Street, Trenton.

The Department encourages the evaluation of aerial photographs, regardless of site acreage, when conducting a preliminary assessment. The two-acre minimum is intended to exempt small businesses and homeowners from this requirement. However, as these are minimum requirements, the Department may require the evaluation of aerial photographs at smaller sites, if warranted, based on site specific conditions.

635. COMMENT: Exxon recommended the Department identify the governing regulatory statute at N.J.A.C. 7:26E-3.1(c)1viii to further indicate what type of activities may have occurred on site, as the regulation driving the cleanup of a contaminated site may differ (for example, Toxic Substances Control Act, Comprehensive Environmental Response, Compensation and Liability Act) and be indicative of the nature of contamination present.

RESPONSE: The Department does not believe the regulation driving the remediation is necessary for the Department's evaluation. The person responsible for conducting the remediation can submit additional information if they believe it is appropriate for a particular site.

636. COMMENT: Colonial Pipeline Company recommended that N.J.A.C. 7:26E-3.1(c)1ix be re-written to read: "All existing environmental sampling data..." because there are numerous reasons why a facility will obtain sampling data concerning contaminants at a site. Sampling data can be for product quality control, calibration of product meters, or environmental sampling.

RESPONSE: The Department agrees with this comment and has modified the rule accordingly.

637. COMMENT: Chevron U.S.A., Inc. believes section N.J.A.C. 7:26E-3.1(c)1ix should be revised to read as follows: "All existing sampling data showing a discharge or contamination at the site." Submittal of sampling history showing no adverse impact should not be required. An assumption is implied that all sampling data "concerning contaminants" will document contamination; this is unlikely for most sites.

RESPONSE: N.J.A.C. 7:26E-3.1(c)1 and 3.1(c)ix specifically require an evaluation of all existing environmental sampling data while N.J.A.C. 7:26E-3.2(a)3ii requires the submittal of a summary of the data evaluated. Evaluating and summarizing all sampling data, including that which exhibits contamination below an applicable remediation standard, provides valuable site information to the Department and is required before a "no further action" determination is made at potentially contaminated areas of concern.

638. COMMENT: Chevron U.S.A., Inc. suggested the following revision to N.J.A.C. 7:26E-3.1(c)1xi: "Applicable and obtainable federal, state and local environmental permits..." Many permits may not be applicable or provide useful information (for example, electrical permits for lighting fixtures in an office area). Additionally, older facilities particularly may be poorly documented. Some permits, even some remaining in effect, may not be readily obtainable.

RESPONSE: N.J.A.C. 7:26E-3.1(c)1xi states that only environmental permits need to be evaluated. Therefore, electrical permits for lighting fixtures would not need to be evaluated.

The Department also recognizes that, in the past, records may not have been kept as diligently or completely as today, and therefore, N.J.A.C. 7:26E-3.1(c)1 includes the phrase "to the extent available from diligent inquiry," to provide the necessary flexibility.

639. COMMENT: Exxon Company, U.S.A. believes the requirement at N.J.A.C. 7:26E-3.1(c)1xii(7) to describe the potential environmental impact which may have resulted from an alleged violation of an environmental law is vague, open-ended, and inappropriate given the intent of N.J.A.C. 7:26E-3.1. Additionally, the information that must be gathered cannot be used directly to make an assessment of potential environmental impact. Exxon recommended deleting this clause.

RESPONSE: The Department disagrees that N.J.A.C. 7:26E-3.1(c)1xii(7) is unclear and inappropriate. Describing potential impacts associated with alleged violations may provide essential information regarding potentially contaminated areas of concern.

640. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company questioned whether or not a preliminary assessment certification and/or site visit pursuant to N.J.A.C. 7:26E-3.1(c)2 is required in all cases.

RESPONSE: In all cases the person performing the preliminary assessment shall conduct a site visit to verify the findings of the preliminary assessment in N.J.A.C. 7:26E-3.1(c)1. The certification requirements will be addressed by the individual programs or under the appropriate oversight document pursuant to the Procedures for Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C.

N.J.A.C. 7:26E-3.2

641. COMMENT: Groundwater & Environmental Services, Inc. commented that a preliminary assessment report prepared pursuant to N.J.A.C. 7:26E-3.2 is unnecessary at sites where ongoing investigations have been performed according to various Department programs, such as underground storage tanks, the Environmental Cleanup Responsibility Act, or the New Jersey Pollutant Discharge Elimination System. These regulations should not be applied retroactively to sites where investigations have been ongoing and have been performed according to previous Department approvals.

RESPONSE: N.J.A.C. 7:26E-3.2(c) provides that previous submissions to the Department pursuant to N.J.A.C. 7:26B, for example, may satisfy the specific items required for the preliminary assessment. Thus, the Site Evaluation Submission, which is similar to the preliminary assessment/ site investigation, prepared pursuant to the initial notice requirement of the Environmental Cleanup Responsibility Act, N.J.A.C. 7:26B-3, may satisfy these requirements. Pursuant to N.J.A.C. 7:26E-1.3(c), if a party is in the preliminary assessment phase as of the effective date of these rules, the Department will evaluate the work conducted to determine if it is in substantial compliance with N.J.A.C. 7:26E. If the preliminary assessment phase was completed prior to the effective date of these rules, the Department will only require additional work if it is necessary to protect human health and the environment. For example, if remediation standards become more stringent by an order of magnitude or if a new area of concern is identified.

642. COMMENT: Schering Laboratories believes that the reporting requirements at N.J.A.C. 7:26E-3.2 are too extensive. In the Superfund program, preliminary assessments are completed using a simple "fill in the blank" form that is only a few pages long. Schering believes the Department should develop a simple "fill in the blank" form along the lines of the Environmental Protection Agency preliminary assessment form. This form should be simple enough for even the smallest business operator to complete with reasonable confidence.

RESPONSE: The commenter makes reference to Environmental Protection Agency form 2070-12, abandoned by the Environmental Protection Agency in the Superfund program a number of years ago due to numerous deficiencies and the overall lack of information required for their completion. A "fill in the blank" form may be used if it complies with the rule requirements and contains the required information.

643. COMMENT: Colonial Pipeline Company believes N.J.A.C. 7:26E-3.2(a) should be changed as follows: "The person responsible for conducting the assessment shall prepare . . ."

RESPONSE: The person responsible for conducting the remediation is a term of art which is defined by these regulations as ". . . any person who is conducting the remediation . . ." Remediation as defined by these rules specifically includes the preliminary assessment, thus the Department does not believe this modification is necessary.

644. COMMENT: Chevron U.S.A., Inc. believes N.J.A.C. 7:26E-3.2(a)1 should be changed to read, "Presents and discusses the relevant and appropriate information evaluated or collected pursuant to N.J.A.C. 7:26E-3.1;" and N.J.A.C. 7:26E-3.2(a)3 should be revised to read, "If relevant and appropriate the following information may also be required to be included in the report:".

RESPONSE: It is the Department's position that all information collected and evaluated pursuant to N.J.A.C. 7:26E-3.1(c) is relevant and appropriate and should, therefore, be included in the preliminary assessment report.

645. COMMENT: Exxon Company, U.S.A. believes that the words "if available" should be added to N.J.A.C. 7:26E-3.2(a)3 as some of the data may not be available.

646. COMMENT: The General Electric Company believes that requiring scaled historical and current site plans and facility as-built construction drawings at N.J.A.C. 7:26E-3.2(a)3i is unnecessary and burdensome, especially if the regulation means that the investigator will have to prepare such plans if none are available. The preliminary assessment report should contain a site map showing lot and block, property boundaries, building location and the location and dimensions of specific areas of concern that may have related to discharges of hazardous substances (for example, lagoons, landfills).

647. COMMENT: Schering Laboratories objected to the requirement for several scaled historical plans at N.J.A.C. 7:26E-3.2(a)31 since they can cost a few thousand dollars each. Figures should be included for clarification, but scale drawings are unnecessary.

648. COMMENT: Allied Signal, Inc. believes N.J.A.C. 7:26E-3.2(a)3i is unclear as to the preparation requirements for site plans and drawings. The detail required for site plans and facility as-built construction drawing preparation is excessive in nature if the rule is requiring the original preparation of the plans and drawings listed and not merely the presentation of existing, available plans. Original plan and drawing preparation of this type is warranted only when phased investigations uncover areas of concern and the detailed documentation of historical site use is necessary. The proposed rule should require the preparation of a site plan, appropriate for site conditions, with the minimum detail equal to a boundary survey. Boundary surveys are often prepared for property transfers and include information such as lot and block identification, property size, building location, etc. The site map for the report should provide sufficient detail and scale to present the location of any areas of concern.

RESPONSE: The Department's intent is not to have historical site plans and facility as-built construction drawings prepared if they never existed. Therefore, N.J.A.C. 7:26E-3.1(a)3 has been revised to require the submittal of historical site plans and facility as-built construction drawings only when they are available. Existing plans may be modified (enlarged) to meet the cited requirement. Items such as the location of fill material, pavement and vegetation are necessary so that the appropriateness of sample locations, if any, can be determined, and to allow for a complete presentation of site conditions.

649. COMMENT: Lindabury, McCormick & Estabrook believes the reference to documentation required, pursuant to N.J.A.C. 7:26E-1.6(c) at N.J.A.C. 7:26E-3.2(a)4ii, is unclear. N.J.A.C. 7:26E-1.6(c) does not specify any requirements or standards for determining that an area of concern is not contaminated. This inconsistency and vagueness should be clarified.

RESPONSE: The Department agrees that the reference to N.J.A.C. 7:26E-1.6(c) at N.J.A.C. 7:26E-3.2(a)4ii was inappropriate and has deleted it on adoption.

650. COMMENT: Atlantic Electric believes the idea of approving in advance "previously completed work" at N.J.A.C. 7:26E-3.2(b) is confusing. Atlantic Electric hoped that it is not the intent of the Department to require all sites where remediation was (or is in the process of being) performed to start all over again and conduct a preliminary assessment. Atlantic Electric recommended deleting the current text and replacing it with the following: "Previous submissions or other previously completed work will satisfy specific items required for the preliminary assessment if they were approved by the Department. Sites where remediation was performed prior to the effective date of this rule may be required to conduct a preliminary assessment if there is substantive significant threat to human health or the environment which has not been addressed by the previous remediation activities."

651. COMMENT: Allied Signal, Inc. commented that N.J.A.C. 7:26E-3.2(b) should be modified because submissions of technical work, previously approved by the Department, should not require additional approval prior to submission for the preliminary assessment if the technical work is consistent with the requirements of N.J.A.C. 7:26E.

652. COMMENT: The Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E-3.2(b) should be revised because if the Department has approved previously submitted reports, that should be sufficient. The exception to this should only be in light of new sound technical information that shows that the basis for the earlier approval warrants additional scrutiny. Additionally, it is unclear as to how "previously completed work" can be approved in advance since it has already been completed. The proposed rules imply that all remediations previously or currently being implemented will have to "start over again" and perform a preliminary assessment. This could lead to wasting time by reconstructing the original reports. The Chemical Industry Council of New Jersey recommended the following modification: "Previous approved submissions or other previously completed work (prior to this rule promulgation) will satisfy specific items for the preliminary assessment, unless new technical information is available that shows that the basis for the earlier approval is no longer valid for the protection of human health and the environment."

653. COMMENT: Exxon Company, U.S.A. recommended adding the following after "assessment" at N.J.A.C. 7:26E-3.2(b): "if the data substantially complies with N.J.A.C. 7:26E-3.1, or". This change encourages adherence to the proposed procedures and protocols.

654. COMMENT: Union Carbide Chemicals and Plastics Company believes that N.J.A.C. 7:26E-3.2(b) should be revised as follows: "Work completed according to plans approved by the Department and submittals approved by the Department prior to the effective date of this rule will be accepted by the Department for the appropriate component of the preliminary assessment report. The Department may require preliminary assessements to be performed for sites remediated prior to the effective date of this rule only if human health and environmental risks have not been considered and reported to the agency." The modifications suggested above clarifies the intent of not reopening completed projects providing prior approval of the work by the Department.

655. COMMENT: Chevron U.S.A., Inc. believes N.J.A.C. 7:26E-3.2(b) should be deleted and replaced with the following: "Previous submissions or other previously submitted work which was conducted in accordance with Departmental requirements will be deemed to satisfy applicable portions or parts of the preliminary assessment if such work was previously approved by the Department." The regulated community needs to be assured that prior work, if conducted in accordance with Department oversight and approval, will be acceptable in the future.

656. COMMENT: It is unclear to E. I. du Pont de Nemours and Company how "previously completed work" as referenced at N.J.A.C. 7:26E-3.2(b) can be approved in advance if it has already been completed. Additionally, E. I. du Pont de Nemours and Company does not believe it is the Department's intent to require all sites where remediation has been performed or is currenty being performed to start over again and conduct a preliminary assessment. E. I. du Pont suggested that the section be revised as follows: "Submissions or other completed work prior to the effective date of this regulation will satisfy specific items required for a preliminary assessment if they were approved by the Department. Sites where remediation was performed prior to the effective date of this regulation may be required to conduct a preliminary assessment if a significant threat to human health or the environment has not been addressed by the previous remediation activities."

657. COMMENT: Mobil Oil Corporation commented that N.J.A.C. 7:26E-3.2(b) should be revised to read as follows: "Previous submissions or other previously completed work that was reviewed and accepted or approved by the Department prior to the promulgation of this rule will, where applicable, automatically satisfy specific items for the preliminary assessment. Previous submissions or other previously completed work that was not reviewed and accepted by the Department prior to the promulgation of this rule will satisfy specific items for the preliminary assessment upon advance approval by the Department."

658. COMMENT: Shell Oil Company believes that all previous submissions referenced at N.J.A.C. 7:26E-3.2(b) should only be summarized and referenced, not included in subsequent submissions.

659. COMMENT: The General Electric Company believes submissions of technical work, previously approved by the Department, should not require additional approval prior to submission for the preliminary assessment pursuant to N.J.A.C. 7:26E-3.2(b) if the technical work is consistent with the requirements of N.J.A.C. 7:26E.

RESPONSE: The intent of the rule is not to require the repetition of previously completed work which was approved by the Department and is protective of human health and the environment at the time of review pursuant to N.J.A.C. 7:26E. Individuals requesting a "no further action" determination for an entire site or an area of concern by the Department are required to prepare and submit, for Departmental review and approval, a preliminary assessement report. In accordance with N.J.A.C. 7:26E-1.1(c) and 1.3(c), if the preliminary assessment has been completed prior to the effective date of these rules, then the Department will accept that work, even if it was done without Department oversight, if it was in substantial compliance with N.J.A.C. 7:26E and human health and environment are protected by the previous remediation activities. N.J.A.C. 7:26E-3.2(b) has been modified to provide additional clarity concerning the Department's intent.

When a preliminary assessment report is required as part of the site investigation report, N.J.A.C. 7:26E-3.10(b)1, previous submissions may be submitted as an attachment or summarized in the current submission. However, the degree of documentation required for Department approval may vary depending on site conditions and the nature of the remediation. These factors should, in most instances, dictate the format of the submission.

660. COMMENT: Mobil Oil Corporation believes the Department should set a 30-day time limit for the review of any other previous submissions or previously completed work submitted for advance approval for inclusion in the preliminary assessment pursuant to N.J.A.C. 7:26E-3.2(b). If the Department does not respond within 30 days, the items should be deemed approved for inclusion. A time limit for the review of those items will ensure that the Department does not unnecessarily delay the progress of voluntary investigations. If the Department has not responded to a request for advance approval within 30 days of its receipt by the Department, the request shall be deemed to be granted and shall satisfy the specific relevant item in the preliminary assessment.

661. COMMENT: Exxon Company, U.S.A. believes the following should be added to N.J.A.C. 7:26E-3.2(c) to provide closure on whether further action is needed: "The Department will review the preliminary assessment report and the recommendation of N.J.A.C. 7:26E-3.2(a)4ii within 90 days and respond in writing whether additional investigation is required."

RESPONSE: Because the language at N.J.A.C. 7:26E-3.2(b) was confusing, on adoption, the Department has deleted the first sentence. Therefore, the request for a 30 or 90 day turnaround time by the Department at N.J.A.C. 7:26E-3.2(b) is not necessary. A request for prior Department approval of deviations from N.J.A.C. 7:26E may be sought pursuant to N.J.A.C. 7:26E-1.6(d). If a memorandum of agreement is required, timeframes for Department review can be addressed in the context of that process.

N.J.A.C. 7:26E-3.3

662. COMMENT: Schering Laboratories commented that under Superfund, the site investigation is used to determine if contamination is present and to determine if contaminant receptors are nearby. This data is then used to determine if a remedial investigation is required. The Environmental Protection Agency expects a site inspection to take no more than 300 man-hours and an average of five to 10 samples. However, Schering Laboratories believes N.J.A.C. 7:26E-3.3 shows the Department is using a site investigation to determine the presence and the extent of contamination. If the expensive and complex Superfund process is to be modeled then the Department process should follow the same pattern by using the site investigation to rank sites. This ranking should then be used to determine the worst sites in the State. Then only the worst sites should be subjected to the remedial investigation process. The Department should greatly reduce its sampling requirements for a site investigation and include the identification of receptors in the site investigation process. This information should be used to rank sites to determine what further work is needed.

RESPONSE: The Superfund Site Inspection and the associated workload factor (300 man-hours) referred to by the commenter is an antiquated approach no longer used by the Environmental Protection Agency. The Superfund pre-remedial process has since evolved and expanded to include a Preliminary Assessment, Screening Site Inspection and Expanded Site Inspection. The Screening Site Inspection is a limited sampling effort to determine the need for further action based on the

detection of contaminants **above background.** The Environmental Protection Agency's estimated average workload factor for a Screening Site Inspection is 400 man-hours. Detection of contaminants above background with sufficient receptors in the vicinity of the site warrants the initiation of an Expanded Site Inspection to collect the data required for the actual scoring using the Hazard Ranking system. The Environmental Protection Agency's estimated average workload factor for an Expanded Site Inspection is 1,050 man-hours. The Screening Site Inspection and Expanded Site Inspection together replace the former Site Inspection phase for those sites warranting consideration for the National Priorities List (NPL).

Although N.J.A.C. 7:26E is similar to the Superfund pre-remedial process in approach and terminology, N.J.A.C. 7:26E provides the means for determining whether or not a site requires remediation whereas the Superfund pre-remedial process serves to identify those sites which qualify for remediation under the Federal Superfund. Sites which do not warrant inclusion on the National Priorities List may or may not warrant further investigation or remediation. Any site in New Jersey that is contaminated must be remediated. Therefore, the approach proposed by the commenter is unacceptable to the Department.

Receptor identification is performed in the remedial investigation phase. Performing this activity during the site investigation phase is premature (further remediation may not be required) and would significantly add to the time and expense of the site investigation.

663. COMMENT: Atlantic Electric believes site investigations should be limited at N.J.A.C. 7:26E-3.3(a) to areas of concern of the release only. Many of the contaminants in N.J.A.C. 7:26D occur naturally in the environment at higher concentrations than those allowed. Atlantic Electric requested N.J.A.C. 7:26E-3.3(a) be rewritten as follows: "The purpose of a site investigation is to determine if any contaminants associated with a new release are present at the site above any of the applicable cleanup standards pursuant to N.J.A.C. 7:26D. If such contaminants associated with a release are present at the site and there is substantive potential for significant exposure of a receptor, then additional remediation may be necessary prior to a Department determination that no further action is necessary."

664. COMMENT: E. I. du Pont de Nemours and Company believes the necessity for further remediation at a site where contaminants are present at concentrations above an applicable cleanup standard should be limited to areas of concern where a discharge has occurred. Many of the contaminants included in N.J.A.C. 7:26D occur naturally in the environment at higher concentrations than their cleanup standards. The need for further remediation should consider these naturally occurring concentrations. In addition, the potential for exposure to the contaminant should be considered in requiring further remediation. E. I. du Pont suggested the following modification to N.J.A.C. 7:26E-3.3(a): "The purpose of a site investigation is to determine if any contaminants associated with a discharge are present at the site above any of the default cleanup standards pursuant to N.J.A.C. 7:26D-1 et seq. or if no further action is required. If such contaminants associated with a discharge are present at the site and there is a potential for exposure of a receptor, then additional remediation may be necessary prior to the Department's determination that no further action is necessary."

665. COMMENT: The Chemical Industry Council of New Jersey believes the presence of contaminants above an applicable cleanup standard does not, in itself, constitute sufficient reason for further remediation. The Chemical Industry Council of New Jersey recommended the following modification to N.J.A.C. 7:26E-3.3(a): "The purpose of any site investigation is to determine if any contaminants associated with a discharge are present at the site above any of the applicable cleanup standards pursuant to N.J.A.C. 7:26D-1 or if such contaminants associated with a discharge are present at the site and there is a potential for exposure of a receptor, then additional remediation is . . ."

666. COMMENT: Since cleanup should be based on a specific risk to human health and the environment, Mobil Oil Corporation believes the presence of contaminants above an applicable cleanup standard does not, in itself, constitute sufficient reason for further remediation. For example, if no human or environmental receptors are threatened and the contamination will not migrate and/or will naturally degrade or attenuate, no further action should be required. The following revision to N.J.A.C. 7:26E-3.3(a) should be made: "The purpose of any site investigation is to determine if any contaminants associated with a discharge are present at the site above any of the applicable cleanup standards pursuant to N.J.A.C. 7:26D and if such contaminants associated with a discharge are present at the site and there is a potential for exposure to a receptor, then additional remediation is . . ."

667. COMMENT: Shell Oil Company believes N.J.A.C. 7:26E-3.3(a) should allow for exposure and risk assessment to set alternate contaminant levels (and natural attenuation to reach selected levels).

668. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.3(a) should be revised as follows: "The purpose of a site investigation is to collect and evaluate data to determine the human health and environmental risks (if any) on or emanating from a site and the factors affecting remediation. Information gathered may include contaminant concentrations, geological/hydrogeological aspects, past manufacturing or waste handling practices, pathways for migration and exposure, fate and transport, media interactions, and other site specific control parameters."

Site investigations are performed to determine the potential risks of contaminants and the parameters affecting their potential remediation and not just for the purpose of comparison to cleanup standards. To determine the extent of a site's contamination, a clear understanding of past practices (manufacturing and waste handling), the geological/hydrogeological systems, pathways for migration and exposure, fate and transport, and other site specific control parameters must be achieved to make conclusions in a site investigation. This is a more complex procedure than strictly a comparison to cleanup standards.

RESPONSE: Contamination resulting from historical releases or operational practices which is above the remediation standard poses the same threat to public health and the environment as a new release and must be remediated accordingly. The Department's site specific remediation standards are risk-based standards which inherently account for the potential or actual exposure to receptors, therefore, the issue of exposure need not be addressed in N.J.A.C. 7:26E. The Department intends to propose amendments to N.J.A.C. 7:26E to account for those instances where contaminants are believed to be naturally occurring. The information would then be utilized in establishing the site specific remediation standards. Until the rules are amended, these decisions will be addressed on a case-by-case basis. For further discussion of this issue, refer to the Department's response to comments on "Risk Assessment" in the "General Comments" section of this summary.

669. COMMENT: Chevron U.S.A., Inc. believes the second sentence of N.J.A.C. 7:26E-3.3(a) "If such contaminants are . . .," should be deleted. This sentence has no bearing on the definition or purpose of the site investigation phase of the regulations. It is also a false statement. Contaminants may be present at a site due to background conditions or other reasons which may not result in "additional" or any remediation.

RESPONSE: The sentence in question specifically states that additional remediation is required if contaminants are present above an applicable remediation standard prior to a Departmental determination that no further action is necessary. This sentence is accurate and serves to clarify the purpose of the site investigation. The Department intends to propose amendments to N.J.A.C. 7:26E to account for those instances where contaminants are believed to be naturally occurring. The information would then be utilized in establishing the site specific remediation standards. Until the rules are amended, these decisions will be addressed on a case-by-case basis.

670. COMMENT: Chevron U.S.A., Inc. believes the following language should be added to N.J.A.C. 7:26E-3.3(a), "The site investigation is limited to those areas of concern at a site which are known or suspected to have discharged based on a preliminary assessment or other available information."

RESPONSE: The Department agrees that only areas which are suspected to be contaminated need to be sampled and this has been clarified at N.J.A.C. 7:26E-3.4(a). It is not appropriate to change the language at N.J.A.C. 7:26E-3.3(a) because this language specifies the general objective of the site investigation.

671. COMMENT: To clarify that a site investigation is only required for those potentially contaminated areas of concern identified in the preliminary assessment pursuant to N.J.A.C. 7:26E-3.1(a), Exxon Company, U.S.A. recommended inserting "for those areas of concern identified in the preliminary assessment" following ". . . at the site."

RESPONSE: A clarification is not necessary in N.J.A.C. 7:26E-3.3(a) as N.J.A.C. 7:26E-3.3(b) states that the site investigation is based on the information collected pursuant to the preliminary assessment requirements in N.J.A.C. 7:26E-3.1. Additionally, because the person performing the remediation may proceed directly to subsequent phases of remediation without an independent preliminary assessment phase, the suggested revision is not appropriate.

672. COMMENT: Chevron U.S.A., Inc. believes N.J.A.C. 7:26E-3.3(b) should be revised to read: "... and shall satisfy the applicable following requirements:". All media at a site may not require investigation. As the Department notes in its background language, a ground water investigation, for example, is not required at every site.

673. COMMENT: Exxon Company, U.S.A. believes N.J.A.C. 7:26E-3.3(b) should be revised to add "as applicable." Some of the items listed may not be applicable.

RESPONSE: The Department agrees and has modified N.J.A.C. 7:26E-3.3(b) accordingly.

674. COMMENT: In N.J.A.C. 7:26E-3.3(d), the Department states that, "If at any time during the site investigation, any contamination is found above the applicable cleanup standards, then the site investigation may be discontinued and the remediation continued at either the remedial investigation or remedial action phase." American Cyanamid Company believes it is not logical as to why the Department would promulgate a rule that would result in the disruption of a remedial investigation if one area of contamination is found to be above the cleanup levels. This would result in a disjointed site investigation that is stopped any number of times to begin a remedial investigation whenever cleanup levels were exceeded. The Department should temporarily stop the site investigation if an area of contamination is found above the cleanup levels only if this finding could cause an immediate threat to worker health and safety and the environment. Once this area is addressed and the threat no longer exists, the Department should continue the site investigation to get a complete overall picture of the site and the areas to be remediated. Cyanamid recommended the Department revise this section to reflect these issues in order to get a more accurate knowledge of the impacts of a site to determine the degree of remediation required at a facility. The Department should not stop the site investigation if one area of contamination is found above the cleanup levels where there is no imminent threat to worker health and safety or the environment. If the Department retains this requirement as proposed in the final rule, it would result in inefficient, disjointed investigations and extended remediation programs which could actually defer the identification of highly contaminated areas requiring short-term action just based on the logistics of the overall site investigation.

675. COMMENT: Shell Oil Company commented that N.J.A.C. 7:26E-3.3(d) should be revised because interim remediation should only be undertaken when there is an evident potential for exposure and risk to human health and the environment. Usually this will need to first delineate contamination and sensitive receptors, assess transport/fate/exposure, set clean up levels, and then conduct remediation, if necessary.

RESPONSE: The purpose of the site investigation is to determine if contamination is present above an applicable remediation standard, not to determine the degree of remediation required. Once the site or area of concern is known to be contaminated, the person conducting the remediation should proceed to the remedial investigation to determine the degree and extent of contamination.

The intent of N.J.A.C. 7:26E-3.3(d) is to provide an investigator with the opportunity to move directly into the remedial investigation once contamination is detected at an area of concern rather than perform individual site investigations at any remaining areas of concern. The Department has no intention of stopping site investigations or impeding remedial progress except in those circumstances deemed an immediate threat to public health or the environment as stated by the commenter.

676. COMMENT: Chevron U.S.A., Inc. believes a new N.J.A.C. 7:26E-3.3(e) should be added to read, "if at any time during the site investigation phase it is determined that a suspected area of concern has (1) either not discharged, or (2) has discharged but the discharge has not resulted in an exceedance of any applicable cleanup standard; then that area shall require no additional investigation or remediation pursuant to this chapter."

RESPONSE: As stated in N.J.A.C. 7:26E-3.3(a), the purpose of the site investigation is to determine if any contaminants are present at the site above any applicable remediation standards; this is without regard to the existence or absence of a known or suspected discharge. If contaminants are below the applicable remediation standard, then no further action is required for the area of concern.

N.J.A.C. 7:26E-3.4

677. COMMENT: Public Service Electric and Gas believes N.J.A.C. 7:26E-3.4 should be revised to add an exemption to conducting a site investigation for remediation of specific discharge events, underground storage tanks and underground storage tank systems where the contaminant is known, contamination is visible, limited in areal extent, not in contact with ground water, where remediation is verifiable by field screening and is immediately cleaned up.

678. COMMENT: Atlantic Electric recommended N.J.A.C. 7:26E-3.4(a) be revised as follows: "Sampling shall be conducted in areas of concern where a known new release has occurred." Small releases (less than 20 gallons) of petroleum hydrocarbons should be exempt from these requirements.

RESPONSE: The purpose of the site investigation is to determine if any contaminants are present at the site above an applicable remediation standard. Once a potentially contaminated area of concern is identified, the only way a person can determine if the contaminants are present above the applicable remediation standard is through the collection and analysis of environmental samples. The actual sampling and analysis may be postponed and the requirements of the site investigation may not be satisfied until the later phases of the remedial process; however, before the Department will issue a "no further action" determination, the requirements of the site investigation must be met. The Department does not agree that minor discharges or underground storage tanks should be exempt from N.J.A.C. 7:26E. For further discussion, refer to comments and response in "Technical Requirements as Minimum Standards" in the "General Comments" section of this summary.

679. COMMENT: Lindabury, McCormick & Estabrook believes N.J.A.C. 7:26E-3.4, which provides that "sampling shall be conducted in all areas of concern . . .," is too broad. The definition of area of concern includes locations where hazardous substances, hazardous wastes, hazardous constituents or pollutants, were, inter alia, generated, manufactured, stored and handled. The requirement for sampling should be limited to those areas identified in the preliminary assessment as potentially contaminated areas of concern. Unless such clarification is provided, the regulations as proposed could be interpreted to require sampling at every area of concern, whether potentially contaminated or not.

RESPONSE: The Department has revised N.J.A.C. 7:26E-3.4(a) to require sampling only in "potentially contaminated areas of concern."

680. COMMENT: Although it may be appropriate to investigate all "areas of concern" at large hazardous waste sites or industrial properties undergoing remediation pursuant to the Environmental Cleanup Responsibility Act, Jersey Central Power and Light Company believes it is inappropriate to require sampling in all areas of concern at sites with small scale historical discharges. Sampling pursuant to N.J.A.C. 7:26E-3.4(a) should only occur in the specific area of a known discharge. The requirement to investigate all suspected or potentially impacted areas (as indicated by definition of area of concern) is unnecessary and extremely burdensome and will result in a great reduction of efficiency of remediation activities in New Jersey.

681. COMMENT: E.I. du Pont de Nemours and Company, Mobil Oil Corporation and the Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E-3.4(a) inappropriately requires sampling in all areas of concern regardless of whether a discharge is known or suspected. This proposal will require an inordinate amount of sampling and analysis, which is both costly and time-consuming, taxing the limited resources of the regulated community with no benefit to human health or the environment. E.I. du Pont, Mobil and the Chemical Industry Council of New Jersey recommended the following revision: "Sampling shall be conducted in all areas of concern where either a known or suspected discharge has occurred, whether relating to current or former uses of the site to determine . . ."

682. COMMENT: New Jersey Natural Gas Company believes it is inappropriate to require sampling in all areas of concern at N.J.A.C. 7:26E-3.4(a) and sampling should only occur in the specific area of a known discharge.

683. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. recommended the following revision to N.J.A.C. 7:26E-3.4: "Sampling shall be conducted in all areas of concern where either a known or suspected discharge to the environment has occurred, whether relating to current or former uses of the site, to determine risks related to the contaminants." The sampling of areas, whether a discharge has occurred or not, is costly, time-consuming, and inefficient in determining a risk to human health or the environment.

684. COMMENT: Atlantic Electric believes the requirement of demanding sampling in "all areas of concern" is overly burdensome and unjustifiable, not to mention extremely expensive. It does not leave room for any professional and/or engineering judgement/flexibility.

RESPONSE: The purpose of the preliminary assessment is to evaluate all areas of concern and to focus the efforts of the site investigation on those areas of concern which are "potentially contaminated." As stated in N.J.A.C. 7:26E-3.3(a), the purpose of the site investigation is to determine if any contaminants are present at the site above any applicable remediation standards; this is without regard to the existence or absence of a known or suspected discharge. Contamination resulting from small scale historical discharges which is above the remediation standard poses the same threat to human health and the environment as a known discharge and must be remedied accordingly. On adoption, the Department has clarified that a person need only sample potentially contaminated areas of concern, not all areas of concern as defined in N.J.A.C. 7:26E-1.8. A party will be able to identify potentially contaminated areas of concern using professional judgement and based upon the evaluation of the site or areas of concern conducted in the preliminary assessment.

685. COMMENT: Chevron U.S.A., Inc. recommended the following revision to N.J.A.C. 7:26E-3.4(a): "Sampling shall be conducted at all areas of concern which are known or suspected to have discharged. Sampling of an area of concern is not required if it can be demonstrated through prior sampling data or other relevant information that the area did not result in a discharge of contaminants above the applicable cleanup standard."

RESPONSE: As stated in N.J.A.C. 7:26E-3.3(a), the purpose of the site investigation is to determine if any contaminants are present at the site above any applicable remediation standards; this is without regard to the existence or absence of a known or suspected discharge.

In accordance with N.J.A.C. 7:26E-3.2(b), the Department recognizes that prior sampling data may demonstrate that an area of concern is not contaminated. If this sampling was conducted in substantial compliance with N.J.A.C. 7:26E, the Department will be assured that human health and the environment are protected.

686. COMMENT: E.I. du Pont de Nemours and Company, Mobil Oil Corporation and the Chemical Industry Council of New Jersey believe requiring sampling locations to comply with N.J.A.C. 7:26E-3.5 through 3.9 significantly limits the flexibility of the site investigation and does not take into consideration site specific conditions. E.I. du Pont, Mobil and the Chemical Industry Council of New Jersey suggested that N.J.A.C. 7:26E-3.4(a)3 be expanded to include the phrase "unless approved by the Department."

687. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.4(a)3 should be revised as follows: "Sampling locations shall comply with requirements listed in N.J.A.C. 7:26E-3.5 through 3.9 unless approved by the Department." The sampling locations need flexibility relative to site specific conditions.

688. COMMENT: The General Electric Company commented that frequency and location should be flexible and based on professional judgement and site specific conditions (for all environmental media). The purpose of sampling should be to achieve site specific characterization rather than to complete task oriented checklists.

689. COMMENT: Atlantic Electric believes N.J.A.C. 7:26E-3.4(a)3 is overly restrictive. The Department does not take site specific conditions into account. Atlantic Electric also believes the requirements in N.J.A.C. 7:26E-3.5 and 3.9 are overly broad.

RESPONSE: The rule already allows, in N.J.A.C. 7:26E-1.6(c), for the use of alternate sampling, analytical, or investigatory methods in certain limited situations (see N.J.A.C. 7:26E-2.1(a)4, 2.1(a)6 and 3.9). In response to the request for increased flexibility in the site remediation process, the Department is allowing for the use of alternate approaches, subject to Departmental preapproval pursuant to the modification in N.J.A.C. 7:26E-1.6(d). In this manner, site specific conditions can be taken into account.

The requirements pursuant to N.J.A.C. 7:26E-3.5 and 3.9 are intentionally broad to provide guidance for addressing as many types of areas of concern as possible with limited Department involvement or oversight.

690. COMMENT: The General Electric Company believes the new rule at N.J.A.C. 7:26E-3.4(c) should include provisions for those instances where composite sampling may be appropriate. A decision to use composite sampling should be based on professional judgement and Department review.

691. COMMENT: Colonial Pipeline Company believes N.J.A.C. 7:26E-3.4(c) should be deleted. Composite sampling over a sample interval from a specific point is valid (except for volatile organics).

692. COMMENT: Atlantic Electric believes the Department should allow composite sampling for screening purposes.

693. COMMENT: E.I. du Pont de Nemours and Company believes the Department is inappropriately limiting flexibility in the site investigation at N.J.A.C. 7:26E-3.4(c). E.I. du Pont was concerned that the Department is inappropriately limiting sampling, particularly in a remediation phase that could be used for "screening" purposes. There may be some areas of concern with site specific conditions where composite sampling is entirely appropriate. E.I. du Pont suggested this section be expanded to include the phrase "unless otherwise approved by the Department."

694. COMMENT: Chevron U.S.A., Inc. believes N.J.A.C. 7:26E-3.4(c) should be deleted. Composite sampling may provide statistically useful and economical data. The Department must provide flexibility in sampling.

695. COMMENT: Mobil Oil Corporation and the Chemical Industry Council of New Jersey believe N.J.A.C. 7:26E-3.4(c) should be expanded to include the phrase ".... unless otherwise approved by the Department..." There may be areas of concern where site specific conditions may warrant compositing of samples.

696. COMMENT: Union Carbide Chemicals and Plastics Company believe N.J.A.C. 7:26E-3.4(c) should be deleted. This poses an inappropriate limit on flexibility. There may be areas of concern where site specific conditions may warrant compositing of samples.

697. COMMENT: Exxon Company, U.S.A. recommended N.J.A.C. 7:26E-3.4(c) be modified to allow more flexibility in the selection and use of composite samples, when scientifically justified. Compositing of samples is performed when an average concentration of contamination is required over a defined number of sampling points. In certain instances this procedure is scientifically justifiable and has been documented for statistically based investigation(s) in peer review literature and Environmental Protection Agency guidance documents. Composite sampling coupled with statistical analysis for a specific site and range of contaminants for a given situation may be a cost effective way to characterize a site or a portion thereof.

698. COMMENT: Allied Signal, Inc. believes the new rule should include provisions for those instances where composite sampling is appropriate. A decision to use composite sampling should be based on professional judgement and Department review.

699. COMMENT: CIBA-GEIGY Corporation believes composite sampling and analysis is a useful and cost-efficient procedure and should not be unilaterally eliminated. Rather, it should be approved on a "case by case" basis with justification from the applicant.

700. COMMENT: Chemical Land Holdings, Inc. believes a composite program, if properly implemented, would allow a considerable cost savings with no reduction in the ability to determine the distribution of soils that exceed the soil cleanup standards and should be allowed at N.J.A.C. 7:26E-3.4(c). A properly designed compositing program would utilize an analytical detection limit for each compound of interest that is at least as low as the soil cleanup standard divided by the number of samples in the composite. An example for a ten sample composite for PCBs in subsurface soils is provided in which the proposed 100 mg/kg cleanup standard is divided by 10, yielding a 10.0 mg/kg maximum required detection limit. Therefore, if only one discrete sample in the composite exceeded the soil clean-up standard, PCBs would be detected, allowing the subsequent decision to be made to analyze each of the discrete samples in the composite. By using this approach, only those samples that actually or potentially exceed the soil standard need to be analyzed, thus providing a significant potential savings in analytical costs. Admittedly, it would be difficult to implement this type of composite program if the list of compounds to be analyzed were very large (for example, Target Compound List). However, this type of approach has proven very workable in programs that are targeted to a relatively short list of analytes.

701. COMMENT: Public Service Electric and Gas Company believes composite sampling is a technically valid sampling procedure and should be allowed at N.J.A.C. 7:26E-3.4(c). Its use can greatly reduce the number of samples required and the associated analytical costs especially in areas anticipated to be below the relevant cleanup standards. Composite sampling is appropriate when: $C<1/N * S$ and $C>MDL$ where C is the concentration of the compound or element in the composite sample, N is the number of subsamples used to create the composite, S is the relevant cleanup standard and MDL is the analytical method detection limit. Under these conditions the concentration of all subsamples is below the relevant cleanup standards and accurately

measured by the analytical procedure used. In the event that C>1/N * S, then at least one of the subsamples could exceed the relevant cleanup standard and all N sample locations would need to be sampled individually. Public Service Electric and Gas Company believes composite sampling should be allowed as an option to the person responsible for conducting the remedial investigation provided they comply with appropriate technical constraints as described above.

RESPONSE: Composite sampling is unacceptable in most cases. Although this investigative method may be useful for obtaining general site screening data, composite samples are not appropriate when comparing analytical data with an applicable standard. This is because the heterogeneity of the sample and the small subsample size may result in a non-representative subsample which is withdrawn for analysis in the laboratory, and for some analytes, dilution caused by compositing may raise the method detection limit above the applicable remediation standard. Discrete sampling is generally the only appropriate method of sample collection for the purpose of making determinations for futher action for an area of concern. However, any party may petition the Department to use composite sampling at a specific site pursuant to N.J.A.C. 7:26E-1.6(d).

702. COMMENT: Atlantic Electric disagreed with the use of inventory control records as indications of a release at N.J.A.C. 7:26E-3.4(d). Inventory control records are usually done for accounting purposes and do not take process reactions and the like into account. Furthermore, it is not clear as to how many years of inventory control records have to be reviewed (as this can be an impossible task). Atlantic Electric strongly urged the Department to delete this section.

703. COMMENT: E. I. du Pont de Nemours and Company believes inventory control records would not necessarily identify or confirm a loss to environmental medium via a leak. Inventory control records are maintained as a normal and routine accounting procedure by industry. These records, in and of themselves, however, often would not identify a loss of inventory due to a leak. Inventory can be "lost" due to process reactions and permitted discharges. E. I. du Pont recommended deletion of this section.

704. COMMENT: Union Carbide Chemicals and Plastics Company recommended N.J.A.C. 7:26E-3.4(d) be deleted. The section should be deleted since losses are not necessarily related to leaks. Visual inspection of the areas would yield more valuable information than reconciliation of inventory records. Also, the balancing of inventory for many facilities would be an endless and inconclusive task. Inventory reconciliation is usually too imprecise to determine if a release has occurred in most cases.

705. COMMENT: Chevron U.S.A., Inc. recommended that N.J.A.C. 7:26E-3.4(d) be deleted. This inventory control is part of the preliminary assessment and only areas with known or suspected discharges should require investigation.

706. COMMENT: New Jersey Natural Gas Company believes N.J.A.C. 7:26E-3.4(d) is a very broad requirement which is not very well defined and may be burdensome to large industrial facilities. This subsection includes a broad, general requirement for review of inventory control records of all hazardous substances, hazardous wastes, hazardous constituents, and pollutants, with sampling required at potential leak areas.

707. COMMENT: Mobil Oil Corporation believes losses of substances in inventory control records are not necessarily indicative of leaks. Often times inventory records are accounting records. Inventory "losses" at the refinery level are often due to process reactions and permitted discharges.

708. COMMENT: The Chemical Industry Council of New Jersey believes inventory control records are not indicative of leaks and N.J.A.C. 7:26E-3.4(d) should be deleted. Oftentimes inventory records are accounting records. Inventory "losses" are often due to process reactions and permitted discharges. The Chemical Industry Council of New Jersey recommended this section be deleted.

RESPONSE: The requirements to review inventory control records at N.J.A.C. 7:26E-3.4(d) has been modified and moved to N.J.A.C. 7:26E-3.1(c) where it is more appropriate. The inventory control records, if available, shall be evaluated in the preliminary assessment phase in an effort to identify potentially contaminated areas of concern. Inventory control records state where materials are stored or were stored and, in some instances, may indicate unexplained product loss. This effort may lead to the identification of additional areas of concern or may assist in attributing contamination to an area of concern. In either case, this information is essential for the Department, or any individual, to make well-informed determinations of whether or not further action is required at potentially contaminated sites. These records should be reviewed to the extent required to make a determination as to whether or not the area of concern is potentially contaminated. If potentially contaminated, the area of concern must be sampled.

709. COMMENT: N.J.A.C. 7:26E-3.4(d) states that an inventory of control records shall be reviewed for all hazardous substances, hazardous wastes, hazardous constituents, and pollutants. Public Service Electric and Gas Company believes this requirement is clearly not a sampling activity although located in the general sampling requirements. It is a "paper procedure." This activity should be done during the preliminary assessment phase, N.J.A.C. 7:26E-3.1, particularly during the review of historical material relevant to the site undergoing remediation.

This will allow for any areas identified for having hazardous materials, hazardous substances, hazardous constituents and pollutants to be sampled during site investigation. The site investigation report, N.J.A.C. 7:26E-3.10(a), should not include a review of control records, because, again, this is a "paper activity" and not an on-site investigation. Language should also be inserted to delete from the review of inventory control records any hazardous materials, hazardous substances and hazardous constituents that are used or have been used for office operations (for example, white-out, Windex, etc.) or, at a minimum, allow the regulated party to apply for an exemption to this phase of the assessment.

710. COMMENT: Inventory monitoring can indicate leakage, however, The General Electric Company and Allied Signal, Inc. believe the requirement pursuant to N.J.A.C. 7:26E-3.4(d) should be based on the availability of site specific storage and inventory control records.

RESPONSE: The requirement to review inventory control records will be moved to N.J.A.C. 7:26E-3.1(c)1v where it is more appropriate and, under N.J.A.C. 7:26E-3.1, is required to the extent available by diligent inquiry. By placing the requirement at N.J.A.C. 7:26E-3.1(c)1v(9), the Department has clarified that the requirement to review inventory control records is applicable to tanks and similar structures. It is not the Department's intent to require the review of inventory records of supplies for office use.

711. COMMENT: Jersey Central Power and Light Company believes that N.J.A.C. 7:26E-3.4(d), which includes a broad, general requirement for review of inventory control records of all hazardous substances, hazardous wastes, hazardous constituents, and pollutants, with sampling required at potential leak areas, is a broad requirement which is not well defined and will be burdensome to large industrial facilities.

RESPONSE: The requirement to review inventory control records has been moved to N.J.A.C. 7:26E-3.1(c)1v where it is more appropriate. The inventory control records, if available, shall be evaluated in the preliminary assessment phase in an effort to identify potentially contaminated areas of concern. If a potential leak area is identified as a potentially contaminated area of concern in the preliminary assessment, then the area must be sampled.

Obviously, the greater the number of storage units, the greater the number of potentially contaminated areas of concern and, therefore, a proportionately greater effort is required to evaluate the site. This approach is consistent throughout these regulations. The Department believes the information in question is routinely maintained and readily available at large industrial facilities and this requirement does not create an undue burden.

712. COMMENT: Mobil Oil Corporation recommended that N.J.A.C. 7:26E-3.4(d) be deleted because the Department already requires tank testing and electronic monitoring on underground storage tanks as the primary forms of leak detection, and inventory records as a secondary form. In the alternative, samples should be only required when physical observation confirms that leaks have occurred.

RESPONSE: The Department agrees that requiring an evaluation of inventory control records is unnecessary when a Department-approved leak detection system has always been in place. N.J.A.C. 7:26E-3.4(d) has been modified accordingly.

713. COMMENT: With regard to N.J.A.C. 7:26E-3.4, Exxon Company, U.S.A. recommended changing "leak" to "discharge."

RESPONSE: The requirement to review inventory control records has been moved to N.J.A.C. 7:26E-3.1(c) where it is more appropriate and the sentence containing the word "leak" has been deleted.

N.J.A.C. 7:26E-3.5

714. COMMENT: Altantic Electric, E.I. duPont de Nemours and Company, Chevron U.S.A., Inc. New Jersey Natural Gas Company, The General Electric Company, Jersey Central Power and Light Company,

Union Carbide Chemicals and Plastics Company, Inc., Exxon Company, U.S.A. and the Chemical Industry Council of New Jersey commented that the Department does not have the statutory authority to require remediation, including sampling, of building interiors and recommended deletion of all requirements regarding buildings.

715. COMMENT: E.I. duPont de Nemours and Company commented that the Air Pollution Control Act regulates air contaminants "in the outdoor atmosphere;" the Solid Waste Management Act regulates the discharge of solid and hazardous wastes "into or on any land or water." Both the Spill Act and the Water Pollution Control Act identify specific environmental media (that is, land or water) of concern. Nothing in any of these statutes expressly or implicitly gives the Department the authority to mandate cleanup of building interiors.

716. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that employees at industrial sites are adequately protected by the Occupational Safety and Health Act (OSHA). It is not necessary for the Department to infringe on workplace safety standards contained in OSHA and related regulations to protect workers. Union Carbide Chemicals and Plastics Company, Inc. stated that N.J.A.C. 7:26E also infringes on Federal legislation for contaminants such as asbestos and lead.

717. COMMENT: Schering Laboratories commented that building interiors, particularly surveys for asbestos, are covered by other regulatory agencies, and should not be covered under this regulation. It was suggested that the building interior requirements at N.J.A.C. 7:26E-3.5 be deleted, except when no other regulation applies.

718. COMMENT: Exxon Company, U.S.A. commented that the protection of worker health and safety regarding asbestos is regulated by the Occupational Safety and Health Act as promulgated in 29 CFR 1910.1001 and 1101. The State does not have jurisdiction to impose additional requirements regarding worker safety and health. Additionally, the State does regulate asbestos abatement activities through a myriad of State agencies such as the Departments of Community Affairs, Health and Treasury.

719. COMMENT: Rutgers Environmental Law Clinic commented that for building interiors, remediation must be required where a contaminant present above the cleanup standards and discovered in a building is not the result of a "discharge." N.J.A.C. 7:26E-3.5(a)(5).

RESPONSE: The Department continues to evaluate the interplay between the Occupational Safety and Health Act (29 U.S.C. et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Toxic Substances Control Act (15 U.S.C. 2601 et seq.), Asbestos Hazard Emergency Response Act (15 U.S.C. 2641 et seq.), other Federal and State legislation, and State environmental statutes. As noted by the varied comments on the Department's statutory authority to require the remediation of building interiors, the issue is not settled. On adoption, the Department has decided to modify N.J.A.C. 7:26E-3.5. The Department will not always mandate an investigation of building interiors before issuing a no further action determination. In accordance with modifications to the definitions of "discharge" and "receptor" on adoption, and as fully explained in the Department's responses to comments in the definition of "environmental media," the Department will only require an investigation of building interiors pursuant to N.J.A.C. 7:26E-3.5 in certain circumstances. First, since certain areas inside buildings can be significant sources of contamination to the exterior environment, these areas must be investigated. For example, areas such as floor drains, trenches, pits and sumps may leak contaminants to the soils and ground water beneath a building. Specific sampling requirements for these areas are set forth at N.J.A.C. 7:26E-3.9(d)1, 4 and (e)3. Second, a building interior may act as a source or reservior of contaminants that may substantially be released in an uncontrolled manner into the environment, and these areas must be evaluated. Third, a private party may seek the Department's approval for an investigation of a building interior; if such approval is sought, the Department will require the investigation be done in accordance with N.J.A.C. 7:26E-3.5. In addition, air sampling inside a building may be required pursuant to N.J.A.C. 7:26E-4.1(a)3 if any discharges outside or beneath the building have the potential to migrate inside the building, causing a threat to human health. Finally, the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., requires the Department to adopt regulations "for the detoxification of an industrial establishment, including buildings and equipment . . .," (N.J.S.A. 13:1K-10a). N.J.A.C. 7:26E-3.5 does just that.

The Department has the statutory authority to develop a comprehensive set of rules to assure a systematic and consistent approach to the investigation and remediation of potentially contaminated sites in New Jersey pursuant to N.J.S.A. 58:10-23.24. The inclusion of buildings assures that all potential discharges are appropriately investigated and addressed. For further discussion of this issue, the Department refers the commenters to the response to comments on the definition of "environmental media" (N.J.A.C. 7:26E-1.8).

720. COMMENT: E.I. duPont de Nemours and Company commented that since buildings at industrial sites are typically places of controlled access and controlled exposure, the risk to public health is minimal. Buildings are intrinsically different from normally recognized environmental media, which are appropriately the focus of these regulations.

721. COMMENT: E.I. duPont de Nemours and Company and Environmental Liability Management, Inc., suggested that the Department limit the rule to residential structures or to industrial structures for which public access is not adequately controlled by security measures, facility fencing, or other means.

722. COMMENT: Shell Oil Company commented that building interior requirements should only be required for property transfers.

RESPONSE: The Department will review building interior remediation when the person conducting a remediation seeks the Department's review and approval or is otherwise required to remediate the building interior as specified in the above response or in a Department oversight document.

It is not appropriate to limit building interior remediation to those buildings which have public access because discharges within a building may migrate to the environment outside or beneath the building.

Further, it is not appropriate to limit building interior remediations to buildings undergoing property transfers because environmental risks are not triggered by property transfers, but rather by discharges within the building which may migrate to the environment outside or beneath the building.

723. COMMENT: Shell Oil Company questioned whether building interiors need to be sampled for an underground storage tank project.

RESPONSE: Compliance with the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10-21 et seq. will not trigger an investigation of a building interior except where there is a potential discharge inside the building which may migrate to the environment outside or beneath the building. In addition, air sampling inside a building may be required pursuant to N.J.A.C. 7:26E-4.1(a)3 if any discharges outside or beneath the building have the potential to migrate inside the building, causing a threat to human health.

724. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company commented that N.J.A.C. 7:26E-3.5 indicates that asbestos surveys must be conducted in accordance with Asbestos Hazard Emergency Response Act regulations. The Asbestos Hazard Emergency Response Act (40 CFR 763, Subpart E) is a Federal regulation that applies to schools rather than industrial facilities. Regulations which apply to industrial facilities such as the Occupational Safety and Health Act and the National Emission Standards for Hazardous Air Pollutants (40 CFR, Part 61) are more appropriately applied than these proposed rules.

RESPONSE: The Asbestos Hazard Emergency Response Act, as amended by the "Asbestos School Hazard Reauthorization Act of 1990," regulates asbestos training requirements (for asbestos surveys) for schools or other public or commercial buildings. The Department believes the survey requirement set forth in the Asbestos Hazard Emergency Response Act (AHERA) represents an appropriate minimum standard for asbestos surveying regardless of building ownership or use as noted above, the investigation requirements at N.J.A.C. 7:26E-3.5 are not mandatory for all structures and, pursuant to N.J.A.C. 7:26E-1.6(d), alternate methods for conducting asbestos surveys may be proposed.

725. COMMENT: Exxon Company, U.S.A. commented that N.J.A.C. 7:26D recommended cleanup criteria based on health risk assessments for antimony, arsenic, cadmium, lead, mercury and PCBs for interior building surfaces. These standards were set on the basis of unrealistic human exposure estimates of contact and contaminant absorption from contaminated surfaces in both an industrial and non-industrial setting. The use of these standards is challenged since there is no scientific basis for the occupational numeric criteria surface criteria specified herein. Additionally, worker safety and health in the industrial setting is regulated by the United States Department of Labor through the Occupational Safety and Health Administration, and the state of New Jersey does not have jurisdiction to set occupational exposure. Furthermore, the basis to sample and analyze for target compound list

plus 30/target analyte list or priority pollutants plus 40 in accordance with N.J.A.C. 7:26E-2.1 is unclear, as well as the technical basis for sampling for volatile organics. It was recommended to delete the proposed cleanup criteria for building structures within industrial locations as the science used is flawed and the Department does not have the statutory authority.

RESPONSE: The Department has not adopted N.J.A.C. 7:26D, and therefore, will develop remediation standards on a case by case basis taking into consideration factors such as physical site characteristics and site use.

The Department has the authority to regulate discharges of hazardous substances which includes the development of appropriate cleanup standards so that the determination as to the adequacy of a remediation can be made. Thus, as was the case for soil and/or ground water analyses, target compound list/target analyte list or priority pollutants plus 40 analyses should be conducted if contaminants in an area are unknown or not well documented. Otherwise, analysis is only required for those contaminants which may be present in the area. For more details, refer to comments and responses in section N.J.A.C. 7:26E-2.1 of this summary.

726. COMMENT: Exxon Company, U.S.A. commented that there is no technical merit to conducting an asbestos investigation of all structures, unless the structure will be demolished as part of a remedial action. Therefore, Exxon Company recommended this subparagraph be deleted.

727. COMMENT: Hackensack Water Company commented that N.J.A.C. 7:26E-3.5(a)4 requires the asbestos content be determined in ceiling tiles and vinyl asbestos tiles and questioned whether all intact, non-friable, possible asbestos-containing material needs to be sampled. Furthermore, since installing floor and/or ceiling tile does not constitute a discharge, Hackenack Water Company questioned why sampling of these materials is required.

RESPONSE: Conducting asbestos surveys is not mandatory for all sites (refer to response to comments at N.J.A.C. 7:26E-3.5 above regarding the Department's authority to regulate building interiors). However, if building interiors will be investigated, the Department believes that the Asbestos Hazard Emergency Response Act (AHERA) provides the appropriate minimum standard for conducting asbestos surveys and a means to determine if an asbestos discharge has occurred. Alternate methods to determine if an asbestos discharge has occurred may be proposed pursuant to N.J.A.C. 7:26E-1.6(d).

According to AHERA, ceiling and floor tile, and other materials, do not have to be sampled if they are assumed to contain asbestos and are treated as such; however, material suspected to contain friable or non-friable asbestos must be sampled to confirm the absence of asbestos.

728. COMMENT: Rutgers Environmental Law Clinic commented that the Department should provide more specific standards for the investigation of building interiors regarding the methodology for wipe samples, given the potential for inaccuracies in those samples.

RESPONSE: The Department refers the commenter to the New Jersey Department of Environmental Protection and Energy's Field Sampling Procedures Manual, May 1992 for acceptable methods for the collection of wipe samples. In addition, as indicated in N.J.A.C. 7:26E-3.4(a)1 and 2, sampling is to be biased to the suspected location of greatest contamination based on professional judgement and area history.

729. COMMENT: Exxon Company, U.S.A. and Environmental Liability Management, Inc., commented that sampling requirements at N.J.A.C. 7:26E-3.5(a)3 should be more flexible since there will be many situations where only a small portion of a building interior surface may be contaminated which could be validated by sampling the suspect areas and outside the perimeter of the area. A "blanket" policy to conduct "non-bias" sampling based only on the interior building square footage is restrictive and burdensome. This is also inconsistent with other sections within the regulations which promote bias sampling strategies. The commenters recommended that the Department develop alternative language that incorporates the historical data gathered during the preliminary investigation, along with the professional judgement of the investigator, to develop an alternative sampling strategy.

RESPONSE: N.J.A.C. 7:26E-3.4(a)1 and 2 indicate how samples should be biased for the site investigation and N.J.A.C. 7:26E-3.5(a)3 provides a minimum sampling frequency. No sampling is required if there is no reason to believe interior surfaces are contaminated pursuant to N.J.A.C. 7:26E-3.5(a)2. Alternate approaches to building interior remediation may be proposed pursuant to N.J.A.C. 7:26E-1.6(d).

730. COMMENT: Exxon Company, U.S.A. commented that the flexibility afforded in this section is commendable; however, it was recommended that the concept of accessible surface and exposures criteria as defined in the EPA PCB Final Rule (40 CFR 761) be used to allow less stringent surface contamination criteria for non-mobile contaminants in areas that have restricted or limited access. Exxon Company, U.S.A. recommended that the Department define surface classifications based on the realistic exposure assessment scenarios that differentiate between accessible and non-accessible surfaces in an occupational environment. Additionally, it was recommended that scientifically based dermal absorption rates and, ingestion rate/uptake efficiency be incorporated into the setting of surface contamination criteria for industrial facilities.

RESPONSE: N.J.A.C. 7:26E provides requirements for sampling and analytical methods, sample frequency and location, and other requirements related to site remediation. N.J.A.C. 7:26E does not specify cleanup criteria. Such criteria are currently developed on a site specific basis.

N.J.A.C. 7:26E-3.6

731. COMMENT: Exxon Company, U.S.A. believes no guidance was provided for the disposal of drill cuttings at N.J.A.C. 7:26E-3.6. It was recommended that upon completion, drill cuttings be either re-introduced into the borehole or stored on site to await future remediation, if necessary.

RESPONSE: Drill cuttings which do not exhibit contamination at or above an applicable remediation standard may be re-introduced into the borehole. Drill cuttings which exhibit contamination at or above an applicable standard must be disposed of in accordance with N.J.A.C. 7:26.

732. COMMENT: Atlantic Electric objected to N.J.A.C. 7:26E-3.6(a)1. There are miles of underground cable throughout the State. The various gas companies also have numerous underground pipelines transporting gases. Atlantic Electric pointed out the extreme safety concerns of having companies conducting borings/excavations wherever there appears to be metallic substances underground (detected by the techniques mentioned). Some of the potential results would be: 1. Death or injury to improperly trained personnel conducting borings or excavation. 2. Rupture of gas pipelines which may lead to large scale explosions as gas migrates into structures. 3. Disruptions of electrical and/or gas and/or telephone services, potentially to whole communities. Atlantic Electric urged the Department to rethink this issue before any disasters occur. At the very least, the Department should sit down with the State's utilities to come up with a safe and workable plan to conduct surveys and borings/excavations leading from such surveys. Atlantic Electric urged the Department to delete this section. Not only does it place parties at risk from a safety and health standpoint, it is overly burdensome.

733. COMMENT: Although specified surveys in N.J.A.C. 7:26E-3.6(a)1 are useful for finding buried metal or evidence of disturbed soils, E. I. du Pont de Nemours and Company believes the metal that is detected is not always caused by the presence of drums containing chemicals, nor do disturbed soils always indicate burial activities. The nature, age, and size of the site should be considered before conducting the geophysical survey. In addition, active industrial sites are often laced with underground utilities. These utilities will interfere with the survey. It should be the responsibility of the consultant or geophysical services contractor to determine the feasibility of conducting a successful service geophysical survey based on site specific conditions.

Process line evaluation, review of site plans, or inquiries of responsible site personnel should be conducted. If a surface geophysical survey (for example, ground penetrating radar, magnetometer) is conducted, it should be designed with a certain target size in mind. Single isolated drums may be difficult to find unless the survey is conducted utilizing closely spaced grid lines. When the survey is completed, a verification phase should be conducted. The use of test pits is recommended. E. I. du Pont recommended that the wording "shall be conducted" be changed to "may be conducted, depending on site conditions and the degree of geophysical constraints or interferences, as determined by a qualified individual if..."

734. COMMENT: Chemical Land Holdings, Inc. believes N.J.A.C. 7:26E-3.6(a)1 should be modified to indicate that such surveys "shall be conducted, where feasible, if:..." The success of most surface geophysical survey techniques is highly dependent upon the level of interference from such things as power lines, fences, metallic buildings, and underground utilities. The use of test pits can also be significantly

constrained by both above ground and underground utilities. Accordingly, the term "where feasibile" should be added to this paragraph of the regulations. This change would clarify for the regulated community that such techniques have physical limitations, but would not alter the Department's preference that such surveys be conducted.

735. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.6(a)1 should be revised as follows: "A survey for buried drums, tanks or waste using test pits, ground penetrating radar, magnetometry, electromagnetics, or other techniques capable of detecting metal containers and other waste may be conducted depending on site conditions and degree of geophysical constraints or interferences as determined by a qualified individual if:" In many instances, geophysical tools are unable to distinguish between drums, rubble, and tanks and other site features such as utilities and fences. Geophysical surveys are not necessary in every instance.

736. COMMENT: The half life of a buried drum is thought to be approximately five years, therefore, the Chemical Industry Council of New Jersey believes the investigations required in N.J.A.C. 7:26E-3.6(a)1 may not be appropriate for reports of older buried drums. Based on the results of such investigations at the Lone Pine Landfill, ground penetrating radar and other techniques were not useful for other than legal reasons, and did not lead to more successful remediation. The use of geophysical methods should be left to the investigator and the responsible party.

RESPONSE: The rule does not require all sites to undergo a survey for buried drums, but only those sites where buried drums are likely to exist. For such sites, the Department believes that the difficulties involved in conducting and interpreting drum surveys are balanced by the potential threat to a human health and the environment if buried drums, tanks, or other waste goes undetected. The Department believes N.J.A.C. 7:26E-3.6(a)1 affords adequate flexibility for selecting the most appropriate investigative technique for individual site specific conditions by providing for the use test pits, ground penetrating radar, magnetometry or other techniques. In every instance, when conducting subsurface investigations or remediation, extreme care must be exercised and every precaution taken to insure the safety and health of all potentially impacted individuals. This is precisely why the Department has afforded the flexibility for selecting the most appropriate investigative technique for the individual site specific conditions. Additionally, the requirement to conduct a subsurface investigation pursuant to N.J.A.C. 7:26E-3.6(a)1 applies only when there have been reports of buried drums, tanks or waste; ground water contamination is detected and no source has been identified; or the aerial photographic history of the site indicates the presence of drums, tanks or waste in or adjacent to regraded and/or filled areas.

737. COMMENT: E. I. du Pont de Nemours and Company and Mobil Oil Corporation believe requiring the use of ground penetrating radar or magnetometer surveys because of "reports" of buried drums at N.J.A.C. 7:26E-3.6(a)1i may not be warranted. Documented cases have occurred in which disgruntled employees or people living next to landfills, chemical manufacturing facilities, and similar sites have stated unfounded stories relating to illegal drum disposal. Any "reports" should be substantiated before requiring a potentially responsible party to conduct a surface geophysical survey.

738. COMMENT: Environmental Liability Management, Inc. requested that wording of N.J.A.C. 7:26E-3.6(a)1i be changed to read: "There have been any credible reports of buried drums, tanks, or waste." The basis for adding the word credible is obvious.

739. COMMENT: Chevron U.S.A., Inc. believes that the word "documented" or "substantiated" should be added to N.J.A.C. 7:26E-3.6(a)1i. A person should only be obliged to confirm evidence or suspicions which appear to have a reasonable foundation in fact.

740. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.6(a)1i should be revised as follows: "There have been documented reports of buried drums, tanks, or waste:". The use of geophysical techniques or test pits should be employed in cases based on facts rather than recollections or unfounded reports.

RESPONSE: In those instances where a responsible party is able to refute, discredit or otherwise disprove any allegation of subsurface disposal, the individual may apply for a waiver for this requirement pursaunt to N.J.A.C. 7:26E-1.6(d) and, if approved, no subsurface investigation would be required.

741. COMMENT: The types of surveys specified in N.J.A.C. 7:26E-3.6(a)1 are useful for finding buried metal; however, Mobil Oil Corporation believes the metal that is detected is not always due to the presence of drums containing chemicals. Active industrial sites are often laced with underground utilities. These utilities will interfere with these surveys. Site specific conditions should be considered before conducting the geophysical survey. The feasibility of conducting a successful surface geophysical survey should be determined by the technical experts in the field on a site specific basis. There are many service station and terminal locations which have residual contamination from former discharges from old underground storage tanks and lines which have been removed in recent years as part of tank upgrade programs. These facilities undergo assessment and remediation, but no exact source of the discharge is known. Mobil interpreted this section to require that all such facilities would require an underground survey. Although this may be useful at some facilities, this requirement for every such facility is scientifically unwarranted and unnecessarily expensive. Mobil recommended that "shall be conducted" be changed to "may be conducted depending on site specific conditions."

RESPONSE: The requirement at N.J.A.C. 7:26E-3.6(a)1 is intended to be used to identify unknown sources of contamination on previously investigated or unremediated properties. Although the contamination in the commenter's example is not attributable to a specific individual source, the contamination is known to be originating from a former tank or pipeline whose location could be identified; therefore, a subsurface source investigation would not be warranted.

742. COMMENT: Specifying a minimum depth of "20 feet or deeper" for buried drum, test pits, etc. at N.J.A.C. 7:26E-3.6(a) is a good practice, but CIBA-GEIGY Corporation believes flexibility should be left up to the Department. A 10 foot deep pit over bedrock does not require a 20 foot excavation; on the other hand a 20 foot pit in sandy soil may be insufficient.

743. COMMENT: The most commonly available terrain conductivity instrument, the EM-31, has a penetration depth of six meters, or approximately 19 feet. Therefore, the Chemical Industry Council of New Jersey believes the proposed rule at N.J.A.C. 7:26E-3.6(a)1 should use six meters rather than 20 as a limit.

The Chemical Industry Council of New Jersey recommended the following modification: Change ". . . 20 feet or deeper shall be conducted if:" to "20 feet may be conducted depending on site conditions and the degree of geophysical constraints or interferences as determined by a qualified individual if:"

RESPONSE: N.J.A.C. 7:26E-3.6(a)1 states that the investigatory technique employed must be capable of detecting metal containers or other waste to an average depth of 20 feet. If 20 feet is considered to be an impractical depth for the survey, a variance based on site specific conditions may be requested pursuant to N.J.A.C. 7:26E-1.6(d). On the other hand, the survey should be extended to a deeper depth if indicated by site specific conditions pursuant to N.J.A.C. 7:26E-1.7.

744. COMMENT: Ground water contamination, at various concentrations, without source identification is a common occurence found during preliminary investigations. However, The General Electric Company and Allied Signal, Inc. believe identification of contaminated ground water in itself does not warrant the required geophysical investigations for buried drums, tanks, or waste as required at N.J.A.C. 7:26E-3.6(a)1ii. Various other circumstances may exist, other than a buried source, for the detection of impacted ground water. These may include but not be limited to off-site sources or contaminated soil sources from surface spills. The detection of ground water contamination should first require the on-site delineation of the ground water contamination which may lead to the source. This procedure is well understood and presented in various guidance documents including the Resource Conservation and Recovery Act Ground Water Monitoring Technical Enforcement Guidance Document (USEPA, 1985). In addition, the phrase "Detection of ground water contamination" should be clarified in this section to include the level of detection that would trigger additional investigation.

745. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.6(a)1ii should be deleted. Often ground water contamination sources are remote from detection points and are not indicative of drums or tanks. Many complex factors such as site geology, hydrogeology, and contaminant fate and transport prevent clearly determining the source.

746. COMMENT: Beneath large industrial sites, ground water contamination is sometimes detected, and the source is not always immediately apparent. E.I. duPont de Nemours and Company believes requiring a surface geophysical survey because the source is unknown

at N.J.A.C. 7:26E-3.6(a)1ii may be premature. A phased approach may be better suited to determining the source of ground water contamination.

747. COMMENT: The General Electric Company believes the regulations requiring site investigations are burdensome. N.J.A.C. 7:26E-3.6(a)1 requires magnetometer, ground-penetrating radar and other methods to be used for subsurface detection of metal containers wherever ground water contamination has been detected and no source has been located. Techniques for subsurface metal detection are appropriate where drums or tanks are known or suspected to have been buried on site based on the site history compiled in the assessment. However, there are numerous potential sources of ground water contamination, including migration from off-site areas, that are totally unrelated to metal containers; indeed, most ground water contamination results from spillage or disposal that is not connected to any subsurface container. Therefore, metal detection should not be demanded unless no other potential sources of ground water contamination can be identified and there is reasonable basis to believe that metal containers existed on site.

748. COMMENT: Lindabury, McCormick & Estabrook believes there are many instances where ground water contamination may be found without an identifiable source because the source is coming from beyond the bounds of the affected property. Conducting a buried drum survey pursuant to N.J.A.C. 7:26E-3.6(a)1ii in such an instance is a costly and non-productive exercise.

749. COMMENT: Chevron U.S.A., Inc. believes N.J.A.C. 7:26E-3.6(a)1 should be deleted. There is no basis to assume that the unknown source area is a buried object(s) which are amendable to detection by the listed geophysical techniques. The need for remote sensing should be made on a case by case basis and determined based on the available site evidence.

RESPONSE: The subsurface survey is only required when the source of ground water contamination has not been identified. If contamination in ground water can be conclusively attributed to a specific source, whether on site or off site, then a survey would not be required. Contamination, proven to the Department's satisfaction to be originating from beyond the boundaries of the site, would be considered an identified source of ground water contamination (the adjacent site), and no survey would be required. Detection of ground water contamination at any concentration, regardless of the applicable remediation standard, requires further investigation if the specific source has not been conclusively identified because buried drums may be a continuing source. If the specific source has been conclusively identified, further investigation is required only if the contamination is above the applicable remediation standard. Although generally more expensive, it is perfectly acceptable to enter immediately into ground water investigation in an effort to identify the source of contamination.

750. COMMENT: Lindabury, McCormick & Estabrook believes the requirements contained in N.J.A.C. 7:26E-3.6(a)1 regarding a buried drum survey are too onerous in that they require a buried drum survey where contamination is found, but the source is unidentified. A buried drum survey does not make any logical sense where only surficial contamination is discovered even though the source of the contamination may not be identified. Accordingly, N.J.A.C. 7:26E-3.6(a)1 should be revised to eliminate the requirement for buried drum surveys in instances where the contamination is either surficial, or the contamination can be established, to the Department's satisfaction, to be originating beyond the boundaries of the site in question.

RESPONSE: The regulations do not require a buried drum survey where surficial contamination is detected and ground water contamination is not identified. A subsurface investigation is required pursuant to N.J.A.C. 7:26E-3.6(a)1ii only when a source of ground water contamination has not been identified. If contamination is surficial, but is obviously not the source of the ground water contamination, a surbsurface investigation is required to determine if buried drums, tanks or waste is the source of ground water contamination.

751. COMMENT: Allied Signal, Inc., Environmental Liability Management, Inc. and The General Electric Company believe a soil classification system of choice should be specified by the Department at N.J.A.C. 7:26E-3.6(a)2ii for use during an investigation. Any variations from this choice should be considered by the Department if site specific conditions warrant the use of another system.

RESPONSE: The Department recognizes any of the standard soil classification systems including the examples provided in the rule text. The use of any of these is acceptable to the Department.

752. COMMENT: Environmental Liability Management, Inc. requested that there not be a need to obtain a permit pursuant to N.J.A.C. 7:26E-3.6(a)2iii when borings will be conducted in fill, even when they go to first water. Extensive areas of northeast New Jersey have been filled. As a result of this filling, especially in low lying areas, first ground water is often encountered above the former land surface. These artificially raised "first water tables" are not used for potable purposes and boring into this "first water table" does not pose a threat to a deeper aquifer which may be used. Therefore, the requirement for a permit when boring to first water on a filled site serves no environmental protection purpose. Thus, the need to obtain a permit when boring in fill to first water should not include a boring which will remain within the fill. For sites with no fill but the first water is known not to be used, it is technically appropriate not to require a permit when boring to first water.

RESPONSE: Pursuant to N.M.J.S.A. 58:4A-4.1 et seq., a permit under this Act is only required when the boring exceeds 25 feet. N.J.A.C. 7:26E-3.6(a)2iii has been modified to be consistent with the statute and has deleted reference "to first water or" accordingly.

753. COMMENT: E.I. duPont de Nemours and Company believes the use of zero to six inches below grade for initial characterization samples at N.J.A.C. 7:26E-3.6(a)3 may be limiting and appears arbitrary. Although the choice of zero to six inches below grade for initial characterization samples will make sense in the majority of cases, under certain circumstances the results from sampling this interval may be misleading. For example, if the upper portion of the interval is "capped" by asphalt, the sample may yield elevated concentrations of petroleum and polynuclear aromatic compounds. These concentrations will not reflect contamination from a discharge. E.I. duPont de Nemours suggested adding the following to the requirement: "considering site specific conditions or unless otherwise approved by the Department."

RESPONSE: The Department agrees that additional flexibility from the zero to six inches below grade may be required in specific instances; however, the Department does not believe that such flexibility would be necessary in the example cited. Because asphalt constituents do not migrate vertically from an asphalt cap after application, soils directly beneath asphalt caps should not exhibit contamination with asphalt constituents as long as the samples do not include asphalt particles.

In response to the request for increased flexibility in the site remediation process, the Department is allowing for the use of alternate approaches, subject to Departmental preapproval pursuant to the modification in N.J.A.C. 7:26E-1.6(d).

754. COMMENT: Chevron U.S.A., Inc. believes N.J.A.C. 7:26E-3.6(a)3 should be revised as follows: "Initial characterization soils (except samples being analyzed for volatile organics) shall be collected at the depth interval which corresponds to the likely location of the discharge except as required pursuant to N.J.A.C. 7:26E-3.9 (Area Specific). For surface spills the zero to six inches below grade interval is usually appropriate." The zero to six inch interval may be appropriate for surface spills, however, in many instances a site may contain buried waste or other materials, for which surface sampling would be a waste of time and resources.

755. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.6(a)3 should be revised as follows: "Initial characterization soil samples (except samples being analyzed for volatile organics) shall be collected at zero to six inches below grade except as required pursuant to N.J.A.C. 7:26E-3.9 (Area Specific), considering site specific conditions, or otherwise approved by the Department." The site conditions need consideration to truly determine if the contamination is related to a discharge or site condition.

756. COMMENT: For clarity, Exxon Company, U.S.A. recommended adding at the end of N.J.A.C. 7:26E-3.6(a)3: "unless contamination is known or believed to be at depth."

757. COMMENT: Colonial Pipeline Company believes to collect a soil sample at a depth of zero to six inches below grade is not always valid since, for example, man-made foundations (that is, concrete or gravel pads) or beds of thick organic detritus and root zones may exist at grade. The most representative zone to sample would be from zero to six inches, within compacted fill material or within soils immediately underlying root zones.

758. COMMENT: The General Electric Company and Allied Signal, Inc. believe the initial characterization of soil samples at N.J.A.C. 7:26E-3.6(a)3 should be collected at depths that are determined for site specific conditions based on sound professional judgement. Provisions must be included in the rule for flexibility for selecting sample locations

and depth (including when utilizing field screening techniques) for the initial characterization of soils. The potential exists that vegetation or clean fill over contaminated soils may bias investigation results. In addition, the potential for obstructions may make sampling from any given depth impossible.

759. COMMENT: Colonial Pipeline Company believes N.J.A.C. 7:26E-3.6(a)4i should be revised as follows: "... a soil sample shall be collected ..." The word "core" should be deleted as situations may arise where it is not possible to collect a soil core.

760. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.6(a)4i(3) and (a)4ii(1) through (3) should be deleted because the requirements listed in these subparagraphs lack scientific basis, lack flexibility for regional or site specific soil conditions, and make generalized assumptions concerning volatile organic behavior which are misleading.

RESPONSE: Although the zero to six inch interval is generally appropriate for surface soil sampling, N.J.A.C. 7:26E-3.6(a)6 provides for sampling at other depths in those cases where the surface has been regraded or there is reason to believe that soil at another depth is contaminated. The Department recognizes that the use of a coring device will not always be practical; therefore, N.J.A.C. 7:26E-3.6(a)4 has been modified to include N.J.A.C. 7:26E-3.6(a)4iii which requires the use of a coring device when sampling for volatile organics, "if practicable." The Department agrees that flexibility for sampling may be required in specific instances, and the Department is allowing for the use of alternate sampling approaches, subject to Departmental preapproval pursuant to the modification in N.J.A.C. 7:26E-1.6(d).

761. COMMENT: Exxon Company, U.S.A. recommended deleting the word "and" as a technical correction in N.J.A.C. 7:26E-3.6(a)4.

RESPONSE: The Department agrees; the word "and" will be deleted from N.J.A.C. 7:26E-3.6(a)4.

762. COMMENT: Chemical Industry Council of New Jersey, Mobil Oil Corporation, Atlantic Electric and E.I. duPont de Nemours and Company believe delineating the vertical extent of contamination is one of the stated purposes of the remedial investigation and the requirement is not appropriate for the site investigation. Vertical sampling is not necessary to achieve the stated purpose of the site investigation, which is "to determine if any contaminants are present at the site above any applicable cleanup standard" (N.J.A.C. 7:26E-3.3(a)). It was recommended that this subsection be deleted from the proposed rule.

RESPONSE: It is imperative that the representative sample for a particular area of concern be biased to reflect the highest potential contaminant concentrations, both horizontally and vertically, for that particular area of concern considering the importance being based on those samples (whether or not further remediation is required). If the sample is biased in accordance with these requirements and contaminants are below the applicable remediation standard, no further remediation is required.

763. COMMENT: Public Service Electric and Gas Company believes highly permeable soils is included in the definition but is not used consistently in the text. Frequently the text reiterates the definition of soils having less than 15 percent silt and clay as highly permeable. Public Service Electric and Gas Company recommended changing all references including N.J.A.C. 7:26E-3.6(a)4i(3) to soils having less than 15 percent silt/clay throughout the proposed regulations to "highly permeable" soils as determined by applicable field methods.

RESPONSE: The Department disagrees that changing all references to soils having less than 15 percent silt/clay throughout the proposed regulations to "highly permeable" soils is necessary. The term "highly permeable soils" is defined at N.J.A.C. 7:26E-1.8 and the Department has specified therein that field analysis is acceptable for identifying "highly permeable soils."

764. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas believe the Department should provide the technical basis for N.J.A.C. 7:26E-3.6(a)4i. This includes a complicated set of requirements for soil samples collected for volatile organic analysis. When sampling for volatile organic analysis in the surface soil (zero to two feet), a coring device must be used so that a 24 inch soil profile can be observed, and the sampling depth must be based upon FID/PID readings from the soil core or the silt/clay content of the soil.

RESPONSE: The commenters appear to have misinterpreted the requirement at N.J.A.C. 7:26E-3.6(a)4. Field screening is recommended, but not required. Samples may also be collected pursuant to N.J.A.C. 7:26E-3.6(a)4ii, which specifies requirements when field sampling is not utilized. The requirements for collecting soil samples for volatile organic analysis are based on the Department's experience and a literature search. The Department believes that the proposed sampling approach is the most practical, easily implemented, and widely acceptable method of sample collection with the greatest contaminant recovery for this phase of remediation. To avoid future misinterpretation, the Department has clarified the requirements at N.J.A.C. 7:26E-3.6(a)4.

765. COMMENT: The Chemical Industry Council of New Jersey, Atlantic Electric, E.I. duPont de Nemours and Company and Mobil Oil Corporation believe removing the upper six inches of soil below ground surface prior to collecting the sample pursuant to N.J.A.C. 7:26E-3.6(a)4i is not necessary to collect the sample from the six to 24 inch below ground surface interval. Sampling equipment designed to collect a 24 inch interval is easily available. The Chemical Industry Council of New Jersey recommended the following modification: "If field screening is conducted for volatile organics in the surface soil (zero to two feet), a soil core shall be collected from zero to 24 inches below ground surface. The samples for field screening shall be selected from the interval in the soil core equivalent to six to 24 inches below ground surface."

RESPONSE: The Department agrees with the intent of this comment and the requirement at N.J.A.C. 7:26E-3.6(a)4 has been clarified accordingly.

766. COMMENT: Chemical Land Holdings, Inc. assumed that "undisturbed" at N.J.A.C. 7:26E-3.6(a)4i(2) was intended to mean a sample that has been handled in such a way that loss of volatile organic constituents is minimized. The use of this term in this context is confusing in that it is commonly used by geotechnical professionals to describe soil samples that have been collected with the use of special sampling equipment for geotechnical laboratory analyses. The term "undisturbed" should be defined or deleted in order to eliminate this potential confusion.

RESPONSE: Chemical Land Holdings, Inc.'s interpretation of the term "undisturbed" in N.J.A.C. 7:26E-3.6(a)4i(2) is correct. The term is commonly used and widely accepted as intended.

767. COMMENT: Atlantic Electric recommended adding to N.J.A.C. 7:26E-3.6(a)4i(2), "if no single six-inch interval registers a significantly elevated field measurement, then further sampling is not required."

768. COMMENT: In a homogeneous soil, E.I. duPont de Nemours and Company, the Chemical Industry Council of New Jersey and Mobil Oil Corporation believe there may be no single six-inch interval with "the highest field measurement." N.J.A.C. 7:26E-3.6(a)4i(2) should be more flexible to allow for variable and site specific field conditions. The Chemical Industry Council of New Jersey recommended the requirement at N.J.A.C. 7:26E-3.6(a)4i(2) be expanded to include, "if no single six-inch interval registers a significantly elevated field measurement, then the core shall be sub-sampled from the deepest six-inch interval."

RESPONSE: If all sample intervals register the same field measurement, the sample interval shall be selected on the basis of soil type as required by N.J.A.C. 7:26E-3.6(a)4ii.

769. COMMENT: Public Service Electric and Gas Company believes a technical basis for sample collection for volatile organic compound analysis at a depth of 9.5 to 10 feet in high permeability soils at N.J.A.C. 7:26E-3.6(a)4i(3) is not provided. Samples collected at this depth cannot be considered surficial samples. If sampling is needed at these depths it should be part of a subsurface investigation. Clearly the concern is for vertical migration and potential ground water impacts. Setting an arbitrary limit of 9.5 and 10 feet may be overly conservative or not conservative enough depending on the contaminants of concern. Experience with vertical migration of gasoline constituents in the sandy coastal plain soils has shown that volatile organics may not be detected between the surface source area and a depth greater than that indicated but can still appear in ground water. This requirement is arbitrary (unless valid technical basis can be provided for collection of surface soil samples from a depth of 9.5 to 10 feet) and should be deleted from subparagraphs N.J.A.C. 7:26E-3.6(a)4i(3) and 4ii(3), and 3.9(a)3ii(5), (d)4iii, (e)3ii(6), and (e)3iii(4). Language should be inserted that allows samples for volatile organic compounds to be collected based on site specific conditions.

770. COMMENT: The Chemical Industry Council of New Jersey, Mobil Oil Corporation, Atlantic Electric and E.I. duPont de Nemours and Company believe the requirement in N.J.A.C. 7:26E-3.6(a)4i(3) assumes that all volatile organics behave in the same manner, that is moving to solids just above the saturated zone, having an affinity for silt/clay solids or arbitrarily moving to 9.5 to 10 feet.

RESPONSE: The depth of 9.5 to 10 feet was chosen to limit the scope of the site investigation to a practical depth. The 9.5 to 10 foot limit

is based on the Department's experience for the vast majority of investigations conducted throughout most of the State which indicate that either a relatively impermeable layer or ground water is encountered prior to that depth. However, it should be emphasized that these constitute the minimum requirements for site investigation and remediation, and sampling below 9.5 to 10 feet may be required if site specific conditions so warrant.

Public Service Electric and Gas Company correctly notes that sandy soils do not retain gasoline constituents effectively and, for this reason, the Department requires a ground water sample even when only traces of volatile organic contaminants are detected in sandy soils.

Furthermore, in response to the request for increased flexibility in the site remediation process, the Department is allowing for the use of alternate approaches, subject to Departmental preapproval pursuant to N.J.A.C. 7:26E-1.6(d), as adopted.

771. COMMENT: Chevron U.S.A., Inc. believes N.J.A.C. 7:26E-3.6(a)4i(3) and (a)4ii(3) should be revised. The stipulated 15 percent silt/clay fraction will be difficult to measure precisely in the field, virtually mandating laboratory tests. This prevents reaction to the drilling in the field, as the drilling advances, as demanded by the regulation. No explanation or justification is offered for the 15 percent silt/clay cut off; this number is arbitrary and unworkable. The 15 percent silt/clay criterion is also used in N.J.A.C. 7:26E-3.7 and 3.8; the comment applies there as well.

Moreover, "surface soil" can be variable on even small sites—for example, runoff silt/clay deposits at one location and original sandy soil cropping out nearby. Natural processes as well as man-made activities such as filling complicate "surface soil," further reducing the workability of these sections.

RESPONSE: The intent of these requirements is to reflect the literature and practical experience which indicate that sandy soils do not retain volatile organics effectively due to their lack of organic material. Most field classification systems define "sands" as soils consisting of 85 percent or more sand. It was not the Department's intent to require laboratory analysis for soil classification, but to rely on field classification systems, recognizing that the sand content would only be an estimation.

The sampling requirements outlined apply to each individual sampling location. If soil conditions vary significantly within the site boundaries, or even within the area of concern, the sampling methodology should vary accordingly. The issue of regraded areas is addressed in N.J.A.C. 7:26E-3.6(a)6; additional sampling of increments below these specified in N.J.A.C. 7:26E-3.6(a)3 and 4 may be required based on site specific conditions.

772. COMMENT: Environmental Liability Management, Inc. believes the requirement to sample deeper than the 18 to 24 inch interval for volatiles during an initial site investigation when surface soil consists of less than 15 percent silt/clay at N.J.A.C. 7:26E-3.6(a)4ii(3) should be waived in the proposed rule for areas where the first water is known not to be used. The rationale for this is that there is little potential for contamination of ground water above the one ppm and 10 ppm organic values proposed in N.J.A.C. 7:26D-4.2(b)1 and 2 to occur when soil volatile values are below proposed subsurface standards (N.J.A.C. 7:26D-3.2(b)) in a soil of less than 15 percent silt/clay. The exception to this would be when the discharge is a recent one.

RESPONSE: This requirement is intended to identify the location of greatest contamination and is totally unrelated to ground water use. Restricting soil sampling to the uppermost two feet limits the scope of the investigation and significantly reduces the probability of collecting a sample in the location of greatest contamination in highly permeable soils.

773. COMMENT: The Chemical Industry Council of New Jersey and E.I. duPont de Nemours and Company recommended that N.J.A.C. 7:26E-3.6(a)4ii be deleted. The requirement does not relate to surface soil as defined in this rule (zero to two feet below grade).

RESPONSE: The word "surface" in N.J.A.C. 7:26E-3.6(a)4ii is a typographical error and has been deleted from the citation.

774. COMMENT: The rule specifies the use of a "coring device" at N.J.A.C. 7:26E-3.6(a)4ii(4) to minimize loss of volatile organic compound contamination during sampling. The General Electric Company and Allied Signal, Inc. believe reference should be made in the proposed new rule to the Department's guidance documents or other appropriate guidance documents that specify the appropriate devices.

775. COMMENT: With regard to N.J.A.C. 7:26E-3.6(a)4ii(4), Shell Oil Company believes American Society for Testing and Materials sampling methodologies should be used.

776. COMMENT: Chemical Land Holdings Inc. believes specific soil sampling techniques (for example, core sampling) should not be included in the proposed rules at N.J.A.C. 7:26E-3.6(a)4ii(4). Reference to specific methodology may serve to limit the use of existing, alternative, or future innovative methods that may be as good or better than the referenced method. It would be more appropriate to refer to guidance in the "Field Sampling Procedures Manual" regarding the use of specific soil sampling methodologies as is done for the sampling of other media.

RESPONSE: The requirements for collecting soil samples for volatile organic analysis are based on the Department's experience and a literature search. The Department believes that this sampling approach is the most practical, easily implemented, and widely accepted method of sample collection with the greatest contaminant recovery for this phase of remediation. The Department recognizes that the use of a coring device will not always be practical, therefore, N.J.A.C. 7:26E-3.6(a)4 has been modified to include N.J.A.C. 7:26E-3.6(a)4iii which requires the use of a coring device when sampling for volatile organics, "if practicable."

The rule already allows, pursuant to N.J.A.C. 7:26E-2.1(a)6, for the use of alternate sampling, analytical, or investigatory methods subject to the criteria in N.J.A.C. 7:26E-1.6(c).

Appropriate coring devices and other sampling devices are referenced in the Department's "Field Sampling Procedures Manual" as specified in N.J.A.C. 7:26E-2.1(a)6.

777. COMMENT: Exxon Company, U.S.A. believes the volume of soil sample obtained from a six inch increment will most likely be insufficient to fill the sample bottles required for analysis (two 40 ml vials for volatile organics, one eight ounce glass jar for semi-volatile organics and one eight ounce glass jar for inorganics). Exxon recommended that N.J.A.C. 7:26E-3.6(a)5 allow for flexibility in obtaining a sample by adding the following: "samples will be collected for each six to 12 inch increment."

RESPONSE: The sampling methodology outlined in N.J.A.C. 7:26E-3.6(a)4 requiring the use of a coring device is limited to samples being analyzed for volatile organics. The volume of soil present in the core within a discrete six inch interval should, in most cases, be sufficient to completely fill the volatile organic sample vial. Samples to be analyzed for anything over than volatile organics should be collected subsequently using any acceptable sampling methodology which will yield a sufficient volume of sample for the six inch interval. N.J.A.C. 7:26E-3.6(a)5 clearly provides for those instances when sampling more or less than a six inch interval is necessary.

778. COMMENT: Colonial Pipeline Company believes N.J.A.C. 7:26E-3.6(a)5 essentially requires that all boreholes be continuously sampled. This is a valid consideration for the initial one to three borings unless the soil configuration under a facility is extremely variable and complex. The original text should be replaced by the following: "It will be the responsibility of a competent geologist or engineer to determine the number of boreholes that need to be continuously sampled. In the event that areas of complex soil stratification are encountered during the course of the facility, additional continuous boreholes may need to be advanced. If there is poor sample recovery from the type of sampler used, or other field logistical problems, an explanation shall be provided in the field note book or soil log."

RESPONSE: N.J.A.C. 7:26E-3.6(a)5 does not require that boreholes be continuously sampled. N.J.A.C. 7:26E-3.6(a)5 requires the collection of samples in discrete six-inch increments at each sample location. Sampling over larger increments amounts to sample compositing and is unacceptable for the purposes of N.J.A.C. 7:26E. N.J.A.C. 7:26E-3.6(a)5 provides for those situations in which there is poor sample recovery or other field logistical problems are encountered.

779. COMMENT: Atlantic Electric rejected the idea of sampling saturated soils since the results may not be indicative of soil contamination. The majority of remedial technologies are designed to treat unsaturated soil contamination and ground water contamination separately. This data is of questionable value and would furnish misleading results. Atlantic Electric urged the Department to delete N.J.A.C. 7:26E-3.6(a)7.

780. COMMENT: E.I. duPont de Nemours and Company believes analysis of a saturated soil sample at N.J.A.C. 7:26E-3.6(a)7 is inappropriate. Results of the analysis of a saturated soil sample may not be indicative of soil contamination but, rather, may indicate the presence of ground water contamination. The results could not be compared to the soil cleanup standards or the ground water cleanup standards, as the actual media contaminated would not be known. In addition, the majority of remedial technologies are designed to treat unsaturated soil

contamination and ground water contamination separately, thus the data from analysis of a saturated soil sample would serve no useful purpose. The requirement is not a standard practice in remediation, is inconsistent with other regulations, and would furnish misleading results; therefore, it was urged the Department delete N.J.A.C. 7:26E-3.6(a)7 from the proposed rule.

781. COMMENT: Mobil Oil Corporation and the Chemical Industry Council of New Jersey believe submitting saturated soil samples for chemical analysis at N.J.A.C. 7:26E-3.6(a)7 is not appropriate, since it may not be indicative of soil contamination. The sample could be indicative of the presence of ground water contamination. The actual media of contamination would not be known. Additionally, the majority of remedial technologies are designed to treat unsaturated soil contamination and ground water contamination separately. Therefore, this data would be of no useful significance. The commenters recommended that N.J.A.C. 7:26E-3.6(a)7 be deleted.

782. COMMENT: The General Electric Company and Allied Signal, Inc. believe soil sampling and analysis should be conducted to determine soil quality conditions only. Samples and analysis of saturated soils (soils below the water table) have little or no value for soil investigation purposes. Soil contamination below the water table must be considered a ground water problem and investigated with monitoring wells as specified in N.J.A.C. 7:26E-3.7.

783. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.6(a)7 should be deleted. This type of sampling is not standard practice and results could be misinterpreted since the contaminant in the soil and associated ground water (that is, the contaminated media) cannot be segregated and/or identified.

784. COMMENT: Exxon Company, U.S.A. believes N.J.A.C. 7:26E-3.6(a)7 seems meaningless, since the person will not be able to interpret the data to distinguish whether contamination found is from soil or ground water. Exxon recommended deleting N.J.A.C. 7:26E-3.6(a)7.

RESPONSE: N.J.A.C. 7:26E-3.6(a)7 only applies to those instances when the designated sample point is entirely within the saturated zone. If only ground water was sampled in those instances, certain contaminants with a low solubility may not be detected but may be present in the saturated soil. In addition, soil contaminant levels must be determined to identify a potential direct contact threat.

785. COMMENT: E.I. duPont de Nemours and Company and the Chemical Industry Council of New Jersey believe limiting the use of soil gas surveys at N.J.A.C. 7:26E-3.6(b) to biasing sample locations and identifying sources of ground water contamination fails to recognize the recent advances in the technique. Soil gas surveys have traditionally been used as a screening tool for biasing sample locations for volatile organic contamination investigations. Recently, The Environmental Protection Agency's Region IX and the California Environmental Protection Agency have officially accepted the use of soil gas, instead of soil samples, for determining volatile organic concentrations in soils under certain site specific conditions. The results from soil gas surveys are a better estimation of the soil concentrations. E.I. duPont and Chemical Industry Council of New Jersey suggested expanding the potential use of soil gas by including: "Soil gas may be used for other purposes based on site specific conditions and with Departmental approval."

786. COMMENT: The Chemical Industry Council of New Jersey believes the use of soil gas surveys at N.J.A.C. 7:26E-3.6(b) should be available as a possible means of defining areas of concern, because geophysical methods may be unusable at the site or may be inappropriate for the contaminants of concern.

RESPONSE: The commenters cite draft EPA methods which expand the utility of soil gas methods. The rule already allows for the use of published alternate field screening methods at N.J.A.C. 7:26E-2.1(b)4 subject to the criteria in N.J.A.C. 7:26E-1.6(c). When published, these EPA methods may be acceptable for use in site remediation.

While the commenters accurately note that some volatile organic loss occurs during traditional sampling, field screening methods such as soil gas techniques are also subject to inaccuracies due to field calibration requirements and potentially adverse field conditions. As soil gas technology develops, the Department may accept these methods for routine use. In response to the request for increased flexibility in the site remediation process, the Department is allowing for the use of alternate approaches, subject to Departmental preapproval pursuant to the modification in N.J.A.C. 7:26E-1.6(d).

The Department does, however, recognize the soil gas methodology as a valuable screening tool. N.J.A.C. 7:26E-4.4(j) requires a soil gas study to locate sources of ground water contamination when ground water contamination is present is identified, but no apparent source is identified.

787. COMMENT: With regard to N.J.A.C. 7:26E-3.6(b) Colonial Pipeline Company recommended that the following be inserted: "Soil gas or geophysical detection methods ..."

RESPONSE: The intent of N.J.A.C. 7:26E-3.6(b) is to limit the application of the soil gas detection methodology to biasing or screening only. The citation is not intended to prohibit or restrict the use of any investigative techniques for biasing sample locations.

788. COMMENT: Exxon Company, U.S.A. believes a new citation, N.J.A.C. 7:26E-3.6(d), should be added: "The results of the soil site investigation analysis shall be evaluated as follows."

RESPONSE: The results of the entire site investigation must be discussed according to N.J.A.C. 7:26E-3.10; therefore, N.J.A.C. 7:26E-3.6(d) is not required.

N.J.A.C. 7:26E-3.7

789. COMMENT: Rutgers Environmental Law Clinic believes that ground water sampling should be required everywhere there is an indication that ground water may be or may have been impacted by a discharge. Writing off non-potable water sources is short-sighted and irrational. A major public policy goal of these regulations is that "the protection and preservation of these ... waters promotes the health, safety, and welfare of the people of this state..." The State's ground waters are a priceless resource which should not be jeopardized through such a major concession to polluters as failing to require ground water investigation and remediation in certain areas based on the current use of the ground water source. These water sources must be protected because of their potential future use for human consumption and because of their proper place in the overall ecosystem.

RESPONSE: The Department recognizes the importance of ground water and believes these rules provide a means for identifying where ground water contamination exists so that appropriate remediation can occur.

N.J.A.C. 7:26E does require ground water sampling at all sites where there is evidence of a discharge which may result in ground water contamination above any applicable remediation standard. In drafting these rules, the Department considered comments and suggestions it has received over the years from various parties, including Department personnel, on all existing rules, guidance and policies from various statutory programs concerning the investigation and remediation of contaminated sites. An evaluation of sampling data collected from the various programs was also conducted prior to the proposal of these rules. The conditions set forth in N.J.A.C. 7:26E-3.7(a) and 4.4(a) outlining when a ground water investigation needs to be completed, are the result of that evaluation.

The conditions for ground water sampling are based on levels of contamination found in the soil column and the appropriate remediation standard for the site in question. The site-specific remediation standards do take into account the potential for receptors to be impacted from the site in question. However, the regulations also outline areas of the state in which a ground water sample must be taken regardless of the level of soil contamination found. These sites include areas where the on-site soil contain less than 15 percent silt and clay between the discharge and the water table and if the constituent of concern has a water solubility of greater than 100 mg/l.

The Department continues to stress that the requirements set forth in N.J.A.C. 7:26E represent the minimum sampling requirements for a contaminant investigation. The Department will continue to evaluate the above-mentioned triggering mechanism, to ensure its effectiveness in evaluating the need for a ground water investigation. As the Department identifies other instances in which a ground water investigation must be completed, the regulations will be modified, as needed, in future rulemaking.

In addition, the Department's Division of Science and Research has issued a Request for Proposal pursuant to the Spill Fund Research Program to attempt to develop an appropriate method to determine when a ground water investigation needs to be completed or to confirm the existing approach. When the evaluation is completed and approved, any new methodology will be incorporated into the regulations in future rulemaking.

790. COMMENT: Shell Oil Company questioned if it is truly necessary for each and every ground water monitoring well to have a permit. If the Department truly wants to stream line the assessment and remediation process this "red tape" needs to be removed. If the

Department is aware of (and approves) the proposed locations of the wells, there should be no need to have them permitted.

RESPONSE: The requirement to obtain a permit is a statutory requirement. Pursuant to N.J.S.A. 58:4A-4.1 et seq., all wells regardless of their use (for example, potable supply, monitoring, etc.) are required to be permitted by the Department.

791. COMMENT: Colonial Pipeline Company commented that the rules should identify areas of the State where groundwater sampling is required prior to issuance of "no further action."

RESPONSE: N.J.A.C. 7:26E-3.7 and 4.4 outline when ground water sampling is required. The ground water investigation triggers are based on the presence of soil contamination above the applicable remediation standard for the site in question within two feet of the water table, unless the constituent of concern has a water solubility of greater than 100 mg/l and the soil at the site has less then 15 percent silt and clay between the suspected discharge and the water table. In these instances, a ground water sample must be taken if any level of contamination is detected anywhere in the soil column.

The soil remediation standards for the site are based on an evaluation of the exposure pathways and potential receptors that exist at the site. Soil contamination levels which trigger the need for ground water sampling will vary depending upon ground water use in the area.

792. COMMENT: New Jersey Natural Gas Company and Jersey Central Power and Light Company believes N.J.A.C. 7:26E-3.7(a) is inconsistent with requirements detailed in N.J.A.C. 7:26E-4.4(a). N.J.A.C. 7:26E-3.7(a) indicates that at least one ground water sample is required for each area of concern, based on water solubility of the contaminant (for example, greater than 100 mg/l) and silt/clay content of the soil between the contaminant and the saturated zone (for example, less than 15 percent silt and clay).

RESPONSE: The site investigation and remedial investigation each have a different focus. The site investigation is used to determine if contamination is present at the site above any of the applicable remediation standards. It is the objective of the remedial investigation to determine the extent of that contamination. The intent of these regulations is to allow the person responsible for the investigation to move directly to the remedial investigation when any contaminated media are found above the applicable remediation standard. The intent of N.J.A.C. 7:26E-3.7(a) and (b) is to sample the ground water regardless of the levels of contaminants found in the soil when the water solubility of the compound in question is greater than 100 mg/l and the site is in a highly permeable area (as defined by less than 15 percent silt and clay). This is because the high water solubility and poor retentive properties of such soils allow the contaminants to move more freely to the water table. The requirements found in N.J.A.C. 7:26E-4.4(a) apply when the subsurface soil has already been determined to be contaminated.

793. COMMENT: Chemical Land Holdings, Inc. stated that there is no justification for selecting this investigation level for all contaminants at N.J.A.C. 7:26E-3.7(a), as solubility has no correlation to potential hazard or health threat. Therefore, this requirement should be deleted.

RESPONSE: Water solubility is used in the site investigation as an indication of a contaminant's ability to migrate in the vadose zone. Compounds with water solubility values greater than 100 mg/l which have been discharged in the vadose zone have a greater likelihood to be found in the ground water system. The extent to which these compounds need to be remediated is based on the appropriate remediation standard which is based on a chemical's risk to human health and the environment.

794. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested revising N.J.A.C. 7:26E-3.7(a) as follows: "Except as provided in (b) below, the site investigation shall include a ground water monitoring program to determine if an area of concern has resulted in a discharge or ground water contamination." The development of a ground water program must be driven by site specific conditions and generalizations regarding the well coverage may result in an inadequate program when considering areal extent or depth of contamination.

RESPONSE: The intent of the site investigation is to determine if any contamination exists, not its extent. Once any contamination is found, the investigation moves into the remedial investigation phase for the delineation of the contamination.

795. COMMENT: Environmental Liability Management, Inc. recommended that the following criterion be added as an exception to N.J.A.C. 7:26E-3.7(a)2: "the results from soil samples collected per N.J.A.C. 7:26E-3.6(a)4ii(3) are in compliance with subsurface soil standards and the site's ground water has a nonuse status."

RESPONSE: The intent of these rules is to allow the person responsible for the investigation to move directly to the remedial investigation when any contaminated media are found above the applicable remediation standard. The intent of N.J.A.C. 7:26E-3.7(a) and (b) is to direct a party to sample the ground water regardless of the levels of contaminants found in the soil when the water solubility of the compound in question is greater than 100 mg/l and the site is in a highly permeable area (as defined by soils having less than 15 percent silt and clay). This is because the high water solubility of the compound and poor retentive properties of such soils allow the contaminants to move more freely to the water table. Other than in the situation described above, any site found to be compliance with the applicable soil remediation standards are not required to undertake further evaluation of the soil or ground water. Limiting an investigation of ground water in areas of nonuse fails to consider the potential future use of the ground water and its potential to impact other receptors (for example, buildings and surface water bodies). Therefore, the Department has not made the requested modification.

796. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-3.7(a)1 should be revised to incorporate the "effective solubility" of a compound. The Department arbitrarily uses a contaminant water solubility of 100 milligrams per liter. The need for a peer reviewed reference suggests pure phase solubility. More significant in the context of a nonaqueous phase liquid is the effective solubility (a reference for effective solubility is Feenstra, S., D.M. Mackay, and J.A. Cherry, 1991. A method for Assessing Residual Non-Aqueous Phase Liquids Based on Organic Chemical Concentrations in Soil Samples. Ground Water Monitoring Review, Vol. XI No. 2, pp. 128-136). The effective solubility is the maximum concentration at which the compound is likely to occur in ground water. The calculation is contained in the Feenstra et al. (1991) paper which is included as an attachment to these comments.

RESPONSE: The intent of the water solubility criterion is not to determine the existence of free product as the referenced article suggests, but rather to indicate which compounds have a high potential to contaminate ground water when they are discharged in the vadose zone. It has been the Department's experience that compounds with a water solubility of 100 mg/l or greater are the most prevalent compounds found in ground water contamination investigations. In addition, because of their high water solubilities, such compounds are also the least likely to be found as residual contamination in the soil column. Therefore, the Department requires ground water sampling to be conducted when the criteria in N.J.A.C. 7:26E-3.7(a) are met.

797. COMMENT: Exxon Company, U.S.A. recommended, to avoid extreme applications of N.J.A.C. 7:26E-3.7(a)1 (for example, installing a well if acetone is found in a building), the wording in N.J.A.C. 7:26E-3.7(b) should be changed as follows: "Wells shall be installed if contamination is found in soil at a concentration exceeding the subsurface cleanup standard for a Class IIB Aquifer."

RESPONSE: The Department does not agree with the suggested change. The presence of acetone in an area of concern does not automatically mean that ground water samples need to be analyzed for that compound pursuant to N.J.A.C. 7:26E-3.7(a). Acetone would only have to be sampled for if it was present in the soil as a contaminant, which, by definition, means it was "discharged." Furthermore, the intent of N.J.A.C. 7:26E-3.7(a) and (b) is to sample the ground water regardless of the levels of contaminants found in the soil when the water solubility of the compound in question is greater than 100 mg/l and the site is in a highly permeable area (as defined by less than 15 percent silt and clay). This is because the high water solubility of the compound and poor retentive properties of such soils allow the contaminants to move more freely to the water table.

798. COMMENT: Exxon Company, U.S.A. recommended defining the requirement at N.J.A.C. 7:26E-3.7(a)2 by using permeability of hydraulic conductivity of the soil zone in question rather than the 15 percent silt and clay requirement outlined in N.J.A.C. 7:26E-3.7(a)2. There is no known basis for selecting the 15 percent silt and clay criteria.

RESPONSE: Soils having less than 15 percent silt and clay have poor retentive properties due in part to the lack of organic matter found in such soils.

799. COMMENT: Rutgers Environmental Law Clinic commented that N.J.A.C. 7:26E-3.7(b) states that ground water sampling may not be necessary where previous remediation has occurred on a site and post-remediation data show compliance with cleanup standards. N.J.A.C. 7:26E-3.7(b)4. The sampling should include ground water as well as soil, unless the sampling from the prior remediation is representative of

current site conditions, based on the date of the remediation samples and the conditions of the soil in terms of porosity and other, similar parameters. Unless the remediation sampling is representative of current conditions, lower levels in the soil may only indicate contaminant migration, perhaps to ground water. Baseline soil and ground water testing is the only way to ensure that a previously remediated site is sufficiently clean under the new standards.

RESPONSE: The intent of N.J.A.C. 7:26E-3.7(b) is to allow a facility with a one-time, short duration, known quantity spill to be cleaned up quickly without having to sample the ground water. The post-remediation sample is required to confirm that all of the contaminated soil has been removed or remediated. If all of the criteria outlined in N.J.A.C. 7:26E-3.7(b) cannot be met, the person conducting the remediation must complete the ground water portion of the site investigation.

800. COMMENT: Atlantic Electric recommended replacing N.J.A.C. 7:26E-3.7(b)4 with: "Soil sampling data establish that the applicable cleanup standards are not exceeded at the area of concern; or".

RESPONSE: N.J.A.C. 7:26E-3.7(b)4 was clarified upon adoption to indicate that post-remediation sampling data must be below the applicable remediation standard.

801. COMMENT: E.I. Du Pont de Nemours and Company stated N.J.A.C. 7:26E-3.7(b) is overly restrictive. The data required concerning the discharge may not be available, although other data or information, such as soil contaminant concentrations and depth to ground water, may thoroughly support the contention that no ground water sampling is necessary. The "and" statement in the section requires that all the listed data are needed in order to make a determination that ground water sampling is unnecessary. In addition, it is unclear why post-remediation sampling would be part of a site investigation. E.I. du Pont de Nemours and Company suggested the following revisions to N.J.A.C. 7:26E-3.7(b): "4. Soil sampling data establish that the applicable cleanup standards are not exceeded at the area of concern; or 5. Any other data or information that is relevant to the determination of the likelihood of ground water contamination."

RESPONSE: The intent of N.J.A.C. 7:26E-3.7(b) is to allow a facility with a one-time, short duration, known quantity spill to be cleaned up quickly without having to sample the ground water. N.J.A.C. 7:26E-3.7(b)1 through 4 are all required to demonstrate the above. The post-remediation sample is required to confirm that all of the contaminated soil has been removed or remediated.

802. COMMENT: Shell Oil Company commented that "Ground water sampling may not be necessary ..." expected depth to ground water should also be included in deciding whether or not the ground water needs to be sampled at N.J.A.C. 7:26E-3.7(b).

803. COMMENT: Chevron U.S.A., Inc. suggested adding a fifth criteria relevant to the possibility of no ground water contamination: "5. Depth to water table." At certain locations within the State the water table is located tens of feet below the land surface. For relatively low-volume discharges into thick, unsaturated glacial overburden for example, the likelihood of contamination reaching the underlying water table can be slight.

RESPONSE: N.J.A.C. 7:26E-3.7(b)5 allows any other relevant data or information, such as depth to ground water, to be used to justify when a ground water sample does not need to be taken. However, depth to ground water alone will not exempt a site from taking a ground water sample in the site investigation. The determination that a ground water sample is not necessary pursuant to N.J.A.C. 7:26E-3.7(b) must be made using site specific data and on a case by case basis.

804. COMMENT: Mobil Oil Company and the Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E-3.7(b)5 makes the regulations overly restrictive. This section of the rule should comprehend that there may or may not be other data or information that supports the contention that no ground water sampling is necessary. Items 1 through 4 combined are sufficient to support the conclusion that no sampling is necessary. Item 5 should simply allow the review and inclusion of other relevant information. Mobil Oil Company recommended the following changes should be made: "4. Soil sampling data establish that the applicable cleanup standards are not exceeded at the area of concern; and 5. Other data or information, if any, that is relevant to the determination of the likelihood of ground water contamination."

RESPONSE: N.J.A.C. 7:26E-3.7(b)5 is included to allow any other information that the person responsible for the investigation may deem helpful in determining when a ground water sample does not need to be taken. The Department does not agree that it makes the requirement more restrictive.

805. COMMENT: Exxon Company, U.S.A. suggested for clarity and consistency with N.J.A.C. 7:26D and to reflect the fact that oversight documents were signed based on standards in effect at that time, rewrite N.J.A.C. 7:26E-3.7(b)4 to read: "Post remediation sampling data establish that the remediation meets all applicable cleanup standards that were in effect at the time of the site investigation or when the applicable oversight document was signed; or".

RESPONSE: It is the policy of the Department that the remediation standards applicable at the time of the remedial action workplan approval are the remediation standards to be set for the remediation at the site. N.J.A.C. 7:26E-3.7(b)4 has been modified accordingly. This policy matter has also been addressed in legislation (S1070) being considered by the Legislature. The bill, as approved by the Senate, establishes when the applicable remediation standards apply. In addition, the bill specifies that the site will only need to be reevaluated to determine if the standard is still protective of human health and the environment if the remediation standard for any contaminant changes by an order of magnitude or more.

806. COMMENT: Shell Oil Company suggested adding to end of sentence at N.J.A.C. 7:26E-3.7(b)5 ", such as a demonstration of decreasing and eventually background soil contamination with depth."

RESPONSE: This statement does not need to be added to N.J.A.C. 7:26E-3.7(b)5. The demonstration noted in the comment may be submitted as "other relevant information" but the Department will not limit this provision to this circumstance. N.J.A.C. 7:26E-3.7(b)5 allows any other relevant data or information, such as depth to ground water, to be used in justifying when a ground water sample does not need to be taken. Listing one or more items would indicate the Department intended a limited universe of "other data or information," which is not the case.

807. COMMENT: Colonial Pipeline Company suggested modifying N.J.A.C. 7:26E-3.7(c)3i as follows: "The excavation of an underground storage tank which is the ..." The excavation of a large volume above ground storage tank may not be possible without significant operational impacts or risk of physical damage.

RESPONSE: The Department agrees with the comment and has modified N.J.A.C. 7:26E-3.7(c)3i accordingly.

808. COMMENT: E.I. du Pont de Nemours and Company commented that the requirement in N.J.A.C. 7:26E-3.7(c)3ii to take one ground water sample per area of concern is overly restrictive and does not consider site specific conditions. One ground water sample per area of concern may or may not reveal the presence of ground water contamination associated with a discharge at the area of concern. At both very large and very small areas of concern this requirement may be inadequate because ground water constantly moves in the subsurface. E.I. du Pont de Nemours and Company suggested the following revision of the section: "Except as provided in N.J.A.C. 7:26E-3.7(b) above, the site investigation shall include a ground water sampling program designed to determine if an area of concern has caused the ground water to be contaminated above the applicable cleanup standards if ..."

809. COMMENT: Chemical Land Holdings, Inc. stated that detailed site investigation embodying the concept of "Consolidated Areas of Concern" for potential ground water contamination should be considered at N.J.A.C. 7:26E-3.7(c)3ii. Ground water contamination is by its very nature more dispersed than soil contamination. Soil contamination levels often vary by orders of magnitude on a scale of centimeters (Kueper, et al., 1992). Through the processes of longitudinal and transverse dispersion, ground water contamination tends to exist in relatively dispersed plumes which are more easily detected. Consequently fewer ground water samples or wells are necessary to characterize the extent of ground water contamination than may be needed to define the extent of soil contamination.

One approach to locating ground water monitoring wells would be to combine proximate areas of Concern into "Consolidated Areas of concern." The consolidated areas of concern could then be monitored by ground water sampling or placement of wells along the downgradient perimeters of the areas. In addition, for large consolidated areas of concern, several wells or ground water samples within the interior of the composite area of concern may also be appropriate. This concept is analogous to the approach employed under Resource Conservation and Recovery Act where solid waste management units can be logically grouped for combined ground water monitoring purposes. It is suggested that a ground water sampling or monitoring well spacing in the range

of 150 to 250 feet be used as a baseline for monitoring consolidated areas of concern. The actual spacing would be determined based upon site specific factors such as the nature of the hydrogeologic system, the geometry of the consolidated area of concern and its spatial relationship to ground water flow directions, the depth and type of soils encountered, and other such factors as are routinely applied by qualified professionals. A sufficient number of upgradient background monitoring wells should also be located to determine ground water quality entering the property or the consolidated areas of concern.

As mentioned above, wells may also need to be constructed or samples collected from within the interior of consolidated areas of concern in order to sufficiently characterize ground water quality. The following formula is suggested for determining the number of interior wells to be constructed or samples collected. The interior wells or samples would be placed or collected downgradient of selected areas of concern within the interior of the consolidated area of concern.

Size of Consolidated Area of Concern	No. of Internal Wells
Less than five acres	None
Greater than five acres, Less than 50 acres	One for each five acres
Greater than 50 acres	One for each additional 10 acres

810. COMMENT: Public Service Gas and Electric Company commented N.J.A.C. 7:26E-3.7(c)ii states that one ground water monitoring point must be installed for each area of concern unless it is within 10 feet hydraulically upgradient of another monitoring point. The technical rationale for this requirement is not given and appears to be arbitrary. Ground water quality depends on aquifer characteristics, soil permeability, ground water gradient, contaminant properties, etc. Requiring ground water sampling locations based on proximity to surficial areas of concern on this basis is not technically sound, and may result in an excessive number of wells at a site. Often, several areas of environmental concern can be served by a common well. Additionally, the proposed requirements do not provide for the option to propose an alternate ground water sampling plan. A valid technical basis or rationale for the ground water sampling requirement, cited above should be included. If a valid technical basis cannot be provided, the requirements should be deleted and other guidance should be substituted. At a minimum the regulations should provide an option for submitting an alternative ground water sampling plan that is based on aquifer characteristics, soil permeability, ground water gradient, contaminant properties, etc.

811. COMMENT: Atlantic Electric commented that at N.J.A.C. 7:26E-3.7(c)3ii, site specific conditions, along with professional judgement, must be taken into consideration in placing ground water monitoring wells. The commenter recommended rewording N.J.A.C. 7:26E-3.7(c)3ii as follows: "The expected downgradient flow direction of the area of concern and at such a location as to determine if ground water contamination associated with a release at the area of concern has occurred above the applicable cleanup standards..."

812. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested revising N.J.A.C. 7:26E-3.7(c)3ii as follows: "The expected downgradient flow direction shall be determined at appropriate location(s) from an area of concern to evaluate if a discharge or ground water contamination has occurred." The ground water program should establish the flow direction and hydraulic gradient with resolution sufficient to characterize an area of concern. Because of the vast variation in physical characteristics of areas of concern prescriptive requirements will lead to inappropriate or unnecessarily expensive actions in many cases. Flexibility is warranted.

813. COMMENT: Exxon Company, U.S.A. recommended deleting "10 feet" from N.J.A.C. 7:26E-3.7(c)3ii. The distance between a well and the area of concern should be based on calculated seepage velocity rates, not an arbitrary distance.

814. COMMENT: The Chemical Industry Council of New Jersey stated that at N.J.A.C. 7:26E-3.7(c)3ii site specific conditions must be taken into consideration and recommended the following modification to N.J.A.C. 7:26E-3.7(c)3ii: "The expected downgradient flow direction of the area of concern and at such a location as to determine if ground water contamination associated with a discharge at the area of concern has occurred above the applicable cleanup standards..."

815. COMMENT: E.I. du Pont de Nemours and Company stated that requiring the location of a monitoring well or piezometer to be within 10 feet of an area of concern in N.J.A.C. 7:26E-3.7(c)3ii is arbitrary and without scientific basis. Locating a monitoring well or piezometer within 10 feet of an area of concern does not guarantee that ground water contamination associated with a discharge at the area of concern will be detected. Contaminant migration in the ground water away from the area of concern may have occurred, and ground water contamination could be located closer to or farther away than 10 feet from the area of concern. E.I. du Pont de Nemours and Company suggested the following modification to N.J.A.C. 7:26E-3.7(c)3ii: "The expected downgradient flow direction of the area of concern and at such a location as to determine if ground water contamination associated with a discharge at the area of concern has occurred above the applicable cleanup standards..."

816. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-3.7(c)3ii should be revised to read, "... and within 10 to 100 feet of the area of concern." Greater distances are acceptable if a well cannot be installed due to obstructions such as utility lines. For single underground tanks, seepage pits and other relatively small discrete units the well should be within 10 feet downgradient of the area of concern. For very large units such as landfills, wells can be over 100 feet away. Intermediate distances (between 10 and 100 feet) are acceptable for other intermediately sized units. Actual distance should be based on the size of the unit, seepage velocity rate of the ground water zone being monitored, mobility of the potential contaminants and dispersion properties of the ground water zone.

817. COMMENT: Mobil Oil Company commented the "10 feet" requirement at N.J.A.C. 7:26E-3.7(c)3ii is arbitrary and does not allow for variation depending on site specific conditions. Site specific conditions must be taken into consideration. Mobil Oil Company recommended this section should be modified to read as follows: "The expected downgradient flow direction of the area of concern and at such distance from the area of concern as necessary to determine if ground water contamination associated with a discharge at the area of concern has occurred above the applicable cleanup standards..."

RESPONSE: The Department agrees that a well located within 10 feet downgradient of an area of concern may not be practical in all cases. The Department also agrees that under certain circumstances one ground water sampling point may be able to detect contamination emanating from more than one area of concern. The rules have been changed in N.J.A.C. 7:26E-1.6(d) to allow the person responsible for conducting the remediation to demonstrate that the location of the sampling point is able to detect any ground water contamination emanating from the areas of concern. When the person conducting the investigation feels this option may be warranted at the site, this must be demonstrated based on site-specific conditions and professional judgement pursuant to N.J.A.C. 7:26E-1.6(d). The party must provide information relevant to the investigation which may include ground water flow direction, ground water flow velocity and gradient, other relevant hydrogeologic parameters, and contaminant properties such as water solubility and other properties affecting contaminant mobility, for the Department to be able to approve a reduction in the number of ground water sampling points. Therefore, to be able to gather sufficient data for such an evaluation, a minimum of three wells must be installed before the Department would entertain such a request.

818. COMMENT: Shell Oil Company commented that if the area of concern is an underground storage tank system, the "within 10 feet" limit in N.J.A.C. 7:26E-3.7(c)3ii may result in a rupture due to drilling possibly causing a discharge. Wording should allow for discretion when the exact location of an underground is not certain.

RESPONSE: The Department believes that the requirement in N.J.A.C. 7:26E-3.7(c)3ii, to install a ground water sampling point within 10 feet of an underground storage tank, is possible in almost all instances. In those circumstances where the exact location of the tank or product lines is unknown, the person responsible for conducting the remediation may request a waiver to this condition pursuant to N.J.A.C. 7:26E-1.6(d).

819. COMMENT: Environmental Liability Management, Inc. stated N.J.A.C. 7:26E-3.7(d) requires that one ground water sample be collected for each septic system. It has been the Department's practice not to routinely require the installation of a well when it could be shown that the septic system received only sanitary waste. This practice is reflected under N.J.A.C. 7:26E-3.9(e)3i regarding the potential impact of a septic system on soil and similar wording should be included under N.J.A.C. 7:26E-3.7(d)1 for consistency.

RESPONSE: The intent of these rules is to assess the effects of discharges (or potential discharges) of hazardous constituents, not those

attributed to sanitary waste streams. A statement has been added to N.J.A.C. 7:26E-3.7(d)1 referencing the criteria in N.J.A.C. 7:26E-3.9(e)3.

820. COMMENT: Rutgers Environmental Law Clinic stated that N.J.A.C. 7:26E-3.7(d)2 and 4.4(e)2 inappropriately allow one sample for an entire site, even where the three tanks are located at three different areas of the site. This is an absurd position which would lead to a great deal of environmental harm from undetected, and therefore unremediated contamination. Under no circumstances should there be any fewer wells than those required by the analysis described by Rutgers Environmental Law Clinic requiring a 95 percent confidence level for the minimum number of samples per area of concern.

RESPONSE: N.J.A.C. 7:26E-3.7(d)2 and 4.4(e)2 do not allow one well to be installed if there are three underground storage tanks located at three different areas of concern. These citations allow one well to be installed at a tankfield (as defined by a maximum of three, 10,000 gallon tanks in an excavation). If there are tanks scattered across the site, then ground water samples are required at each tank area demonstrating elevated levels of soil contamination.

The Department based this requirement on the maximum size tankfield that is believed can adequately be monitored by one ground water sample.

Regarding the comment on the 95 percent confidence level, see the discussion in response to the comment submitted by the Rutgers Environmental Law Clinic on N.J.A.C. 7:26E-3.9.

821. COMMENT: Shell Oil Company questioned the basis for specifying the number and size of tanks in N.J.A.C. 7:26E-3.7(d) since square footage of tankfield would be more applicable. Shell proposes one ground water sample for every 2000 square feet of tankfield.

RESPONSE: The Department based this requirement on what the Department has defined as a typical sized tankfield. The Department also based this requirement on the maximum size tankfield that it believed can adequately be monitored by one ground water sample.

822. COMMENT: Atlantic Electric stated N.J.A.C. 7:26E-3.7(d)4 is overly restrictive and arbitrary. This section should be deleted in favor of site specific and contamination specific sampling program.

823. COMMENT: Mobil Oil Company and the Chemical Industry Council of New Jersey commented the "10 feet" requirement in N.J.A.C. 7:26E-3.7(d)4 is arbitrary. Mobil Oil Company recommended deleting this requirement in favor of site specific language specifying a site specific ground water sampling plan.

824. COMMENT: Exxon Company, U.S.A. recommended deleting "10 feet" from N.J.A.C. 7:26E-3.7(d)4. Distance should be based on calculated seepage velocity rates.

825. COMMENT: E.I. du Pont de Nemours and Company stated the requirement in N.J.A.C. 7:26E-3.7(d)4, to take one ground water sample per area of concern is overly restrictive and does not consider site specific conditions. One ground water sample per area of concern may or may not reveal the presence of ground water contamination associated with a discharge at the area of concern. At both very large and very small areas of concern, this requirement may be inadequate because ground water constantly moves in the subsurface. E.I. du Pont de Nemours and Company recommended the provision should be deleted in favor of a site specific ground water sampling program as outlined in our proposed alteration for N.J.A.C. 7:26E-3.7(a).

826. COMMENT: Allied Signal, Inc. stated the basis for the selected distance of 10 feet in N.J.A.C. 7:26E-3.7(d)4 appears arbitrary. The potential exists for one monitoring well to effectively monitor two or more areas of concern. The distance and effectiveness of a monitoring well network should be based on site specific conditions, professional judgment, and review by the Department.

RESPONSE: The Department agrees that a well located within 10 feet downgradient of an area of concern may not be practical in all cases. For further discussion, see response to comments on N.J.A.C. 7:26E-3.7(c)3iii above.

827. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. recommended revising N.J.A.C. 7:26E-3.7(d)4 as follows: "The ground water monitoring program shall determine if an area of concern has resulted in a discharge or ground water contamination."

RESPONSE: The Department believes the intent of the site investigation is clearly specified in N.J.A.C. 7:26E-3.4 and therefore, the regulations will not be changed as suggested.

828. COMMENT: Chevron U.S.A., Inc. recommended that a new N.J.A.C. 7:26E-3.7(e) be added (existing subsection (e) should become subsection (f)) to read, "If more than one area of concern exists at a site the person responsible for conducting the ground water investigation may propose to combine several nearby individual areas of concern into a single ground water monitoring area. Several areas of concern may utilize one ground water monitoring system if based on the opinion of a qualified hydrogeologist, the network would be able to adequately determine if ground water was impacted from any or all of the units." Separate monitoring well networks should not be required where units are adjacent or relatively close to each other. This will result in cost savings and increase efficiency. The Department recognizes the utility of this approach in existing rules N.J.A.C. 7:14A-6 et seq., where the regulations allow for the designation of a waste management area.

RESPONSE: The Department agrees that under certain circumstances one ground water sampling point may be able to detect contamination emanating from more than one area of concern. For further discussion, see response to comments on N.J.A.C. 7:26E-3.7(c)3iii above.

829. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company commented that the confirmation sampling requirements in N.J.A.C. 7:26E-3.7(e)2 for ground water specify two additional samples if concentrations of contaminants on ground water exceed applicable ground water cleanup standards. This implies three rounds of sampling to confirm the presence of ground water contamination, whereas current remedial investigation guidelines require two sampling episodes to confirm the presence or absence of ground water contamination. Three rounds of sampling is inappropriate and former remedial investigation guidance should prevail.

830. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the basis for averaging sample results and the 30-day period in N.J.A.C. 7:26E-3.7(e)2 is not understood. The Department should provide the basis for this requirement. Further several statistically valid methods are available (Environmental Protection Agency, Resource Conservation and Recovery Act, 1986) and should be considered for use when confirming data results used to determine compliance.

RESPONSE: The intent of N.J.A.C. 7:26E-3.7(e)2 is to allow the person responsible for the investigation the opportunity to resample the ground water to confirm if levels of contamination are found above or below the appropriate remediation standard. This provision allows the person conducting the remediation to average the three ground water samples if slightly above the remediation standards to determine if a remedial investigation is truly necessary. This requirement does not mean that for all confirmatory sampling that three samples need to be taken. If the person conducting the remediation can demonstrate that the ground water is above or below the appropriate remediation standard (both samples clean or both contaminated), they may do so. The third sample only needs to be taken if the person conducting the remediation is averaging the results. Other statistically valid methods for determining compliance with the applicable remediation standards may be submitted pursuant to N.J.A.C. 7:26E-1.6(d).

831. COMMENT: Atlantic Electric recommended the words "shall be conducted" be replaced with "may be required, depending on ground water use and potential receptors." Atlantic Electric commented that the regulations should not require remedial investigations for all cases where contamination is present at levels exceeding the ground water cleanup standards. In some areas of New Jersey, ground water quality is naturally poor, and there are no ground water receptors.

832. COMMENT: E.I. du Pont de Nemours and Company commented that ground water contamination above applicable cleanup levels does not always indicate a discharge or a risk to human health and the environment. A remedial investigation is not appropriate in all cases where contaminant concentrations are confirmed to be present at levels exceeding ground water cleanup standards. In some areas of New Jersey (for example, ironbound section of Newark, Linden, Arthur Kill area), ground water quality is naturally poor and there are no ground water receptors. For this reason, the need to investigate and remediate ground water in such areas should be addressed on a case by case basis. E.I. du Pont de Nemours and Company recommended that the words "shall be conducted" in N.J.A.C. 7:26E-3.7(e)3 be replaced with "may be required, depending on ground water use and pontential receptors."

833. COMMENT: Mobil Oil Company and the Chemical Industry Council of New Jersey commented that the remedial investigation should not be conducted in all cases where contaminant concentrations are confirmed to be present at levels exceeding ground water cleanup standards. For areas where there are no receptors, natural remediation should be allowed. This should be determined on a case by case basis. Mobil Oil Company recommended the words "shall be conducted" at

N.J.A.C. 7:26E-3.7(e)3 should be replaced with "may be required, depending upon site specific conditions that incorporate ground water use and potential receptors."

834. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested revising N.J.A.C. 7:26E-3.7(e)3 as follows: If ground water contamination is confirmed, a ground water remedial investigation may be required depending on ground water usage and potential receptors. The proposed rule should allow flexibility for areas of high background contamination and potential receptors/usage of the ground water.

RESPONSE: By using the appropriate site-specific remediation standard and the Ground Water Quality Standards (N.J.A.C. 7:9-6) as triggers for when a remedial investigation is necessary, the Department is taking the uses and natural conditions of the ground water into consideration. In setting the remediation standard for a site, the Department takes into account any significant degradation of the ground water quality, whether it be man-made (regional urbanization or salt water intrusion induced by over-pumping of an aquifer) or a natural background phenomenon (excessive iron in the coastal plain aquifers). For example, the remediation standard set for a site in a drinking water area may be more stringent than for a site in an area of salt water intrusion. As a clarification, all ground water found to be above the remediation standards may not have to be actively remediated. The regulations do allow for natural remediations to occur in areas without any potential receptors. This determination can be made after appropriate data are gathered during the remedial investigation.

N.J.A.C. 7:26E-3.8

835. COMMENT: Exxon Company, U.S.A. found the inclusion of "wetlands" confusing and perplexing. The purpose of the site investigation described in N.J.A.C. 7:26E-3.8 is to determine the concentration of contaminants in surface waters and sediments. Wetlands are defined in New Jersey (N.J.S.A. 13:9B-3) as "an area that is inundated or saturated by surface water or ground water at a frequency and duration sufficient to support ... vegetation typically, adapted to life in saturated soil conditions..." It was unclear what course of action must be taken when a site investigation occurs during a time when the wetland is dry, since surface water sampling will not occur. The last sentence of this paragraph was ambiguous since the wording "... any other environmental media..." appears to encompass everything. The inclusion of this statement will require burdensome efforts to prove an environmental medium is not in this category and not warranting additional ground water investigation. Exxon recommended the Department delete "wetland" from the title and the text in N.J.A.C. 7:26E-3.8 and delete the last sentence of the section.

RESPONSE: The Department agrees with the commenter. The requirements for the collection of samples in saturated soils such as wetlands is already addressed in N.J.A.C. 7:26E-3.6(a)7. Therefore, the Department has deleted all references to site investigations specific to wetlands from N.J.A.C. 7:26E-3.8 as these references were confusing. The Department will continue to reference wetlands in the remedial investigation phase at N.J.A.C. 7:26E-4.5.

836. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company believe N.J.A.C. 7:26E-3.8(a) and (b) are somewhat confusing and contradictory. N.J.A.C. 7:26E-3.8(a) indicates that a surface water and sediment investigation is required if contamination is found in any of the other environmental media at a site, whereas N.J.A.C. 7:26E-3.8(b) says that surface water and sediment samples are required, "when there is no reason to believe" contaminants may have been discharged to surface water or that sediments contain potential contaminants.

837. COMMENT: E. I. du Pont de Nemours and Company and Atlantic Electric believe the last sentence of N.J.A.C. 7:26E-3.8(a) could be interpreted as requiring the responsible party to investigate the entire surface water and sediment associated with the site and not just the areas associated with the contaminated area of concern. The proposed rule should be more specific to what areas must be investigated for surface water and sediments so no misunderstanding will exist on which area needs to be investigated. E. I. du Pont recommended that the last sentence be revised as follows: "if contamination is found in any of the other environmental media at a site, then the surface water and sediment investigation associated with a discharge from an area of concern shall be investigated as part of the remedial investigation."

838. COMMENT: Mobil Oil Corporation commented that pursuant to N.J.A.C. 7:26E-3.8(a), the triggering event for a surface water, wetlands, or sediment investigation is the finding of no further remediation for all other media on the site. That event is irrelevant to whether those media are contaminated. Mobil believes the criteria for the investigation should be similar to the criteria for other media—known or suspected contamination. The last sentence (if broadly interpreted) could require the responsible party to investigate the entire surface water and sediment associated with the site and not the areas associated with a contaminated area of concern. The commenter did not believe that to be the Department's intent. Mobil suggested revising N.J.A.C. 7:26E-3.8(a) to read as follows: "... and sediment investigation when there is knowledge or reason to believe or all of those media have been contaminated. If contamination is found in any of the other environmental media at a site, then the surface water and sediment investigation that is linked to that area of concern shall be investigated as part of the remedial investigation."

839. COMMENT: N.J.A.C. 7:26E-3.8(a) requires investigation of surface water and sediment if contamination is found "in any of the other environmental media at a site." The General Electric Company believes this requirement for surface water and sediment investigation is burdensome. Such an investigation should only be required where the field data gathered from the site show actual or potential migration of contaminants to the surface water and sediment through a defined pathway. Contamination of building surfaces, air, soil or even ground water often pose no threat to surface waters and sediment and should not automatically trigger additional sampling of other media.

840. COMMENT: N.J.A.C. 7:26E-3.8(a) requires that a surface water and sediment investigation be conducted based solely on the fact that contamination is found in another environmental medium such as ground water. Allied Signal and Chemical Industry Council of New Jersey believe this requirement is arbitrary and not based on sound scientific process. The need for any additional investigations should be based on professional judgment concerning potential pathways that identified contamination may follow.

841. COMMENT: Chemical Land Holdings, Inc. believes N.J.A.C. 7:26E-3.8(a) is too broadly defined to serve as a reasonable trigger for the performance of a surface water and sediment investigation. As defined in N.J.A.C. 7:26E-1.8, the environmental media at a site include air and structures in addition to soil and ground water. As currently written, this provision would require a surface water and sediment investigation based upon the occurrence of air or structural contamination, even if the soil and ground water investigations found no indication of contamination. The text should be revised to reference detection of contamination in soil or ground water as the trigger for investigating surface water and sediment.

842. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.8(a) should be revised as follows: ...."If contamination is found in soil or ground water at the site, then the surface water and sediment investigation related to an area of concern shall be investigated as part of the remedial investigation."

RESPONSE: Jersey Central Power and Light Company and New Jersey Natural Gas Company have inaccurately cited the requirements outlined in N.J.A.C. 7:26E-3.8. However, in response to numerous additional comments, the Department has modified the wording of N.J.A.C. 7:26E-3.8(a) and (b) to clarify their intent. N.J.A.C. 7:26E-3.8(a), as adopted, states that if contamination is found in any of the other environmental media at a site, then surface water and sediment may be investigated as part of the remedial investigation. N.J.A.C. 7:26E-3.8(b)2 states "Surface water samples are required ... when there is reason to believe surface water may have been impacted by contamination emanating from the site." N.J.A.C. 7:26E-3.8(b)3 states "Sediments ... shall be analyzed when there is reason to believe sediments may have been impacted by contamination emanating from the site." When evaluating the need for an investigation, the person conducting the remediation must take into account the existing ground water quality at the site and compare it with the Surface Water Quality Standards (N.J.A.C. 7:9-4) and the technology-based effluent limits (N.J.A.C. 7:14A) for the stream in question.

The Department is in the process of developing more specific criteria in defining when a surface water investigation needs to be completed. Until these criteria are developed, the Department will continue to evaluate the need for a surface water investigation on a case-by-case basis. Once these criteria have been developed, they will be proposed in future rulemaking.

843. COMMENT: Environmental Liability Management, Inc. commented that N.J.A.C. 7:26E-3.8(b)2 would require surface water samples "when there is reason to believe site contaminants may have

been discharged to surface water." However, contamination in surface water will be ephemeral. Therefore, the commenter believes the requirement to sample surface water when there "may have been" a discharge is not technically appropriate and should be deleted. Surface water sampling should be required when there is an on-going discharge or the presence of contaminated sediments. The following revision was suggested: "A surface water body will be sampled when there is reason to believe contaminant levels would exceed surface water standards due to an active discharge or the presence of potentially mobile contaminants in the sediments of the surface water body."

RESPONSE: Sampling of surface water and sediment is required when there is reason to believe surface water or sediments may have been impacted by site contaminants. Although in many cases the impacts associated with a discharge to a surface water body may not persist, the only acceptable method available to the Department to ensure that no contaminants are, in fact, present is via the collection and subsequent analysis of environmental samples. Even if the discharge to surface water was a one time release, the contaminant may persist in the surface water body if the contaminant is refractory and the water body is lentic. In the event the contaminant is degradable and the water body is lotic, a petition for a variance from N.J.A.C. 7:26E may be made pursuant to N.J.A.C. 7:26E-1.6(d).

844. COMMENT: Groundwater & Environmental Services, Inc. believes the size of the surface water body should be considered in N.J.A.C 7:26E-3.8(b)2 when evaluating the need for surface water or sediment samples. Surface water bodies located in industrial areas may contain sediments impacted by multiple sites or operations.

RESPONSE: As required at N.J.A.C. 7:26E-3.8(b)2, samples shall be collected upgradient, downgradient and at the points where contaminants would enter or would have entered the water body. The upgradient sample serves as the background to which the discharge point and downgradient samples are compared to determine the need for further remediation. Sampling strategies which exceed these minimum requirements, such as the collection of additional samples upgradient of the source being evaluated, may be employed in an effort to attribute contaminants to an upgradient source or establish background conditions. The Department believes that the size of the surface water body should not be a basis for eliminating it as an area of concern.

845. COMMENT: The General Electric Company and Allied Signal, Inc. believes the sampling as set forth in N.J.A.C. 7:26E-3.8(b)2 should be conducted only if deemed appropriate based on sound professional judgement. Collecting the information on a seasonal basis, as specified by this paragraph, would require a one-year time period, which is excessive for the objectives of a site investigation, and may not be necessary for some sites, even during a remedial investigation.

RESPONSE: The commenters have misinterpreted N.J.A.C. 7:26E-3.8(b)2. Sampling shall be designed to account for seasonal fluctuations, for example, sampling during low flow periods; however, a seasonal sampling program is not required.

846. COMMENT: Atlantic Electric believes N.J.A.C. 7:26E-3.8(b)3, as worded, would make any person conducting a remediation responsible for cleaning up sites only because of contamination presence without regard of who was responsible for the released contaminants. It is illogical for the Department to attempt to get "anyone it can" to clean up these contaminated areas regardless of their responsibility to the contamination. Atlantic Electric urged the Department to delete this paragraph.

847. COMMENT: E. I. du Pont de Nemours and Company, Mobil Oil Corporation and the Chemical Industry Council of New Jersey believe determining the basis for evaluating when sediments contain potential contaminants at N.J.A.C. 7:26E-3.8(b)3 is nearly impossible. Many of New Jersey's surface water bodies and wetlands have been badly abused for decades. Therefore, there may always be "reason to believe the sediments contain potential contaminants." Assessment of sediments of these bodies will reveal a hodgepodge of contaminants. Correlation to a particular site's areas of concerns may be impossible in all but the simplest situations. Until definition of culpability for this type of contamination can be refined and defined, this issue cannot be examined pragmatically for many sites in New Jersey. Unless responsibility for contamination can be clearly distinguished, the issue of sediment contamination is best handled directly by the regulatory agencies as a State or interstate issue. E. I. du Pont, Mobil and the Chemical Industry Council or New Jersey recommended deleting this requirement.

RESPONSE: The Department's intent in N.J.A.C. 7:26E-3.8(b)3 is to require sediment sampling when there is reason to believe sediments may have been impacted by site contaminants. The Department has modified N.J.A.C. 7:26E-3.8(b)3 to clarify its intent.

848. COMMENT: N.J.A.C. 7:26E-3.8(b)3 states that sediments in surface water or wetlands only need to be analyzed "when there is reason to believe" the sediments contain potential contaminants. Rutgers Environmental Law Clinic believes this is vague and will result in less protection of these important areas, since responsible parties will have reason to attempt to ignore surface waters and wetlands in the site investigation. Surface water and wetland sediments must always be sampled.

RESPONSE: The person performing the investigation, having exercised due diligence, will have thoroughly evaluated each area of concern and determined whether or not each potentially contaminated area of concern could have possibly impacted surface water or sediments. If there is any reason to believe these media may have been impacted, they must be sampled accordingly. Requiring sampling of surface water and wetlands in every instance is not necessary to protect human health and the environment.

Additionally, the Department is deleting all references to wetlands from N.J.A.C. 7:26E-3.8. The requirements for the collection of samples in saturated soils such as wetlands is already addressed in N.J.A.C. 7:26E-3.6(a)7.

849. COMMENT: The Chemical Industry Council of New Jersey, E.I. duPont de Nemours and Company, Atlantic Electric and Mobil Oil Corporation believe N.J.A.C. 7:26E-3.8(b)3iii indicates that cleanup levels will be based on a site specific assessment. However, N.J.A.C. 7:26D does not indicate how these parameters will be used to set cleanup standards. The commenters acknowledged and supported the importance of site specific data for determining appropriate cleanup standards. However, the commenters believe N.J.A.C. 7:26D does not indicate how these parameters will be used or applied to set cleanup standards and thus, does not provide the regulated community adequate opportunity to review and comment. Such undefined and broad bases for establishing numeric standards may be considered arbitrary. The Department should propose detailed methods in N.J.A.C. 7:26D for applying the identified parameters in setting specific cleanup standards.

RESPONSE: Due to the complexities involved in evaluating and determining the need for remediation of surface water sediments, this area of environmental assessment is not well standardized. Therefore, the Department has elected to address this issue on a site by site basis and is unable, at this time, to provide a standard method by which these evaluations will be conducted. If requested, Department approval of the sampling strategy may be obtained prior to the actual collection of sediment samples. As the science improves in this area, the Department will propose additional rulemaking to address this issue.

850. COMMENT: Exxon Company, U.S.A. believes that N.J.A.C. 7:26E-3.8(b)3iii implies that all sediment samples should be analyzed with respect to particle size. The technical merit of particle size analysis for all samples is questionable. Exxon recommended the Department revise the narrative to indicate that particle size analysis is required for specific sample areas and the frequency of the analysis for a defined area shall be a matter of professional judgement that is justified in the site specific remedial investigation work plan.

RESPONSE: Sediment particle size analysis provides a large amount of information at a relatively low cost. Knowledge of particle size distribution allows an ecologist to more accurately predict the type of benthic community that may be present, aiding in the interpretation of possible site related impacts. Given the usual constraints of time and money, resource managers usually bias sampling efforts to areas that are likely to be contaminated (that is, areas of sediment deposition). Knowledge of particle grain size distribution also helps the resource manager determine if samples were collected from such areas.

851. COMMENT: Colonial Pipeline Company pointed out that the analytical procedures for total organic carbon, pH, and particle size are not defined in N.J.A.C. 7:26E-3.8(b)3iii.

RESPONSE: Methods for pH and total organic carbon may be found in the Department's "Field Sampling Procedures Manual." Particle size is a physical analysis and appropriate methods are provided by the American Society for Testing and Materials (ASTM).

N.J.A.C. 7:26E-3.9

852. COMMENT: The Department's approach to soil and ground water investigations includes separate requirements for each medium. Groundwater & Environmental Services, Inc. believes greater coordination is needed since soil and ground water impacts are related.

At sites where a ground water investigation is required or is ongoing, data from monitoring wells which are screened across the water table will provide sufficient data to evaluate contaminant impacts at the vadose zone water table interface. The requirements to obtain and analyze soil samples at the water table interface is redundant and is not cost effective at sites where the ground water investigation includes monitoring wells screened across the water table. The Department should also consider the remedial alternative when developing investigation requirements. For example, extensive soil sampling is unnecessary at sites where vapor extraction is feasible.

853. COMMENT: The General Electric Company and Allied Signal, Inc. believe discrete investigatory phases specifically designed to gather sufficient information to ensure that the investigation is complete should be taken. This requires site specific design of sample location, type and frequency. The new rules have not include the flexibility necessary to design an assessment for the site specific complexities found at every site.

RESPONSE: N.J.A.C. 7:26E is intended to provide for a natural progression from preliminary assessment, through the data collection requirements of the site investigation and then into the remedial investigation and remedial action phases. This progression is practical and logical particularly when site conditions are virtually unknown. N.J.A.C. 7:26E-3 provides the minimum requirements by which all site investigations are to be conducted in an effort to eliminate the need for case by case decisions at every site and expedite Departmental reviews of work submitted. N.J.A.C. 7:26E-3.3(d) provides for the opportunity to move directly into the remedial investigation or remedial action phases once contamination is found above the applicable remediation standard.

The rule already allows, in N.J.A.C. 7:26E-1.6(c), for the use of alternate sampling, analytical, or investigatory methods in certain limited situations. In response to the request for increased flexibility in the site remediation process, the Department is allowing for the use of alternate approaches, subject to Departmental preapproval pursuant to the modification in N.J.A.C. 7:26E-1.6(d).

In response to Groundwater & Environmental Services, Inc.'s comment that soil sampling at the ground water interface is redundant, the Department believes that subsurface soils present **potential** direct contact hazards if these soils are disturbed or brought to the surface in the future and, therefore, such soils must be analyzed as soil samples and not indirectly through ground water sampling as the commenter suggests.

854. COMMENT: Schering Laboratories commented that the objective of the site investigation is to determine if contamination is present. However, the sampling required in this area also seeks to determine the extent of contamination. Schering believes several sampling requirements in N.J.A.C. 7:26E-3.9 overlap existing regulations and are thus redundant. For above ground tanks several soil samples and borings are required. If the objective is to determine the presence, and not the extent of contamination, then only one sample is needed. For underground tanks, details as to monitoring and leak detection are included in existing underground storage tank (UST) regulations. Schering believes N.J.A.C. 7:26E-3.9 is redundant. For buried piping the Department's underground storage tank regulations apply. For loading/unloading pads one biased sample is sufficient to determine the presence of contamination. Where applicable regulations already exist, N.J.A.C. 7:26E-3.9 should only reference the applicable regulation. One biased sample per area of concern is adequate to determine the existence of contamination.

RESPONSE: It is imperative that the representative sample(s) for a particular area of concern be biased to reflect the highest potential contaminant concentrations, both horizontally and vertically, for that particular area of concern. The Department disagrees with the comment that one biased sample per area of concern is adequate to satisfy this requirement in all circumstances. In many instances, the nature, source and extent of the potential contamination is entirely unknown and, therefore, does not lend itself to any particular biasing methodology. Additionally, the importance of the decision being based on this information (whether or not further remediation is required) warrants the collection and evaluation of reproducible, laboratory generated analytical data for the basis of such a decision. Contaminant delineation is conducted pursuant to N.J.A.C. 7:26E-4.1(a)1 after the locations of greatest suspected contamination have been sampled in the site investigation. Contaminant delineation typically requires more samples than are required to determine if contamination is present.

It has been the Department's experience that the sample frequencies specified in N.J.A.C. 7:26E-3.9 are a reasonable minimum requirement to adequately determine if specific areas have historically been contaminated even without documented leaks, spills, discharges or other unobserved releases. In many instances releases to the environment are not observed or documented and, therefore, remain undetected until discovered during the site investigation. In some instances, a higher sample frequency may be appropriate pursuant to N.J.A.C. 7:26E-1.7 and a lower sample frequency may also be requested pursuant to N.J.A.C. 7:26E-1.6(d).

N.J.A.C. 7:26E, when adopted, will become the requirements for all site remediation regardless of under which Departmental program the site falls. The underground storage tank regulations will be reproposed to be consistent with N.J.A.C. 7:26E.

855. COMMENT: Rutgers Environmental Law Clinic believes the number of samples that the Department is requiring at N.J.A.C. 7:26E-3.9 is inadequate to reasonably assume that all contamination at the site has been identified. The small number of samples that the Department is requiring raises substantial concerns. The Department must establish a standard for the identification and delineation of the volume or area of contamination which could remain undetected without threatening human health or the environment. The Department must establish in its regulations a confidence level that must be met in the sampling of a contaminated area of concern. Once the Department has set the confidence level and delineated the amount of contamination that could go undetected without jeopardizing human health or the environment, the remediator will be able to calculate the number of samples required for any given area of concern in order to achieve the required level of confidence. For example, if the Department determines that the area of contamination that may remain undetected without danger to human health or the environment is 10 square feet, then a larger number of samples would be required for a 1,000 square foot area of concern than would be needed for a 100 square foot area of concern, in order to achieve a given confidence level, such as 95 percent, which we recommend. Rather than establishing numbers of samples required based solely on variables like the length of the tank, [N.J.A.C. 7:26E-3.9(a)3], the Department should 1) identify the size by area or volume of soil contamination which may remain undetected without harm to human health or the environment and 2) the required level of confidence which the sampling protocol must achieve. The number of samples needed can then be calculated for each area of concern to assure that any area larger than that which the Department has determined may remain undetected, will be detected to the required confidence level. Furthermore, the 95 percent confidence level should apply not only to the sampling methods specified in these regulations, but also to the alternate sampling methods.

RESPONSE: The Department believes that the number of samples required in N.J.A.C. 7:26E is sufficient to determine if site contamination is above an applicable remediation standard. These rules strike a balance between insuring that human health and the environment are protected to the greatest extent possible without imposing an undue and unnecessary burden on the regulated community. Furthermore, N.J.A.C. 7:26E establishes the minimum requirements for remediation of potentially contaminated sites; therefore, when necessary, sampling in addition to that specified should be conducted pursuant to N.J.A.C. 7:26E-1.7.

N.J.A.C. 7:26E is based on a biased sampling approach rather than on random sampling, which is the basis of the commenter's argument. A discussion of statistical levels of confidence is inappropriate for a biased approach since the particular areas of concern are specifically targeted for sampling. The site investigation would require a significantly greater sample frequency to attain the desired confidence level using a random sampling approach. The approach presented by the commenter will not increase the level of confidence, but would seriously impact one of the primary goals of these requirements: to expedite the identification, investigation and remediation of potentially contaminated sites.

856. COMMENT: Chevron U.S.A., Inc. believes a new N.J.A.C. 7:26E-3.9(a) should be added to read, "Only those areas of concern which have had a known or suspected discharge are subject to the requirement of N.J.A.C. 7:26E-3.9."

RESPONSE: The site investigation is directed at those areas which fall under the definition of an area of concern as identified at the preliminary assessment stage without regard to the occurrence of a particular discharge; therefore, the Department does not believe this change is appropriate.

857. COMMENT: Exxon Company, U.S.A. believes that for clarity, and to be consistent with N.J.A.C. 7:26E-3.1(a) and 3.3(a), which would require a site investigation only for those areas of concern identified in the preliminary assessment, add "if the preliminary assessment has identified these areas as potentially contaminated areas of concern," as the opening phrase in N.J.A.C. 7:26E-3.9(a).

RESPONSE: The Department has clarified at N.J.A.C. 7:26E-3.4(a) that areas of concern need to be sampled only if they are potentially contaminated. Additionally, because the person performing the remediation may proceed directly to subsequent phases of remediation without an independent preliminary assessment phase, the suggested revision is not appropriate.

858. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.9(a)1i(1) should be revised as follows: "Sampling to detect surface contamination shall be conducted in expected areas of contamination based on soil discoloration/odor, history of repairs/replacement, soil beneath valves, or low areas where spills or leaks from valves may accumulate."

859. COMMENT: The Chemical Industry Council of New Jersey believes N.J.A.C. 7:26E-3.9(a)1i(1) is inconsistent with N.J.A.C. 7:26E-3.4(a)1, "Sampling shall be biased to the suspected location of greatest contamination" and recommended the following modification: "Sampling to detect surface contamination shall include expected area of contamination based on soil discoloration/odors, history of repairs/replacement, soil beneath valves, or low area where spills or leaks from valves may accumulate."

860. COMMENT: Mobil Oil Corporation and E.I. duPont de Nemours and Company believe the sampling requirements in N.J.A.C. 7:26E-3.9(a)1 are excessive. Sample number and location should be based on the site specific conditions and be biased to areas of obvious or expected contamination. The number of samples outside immediate area of concern should be very limited. N.J.A.C. 7:26E-3.9(a)1 is also inconsistent with N.J.A.C. 7:26E-3.4(a)1, "Sampling shall be biased to the suspected location greatest contamination." This should be revised to read as follows: "Sampling to detect surface contamination shall include expected area of contamination based on soil discoloration or odors, history of repairs or replacement, soil beneath valves, or low area where spills or leaks from valves may accumulate."

RESPONSE: In all cases, samples must be biased in accordance with N.J.A.C. 7:26E-3.4(a)1 and 2 to the location of greatest contamination. The requirement in N.J.A.C. 7:26E-3.9(a)1i(1) establishes the minimum sample frequency and provides the sampling strategy for those instances when no readily available biasing criteria exist.

It has been the Department's experience that the sample frequency specified in N.J.A.C. 7:26E-3.9(a)1i(1) is a reasonable minimum requirement to adequately determine if above ground tank areas have historically been contaminated even without documented leaks, spills, discharges or other unobserved releases. In many instances releases to the environment are not observed or documented and, therefore, remain undetected until discovered during the site investigation. In some instances, a higher sample frequency may be appropriate pursuant to N.J.A.C. 7:26E-1.7 and a lower sample frequency may also be requested pursuant to N.J.A.C. 7:26E-1.6(d).

861. COMMENT: Atlantic Electric and E.I. duPont de Nemours and Company believe requiring one sample per 100 linear feet at N.J.A.C. 7:26E-3.9(a)1i(1) is arbitrary with no relationship to the construction of the tank or the purpose of site investigation (to determine if soil contamination is present above the applicable cleanup standards). It leaves no room for professional judgement to the qualified individual conducting the site investigation. Atlantic Electric suggested the following revision: "sampling to detect surface contamination shall include known or suspected releases, based on soil discoloration/odors, history of repairs/replacement, soil beneath valves, or low areas where spills or leaks from valves may accumulate."

862. COMMENT: Union Carbide Chemicals and Plastics Company believes the distance is an arbitrary number with no scientific basis. The sampling should be biased towards sites where the operations are most likely to have resulted in a discharge.

RESPONSE: The one sample per 100 linear feet requirement in N.J.A.C. 7:26E-3.9(a)1i(1) establishes a reasonable minimum sample frequency that the Department believes is protective of human health and the environment. N.J.A.C. 7:26E-3.9(a)1i(1) provides for ample flexibility and professional judgement when selecting specific sample locations. The Department's experience indicates that discharges in above ground tank areas are common occurrences.

863. COMMENT: The Chemical Industry Council of New Jersey and Mobil Oil Corporation recommended the following modification to N.J.A.C. 7:26E-3.9(a)1i(2): "To verify tank integrity, tank testing shall be performed. Alternatively, the site may install at least one soil boring which shall be located adjacent to or within two . . ." since prior to doing any soil borings the physical tank integrity should be verified.

RESPONSE: For the purposes of N.J.A.C. 7:26E, the exclusive use of tank testing to determine tank integrity is unacceptable except where specifically provided for. Contamination is frequently the result of other events such as overfills or other sources such as previously existing tanks. Tank testing alone would result in contamination from these events or sources being overlooked.

864. COMMENT: The Chemical Industry Council of New Jersey believes the type of testing in N.J.A.C. 7:26E-3.9(a)1ii(1) should be done on an as needed, site specific basis and recommended the following modification: "If constituent of the discharge is unknown, then at least one sample . . ."

RESPONSE: Soil sampling pursuant to N.J.A.C. 7:26E-3.9(a)1ii(1) is necessary to determine whether or not contaminants are present above an applicable remediation standard in an effort to determine the need for further remediation. Whether or not the identity of the contaminants is known or unknown is not relevant to that determination.

865. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company interpret N.J.A.C. 7:26E-3.9(a)3i as requiring soil sampling for a single-walled underground storage tank, even if the tank has a daily or continuous leak detection system (for example, vapor monitoring, ground water monitoring) or in-tank monitoring in compliance with the underground storage tank regulations. This requirement totally negates underground storage tank guidance with respect to acceptable leak detection systems and is inappropriate.

RESPONSE: If, in accordance with N.J.A.C. 7:26E-3.2(a)4ii, information is provided to the Department documenting that the area of concern is not potentially contaminated, no sampling is required. This would include documentation, as in the commenter's example, that underground storage tanks are in full compliance with current requirements for underground storage tanks as per N.J.A.C. 7:14B and no discharge history. The requirement in N.J.A.C. 7:26E-3.9(a)3i to have double-walled containment for an exemption has been deleted, as the Department agrees with the commenter that other leak detection systems are acceptable.

866. COMMENT: Exxon Company, U.S.A. stated that the purpose of site investigation is not to document the integrity of tank; it is to determine if the cleanup standards have been exceeded at a site. Exxon recommended deleting ". . . or to document the integrity of the tank system" at N.J.A.C. 7:26E-3.9(a)3.

RESPONSE: The Department agrees with the intent of this comment and N.J.A.C. 7:26E-3.9(a)3i has been modified accordingly.

867. COMMENT: Exxon Company, U.S.A. believes a need exists to specify the number of borings and to preclude having to install borings near or too close to an existing tank (very dangerous practice) or to install borings through a building foundation over an underground storage tank at N.J.A.C. 7:26E-3.9(a)3ii. Exxon recommended the following changes: "At least" to "A minimum of four"; and after "tank" insert "or tankfield if more than one tank in the same location". Exxon also recommended the following changes for N.J.A.C. 7:26E-3.9(a)3ii(1): ". . . two . . ." to "five"; replacing ". . . tank . . ." with "tankfield"; and inserting ". . . borings shall not be required through buildings or other structural foundations."

RESPONSE: It is the Department's experience that borings are required within two feet of a tank to accurately access soil contamination resulting from a recent or historical release from an underground storage tank. The Department believes that a minimum distance of two feet is reasonable considering that, for certain soil types and contaminants, vertical movement of spill material may occur rapidly and not result in lateral movement of the spill material. If samples were collected from more than two feet from the tank, discharges from the tank may not be detected.

N.J.A.C. 7:26E-3.9(a)3ii adequately provides for those instances in which tanks are located beneath buildings or are otherwise inaccessible; however, in response to the request for increased flexibility in the site remediation process, the Department is allowing for the use of alternate approaches, subject to Departmental preapproval pursuant to the modification in N.J.A.C. 7:26E-1.6(d).

868. COMMENT: Exxon Company, U.S.A. believes the Department should clarify its requirements regarding the application of approximate

length to non-cylindrical tanks at N.J.A.C. 7:26E-3.9(a)3ii(2), and specify the procedure to be used to determine the minimum number of sampling locations.

RESPONSE: The Department agrees with the commenter and has modified N.J.A.C. 7:26E-3.9(a)3ii(2) accordingly. The phrase limiting the sampling requirements to cylindrical tanks has been deleted.

869. COMMENT: Exxon Company, U.S.A. recommended reducing the minimum number of sampling locations in N.J.A.C. 7:26E-3.9(a)3ii(2) to read as follows: 4,4,6,8. These numbers of samples are more than adequate to detect any contaminants.

870. COMMENT: Shell Oil Company believes more samples are required at N.J.A.C. 7:26E-3.9(a)3ii(2) than necessary to characterize the 10,000-25,000+ gallon tanks. The number of samples should be ½ to ¾ the number stated in N.J.A.C. 7:26E-3.9(a)3ii(2). Shell also proposed one sample location for every 25 feet of tankfield perimeter.

RESPONSE: It has been the Department's experience that the sample frequency specified in N.J.A.C. 7:26E-3.9(a)3ii(2) is a reasonable minimum requirement to adequately determine if underground tank areas have historically been contaminated even without documented leaks, spills, discharges or other unobserved releases. In many instances releases to the environment are not observed or documented and, therefore, remain undetected until discovered during the site investigation. In some instances, a higher sample frequency may be appropriate pursuant to N.J.A.C. 7:26E-1.7 and a lower sample frequency may also be requested pursuant to N.J.A.C. 7:26E-1.6(d).

The rule already allows, in N.J.A.C. 7:26E-1.6(c), for the use of alternate sampling, analytical, or investigatory methods in certain limited situations. In response to the request for increased flexibility in the site remediation process, the Department is also allowing for the use of alternate approaches, subject to Departmental preapproval pursuant to the modification in N.J.A.C. 7:26-1.6(d).

871. COMMENT: Chemical Land Holdings, Inc. believes clarification should be provided at N.J.A.C. 7:26E-3.9(a)3ii(5) as to the basis on which the determination will be made regarding the "material that is less than 15 percent silt/clay" and the "first less permeable soil horizon."

872. COMMENT: Chemical Land Holdings, Inc. believes it should be specifically stated in N.J.A.C. 7:26E-3.9(a)3ii(5) if the Department intends these determinations to be made in the field on the basis of visual analysis of the soils by a hydrogeologic or geotechnical professional.

RESPONSE: It is not the Department's intent to require laboratory analysis for soil classification, but to rely on field classification systems which are based on soil texture, recognizing that the sand content would only be an estimation.

873. COMMENT: Chemical Land Holdings, Inc. believes the rationale for the selection of "9.5 to 10 feet below the tank bottom" in N.J.A.C. 7:26E-3.9(a)3ii(5) should be provided.

RESPONSE: The depth of 9.5 to 10 feet in N.J.A.C. 7:26E-3.9(a)3ii(5) was chosen to limit the scope of the site investigation to a practical depth. The 9.5 to 10 foot limit is based on the Department's experience for the vast majority of investigations conducted throughout most of the State which indicate that either a relatively impermeable layer or ground water is encountered prior to that depth. However, it should be emphasized that these constitute the minimum requirements for site investigation and remediation, and sampling below 9.5 to 10 feet may be required if site specific conditions warrant.

874. COMMENT: The Whitman Companies Inc. believes N.J.A.C. 7:26E-3.9(a)3ii(5), which describes sampling procedures at underground storage tanks, in the event that sandy bedding materials are encountered, does not specifically state that when sampling zero to six inches above the saturated zone, one should sample into native material, not sample the bedding material.

RESPONSE: In accordance with N.J.A.C. 7:26E-3.4(a)1 and 2, samples shall be biased to the suspected location of greatest contamination which, in most cases, without any field indicators, would be the native material.

875. COMMENT: The Whitman Companies Inc. pointed out the concept of alternative site assessment (that is, monitoring well) for tank excavations in bedrock, previously required in the "Interim Closure Requirements" (September, 1990) document has either been omitted or eliminated in N.J.A.C. 7:26E-3.9(a)3ii(5).

RESPONSE: The underground storage tank regulations will be amended to be consistent with N.J.A.C. 7:26E.

The commenter is correct in pointing out that N.J.A.C. 7:26E does not require a monitor well for tank excavations, as was required in N.J.A.C. 7:14B. This is because, as a minimum standard, it is not appropriate that every tank excavation in bedrock require a ground water sample to determine if ground water has been impacted. In some circumstances, for example, if the tank contained a highly mobile and toxic substance such as gasoline, a ground water sample should be taken. On the other hand, if there is no evidence of a discharge, the tank contained a low toxicity substances such as fuel oil, and ground water is neither proximal nor used for potable water in the area, then a ground water investigation would not be appropriate.

876. COMMENT: Environmental Liability Management, Inc. believes the requirement at N.J.A.C. 7:26E-3.9(a)3ii(5) to sample deeper than the 18 to 24 inch interval for volatiles during an initial site investigation when surface soil consists of less than 15 percent silt/clay should be waived in the proposed rule for areas where the first water is known not to be used. The rationale for this is that there is little potential for contamination of ground water above the one ppm and 10 ppm organic values proposed in N.J.A.C. 7:26D-4.2(b)1 and 2 to occur when soil volatile values are below proposed subsurface standards (7:26D-3.2(b)) in a soil of less than 15 percent silt/clay. The exception to this would be when the discharge is a recent one.

RESPONSE: N.J.A.C. 7:26E-3.9(a)3ii(5) is designed so that a party may identify the location of greatest contamination and is totally unrelated to ground water use. Restricting soil sampling to the uppermost two feet limits the scope of the investigation and significantly reduces the probability of collecting a sample in the location of greatest contamination in highly permeable soils.

877. COMMENT: The Chemical Industry Council of New Jersey, Atlantic Electric, E. I. du Pont de Nemours and Company and Mobil Oil Corporation believe submitting saturated soil samples for chemical analysis at N.J.A.C. 7:26E-3.9(a)3ii(6) is not appropriate and is inconsistent with other regulations. Samples should be collected from above the water table. If a potential source (that is, underground storage tank) is partially submerged, then the soil sample should be collected from the six-inch interval above the water table. It is likely that if the underground storage tank has leaked, variations in the water table will affect contaminant migration. Therefore, residual contamination will be observed in the vadose zone. If ground water is impacted, future investigations and/or remedial measures should be addressed via a ground water investigation, not a soil investigation. It was recommended that N.J.A.C. 7:26E-3.9(a)3ii(6) be deleted.

RESPONSE: N.J.A.C. 7:26E-3.9(a)3ii(6) only applies to those instances when the designated sample point is entirely within the saturated zone. The Department believes that it is more appropriate to sample soil near the tank first, and then proceed with a ground water investigation if soil sampling indicates that ground water may be contaminated. If only ground water sampling is conducted, and the results indicate that there was a discharge, the soil near the tank must also be sampled to define the soil condition. Furthermore, a ground water investigation in many instances may be ineffective because poorly soluble contaminants may not be detected in ground water, but may be present in the saturated soil indicating that a discharge has occurred. Contaminants which are more dense than water may not be present in the vadose zone even if the water table fluctuates, as the commenter has suggested. The Department recognizes that N.J.A.C. 7:26E-3.9(a)3ii(6) may be inconsistent with other Department regulations, and notes that the Department will be reviewing and revising its other rules to provide consistency with N.J.A.C. 7:26E.

878. COMMENT: Groundwater & Environmental Services, Inc. believes the Department should distinguish at N.J.A.C. 7:26E-3.9(a)5 between requirements at active facilities where all pipes and tanks have been graded to the Department's specifications and those facilities which are undergoing closure or have ceased operations since the underground storage tank regulations include requirements for updating underground piping.

RESPONSE: If, in accordance with N.J.A.C. 7:26E-3.2(a)4ii, information is provided to the Department documenting that the area of concern is not potentially contaminated, no sampling is required. This would include documentation, as in the commenter's example, that underground storage tanks and piping are in full compliance with current requirements for underground storage tanks, N.J.A.C. 7:14B. Potential contamination from underground piping or tanks which previously existing at this location would not be exempt. The Department does not believe it is necessary to further distinguish between active facilities and closed facilities.

879. COMMENT: Atlantic Electric did not see the requirement at N.J.A.C. 7:26E-3.9(a)5i and (a)5ii as a prudent measure because: a. there is not always as built prints available; thus b. the chances of rupturing an underground pipe are increased to the point where; c. the line may be damaged during drilling and may go undetected, thus causing significant environmental damage. Atlantic Electric recommended using tank and piping testing instead of soil boring.

880. COMMENT: E. I. du Pont de Nemours and Company, Mobil Oil Corporation and the Chemical Industry Council of New Jersey believe the use of soil borings may not be meaningful in verifying piping integrity at N.J.A.C . 7:26E-3.9(a)5. Borings would have to be installed relatively close to the piping in order to detect leaks. Because most facilities do not have accurate as-built drawings showing the location of the piping, the use of soil borings may not provide meaningful information for assessing piping integrity. In addition, drilling soil borings near product-line piping at active facilities is quite risky. If a line is damaged during drilling, it may go undetected for some time and cause significant environmental damage. It was recommended using tank and piping testing instead of soil borings for verifying both piping and tank integrity.

RESPONSE: N.J.A.C. 7:26E-3.9(a)5 allows the use of precision tests pursuant to N.J.A.C. 7:26B-4.3(j) for below grade piping if the piping is original and there is no history of discharges or repairs. When the use of precision test is not acceptable, it is the Department's experience that borings are required within two feet of the piping to accurately assess soil contamination resulting from a recent or historical release from below grade piping. The Department believes that a minimum distance of two feet is reasonable considering that, for certain soil types and contaminants, vertical movement of spill material may occur rapidly and not result in lateral movement of the spill material. If samples were collected from more than two feet from the piping, discharges from the tank may not be detected.

Even with accurate facility plans or as-built construction drawings, extreme care must be exercised when sampling in the vicinity of underground tanks or piping. The need for caution does not preclude the need for data required to make well-informed decisions as to whether or not further remediation is required at potentially contaminated sites.

881. COMMENT: Exxon Comany, U.S.A. believes the 50 feet and 15 feet dimensions in N.J.A.C 7:26E-3.9(a)5ii appear to be arbitrary. It should be kept in mind that this regulation is not exclusively applicable to the Environmental Cleanup Responsibility Act program. The existence of a unit does not mean that a discharge has occurred. Site investigations are required only to determine if exceedances of cleanup standards exist. Further, there is no technical validity to an "across the board" 15 foot requirement, even in a known discharge area. Exxon recommended adding after "...50..." the following: "where there has been a known discharge."

882. COMMENT: Shell Oil Company believes one soil sample for every 25 feet at N.J.A.C 7:26E-3.9(a)5ii is sufficient to characterize contamination associated with below grade piping.

RESPONSE: Based on the Department's experience, the number of samples required in N.J.A.C. 7:26E-3.9(a)5ii constitutes the minimum number necessary to adequately characterize the area of concern, determine if contaminants are above an applicable remediation standard and subsequently determine the need for further remediation. The Department believes that a minimum frequency of 15 feet is reasonable considering that, for certain soil types and contaminants, vertical movement of spill material may occur rapidly, and not result in lateral movement of the spill material, so that, if samples were more than 15 feet apart, discharges from the system may not be detected.

If discharges are known to have occurred in an area, the investigation and delineation of the area should be conducted pursuant to N.J.A.C. 7:26E-4 and the 15 foot minimum frequency need not apply.

The 50 foot limit was selected because the Department believes that, for pipelines greater than 50 feet in length, the 15 foot minimum frequency could be onerous, and alternate approaches, for example, the utilization of field screening methods, supplemented with lab analyzed samples, would, in many cases, be adequate.

883. COMMENT: E. I. du Pont de Nemours and Company, the Chemical Industry Council of New Jersey, Atlantic Electric and Mobil Oil Corporation believe N.J.A.C. 7:26E-3.9(a)6 implies that a discharge to soil has occurred at all fill connections or valved discharge points at loading or unloading areas. Other sections of N.J.A.C. 7:26E recognize that discharges are not universal at certain locations by limiting sampling to areas of discolored soil, those with a history of repairs, et cetera. To assume discharges have occurred at all loading and unloading areas is arbitrary. It was suggested that this section be expanded to add, "based on soil discoloration/odors, history of repairs/replacement, history of spills or leaks, or low areas where spills or leaks from connections or valves may accumulate."

RESPONSE: N.J.A.C. 7:26E requires a site investigation at all potentially contaminated areas of concern. Exposed soils at loading or unloading areas fall under the definition of an area of concern and, as such, must be evaluated in the preliminary assessment to determine if they are potentially contaminated. If a loading or unloading area is determined to be potentially contaminated, then it must be sampled during the site investigation.

It has been the Department's experience that loading and unloading areas over exposed soils have historically been contaminated even without documented leaks, spills, discharges or other unobserved releases. In many instances, releases to the environment are not observed or documented and, therefore, remain undetected until discovered during the site investigation. If, however, the person responsible for the remediation can provide documentation to the Department in accordance with N.J.A.C. 7:26E-3.2(a)4ii that the area of concern is not potentially contaminated, sampling is not required.

884. COMMENT: E. I. du Pont de Nemours and Company believes N.J.A.C. 7:26E-3.9(b) requires a site investigation at the listed areas without recognition of the type of material managed in those areas or evidence that a discharge has occurred or is suspected to have occurred. It was suggested the section be expanded to include the following: "where hazardous substances, hazardous wastes, hazardous constituents, or pollutants are currently or have been managed and there is evidence that a discharge has occurred or is suspected to have occurred."

885. COMMENT: Exxon Company, U.S.A. believes the sampling requirements need to be more flexible with regard to sampling adjacent to concrete pads at N.J.A.C. 7:26E-3.9(b) since there is no allowance for the professional judgment of the investigator to evaluate whether it is reasonable, based on site specific knowledge, for the stored material or a specific tank to have "impacted" the surrounding soil. The Department is mandating this adjacent sampling, regardless of the information about a specific site, with only an additional requirement for under the pad sampling if there is documentation of soil impact. This non-biased sampling scheme will impose additional sampling and analytical costs for data that will have minimum usefulness. Exxon recommended that sample selection concepts contained in N.J.A.C. 7:26E-3.9(b)1iii be incorporated into N.J.A.C 7:26E-3.9(b)1i.

886. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.9(b)1 should be revised as follows: "The site investigation shall also satisfy the following requirements for all storage and staging areas .... and drum storage pads where potential discharges may have occurred or hazardous wastes/substances are currently or were previously managed." The investigation should not include areas where only clean unused drums have been stored.

887. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company believe the Department must clarify N.J.A.C. 7:26E-3.9(b)1. This section indicates that soil sampling may be required for all storage and staging areas, including dumpsters, heat exchangers, and "other outdoor equipment." The commenters believe this could indicate that soil sampling would be required adjacent to a concrete pad where a garbage dumpster is located.

RESPONSE: N.J.A.C. 7:26E-3.1 requires a site investigation at all potentially contaminated areas of concern. The referenced areas fall under the definition of an area of concern only if hazardous substances, hazardous wastes, hazardous constituents or pollutants were in some way associated with the area. All areas of concern are evaluated in the preliminary assessment to determine if they are potentially contaminated. If an area is determined to be potentially contaminated, then it must be sampled during the site investigation pursuant to the requirements of N.J.A.C. 7:26E-3.3 through 3.9.

It has been the Department's experience that the referenced areas have historically been contaminated even without documented leaks, spills, discharges or other unobserved releases. In many instances, releases to the environment are not observed or documented and remain undetected until discovered during the site investigation. Therefore, it is not appropriate to incorporate the sample selection concepts at N.J.A.C. 7:26E-3.9(b)1iii into N.J.A.C. 7:26E-3.9(b)i. If, however, the person performing the remediation can provide documentation to the Department in accordance with N.J.A.C. 7:26E-3.4(a)4ii that the area of concern is not potentially contaminated, then sampling is not required.

888. COMMENT: Union Carbide Chemicals and Plastics Company believes N.J.A.C. 7:26E-3.9(b)1i should be deleted. The distance is an arbitrary number with no scientific basis and does not consider site specific conditions. The sampling should be biased to the operations and potential discharge history.

889. COMMENT: Mobil Oil Corporation believes the sampling requirements of N.J.A.C. 7:26E-3.9(b)1i are excessive. Sample number and location should be based on the site specific conditions and be biased to areas of obvious or expected contamination. The number of samples outside an area of concern should be very limited. This requirement should be deleted and the sampling around a pad be based solely on the requirements of N.J.A.C. 7:26E-3.9(b)1ii, iii and iv.

890. COMMENT: E. I. du Pont de Nemours and Company, the Chemical Industry Council of New Jersey and Atlantic Electric believe requiring one sample for every 30 feet of length at N.J.A.C. 7:26E-3.9(b)1i is arbitrary and does not consider site specific conditions. The requirement to collect one soil sample for every 30 feet of length on the side of a pad has no relationship to the potential for contaminated soils to be adjacent to the pad. The requirement is arbitrary and not based on sound technical judgment. It was suggested the requirement be deleted and the sampling around a pad be based solely on the requirements of N.J.A.C. 7:26E-3.9(b)1ii, iii and iv.

891. COMMENT: Colonial Pipeline Company believes a sample spacing of 30 feet along pad edges at N.J.A.C. 7:26E-3.9(b)1i is overly detailed, especially for site characterization; it was recommended that this interval be expanded to 50 feet.

RESPONSE: In all cases, sampling of pads must meet all of the requirements of N.J.A.C. 7:26E-3.9(b)1. The requirement for N.J.A.C. 7:26E-3.9(b)1i establishes the minimum sample frequency and the requirement at N.J.A.C. 7:26E-3.9(b)1ii specifies that the sample location should be biased to the suspected location of greatest contamination. If no obvious biasing criteria exist, professional judgment should still be used to bias the sample to the location of greatest suspected contamination. For example, if soils adjacent to the pad show no evidence of contamination, but the pad is sloped so that a particular location would be more likely to be contaminated than other locations along that side of the pad, then that location should be sampled.

It has been the Department's experience that the sample frequency specified in N.J.A.C. 7:26E-3.9(b)1i is a reasonable minimum requirement to adequately determine if referenced areas have historically been contaminated even without documented leaks, spills, discharges or other unobserved releases. In many instances releases to the environment are not observed or documented and, therefore, remain undetected until discovered during the site investigation. In some instances, a higher sample frequency may be appropriate pursuant to N.J.A.C. 7:26E-1.7 and a lower sample frequency may also be requested pursuant to N.J.A.C. 7:26E-1.6(d).

892. COMMENT: Environmental Liability Management, Inc. recommended that N.J.A.C. 7:26E-3.9(b)2ii be modified and not require one sample per 400 square feet of a storage/staging area when samples can be biased to specific locations. The one sample per 400 square feet frequency is more stringent than the one sample per 900 square feet required for post-remedial action sampling. Furthermore, the sampling to be conducted under N.J.A.C. 7:26E-3.9(b)2ii will usually be biased. Only when samples cannot be biased to suspected areas is it technically appropriate to state the frequency of samples collected.

893. COMMENT: E. I. du Pont de Nemours and Company believes the sample frequency required at N.J.A.C. 7:26E-3.9(b)2ii, one per 400 square feet of surface area for an area 300 feet in perimeter, is arbitrary and does not consider site specific conditions. The requirement to collect one sample per 400 square feet has no relationship to the potential for contamination of the storage or staging area. The requirement is arbitrary and not based on sound technical judgment. E. I. du Pont proposed that sampling at storage and staging areas be based on the other provisions in proposed N.J.A.C. 7:26E-3.9(b)2ii and the section be revised as follows: "Sampling locations at the storage or staging area shall be biased toward the suspected location of greatest contamination related to a known or suspected discharge based on low points, drainage patterns, discoloration, stressed vegetation, field instrument measurements or other field indicators."

894. COMMENT: Union Carbide Chemicals and Plastics Company, the Chemical Industry Council of New Jersey, Atlantic Electric and Mobil Oil Corporation believe N.J.A.C. 7:26E-3.9(b)2ii should be revised as follows: "Sampling locations shall be biased toward the suspected location of greatest contamination based on low points, drainage patterns, discoloration, stressed vegetation, field instrument measurements or other field indicators. Sampling locations shall be biased toward the suspected location of greatest contamination based on low points, drainage patterns, discoloration, stressed vegetation, field instrument measurements or other field indicators."

895. COMMENT: With respect to N.J.A.C. 7:26E-3.9(b)2ii, Shell Oil Company believes one per 900 square feet is sufficient to characterize storage and staging areas over permeable cover.

896. COMMENT: Colonial Pipeline Company believes sample frequency of one per 400 square feet or one sample within a 300 foot perimeter at N.J.A.C. 7:26E-3.9(b)2ii is overly detailed especially for site characterization. It was recommended that this interval be expanded to one per 1000 square feet or one sample within a 1,000 foot radius.

RESPONSE: In all cases samples must be biased in accordance with N.J.A.C. 7:26E-3.9(b)2ii which also establishes the minimum sample frequency. If no obvious biasing criteria exist, professional judgment should still be used to bias the sample to the location of greatest suspected contamination. The sample frequency has been reduced to one per 900 square feet of surface area because the Department agrees with the commenters that the proposed sample frequency of one per 400 square feet was excessive.

897. COMMENT: Colonial Pipeline Company believes N.J.A.C. 7:26E-3.9(c) should be equally applied to all non-point sources including all storm sewer outfalls, parking lot drains and all other areas designed with a storm water detention pond. Since the Environmental Protection Agency has identified such non-point sources as a major source of contamination, these areas should be characterized and ranked as potential sources of hazardous contamination.

RESPONSE: Storm water detention ponds shall be sampled during the site investigation if the pond received runoff from a potential contaminant source. The sampling requirements for storm sewer outfalls and parking lot drains are addressed in N.J.A.C. 7:26E-3.9(d)4.

898. COMMENT: Colonial Pipeline Company believes N.J.A.C. 7:26E-3.9(c) should be rewritten to include: "Sediments at influent areas to all surface impoundments which are designed to hold an accumulation of liquid substances or substance containing free liquids need to be characterized. If contamination is detected above a specific compound's appropriate cleanup level, then the following areas shall be characterized: 1. Sediments within all unlined ..." Departmental guidance must be developed for areas which may be influenced by tidal actions.

RESPONSE: Sampling is required not only at the influent area but also at the effluent area and other sediment accumulation areas because the Department believes, based on experience and site data, that the influent area may not always represent the area of greatest contamination of sediments. Depending on influent flow velocity and particle mass, sediments may not be deposited at the influent area at the greatest concentration.

The Department is unsure of the commenter's concern regarding the influence of tidal actions on surface impoundments.

899. COMMENT: E. I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey believe the word sediment in N.J.A.C. 7:26E-3.9(c) needs to be changed to reflect recommended definitions for sediment and solids. The use of the word sediment can lead to confusion here because the term sediment has typically been associated only with areas that are waters of the State and/or the United States rather than with surface impoundments and other man-made ponds. This issue was discussed previously in association with the definition of sediments. The word sediment should be replaced with the term "solids" to reflect recommended definitions listed earlier.

RESPONSE: The term "sediments" is widely used and generally understood to mean solid or semi-solid matter that settles to the bottom of a liquid, and does not need to be changed.

900. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company believe N.J.A.C. 7:26E-3.9(c)1 implies that sampling would be required for sediments within all unlined surface improvements if the impoundment receives runoff from areas of "potential contaminant sources." This is a very broad and inappropriate requirement since surface impoundments include fire ponds and stormwater detention basins.

RESPONSE: If the fire ponds or storm water detention basins do not receive runoff from a potential contaminant source, then they do not have to be sampled as a surface impoundment. If, however, there is runoff from a potential contaminant source entering these impoundments, then they must be sampled pursuant to N.J.A.C. 7:26E-3.9(c)1.

901. COMMENT: The General Electric Company and Allied Signal, Inc. believe N.J.A.C. 7:26E-3.9(c)3 should take into consideration the potential of breaching confining layers while taking core samples. If the collection of core samples is inappropriate in a surface impoundment because the sediments in the impoundment are acting as a barrier, a core sample should not be taken. N.J.A.C. 7:26E-3.9(c)3 does not allow for this necessary flexibility.

RESPONSE: The Department agrees with this comment and has modified N.J.A.C. 7:26E-3.9(c) to allow naturally occurring geologic material or residuals accumulated via deposition to be considered an impermeable liner when such materials meet the definition of "impermeable" in N.J.A.C. 7:26E-1.8.

902. COMMENT: Colonial Pipeline Company recommended that sediment layers be individually sampled when greater than 18 inches thick, not when greater than six inches as in N.J.A.C. 7:26E-3.9(c)4.

903. COMMENT: With regard to N.J.A.C. 7:26E-3.9(c)4, Shell Oil Company believes distinct lithologies (permeabilities) should be the only factor for separate samples.

RESPONSE: It is the Department's experience that distinct sediment layers six inches or greater exhibit significantly distinct characteristics and constituents which warrant individual analysis and evaluation as in N.J.A.C. 7:26E-3.9(c)4. This is also consistent with N.J.A.C. 7:26E-3.6(a)5 which requires the collection of soil samples in discrete six inch intervals. The Department did not require sampling based on each distinct layer because sampling thin layers less than six inches thick was considered excessive.

904. COMMENT: N.J.A.C. 7:26E-3.9(c)6 requires that a physical inspection be performed to determine liner integrity. E. I. du Pont de Nemours and Company, Mobil Oil Corporation, Exxon Company, U.S.A., and the Chemical Industry Council of New Jersey believe the requirement to do a physical inspection of the liner to determine integrity is not an appropriate mechanism if the surface impoundment is in use and plans are to continue its use. If monitoring well water quality data exist for the surface impoundment and the monitoring wells were specifically installed for detection monitoring of that surface impoundment, there should be no need for a physical inspection of the liner if the well water quality data shows no impact to ground water has occurred due to the surfce impoundment. Physical inspection of the liner will be very disruptive of manufacturing activities. The following alteration to N.J.A.C. 7:26E-3.9(c)6 was recommended: "Surface impoundments with impermeable liners shall have liner integrity verified by physical inspection and/or evaluation of monitoring well water quality data associated with surface impoundment, if available."

RESPONSE: The Department agrees that this requirement needed clarification, and N.J.A.C. 7:26E-3.9(c)6 has been deleted. The revision suggested by the commenters has been incorporated at N.J.A.C. 7:26E-3.9(c).

905. COMMENT: The General Electric Company believes the requirement of extensive investigation of building floor drains pursuant to N.J.A.C. 7:26E-3.9(d) is overbroad and unreasonable in the absence of evidence that the drains have been used to discharge pollutants into the environment.

RESPONSE: The Department has determined that the requirement pursuant to N.J.A.C. 7:26E-3.9(d) will be clarified to require sampling of floor drains only if there is reason to believe contaminants were discharged into the drainage system.

906. COMMENT: E. I. du Pont de Nemours and Company believes the requirement of sampling of floor drains or collection system laterals pursuant to N.J.A.C. 7:26E-3.9(d)1iv should not be based solely on the material discharged to the drains and laterals. Floor drains and collection system laterals are generally designed to be resistant to the materials discharged to them (for example, coated concrete for caustics, tile for acids, steel or resistant plastic for high-concentration organics). Sampling should only be required where there is evidence of degradation of the drains and laterals that shows the potential for releases. The Department should consider the nature of the discharge (that is, concentration of the discharge, contact time with the underlying material, et cetera) and the construction materials comprising the drain before requiring the collection of soil samples. In addition, drilling through floor drains and laterals will be disruptive of ongoing processes and potentially dangerous in active plant areas. Soil sampling, in these cases, should be strictly limited to those situations where significant contamination is suspected. E. I. du Pont recommended replacing the word "shall" with the word "may".

907. COMMENT: Atlantic Electric and the Chemical Industry Council of New Jersey saw drilling through concrete floors to sample underlying soils as at N.J.A.C. 7:26E-3.9(d)1iv excessive. Atlantic Electric was also concerned with the wording which expands the Department's reach into buildings. N.J.A.C. 7:26E-3.9(d)1iv should be revised as follows: "Sampling soil below floor drains or collection system laterals may be conducted when corrosives . . ."

908. COMMENT: Mobil Oil Corporation believes drilling through concrete floor drains and the underlying concrete slab of the facility in order to sample underlying soils is difficult and disruptive to on-going business. The integrity of these systems should first be tested. Sampling should be required only if testing reveals a lack of system integrity. The focus of any sampling should be at points of known or suspected leaks. N.J.A.C. 7:26E-3.9(d)1iv should be revised as follows: "Sampling soil below floor drains, or collection system laterals, may be conducted when corrosives . . . and/or were discharged to floor drains or collection systems and the integrity of these systems has been shown by testing to be questionable or there has been a history. . ."

RESPONSE: The rule has been modified to clarify that the requirements of N.J.A.C. 7:26E-3.9(d) only apply when there is reason to believe contaminants were discharged into the drainage system. N.J.A.C. 7:26E-3.9(d)1iv requires sampling below floor drains or collection system laterals only when materials which would normally degrade the collection system were discharged or when there has been a history of collection system discharges, rupture or repairs. Soil sampling in these instances will, in fact, determine the significance of the suspected contamination. While the Department agrees that the nature of the discharge, concentration, contact time, etc. will influence whether discharges from floor drains or collection systems occurred, the Department notes that consideration of these items could only be done on a case-by-case basis. Instead of requiring a case by case analysis prior to sampling soil below floor drains and collection systems, the Department generally required these areas to be sampled when corrosives are or were used. The Department has made an assumption, based upon its experience, that when corrosive materials are discharged to floor drains or collection systems, there is a strong possibility that leaks from these areas may occur. However, relief from this requirement may be requested, pursuant to N.J.A.C. 7:26E-1.6(d).

The Department recognizes that investigating drainage systems within buildings is potentially disruptive to operations. However, drainage systems, particularly in process areas, are known to be common sources of contamination to underlying soil and ground water, and the Department believes that such sources must be investigated.

The Department disagrees that sampling soil below drainage systems should only be required if the system fails an integrity test because the integrity test only documents the current condition of the system. Integrity may have been restored to the system only recently, and prior discharges would therefore not be detected.

909. COMMENT: Environmental Liability Management, Inc. was unaware of any site remediation that resulted from contamination by roof runoff and questioned the basis for sampling roof leader discharge points at N.J.A.C. 7:26E-3.9(d)2. Also, the Department does not indicate the potential for roof runoff to be a problem or what type of contaminants could be expected to cause a problem after being vented to the atmosphere. Therefore, the requirement that all roof leader discharge points be sampled was considered excessive. If the Department has the supporting documentation that roof runoff does cause soil contamination, then the conditions (and contaminants) under which this pathway of soil contamination can occur needs to be stated. If this remains as a pathway of concern, it was recommended that when sampling is done, it be limited to those drains most likely to receive contamination (due to proximity of vent and/or roof slope) and that the parameters of concern be limited to nonvolatile, persistent compounds or those compounds which the Department has found to migrate to soil via this pathway.

RESPONSE: The rules do not require that roof drains always be sampled. N.J.A.C. 7:26E-3.9(d)2 states that "each roof leader discharge point shall be sampled if storage units or process operations using hazardous substances, hazardous wastes, hazardous constituents, or pollutants vent or have vented to the roof" (emphasis added). The roof leader discharge would then be an area of concern which requires sampling. Variations in wind direction, which would result in movement of the contaminant to many different locations on the roof, preclude the selection of individual roof leader discharge points for sampling. The

Department has documented instances in which both roof runoff contaminated with volatile and nonvolatile constituents has resulted in soil contamination.

910. COMMENT: Exxon Company, U.S.A. believes N.J.A.C. 7:26E-3.9(d)2 allows no flexibility in the selection of sampling points based on runoff patterns or the number of vents and their location in relation to roof leaders. Additionally, sampling may not be relevant based on the physical properties of the materials discharged. For example, roof leaders when process operations vent to the roof: The venting of a volatile organic compound from a permitted point source in compliance with the permit emission requirements will make all roof leaders subject to investigation. It was recommended that the Department revise the working to provide increased flexibility for professional judgment. The areas that are investigated should be part of the site characterization work plan that is based upon knowledge of the site processes, historical use, etc. Also, Exxon recommended deleting the list of specific items and locations to investigate and adding "non-permitted" after "... any ..." in N.J.A.C. 7:26E-3.9(e)1.

RESPONSE: Soil at each roof leader discharge point is required to be sampled because variations in wind direction, which would result in movement of the contaminant to many different locations on the roof, preclude the selection of individual roof leader discharge points if sampling is required. Physical properties of contaminants were considered by the Department when making the requirement at N.J.A.C. 7:26E-3.9(d)2, and the Department has documented instances in which both roof runoff contaminated with volatile and nonvolatile constituents has resulted in soil contamination. However, a variance from this requirement may be requested pursuant to N.J.A.C. 7:26E-1.6(d).

A permit generally only regulates the amount of a pollutant which can be discharged to a particular medium. A permit does not guarantee that the site at the permitted location is free of contamination. Subsequently, permitted discharge areas may be considered areas of concern. Therefore, restricting the application of these requirements only to non-permitted discharges would not be consistent with the intent of N.J.A.C. 7:26E.

911. COMMENT: E. I. du Pont de Nemours and Company believes the requirement for a soil boring outside the structure at N.J.A.C. 7:26E-3.9(d)4 may not be necessary. Sampling should be conducted within catchbasins, manholes, sumps, et cetera, and not around them. If cleanliness can be documented, then the need to sample around these structures is not warranted. This requirement assumes that the structures do not have bottoms. E. I. du Pont recommended that sampling be required within, not around, catchbasins, manholes, sumps, etc. It was also recommended that sampling around catchbasins not be required if cleanliness can be documented.

RESPONSE: Sampling, pursuant to N.J.A.C. 7:26E-3.9(d)4, must be conducted around the catchbasin, manhole, sump, because substances may be discharged through a permeable structure without leaving a residual or solid which can be collected and subsequently analyzed. If, in accordance with N.J.A.C. 7:26E-3.2(a)4ii, information can be provided to the Department documenting that the area of concern is not potentially contaminated, no sampling is required.

912. COMMENT: E. I. du Pont de Nemours and Company believes N.J.A.C. 7:26E-3.9(d)4iv requires extensive sampling in a drainage network if the potential exists for contaminants. The current wording leaves the possibility for sampling to be done in a drainage network based on an area of concern that has potential contaminants and discharges to the network. Thus, sampling in a drainage network would be based on the potential for contaminants, not on known contamination. Sampling in a drainage network must be assoicated with a contaminated area of concern from which solids (sediments) could possibly migrate. E. I. du Pont recommended that the following sentence replace the Department's proposed wording: "Additional sampling of solids within the system shall be conducted to assess the migration of potential contaminants through the drainage network, if the network is associated with drainage from a contaminated area of concern; and."

913. COMMENT: The rationale for N.J.A.C. 7:26E-3.9(d)4iv was not understood by the Chemical Industry Council of New Jersey. The basis for this needs to be clarified. The Chemical Industry Council of New Jersey, Atlantic Electric, Mobil Oil Corporation and Exxon Company, U.S.A. recommended the following modification: "Additional sampling of solids within the system shall be conducted to assess the migration of potential contaminants, from a contaminated area of concern, through a drainage network; and ..."

914. COMMENT: Shell Oil company questioned the requirement pursuant to N.J.A.C. 7:26E-3.9(d)4iv for sampling within the system. This should be covered by other regulations such as New Jersey Pollutant Discharge Eliminatiion System, Publicly Owned Treatment Works, etc.

RESPONSE: The Department has deleted N.J.A.C. 7:26E-3.9(d)4iv because it is inappropriate for the purpose of the site investigation. Delineation of contamination within the drainage system is required pursuant to N.J.A.C. 7:26E-4.1(a)1.

915. COMMENT: Atlantic Electric believes the presence of stressed soil or stressed vegetation is not in itself a good reason for vigorous sampling. Other site specific factors have to be taken into consideration. The site history and business activity must be considered also. The following revision to N.J.A.C. 7:26E-3.9(e)1 was offered: "For any release areas having discolored soil or stressed vegetation where specific requirements are not otherwise provided in this section, unless sufficient justification pursuant to N.J.A.C. 7:26E-1.6(c) is provided on specifying why these areas were not and should not be sampled:"

916. COMMENT: E. I. du Pont de Nemours and Company, Mobil Oil Corporation and the Chemical Industry Council of New Jersey believe stressed vegetation and discolored soil may nor always be associated with contamination, not does any discharge per se constitute a need to sample. Flexibility in the technical requirements for site remediation must be in place to avoid excessive and meaningless sampling. N.J.A.C. 7:26E-3.9(e)1 requires automatic sampling regardless of the site's history and manufacturing process. These factors are addressed in the preliminary assessment section (N.J.A.C. 7:26E-3.1) of the proposed regulation. If the preliminary assessment of the facility gives sufficient basis not to sample, sampling should not be required. It was recommended the following wording be added to incorporate flexibility into the proposed rule: "For any discharge areas and areas of discolored soil or stressed vegetation where specific requirements are not otherwise provided in this section, unless sufficient justification pursuant to N.J.A.C. 7:26E-1.6(c) is provided specifying why these areas were not sampled."

RESPONSE: The requirements pursuant to N.J.A.C. 7:26E-3.9(e)1 apply only to discharge and waste disposal systems or areas which, by definition, are areas of concern and must be evaluated in the preliminary assessment. If, in accordance with N.J.A.C. 7:26E-3.2(a)4ii, information can be provided to the Department documenting that the area of concern is not potentially contaminated, no sampling is required. The Department, therefore, does not believe the modifications suggested by the comments are necessary.

917. COMMENT: Mobil Oil Corporation, E. I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey believe site specific conditions are not taken into consideration in N.J.A.C. 7:26E-3.9(e)1. In some cases, areas of discolored soil or stressed vegetation will be in very close proximity to each other and there may be evidence relating these areas to the same discharge. Evaluating each area as a separate area of concern is overly restrictive in these cases.

RESPONSE: If the preliminary assessment determines that two visibly distinct areas may be the result of a single discharge then the areas may be considered a single area of concern. In response to the request for increased flexibility in the site remediation process, the Department may allow for the use of alternate approaches, subject to Departmental preapproval pursuant to N.J.A.C. 7:26E-1.6(d). The situation described by the commenter may be appropriate for such a variance.

918. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company believe the sentence "Sample frequency shall be sampled at the rate of ..." at N.J.A.C. 7:26E-3.9(e)1ii does not make sense.

RESPONSE: The phrase "sampled at the rate of" in N.J.A.C. 7:26E-3.9(e)1ii is a typographical error and has been deleted.

919. COMMENT: Union Carbide Chemicals and Plastics Company suggested the following modification to N.J.A.C. 7:26E-3.9(e)1ii: "Initial characterization samples shall be biased based on field indicators such as discoloration, stressed vegetation, or field instrument measurements toward those areas of greatest suspected contamination."

The frequency per unit area is an arbitrary number with no scientific basis and does not consider site specific conditions. The sampling should be biased to the operations, potential discharge history, and sound technical judgment.

920. COMMENT: Mobil Oil Corporation, E. I. du Pont de Nemours and Company, the Chemical Industry Council of New Jersey and Atlantic Electric believe the sampling frequency pursuant to N.J.A.C. 7:26E-3.9(e)1ii is arbitrary and void of sound scientific bases. The

sampling frequency bears no relationship to suspected discharge, discolored soil, or the stressed vegetation area. N.J.A.C. 7:26E-3.9(e)1ii should be reworded as follows: "The relationship of each distinct area shall be considered in determining sampling locations; and initial characterization samples shall be biased based on field indicators such as soil discoloration, stressed vegetation, or field instruments toward those locations of greatest suspected contamination."

RESPONSE: In all cases, samples must be biased in accordance with N.J.A.C. 7:26E-3.9(b)2ii. If no obvious biasing criteria exist, professional judgment should still be used to bias the sample to the location of greatest suspected contamination. N.J.A.C. 7:26E-3.9(e)1ii establishes the minimum sample frequency. The sample frequency has been reduced to one per 900 square feet of surface area because the Department believes that the proposed sample frequency of one per 400 square feet was excessive. The Department believes that the sample frequency adopted is a reasonable minimum requirement to determine if areas sampled pursuant to N.J.A.C. 7:26E-3.9(e)1ii are contaminated. Professional judgement may be used to increase sample frequency pursuant to N.J.A.C. 7:26E-1.7 or to decrease sample frequency pursuant to N.J.A.C. 7:26E-1.6(c).

Sample frequency should bear no relationship to the existence of discolored soil or other field indicators of contamination. Rather, sample frequency should be adequate to measure contaminant concentrations which are representative of the area of concern. Furthermore, basing sample frequency only on field indicators of contamination is inappropriate because many contaminants will not be detectable by field indicators at concentrations in excess of their applicable remediation standards.

921. COMMENT: Exxon Company, U.S.A. believes the requirements of N.J.A.C. 7:26E-3.9(e)2 are unnecessary since they apply to active units, in compliance with their permits, which have not leaked. Therefore, Exxon recommeded deletion of these subparagraphs.

RESPONSE: A permit does not guarantee that the site at the permitted location is free of contamination. If the system is identified as a potentially contaminated area of concern in the preliminary assessment, sampling shall be conducted in accordance with N.J.A.C. 7:26E-3.9(e)2. The citation is not specific to active or inactive units nor is there any reference to compliance status of the unit(s) in question.

922. COMMENT: Shell Oil Company believes above ground treatment systems should only be sampled pursuant to N.J.A.C. 7:26E-3.9(e)2 if there is evidence of leakage, and there is no spill containment.

RESPONSE: The purpose of the site investigation is to determine if contamination is present above an applicable remediation standard via the collection and subsequent analysis of environmental samples. In many instances releases to the environment are not readily observable and, therefore, remain undetected until discovered during the site investigation. If, however, the person performing the remediation can provide documentation to the Department in accordance with N.J.A.C. 7:26E-3.4(a)4ii that the area of concern is not potentially contaminated, then sampling is not required.

923. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company believe N.J.A.C. 7:26E-3.9(e)3i requires sampling unless documentation is available that proves the system only received sanitary waste. This should be revised to waive sampling if documentation exists to prove that the system received one or more hazardous wastes, and waste from the system will be treated/disposed of in accordance with requirements applicable for that waste(s). Under that scenario, no sampling would be required by N.J.A.C. 7:26-8. Therefore, no sampling should be required by the proposed regulations.

RESPONSE: The purpose of sampling the contents of the tank is not only to determine if contaminants have been discharged to the tank, but also to establish sampling parameters for the leach field, if any. Therefore, sampling is required regardless of whether the waste from the system will be treated/disposed of in accordance with applicable requirements for that waste.

924. COMMENT: Mobil Oil Corporation, Union Carbide Chemicals and Plastics Company, the Chemical Industry Council of New Jersey, Atlantic Electric and E. I. du Pont de Nemours and Company believe the sampling requirements of N.J.A.C. 7:26E-3.9(e)3ii(2) are excessive. Sample number and location should be based on the site specific conditions and be biased to areas of obvious or expected contamination. The number of samples outside immediate area of concern should be very limited. The following revision was recommended: "At least one boring per 500 square feet of field area shall be completed, with a minimum of four borings per field; or as approved by the Department on a site specific basis."

RESPONSE: Based on the Department's experience, the requirement at N.J.A.C. 7:26E-3.9(e)3ii(2) for one boring per 500 feet of field area, with a minimum of four borings, establishes the minimum sample frequency required to determine if contaminants are above an applicable remediation level and make well-informed determinations of whether or not further action is required. In all instances, sample locations shall be biased to areas of obvious or expected contamination in accordance with N.J.A.C. 7:26E-3.4. N.J.A.C. 7:26E-3.9(e)3ii(2) also provides for a proportionate increase in sample number with an increase in septic disposal field area. Variances from the minimum sample frequency may be requested pursuant to N.J.A.C. 7:26E-1.6(d).

925. COMMENT: Exxon Company, U.S.A. recommended revising N.J.A.C. 7:26E-3.9(e)3ii(3) and (e)3iii(2) by locating borings no closer than 10 feet of perimeter laterals in both active and abandoned fields rather than two feet. Exxon believes if borings are placed any closer, the potential for cracking of the structure will rise with disastrous environmental consequences.

926. COMMENT: E. I. du Pont de Nemours and Company believes locating borings directly below laterals in abandoned fields pursuant to N.J.A.C. 7:26E-3.9(e)3ii(3) does not consider site specific safety issues. Abandoned septic disposal fields often contain residual wastes. These wastes tend to collect in the septic tank and the field laterals. The requirement to locate a boring directly below a lateral requires drilling through the lateral which can be an unsafe practice if, for example, explosive residual wastes remain in the laterals. It was suggested the requirement be expanded to recognize site specific conditions by including "taking into consideration site specific health and safety issues. Sample locations may be modified based on these considerations and with Departmental approval."

927. COMMENT: Chevron U.S.A., Inc. recommended the following revision to N.J.A.C. 7:26E-3.9(e)3ii(3): "Borings shall be located within two feet of the perimeter laterals, if possible, and samples collected at depth of laterals in active fields, and samples collected directly below laterals within abandoned fields, if possible." Access may not be optimum relative to soil boring locations. The depth of sample collection is no less important than location of the boring itself.

RESPONSE: It is the Department's experience that borings within two feet of laterals and directly below laterals are required as specified in N.J.A.C. 7:26E-3.9(e)3ii(3) to accurately assess soil contamination resulting from a recent or historical contamination associated with septic disposal fields due to rapid vertical migration of contaminants in leach fields.

The Department has deleted the requirement for additional soil samples outside the pit walls at N.J.A.C. 7:26E-3.9(e)3iii(2) and (3) because the bottom sample specified at N.J.A.C. 7:26E-3.9(e)3iii(1) is adequate to determine if a discharge has occurred.

In response to the request for flexibility to consider site specific conditions, including health and safety concerns, at N.J.A.C. 7:26E-3.9(e)3ii(3), the Department may allow for the use of alternate approaches, subject to Departmental preapproval pursuant to N.J.A.C. 7:26E-1.6(d).

928. COMMENT: Environmental Liability Management, Inc. commented that, over time, organic material will accumulate beneath the laterals of a septic system. Therefore, if volatiles have been discharged to a septic system, they can be expected to be adsorbed to the organic matter. The commenter believes this mitigates the Department's concern regarding soil that is less than 15 percent silt/clay beneath a septic system and it is recommended that N.J.A.C. 7:26E-3.9(e)3ii(6) be deleted.

RESPONSE: The commenter's scenario may not occur in all instances. In the case of a newly installed system which received both industrial and sanitary waste, a significant amount of time would be required to accumulate a sufficient quantity of organic material to provide an adsorptive medium. During this time, organics would migrate freely. Furthermore, if the system received primarily industrial waste low in organic matter, the medium may not be sufficiently retentive.

929. COMMENT: Environmental Liability Management, Inc. believes the requirement pursuant to N.J.A.C. 7:26E-3.9(e)3iii(4) to sample deeper than the 18 to 24 inch interval for volatiles during an initial site investigation when surface soil consists of less than 15 percent silt/clay should be waived for areas where the first water is known not to be used. Their rationale is that there is little potential for contamination

of ground water above the one ppm and 10 ppm organic values proposed in N.J.A.C. 7:26D-4.2(b)1 and 2 to occur when soil volatile values are below proposed subsurface standards (N.J.A.C. 7:26D-3.2(b)) in a soil of less than 15 percent silt/clay. The exception to this would be when the discharge is a recent one.

RESPONSE: N.J.A.C. 7:26E-3.9(e)3iii(4) is intended to help identify the location of greatest contamination and is totally unrelated to ground water use. Restricting soil sampling to the uppermost two feet limits the scope of the investigation and significantly reduces the probability of collecting a sample in the location of greatest contamination in highly permeable soils.

930. COMMENT: E.I. duPont de Nemours and Company and the Chemical Industry Council of New Jersey believe the Department has taken an unnecessarily strict approach in N.J.A.C. 7:26E-3.9(f) in requiring sampling unless one can certify that the areas away from the process areas (for example, wooded areas) are not and have not been used for any purpose that may have included hazardous substances, hazardous wastes, hazardous constituents, or pollutants. Instead, the Department should require sampling only if there is reason to believe that the areas away from the process areas have been used for any purpose that has included hazardous substances, hazardous constituents, or pollutants. It was recommended that the words "is required" be replaced with "may be required."

931. COMMENT: Union Carbide Chemicals and Plastics Company recommended deleting N.J.A.C. 7:26E-3.9(f)1i through 3.9(f)1iv. The sampling of areas away from the process areas should be based on potential land use as well as any present or past handling practices of hazardous substances, hazardous wastes, wastes, off-grade materials, or pollutants.

RESPONSE: If the area is identified as a potentially contaminated area of concern in the preliminary assessment, sampling shall be conducted in accordance with N.J.A.C. 7:26E-3.9(f)1. The section has been clarified to represent the Department's intent in this regard.

932. COMMENT: Colonial Pipeline Company recommended the following revision for N.J.A.C. 7:26E-3.9(f)2: "... responsible for conducting the site investigation documents...".

RESPONSE: For the purposes of N.J.A.C. 7:26E, the term "remediation" applies to all aspects of site remediation addressed herein, including the site investigation; therefore, the suggested change to N.J.A.C. 7:26E-3.9(f)2 is not necessary.

N.J.A.C. 7:26E-3.10

933. COMMENT: New Jersey Natural Gas Company and Jersey Central Power and Light Company noted that, in general, N.J.A.C. 7:26E-3.10 appears to be consistent with current Environmental Cleanup Responsibility Act program requirements for reporting sampling plan results, including the historical information, physical description, technical overview, findings/recommendations, and supporting data, soil logs, well records, maps, diagrams, etc., but stated Environmental Cleanup Responsibility Act requirements are not appropriate to de-minimus discharge events or area specific historic discharges.

RESPONSE: The Department believes that minor discharges and historic discharges have the potential to threaten human health and the environment. Specific discharge events are exempt from the historical information and physical setting requirements of N.J.A.C. 7:26E. The Department believes that, for minor discharges, the requirement to provide a technical overview, findings and recommendations, supporting data, and other information pursuant to N.J.A.C. 7:26E-3.10 is not onerous. For more detail, refer to the "Technical Regulations as Minimum Requirements" in the "General Comments" section of this summary.

934. COMMENT: Continental Vanguard, Inc. commented that N.J.A.C. 7:26E-3.10(b)1 and (b)2 stated that specific discharge events and underground storage tanks and systems are excluded from the Site Investigation Report requirements, but, starting at N.J.A.C. 7:26E-3.10(b)3 and (b)4 they are not. The commenter believes N.J.A.C. 7:26E-3.10(b)1 and (b)2 need to be clarifield.

RESPONSE: As stated in N.J.A.C. 7:26E-3.10(b)1 and (b)2, "The site investigation report shall include the following: "... unless the remediation is directed at either, a specific discharge event, rather than a particular area of concern, ..." Historical discharges are not exempt from the reporting requirements of N.J.A.C. 7:26E-3.10(b)1 and 2. Reports must be submitted to the Department which satisfy the applicable requirements of N.J.A.C. 7:26E-3.10, 4.9, 5.3 (if required) and 6.6; however, the Department has modified the rule at N.J.A.C. 7:26E-1.6 to allow for a single submittal at the conclusion of the remedial action to satisfy these requirements.

935. COMMENT: Chevron U.S.A., Inc. recommended the following revision to N.J.A.C. 7:26E-3.10(a), "The site investigation report shall present and discuss all relevant and appropriate information and data obtained during the site investigation."

RESPONSE: It is the Department's position that all information collected and evaluated pursuant to N.J.A.C. 7:26E-3.3 through 3.9 is relevant to and appropriate for determining whether or not further remediation is required and should, therefore, be included in the site investigation report. Therefore, no revision is necessary to N.J.A.C. 7:26E-3.10(a).

936. COMMENT: In an effort to reduce the volume of paper and duplication of submittals, Public Service Electric and Gas Company believes reports and data previously submitted to the Department should not have to be re-submitted and/or duplicated as parts of newly generated reports pursuant to N.J.A.C. 7:26E-3.10(b)1. For example, the preliminary assessment report, N.J.A.C. 7:26E-3.2, should not need to be re-submitted as part of the site investigation report, N.J.A.C. 7:26E-3.10(b)1, and the remedial investigation report, N.J.A.C. 7:26E-4.9(b)1 through 3.

An allowance should be made to reference previously submitted reports, and where applicable provide summaries of the previously submitted reports to enhance the current report.

RESPONSE: The Department agrees that duplication and resubmittal of reports for each phase of the remedial process is inefficient and unnecessary. N.J.A.C. 7:26E-1.6 has been amended to allow for summaries of prior submittals.

937. COMMENT: Environmental Liability Management, Inc. believes to require all of the information presently listed under N.J.A.C. 7:26E-3.10(b)2 for all sites treats all sites the same when there is no technical basis to do so. Therefore, the commenter recommended that most of the requirements of this section be required only when certain conditions exist. N.J.A.C. 7:26E-3.10(b)2iii is an appropriate requirement for all sites. Another appropriate requirement is a general description of the site soils (N.J.A.C. 7:26E-3.10(b)2i). Showing the site on a soil map along with a general description of the soils would be appropriate; there are soil maps for most counties in New Jersey. It was recommended that the following items be required selectively and under specified conditions:—a discussion of geology and hydrogeology (i) only when ground water contaminants exceed standards;—a discussion of surface water bodies (ii) be limited to those which do receive, or can reasonably be expected to receive discharge or runoff from the site;—supply a wetlands map (iv) only when wetlands are present on site or immediately adjacent to the site.

RESPONSE: The requirements pursuant to N.J.A.C. 7:26E-3.10(b)2 do not apply to all sites; specific discharge events and underground tanks or tank systems are excluded from these requirements. Geological and hydrogeological information must be included in the site investigation report for all other sites even when ground water contaminants are below an appropriate action level to provide the Department with the necessary background information to insure the ground water aspects of the site investigation were, in fact, conducted in accordance with N.J.A.C. 7:26E. The requirements of N.J.A.C. 7:26E-3.10(b)2ii and 3.10(b)2iv provide similar information to the Department for surface water and only apply when there is reason to believe contaminants may have been discharged directly to surface water or when contaminants may have migrated to surface water from a potentially contaminated area of concern. The Department has determined that the requirement for the submittal of a wetlands map pursuant to N.J.A.C. 7:26E-3.10(b)2iv is inconsistent with the intent of the site investigation and has been deleted.

938. COMMENT: Colonial Pipeline Company believes that to include a discussion of analytical quality in a technical overview as required in N.J.A.C. 7:26E-3.10(b)3i was not warranted; alternatively, a detailed quality assurance/quality control report should be included in the appendix. A discussion of the analytical results, and their validity, should be discussed as part of the technical overview of site contamination.

RESPONSE: It is of primary importance that analytical data achieve data quality goals dictated by the intended use(s) of the data. Failure to meet data quality goals can result in analytical data which cannot be used to make decisions concerning the remedial activities being conducted. The Department rejects the suggestion that a discussion of data quality/reliability be part of an appendix document because a discussion of the quality and reliability of analytical data is a critical part

of the site investigation report and may be overlooked in an appendix. Therefore, the requirements at N.J.A.C. 7:26E-3.10(b)3i remain.

939. COMMENT: Exxon Company, U.S.A. recommended the Department propose an explanation of the term "quality assurance indicator" as it is used in N.J.A.C. 7:26E-3.10(c)2.

RESPONSE: The intent of N.J.A.C. 7:26E-3.10(c)2 is to have, as part of the site investigation report, an analytical methods/quality assurance summary table containing all of the information required at N.J.A.C. 7:26E-2.2(a)1v. In this context, quality assurance indicators would include field and trip blanks, duplicate samples, split samples, performance evaluation samples, matrix spike/matrix spike duplicate samples, sample preservation techniques, sample containers and sample holding times.

940. COMMENT: E. I. du Pont de Nemours and Company believes instead of having the table show "all sampling results," as required by N.J.A.C. 7:26E-3.10(c)3, the table should be required to include the results that are above applicable cleanup standards, with the remainder of the results (for example, tentatively identified compounds and concentration results below standards) included in the laboratory appendix. E. I. du Pont recommended that the following be inserted after the words "sampling results:" "above applicable cleanup standard levels."

RESPONSE: The Department requires a summary of all sampling results to insure all pertinent analyses were conducted, determine if contaminant delineation is adequate (although contaminant delineation is not the purpose of the site investigation, delineation data will often be generated during this phase) and, if standards change as the result of scientific advances or research, all data must be readily available. The Department will accept a tabulation of data by contaminant class rather than a listing of individual compounds for contaminants below the applicable standard.

941. COMMENT: Exxon Company, U.S.A. recommended adding: "for the indicator parameters pursuant to N.J.A.C. 7:26E-2.1(c) and 2.1(d)" following ". . . to N.J.A.C. 7:26D at N.J.A.C. 7:26E-3.10(c)3i. The Department has provided for indicator samples for contaminants of concern, to clarify that sampling during the site investigation is only for those parameters identified in N.J.A.C. 7:26E-2.1(c) and 2.1(d), and not for all of the contaminants which have a cleanup standard listed in N.J.A.C. 7:26D.

RESPONSE: All contaminant concentrations exceeding the applicable remediation standard, whether or not that analysis was specifically required by N.J.A.C. 7:26E-2.1(c) and 2.1(d), must be reported.

942. COMMENT: To preclude having to do inventory control reviews in every instance, Exxon Company, U.S.A. recommended adding after ". . . records . . ." the following: "if actual discharges have been identified" in N.J.A.C. 7:26E-3.10(c)7.

RESPONSE: The inventory reporting requirement pursuant to N.J.A.C. 7:26E-3.10(c)7 corresponds with the investigative requirement established by N.J.A.C. 7:26E-3.4(d). On adoption, the Department has moved the requirement to review inventory control records from the site investigation at N.J.A.C. 7:26E-3.4(d) to the preliminary assessment at N.J.A.C. 7:26E-3.1(c)1v(9). To be consistent with the changes made at N.J.A.C. 7:26E-3.4(d), N.J.A.C. 7:26E-3.10(c)7 has been deleted.

943. COMMENT: E. I. du Pont de Nemours and Company believes that rather than requiring the map to depict all contaminant concentrations, N.J.A.C. 7:26E-3.10(d)2 should require only plotting of the results that are above applicable cleanup standards. It was recommended to insert "results above applicable cleanup standards" after the word "concentration."

RESPONSE: In an effort to insure that adequate sampling for the appropriate parameters has been conducted, all data must be plotted pursuant to N.J.A.C. 7:26E-3.10(d)2. Where a class of contaminants is not detected or less than the applicable remediation standard, the contaminant class may be presented rather than a list of all compounds evaluated.

944. COMMENT: Chemical Land Holdings, Inc. believes clarification should be made as to the meaning of "overlay" maps as used in N.J.A.C. 7:26E-3.10(d)2iv. This requirement should be deleted if it is intended to mean a set of transparent overlays. Transparent overlays are difficult and costly to develop and reproduce. Furthermore, transparent overlay maps are often difficult to use except where relatively small numbers of small overlay maps are required. Lastly, complex sites may require the use of a large number of overlays such that it would be virtually impossible to physically see through each of the overlays. This requirement should be clarified if the Department simply intends "overlays" to mean a bound set of paper maps keyd to the base map with a defined coordinate system and scale common to the set of maps.

RESPONSE: The Department agrees with the commenter and has clarified N.J.A.C. 7:26E-3.10(d)2iv to allow for the submittal of maps as outlined by the commenter provided each map details the features of the base map.

945. COMMENT: Exxon Company, U.S.A. recommended changing "shall" to "may" in N.J.A.C. 7:26E-3.10(d)2iv. Some site investigation reports may contain too many maps for overlays and in some cases it may be better to have individual maps rather than overlays. Also, maps with different scales may be necessary. The decision on how to present the maps/overlays should be left to the professional judgment of the preparer of the report.

RESPONSE: The Department has revised N.J.A.C. 7:26E-3.10(d)2iv to allow for the submittal of individual maps which have a common coordinate system and a common scale, provided each map details the features of the base map.

946. COMMENT: Chevron U.S.A., Inc. believes a new N.J.A.C. 7:26E-3.11 should be added to read, "The site investigation report shall also contain an evaluation of all areas of concern to determine if any area was a source of a discharge. If an area of concern is a continuous source of an ongoing unpermitted discharge than the person shall institute appropriate source control measures. If an area of concern is the source of a discharge and the discharge has resulted in an actual or suspected exceedance of an applicable cleanup standard than the person responsible for conducting the cleanup shall recommend that the area be subject to additional investigations."

RESPONSE: The Department agrees that, during all phases of remediation at contaminated sites, it is necessary to proceed with a "bias for action" to expedite containment and stabilization of the contaminants. The Department has added N.J.A.C. 7:26E-1.11 to emphasize this approach.

N.J.A.C. 7:26E-4.

General Comments

947. COMMENT: E.I. du Pont de Nemours and Company commented that the proposed regulations indicate that one of the purposes of conducting the remedial investigation is to identify the migration paths and actual or potential receptors of contaminants on or through air, soil, bedrock, sediment, ground water, surface water, and structures at a contaminated site (N.J.A.C. 7:26E-4.1(a)3) The purpose of determining the actual or potential receptors at a site should be to help establish the risks posed by the site, which in turn helps define the exposure pathways that must be addressed as part of the remediation process. Thus, exposure assessment, which is an integral part of a risk assessment, must be included in the remedial investigation. The second area within a remedial investigation for which risk assessment should be applied is defining the baseline risks associated with a given site. The proposed regulation, as written, would require that the investigator sample and analyze the site media and then compare these results to the default cleanup standards in N.J.A.C. 7:26D. However, such an approach fails to recognize that the genuine risk posed by a site, and, hence, the actual need for remediation, is not merely a function of the concentration of the constituents present but also a function of the potential for exposure to these same materials. Thus, a risk assessment, which examines the potential for human and ecological exposure and evaluates the significance of the resulting exposure levels, must be included in a remedial investigation.

948. COMMENT: The Chemical Industry Council of New Jersey commented that the purpose of determining actual or potential pathways or receptors at a site should be used to help establish the baseline risks posed by the site, which in turn will help in defining the exposure pathways which must be addressed as part of the remediation process. Thus, exposure assessment, which is an integral part of a risk assessment, must be included in the remedial investigation. Therefore, the technical requirements should identify the specific aspects of exposure assessment as it pertains to risk assessment. Other elements of this rulemaking initiative (N.J.A.C. 7:26D), are predicated on limited application of risk assessment, using standardized approaches and exposure factors. If the responsible party is to collect these data, the party should be allowed to apply them in properly developing the potential risk.

RESPONSE: The purpose of determining the receptors at a site is, contrary to the commenters' assertion, to identify the applicable remediation standards designed to adequately protect a particular receptor. As a result, the Department has drafted the rule to save the commenter both the cost and time necessary to complete the referenced

exposure assessment by including the concerns that would be raised in these assessments into the remediation standards. For further discussion, see response to comments on "Risk assessment" in the "General Comments" section of this summary.

949. COMMENT: Mr. Mutch commented that the Department needs to modify N.J.A.C. 7:26E to account for varying levels of investigative efforts with respect to the objectives of the particular remedial investigation. For example, the objectives of a remediation investigation are to gather sufficient data; not to design a remediation program. It is more efficient and cost effective to perform a supplemental investigation, pre-designed investigation, where one can gather precisely the data needed to design the particular remedial program. For example, Mr. Mutch noted that one does not need a massive level of investigation to define every hot spot and its configuration at a site if, ultimately, the remediation is going to be a containment basin. Mr. Mutch commented that it appears as if the Department's approach, as outlined in these rules, is more appropriate for small sites where the remedy is going to be an excavation based on the alternative or the permitting treatment alternative. He noted that this is inappropriate for larger facilities where it is unlikely that a permanent remedy will be achieved.

RESPONSE: While the Department understands the concerns over the scope of the remedial investigation requirements, the Department feels that this is the most effective and efficient way to investigate a site. The major objectives of the remedial investigation are twofold. The first is to delineate the extent of and to characterize the contaminants found at the site. The second objective is to gather enough information to evaluate all remedial alternatives in the remedial alternative analysis. If it is evident by the information gathered that a remedial action is necessary, a treatability study might be conducted to determine what remedial alternatives will work at the site. Often the Department has been in the situation where the person responsible for conducting the remediation was moving forward with a remedial action only to find out at the last minute that it will not achieve the expected results. The treatability study requirement is included here to eliminate that situation.

These rules do not preclude the remedial investigation from being conducted in a phased approach if the person responsible for the investigation feels that it is an appropriate approach for the site in question. This allows the person responsible for conducting the remediation to characterize and delineate the contamination and determine the need for remediation in one phase and collect the other pertinent information in a later study.

950. COMMENT: Mr. Mutch noted that N.J.A.C. 7:26E falls short in the recognition of dense non-aqueous phase liquids. They tend to move downward to aquifers often very deeply and can move into fractured rock and settle into deadend joints and highly inaccessible areas to bleed contaminants for not only decades but hundreds of years or longer. The regulations must be fundamentally changed to address this. There needs to be bifurcation of the regulation early on to recognize that if a site is contaminated with dense non-aqueous phase liquids, then a specific type of investigation needs to be performed. Further he noted that there needs to be a radically diverse approach for dense non-aqueous phase liquid sites which is not now reflected. For example, a dense non-aqueous phase liquid site's wells need to be screened very carefully with respect to lower permeability units in the subsurface. Further he noted that there needs to be a great deal of caution about puncturing aquifers and allowing dense non-aqueous phase liquid migration to occur. The implications of the presence of dense non-aqueous phase liquid contaminant on the subsurface at these sites is probably the most important factor that needs to be considered.

RESPONSE: The Department recognizes that cases involving dense non-aqueous phase liquids can be very complex and difficult to assess. The intent of the rules is to require that the investigative techniques used at the site (such as depth of a well screen) be appropriate for the constituents of concern. The Department is relying on the professional judgment of the person doing the investigation to evaluate the site correctly. These requirements are only minimum standards. More complex cases, such as those with dense non-aqueous phase liquids, may require additional investigation. The evaluation of additional work is to be done on a case-by-case basis. In addition, to allow for more technical discretion by the person responsible for conducting the remediation, the Department has expanded the flexibility to use alternate methods for site investigation/remediation pursuant to N.J.A.C. 7:26E-1.6(d) and such discretion may be appropriate for some dense non-aqueous phase liquid investigations.

951. COMMENT: Mobil Oil Corporation stated that the Department is overly proscriptive in defining the methods to be used in performing a remedial investigation. Site-specific bases must be pursued.

RESPONSE: In drafting the rules, the Department had to strike a balance between limiting flexibility so that the rules be used broadly, and making all decisions on a case-by-case basis which would require unnecessary Department review and oversight, thus defeating the primary purpose of the regulations, which is to provide consistent and predictable criteria for the remediation of a site in New Jersey.

While the rules are very detailed and in some instances limited in the methods and sampling techniques allowed, these rules are written to allow the person responsible for conducting the remediation to move forward with an investigation without direct Department oversight and to receive Department approval after the fact. To ensure that the Department will approve such an action after the fact, the guidelines must be very specific. The rules do allow certain tasks to be conducted using site-specific criteria on a case by case basis pursuant to the conditions set forth in N.J.A.C. 7:26E-1.6(c)

Further, the Department has modified the rules to address the commenter's concern of taking site-specific concerns into account by providing for a variance provision in the rules (N.J.A.C. 7:26E-1.6(d)) to allow the person responsible for conducting the remediation to petition the Department to get approval for deviating from a particular requirement of the rule.

952. COMMENT: Mobil Oil Corporation stated this subchapter exceeds the stated intent in the preamble of these "regulations [being] the minimum standards which the Department would follow if it were to conduct remediation at a site itself."

RESPONSE: Because Mobil Oil Corporation did not explain how it believes the rules are inconsistent with the statements in the proposed summary, the Department is unable to fully respond to this comment. Suffice it to say, if the Department were doing an investigation using public funds, these regulations outline the minimum amount of work the Department would perform for the remediation.

953. COMMENT: Chemical Land Holdings, Inc. commented that the level of investigation needs to be specifically targeted toward the specific phases of site remediation, namely the remedial investigation and feasibility study and engineering design. The proposed technical requirements do not appear to distinguish between the data necessary for selection of an appropriate remedy as part of the feasibility study and the data requirements for subsequent design of the chosen remedy. Instead, it appears that the regulations would require a single investigation intended to be adequate for both purposes. There are several problems with this approach. First, by trying to serve dual purposes the investigation typically does neither purpose well. With respect to the remedial investigation/feasibility study, the extensiveness of the investigation set forth within the technical requirements is more than is necessary to define site conditions and select a remedial alternative. The sole purpose of a feasibility study is to select the appropriate remedy for a site. In general, the level of investigative effort necessary to conduct a feasibility study and select the appropriate remedy is considerably less than what is typically necessary to actually design the chosen remedy. Therefore, the proposed level of investigative effort prescribed by the technical requirements for the remedial investigation phase is excessive if the purpose is to provide sufficient data to conduct the feasibility study. Second, the data needs for design of different types of remedial action are quite different. It is almost inevitable, no matter how extensive the remedial investigation, that it will fail to develop the specific information necessary for the design. It is far more practical and cost effective to conduct the investigative phases of the remediation process in sequence. The remedial investigation should be aimed at collecting sufficient data to generally ascertain site conditions with a level of specificity sufficient only to define the need for remedial action. Following the conduct of the feasibility study and selection of the preferred remedy, the predesign investigative efforts can then focus on the specific data needs associated with design of the chosen remedy. It is therefore recommended that the technical requirements be modified accordingly. The extensiveness of the currently prescribed remedial investigation should be scaled back in favor of a more modest characterization of the site with an eye toward selection of the remedy—not design of the remedy. The regulations should then explicitly recognize a separate phase of investigation which could be termed "Predesign Investigation". The scope of this investigative phase would be dependent upon the nature of the chosen remedy. For excavation-based alternatives, a fairly precise delineation of the spatial extent of

subsurface contamination may be necessary. For soil treatment alternatives, the investigation might also require laboratory- or pilot-scale testing. The scope of the predesign investigation should not be rigidly set forth within the regulations, but rather should be developed by qualified professionals on a case-by-case basis in consultation with the Department.

RESPONSE: While the Department understands the concerns over the scope of the remedial investigation guidelines, Department experience indicates the proposal is the most effective and efficient way to investigate a site. The major objectives of the remedial investigation are twofold. The first is to delineate the extent of and characterize the contaminants found at the site. The second objective is to gather enough information to evaluate all remedial alternatives in the remedial alternative analysis.

There is inherent flexibility in the rules that would allow the commenter to design its specific data collection events based upon its intended use of the data. These rules do not preclude the remedial investigation from being conducted in a phased approach consisting of more than one sampling event if the person responsible for the remediation feels that is an appropriate approach for the site in question. This allows the person responsible for conducting the remediation to characterize and delineate the contamination and determine the need for remediation in one sampling event and collect the other pertinent information in a later sampling event.

954. COMMENT: Shell Oil Company stated one of the best ways to control dissolved contaminants and free phase product from migrating down gradient is to install a ground water pumping system that creates hydraulic containment of the respective plume. However, Shell Oil Company currently spends up to hundreds of thousands of dollars per site in treating the ground water to drinking water levels prior to discharging it through a New Jersey Pollution Discharge Elimination System regulated unit or publicly owned treatment works. A much more efficient (and economic) way when hydraulic containment is necessary, is to pump up the ground water, add oxygen and reinject the ground water on the up-gradient side of the plume. This creates a flushing process and enhances the biodegradation of the plume. Therefore, Shell Oil Company believes the water injection concentrations standards should be lowered so that this best available technology can be utilized.

RESPONSE: Currently the Department is allowing reinjection of treated ground water back into the ground. In fact, it is the Department's preference that the person responsible for conducting the remediation reinject rather than send the water to a surface water body or sewage treatment facility, where possible. Depending on where the reinjection takes place, in or out of the contaminant plume, the discharge limits may vary.

While the Department is concerned with the economics and ease with which a ground water remediation may be accomplished, these proposed rules do not address such issues. The lowering of the ground water injection standards is beyond the scope of this rulemaking and this issue must be addressed through the New Jersey Pollutant Discharge Elimination System process or regulations.

955. COMMENT: Public Service Electric and Gas Company commented that the remedial investigations outlined in subchapter 4 fail to include results of the previous investigative phases. If a preliminary assessment and site investigation are performed, the remedial investigation should be limited to those areas of concern not determined to requrie "no further action" by the prior phases. Public Service Electric and Gas Company suggested possible rewording to state "The wording in subchapter 4 should be modified to include a reference to the prior investigative phases so that the remediation will only be conducted in those areas that have been determined to be areas of concern."

RESPONSE: The intent of these rules is to allow all information gathered in the previous phases of the remedial investigation to be used throughout the investigation. A general statement has been added to N.J.A.C. 7:26E-1.6(a) clarifying that previous information and data may be summarized in the remedial investigation report.

956. COMMENT: The Chemical Industry Council of New Jersey stated that if these are the minimum requirements, as explained in the Preamble, the maximum requirements must be staggering. In attempting to establish a set of rules applicable to all sites, the Department has in fact developed a set of rules that are appropriate only to major Comprehensive Environmental Response, Compensation and Liability Act and Spill Fund sites. As pointed out in the Preamble, the remediation required in New Jersey will include 109 Comprehensive Environmental Response, Compensation and Liability Act sites, 600 Resource Conservation and Recovery Act Corrective Action sites, 17,000 Environmental Cleanup Responsibility Act sites and as many as 80,000 underground storage tanks. The Department's focus should be on standardizing toward a minimum, not a maximum level of investigation. Where possible, regional data on soil types and conditions and ground water conditions should be used to focus investigations.

RESPONSE: In stating these rules are the minimum requirements for an investigation, the Department feels that this is the minimum amount of work for the Department to make a determination that no further action is necessary. The minimum requirements specified in these rules are also the minimum amount of work required of the Department in performing the work themselves. The Department agrees that when appropriate data exists that this be incorporated into the remedial investigation rather than duplicated.

N.J.A.C. 7:26E-4.1

957. COMMENT: Ciba-Geigy Corporation commented that the "Site Investigation" and the "Remediation Investigations" processes could be combined to save time and cost. The only need for a "Site Investigation" would be to verify that no remediation is necessary. The applicant should be given the option to "fast track" the investigation and certify that remediation will be necessary, thereby combining the investigations.

RESPONSE: The Department agrees with this comment. These rules are meant to encourage the persons responsible for conducting the investigation to move cases through the system as efficiently as possible. As per N.J.A.C. 7:26E-3.3(d) ... "If at any time during the site investigation, any contamination is found above the appropriate remediation standard, then the site investigation may be discontinued and the remediation continued at either the remedial investigation or remedial action phase." A person responsible for conducting the remediation may combine any of the phases of the investigation as long as the objectives of each phase are met.

958. COMMENT: Colonial Pipeline Company recommended that the Department and the responsible party should agree on the appropriate level of quality assurance and quality control prior to the commencement of the remedial investigation.

RESPONSE: The minimum level of Quality Assurance/Quality Control for an investigation is outlined in subchapter 2 of these rules where it states in N.J.A.C. 7:26E-2.1(a) "The person responsible for conducting the remediation shall ensure that the following quality assurance procedures shall be followed for all sampling and laboratory analysis activities." Also, pursuant to N.J.A.C. 7:26E-2.1(a)11iv the Department may require additional Quality Assurance/Quality Control documentation, if appropriate. If a person responsible for conducting the remediation wants to deviate from the Quality Assurance/Quality Control requirements outlined in Subchapter 2, the person responsible for conducting the remediation may request a variance pursuant to N.J.A.C. 7:26E-1.6(d) and have it reviewed through an oversight document.

959. COMMENT: Public Service Electric and Gas Company suggested the Department add an exemption to conducting a remedial investigation for remediation of specific discharge events, underground storage tanks and underground storage tank systems where the contaminant is known, contamination is visible, limited in areal extent, not in contact with ground water, where remediation is verifiable by field screening and is immediately cleaned up.

RESPONSE: As stated in N.J.A.C. 7:26E-3.7(b) and 4.4(a)4i, the rules allow an exemption from the ground water portion of the site investigation and remedial investigation in situations where the identity and volume of the discharge is known, the date and duration of the discharge is known, the discharge is remediated immediately and the post-remediation samples meet all applicable remediation standards. If a specific discharge event is remediated pursuant to N.J.A.C. 7:26E-6, then the requirements of the remedial investigation will have been satisfied, and, therefore, an exemption from the remedial investigation is not necessary.

960. COMMENT: Chevron U.S.A., Inc. stated that a new N.J.A.C. 7:26E-4.1(a) should be added to read "Only those areas of concern which have had a discharge, such that the discharge has or has likely resulted in the exceedance of an applicable cleanup standard are subject to the requirement to complete a remedial investigation in accordance with N.J.A.C. 7:26E-4.1."

RESPONSE: The intent of the regulations is to require a remedial investigation when the applicable remediation standard has been exceeded in an area of concern. The Department agrees with the

comment that N.J.A.C. 7:26E-4.1(a) should be clarified to express this intent and has modified N.J.A.C. 7:26E-4.1(a) by adding a sentence explaining when a remedial action is necessary.

961. COMMENT: Exxon Company U.S.A. recommended deleting "structures" from N.J.A.C. 7:26E-4.1(a)3, since the Department can only require structural cleanup under Environmental Cleanup Responsibility Act and these are generic technical requirements.

RESPONSE: The Department disagrees with this comment and refers the commenter to the Department's response to the comments on "environmental media" at N.J.A.C. 7:26E-1.8.

962. COMMENT: Mobil Oil Corporation commented that these are overly broad and extensive "generic" requirements that are not applicable to all sites. This will result in tremendous time and money expended for no environmental benefit. The Department should be looking to site-specific criteria. This will be especially detrimental to small business owners and service station facilities. Mobil Oil Company and Atlantic Electric recommend modifying section N.J.A.C. 7:26E-4.1(a)4 to read as follows: "Collect and evaluate all data necessary to evaluate remedial action alternatives pertinent to the site to be remediated. These may include the following:"

963. COMMENT: Exxon Company U.S.A. stated that treatability studies may or may not be required depending on the type and extent of contaminants, the experience and/or technical expertise of the consultant or person conducting the investigation, etc. Further, the Department has not indicated what "general extent" means. Treatability studies should not be mandatory. Exxon Company U.S.A. recommended adding at the beginning of the second sentence: "When applicable" and replacing the "and" following "... bench scale studies" with "or."

964. COMMENT: E.I. duPont de Nemours and Company stated the inclusion of these studies (treatability, pilot and bench scale studies) at the times indicated may be inappropriate. Treatability studies should only be performed when there is enough data to support them and when the need to evaluate a particular technology is established, which is often well after the general extent of contamination is known. It is fruitless and wasteful to perform treatability studies until such time as the need for treatment is established, target cleanup levels have been developed (remembering that there are alternate standards available under the Cleanup Standards rule), and the necessary basic data to support the study have been collected. The commenter recommended eliminating a specific timing for these studies by incorporating the following modifications: "treatability studies, bench scale studies, and pilot scale studies ... shall be initiated when the need for remedial action has been determined, target cleanup levels have been established, and the data necessary to support the study have been collected; and."

965. COMMENT: Groundwater and Environmental Services, Inc. commented that the technologies for the remediation of many compounds are well established and treatability studies are only necessary when the remedial technology is not well established (has not been proved through case histories or is not documented in the scientific literature).

966. COMMENT: Shell Oil Company stated bench scale studies are not needed for known contaminants and usual site conditions (that industry has had experience with) and should only be used with experimental technology, unusual contaminants/situation or unusual site conditions.

967. COMMENT: Exxon Company U.S.A. recommended adding "when applicable" to N.J.A.C. 7:26E-4.1(a)4. Treatability studies may or may not be required depending on the type and extent of contaminants, the experience and/or technical expertise of the consultant or person conducting the investigation, etc. Treatability studies should not be mandatory.

RESPONSE: The commenters have apparently misinterpreted this provision. Not all of the items listed in this provision are required at each site, but only those "necessary" for the purposes stated.

The Department agrees that in situations where the treatment technologies for certain compounds are well established and have been used successfully at sites with similar circumstances a treatability or bench study is not always necessary. In fact, the intent of the rules is not to require a treatability, bench scale or pilot study for every site. N.J.A.C. 7:26E-4.1(a)4 has been revised to state that all of the data necessary to determine the most appropriate remedial alternative for a site must be gathered during the remedial investigation phase of the investigation. If necessary, this shall include treatability, bench scale or pilot studies.

968. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following wording modifications: "Treatability studies, bench scale studies, and pilot scale studies (these studies may be conducted pursuant to Environmental Protection Agency 540/2-89/058 'Guide for Conducting Treatability Studies Under Comprehensive Environmental Response, Compension and Liability Act'). These studies may be initiated as soon as the human health and environmental risks related to the extent of contamination are known." The need for developing control measures through treatability studies, bench scale studies, and pilot scale studies is driven by the potential risks related to the contaminants and their fate and transport through the various media.

RESPONSE: When conducting a treatability study for a remedial action, the person responsible for conducting the remediation must take into account the potential receptors, transport of the contaminants and other potential risks present at the site in question. The rules allow the person responsible for conducting the remediation to conduct the treatability study at any time during the remedial investigation phase of the investigation. The treatability study cannot be completed until basic information on the site characteristics and the contaminants found at the site is also gathered during the remedial investigation phase of the investigation. The rules already allow the person responsible for conducting the remediation the flexibility to do the studies at any time during the remedial investigation and will not be changed as suggested by the commenter.

969. COMMENT: Exxon Company U.S.A. recommended deleting "... without limitation ..." to N.J.A.C. 7:26E-4.1(a)4 and replacing it with the concept that the number of treatability studies to be performed or remedial alternative to be evaluated will be negotiated.

RESPONSE: The phrase "without limitation" merely indicates that there may be other examples of data which are necessary to evaulate remedial action alternatives besides treatability studies, bench scale studies and pilot studies. It does not pertain to the number of studies or remedial alternatives to be evaluated. One of the primary purposes of the rule is to eliminate the very negotiations Exxon proposes.

970. COMMENT: Schering Laboratories stated the technical process the Department has outlined in this proposal closely mirrors the Superfund process. In the Superfund process the contaminant receptors are identified in the site investigation process in order to rank sites. The receptor identification requirements should be moved to "section 3" and a ranking system outlined in "section 3." The ranking should then be used to determine if a remedial investigation is needed as per this section.

RESPONSE: The Department disagrees with this suggestion. If the contamination is present at a site in exceedance of a remediation standard a potential receptor may be affected by the contamination and a remedial investigation must be completed to determine the impact on any potential receptor.

971. COMMENT: Exxon Company U.S.A. commented the use of the terminology "and the environment." The term "and the environment" is often applied within this document as a qualifier in the evaluation of unacceptable risks. However, the definition of "environment" is unclear unless it is interchangeable with "environmental medium," defined in N.J.A.C. 7:26E-1.8 as "any component such as soil, air, sediment, structures, ground water or surface water." An alternate interpretation may be its application to the ecology-based cleanup standards in a site remediation, which have not been fully developed. It was recommended that all references to "and the environment" applied in the evaluation of risk be deleted, as there is currently no benchmark against which a comparison can be made. Once scientifically defensible methodology have been established for the development of ecological risk assessments and ecology-based cleanup standards, remedial actions could then incorporate ecological concerns. A task force/work group comprised of industry, academia and regulatory representatives should be convened to develop ecological assessment guidelines.

972. COMMENT: Exxon Company U.S.A. also commented that the collection and evaluation all data necessary to evaluate the ecological impacts of the contaminants is too sweeping in scope to be a useful guide. The statement does not clarify the purpose of an ecological remedial investigation, and how to perform such an investigation. The reference to N.J.A.C. 7:26D-5 is misleading because this reference does not provide an effective framework on how to perform a remedial investigation. Therefore, Exxon recommended deleting this requirement.

973. COMMENT: Atlantic Electric believes that ecological risk assessment science is not well-developed or reliable. Atlantic Electric requested that this subsection be deleted.

974. COMMENT: E.I. duPont de Nemours and Company stated the science of ecological risk assessment is in its infancy. Scientists simply do not understand many of the basic physical and biological processes that govern how contaminants affect an ecosystem. Requiring collection and evaluation of data to evaluate ecological impacts would be meaningless. This requirement is inconsistent with N.J.A.C. 7:26E-4.7, Remedial investigation of ecological receptors (Reserved). By reserving N.J.A.C. 7:26E-4.7, the Department appears to recognize that there are no currently reliable methodologies for collecting and evaluating data to assess ecological impacts. This requirement should be reserved in the proposed rule until N.J.A.C. 7:26E- 4.7 is developed and its contents are made available for public review and comment.

975. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-4.1(a)5 should be deleted or held in reserve until the Department promulgates specific ecological cleanup standards pursuant to N.J.A.C. 7:26D. The Department has not promulgated specific cleanup standards in N.J.A.C. 7:26D or specific investigation methods in N.J.A.C. 7:26E. N.J.A.C. 7:26E-4.1(a)5 should be deleted or held in reserve until cleanup standards and investigation guidelines are promulgated.

976. COMMENT: Mobil Oil Corporation stated that the science of ecological risk assessment is in its infancy and the procedures/ methodology for performing these assessments are not defined. The current state of knowledge in this area would make the collection of any data in this area meaningless. Evaluation of the collected data would be an impossibility. The reference provision of N.J.A.C. 7:26D-5 should be reserved for the future. It was also recommended that a task force workgroup be established to investigate this area.

977. COMMENT: The General Electric Company commented the ecological impact evaluation specified in N.J.A.C. 7:26D-5, at this point in time, does not provide many specific details. This condition reflects the relative immaturity of the ecological risk assessment field in general. Because of the lack of definition in N.J.A.C. 7:26D-5, the requirement herein to "collect all data necessary . . ." becomes very hard to define and fulfill. The General Electric Company recommended that this requirement be replaced with a more site-specific data collection requirement, tailored to the agreed-upon objectives of the ecological risk assessment for that site.

978. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested deleting N.J.A.C. 7:26E-4.1(a)5. The remedial investigation requirements have not been established; therefore, any reference to ecological impacts should be deleted.

979. COMMENT: Allied Signal, Inc. commented the ecological impact evaluation specified in N.J.A.C. 7:26D-5, at this point in time, does not provide very many specific details. This condition reflects the relative immaturity of the ecological risk assessment field in general. Because of the lack of definition in N.J.A.C. 7:26D-5, the requirement herein to "collect all data necessary . . ." also becomes very hard to define and fulfill. It was recommended that this requirement be replaced with a more site-specific data collection requirement, tailored to the agreed-upon objectives of the ecological risk assessment for that site.

980. COMMENT: The Chemical Industry Council of New Jersey stated that the science of ecological risk assessment is in its infancy. Scientists simply do not understand many of the basic physical and biological processes that govern the effects of contaminants on an ecosystem. Thus, requiring collection and evaluation of data to evaluate ecological impacts on a piecemeal project basis would be meaningless. Recent articles on the ecological impacts of tributyltin on aquatic biota indicate the scope of investigation needed to establish ecological impacts of a single chemical compounds on marine biota (Huggett, et al., 1992). As discussed in other submissions by the Chemical Industry Council of New Jersey and others, the referenced provision of N.J.A.C. 7:26D-5 should be reserved for future use, pending the development of standardized approaches to this issue. As the Chemical Industry Council of New Jersey comments to N.J.A.C. 7:26D indicated, the science of ecological risk assessment is too new to be a reliable guide for remediation. Parenthetically, this and similar requirements are excessive for smaller investigation and remedial activities and may also not be appropriate for such activities in urbanized areas. The Department appears to recognize this limitation because in 7:26E-4.7 the Department reserves remedial investigation of environmental receptors.

981. COMMENT: The Chemical Industry Council of New Jersey stated that due to the undefined methodology required to perform a remedial investigation of ecological receptors, it is correct for the Department to reserve this discussion until the methods have been developed and peer reviewed.

RESPONSE: The Department is charged with the responsibility to protect human health and the environment. Until such time as the Department adopts standardized methods for ecological risk assessments, the Department will continue to determine the need for and application of remediation standards protective of the environment on a case-by-case basis in accordance with the guidance and regulations of the Federal Environmental Protection Agency pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act of 1980," 42 U.S.C. .9601 et seq. and other statutory authorities as applicable.

982. COMMENT: Exxon Company U.S.A. recommends deleting N.J.A.C. 7:26E-4.1(a)6, "Collect all data necessary to develop permit limitations for any discharge to an environmental medium which may be required for any remedial action alternative under consideration" because in many situations the type of remediation is not known at this point of the investigation.

RESPONSE: The remedial investigation is the phase of remediation where most of the environmental data is collected upon which the subsequent phases are based. While the commenter is correct that the necessary data for the required permits may not be obtained until the remedial alternative is selected, the person conducting the investigation shall use their professional judgement in determining which alternatives may be possible at the site in question. By placing this requirement in the remedial investigation, the Department hopes to eliminate any delays in the permit application process.

983. COMMENT: The General Electric Company and Allied Signal, Inc. stated that the rule requires the collection of data "necessary to develop permit limitations"; however, the guidelines or requirements to reach this development goal are not clearly defined or referenced. The Department should provide and reference guidance documents, procedures, and the data quality objectives used to complete the task of developing permit limitations. Further, the permit limitation determination process should be conducted either during or prior to 7:26E-4.1(a)4 to ensure that data collected to "evaluate remedial action alternatives" is consistent with the data "necessary to develop permit limitations."

RESPONSE: The intent of these rules is to ensure that all the data necessary for a permit application is collected during the remedial investigation process. The specific data needed to develop the permit and the appropriate permit limits is program specific. A list of permits and applications is found in subchapter 7 of this chapter. Each program should be contacted for the permit specific criteria.

984. COMMENT: Exxon Company U.S.A. recommended deleting N.J.A.C. 7:26E-4.1(a)7 which states "Characterize all natural resource damages, including the nature and extent of injury or damage to flora and fauna, caused by the potential contaminants at the site."

985. COMMENT: Groundwater and Environmental Services, Inc. stated from practical experience, an evaluation of flora and fauna is unneeded at low environmental concern cases or in most industrial areas. This condition should be changed to require an evaluation of flora and fauna when site conditions or proximity to sensitive receptors reasonably suggests that impacts to flora and fauna are possible.

986. COMMENT: Mobil Oil Corporation commented that this is an arbitrary requirement in many instances because of the complexity of many sites and the infancy of ecological science. The possible sources of damage to flora and fauna on a site are complex and not easily determined. For example, these could include such sources as reduced solar radiation or insect attack in addition to site contamination. As stated previously, the science of defining ecological impacts of contaminants is in its infancy. Also, the inclusion of "potential contaminants" rather than the actual contaminants is excessive. Mobil Oil Corporation recommended this section be deleted and reserved for future consideration.

987. COMMENT: Colonial Pipeline Company commented that there are insufficient guidelines established to characterize all natural resources damages; therefore, this section should be revised to include the appropriate technical requirements.

988. COMMENT: The Chemical Industry Council of New Jersey stated for many of the sites in New Jersey, the possible sources of damage to flora and fauna are manifold, including deposition of air contaminants, reduced solar radiation, anthropogenic lead from automobiles and unauthorized site use by trespassers. As noted above, the science of defining ecological impacts of contaminants is in its infancy. Further, the inclusion of potential contaminants rather than actual contaminants is excessive. The Chemical Industry Council of New Jersey recommended deleting this item from the regulation.

989. COMMENT: American Cyanamid Company stated that Department has to be more specific and include guidance for the characterization of damage to natural resources, as this section does not identify the specifics concerning how to characterize the damage to flora and fauna.

RESPONSE: The Department is charged with the responsibility to protect human health and the environment. Neither the commenter's reluctance to identify, evaluate and respond to a discharge's adverse impact on the environment nor the potential complexity of this particular aspect of remediation justify ignoring this important legislative mandate. As stated above, until such time as the Department adopts standardized methods for ecological risk assessments, the Department will continue to determine the need for and application of remediation standards protective of the environment on a case-by-case basis in accordance with the guidance and regulations of the Federal Environmental Protection Agency pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act of 1980," 42 U.S.C. 9601 et seq. and other statutory authorities as applicable.

990. COMMENT: Shell Oil Company stated that N.J.A.C. 7:26E-4.1(a)7 is very vague and questioned if a hydrogeologist's opinion is good enough.

RESPONSE: The person responsible for the remediation is responsible for the submittal of accurate and true information. It is up to the person responsible for conducting the remediation to determine which individual is appropriate to make that evaluation.

991. COMMENT: Exxon Company U.S.A. recommended deleting "Identify containment and/or stabilization activities to prevent contaminant exposure to on-site receptors and to prevent the off-site migration of contaminants while remedial alternatives are being evaluated" from N.J.A.C. 7:26E-4.1(a)8, since these data may be unknown, unavailable or merely speculative when a person is planning/ conducting a remedial investigation. Should the potential exist for imminent threat to human health or the environment, this would be covered by interim remedial assessment and/or interim remedial measures.

RESPONSE: The Department included this provision to, among other things, require the person responsible for conducting the remediation to evalaute the specific circumstances to determine whether or not such actions are necessary to protect human health and the environment. Without such a requirement, avoidable risks may be allowed to continue.

992. COMMENT: Atlantic Electric stated that the submission of saturated soils pursuant to N.J.A.C. 7:26E-4.1(b) is not appropriate and is inconsistent with other regulations. This subsection should be deleted.

993. COMMENT: Mobil Oil Corporation commented that submission of saturated soil samples for chemical analysis is not appropriate and is inconsistent with other regulations. Samples should be collected above the water table. If ground water is impacted, future investigations and/ or remedial measures should be addressed via ground water investigation, not a soil investigation. This portion of the regulation should be deleted.

994. COMMENT: Exxon Company U.S.A. recommended deleting "The delineation of the horizontal and vertical limits of contamination for all media shall be conducted as part of the remedial investigation "... If soil samples within the saturated zone are required to identify the vertical extent of contamination, a sample of the saturated soil shall be collected, if sample recovery is possible, and analyzed ..."

995. COMMENT: The Chemical Industry Council of New Jersey commented that the submission of saturated soil samples for chemical analysis is not appropriate and is inconsistent with other regulations. Samples should be collected above the water table. The water table should be used to define the vertical limit of contamination with respect to soil contamination in the vadose zone. If ground water is impacted based on the relationship between the area of concern and the depth to ground water, future investigations and or remedial measures should be addressed via a ground water investigation, not a soil investigation.

RESPONSE: The Department does not believe that this approach is inconsistent with any other rules or regulations and the commenters have not identified any conflicting regulations. One of the objectives of the remedial investigation under N.J.A.C. 7:26E-4 is to fully delineate all contamination for all media. It is possible that contaminated soil below the water table, whether it is the result of a fluctuating water table or other reasons, may act as a continuing source of ground water contamination and may present a direct contact threat in the future if the soils are moved to the surface, and, therefore, must be addressed. In addition, to effectively remediate any ground water contamination, the source of the contamination (in this case the saturated soils) must be fully delineated and remediated if necessary. Therefore, this requirement shall remain in the rules.

996. COMMENT: Colonial Pipeline Company commented that as part of the delineation of the horizontal and vertical limits of contamination, a site-specific target compound list must be established. The following was recommended: "Delineation samples shall be biased ... paths of the contaminant. Analytical parameters shall be limited to those contaminants identified during the site characterization; if technically feasible, analytical detection limits shall be lower than the appropriate cleanup level for the individual contaminant. Samples shall be biased on professional ..."

RESPONSE: As stated in N.J.A.C. 7:26E-2.2, the person responsible for conducting the remediation is required to sample for all contaminants that have the potential to be discharged at the site. Therefore in doing the remedial investigation, the person responsible for conducting the remediation shall concentrate on those constituents of concern or a site specific target compound list.

997. COMMENT: The Chemical Industry Council of New Jersey commented that risk assessment should be applied in defining the exposure pathways associated with a given site. As written, the investigator would merely sample and analyze the site media and then compare these results to the cleanup standards in N.J.A.C. 7:26D. However, such an approach fails to recognize that the genuine risk posed by a site, and hence the actual need for remediation, is not only a function of the constituents present but also a function of the potential for exposure to these same materials. Thus, a baseline risk assessment, which examines the potential for human and ecological exposure and evaluates the significance of the resulting exposure levels, must be included in the technical requirements for a full scale remedial investigation. The Chemical Industry Council of New Jersey recommended that the requirement for delineation of contaminant be expanded to encompass evaluation of risk, with guidelines for limitation of investigation.

RESPONSE: The Department agrees that risks to human health and the environment should be evaluated in determining what type of remedial activity is necessary for a given site. However, the Department does not agree that a site-by-site assessment needs to be completed because such an assessment has already been incorporated into the remediation standards the Department identifies for a particular site. When comparing the contaminant levels found at the site to the Department's remediation standards and the Ground Water Quality Standards (N.J.A.C. 7:9-6), certain risks have already been taken into account. The remediation standards are developed based on risks due to ingestion of contaminated soils, the probability of the contaminated soils leaching to ground water, and for ground water risks based on the potability of the water itself. For those aquifers not used for potable purposes, the Ground Water Quality Standards are less stringent. The rules, however, do not preclude the person responsible for conducting the remediation from completing a risk assessment if they feel it is appropriate for the site in question and may request the Department's review under an oversight document.

998. COMMENT: The Chemical Industry Council of New Jersey stated that the remedial investigation in this section, the Department is being overly prescriptive in defining the methods to be used in performing a remedial investigation. For example, geostatistical methods should be allowed to establish a contamination gradient.

RESPONSE: The Department wants to encourage the use of new technologies and methodologies in the remediation of contaminated sites. More flexibility has been added to the rules through the use of a case by case variance found in N.J.A.C. 7:26E-1.6(d). Other statistical methods may be approved on a case-by-case basis if the conditions in N.J.A.C. 7:26E-1.6(d) are met when attempting to determine if the extent of contamination has been defined.

999. COMMENT: Rutgers Environmental Law Clinic stated that technical decisions in these regulations will lead to an inaccurate assessment of the extent of contamination at a given site. Use of a contaminant gradient to delineate ground water contamination is an experimental approach and should not be adopted without a demonstration by the Department that the gradient approach is scientifically valid. After contamination has not been identified, during the site investigation, in certain areas of concern on a property, a remedial investigation is conducted to determine the nature and extent of that contamination. One of the principal functions of that investigation is to delineate the extent of contamination identified at any given site.

Where a remedial action has not yet occurred, the principal means that the Department proposes to determine the delineation is by establishment of a "contaminant gradient". N.J.A.C. 7:26E-4.1(b)2. The gradient can be established as follows: i. Contaminant levels decrease by: (1) 10 percent or more between the initial characterization sample and each of two sequential delineation samples; or (2) a factor of five or more between the initial characterization sample and a single delineation sample; and ii. Once a contaminant gradient has been established, the approximate limits of contamination may be reasonably estimated by extrapolation. N.J.A.C. 7:26E-4.1(b)2. The Rutgers Environmental Law Clinic recognized the need to move away from the ad hoc basis on which sampling has been regulated in the past, however, the Department should not use unreliable and untested sampling methodologies. While it is logical to delineate the extent of contamination using a gradient which establishes declining sample results as the basis for defining a perimeter, Rutgers Environmental Law clinic did not known of any technical basis for the Department's use of the factors of 10 percent or more or of five or more as the appropriate gradient differentials. The Department should provide all information to demonstrate why these figures are not arbitrary. Clearly, the regulation is arbitrary unless this methodology is technically supportable.

1000. COMMENT: New Jersey Natural Gas Company and Jersey Central Power and Light Company stated this section contains requirements for delineation of contamination, based upon sampling data showing contamination below cleanup standards, or by establishing a decreasing contaminent gradient and then extrapolating to approximate the limits of contamination. The requirements for establishing a contaminant gradient appear to be subjective. The Department must provide the scientific basis for these requirements.

1001. COMMENT: Exxon Company U.S.A. suggested replacing all of this subparagraph with the following: "By establishment of a contaminant gradient where the approximate limits of contamination may be readily estimated by extrapolation."

1002. COMMENT: E. I. du Pont de Nemours and Company stated the approaches used for establishing a contaminant gradient do not recognize the increased use of geostatistical methods in the field of remediation. With the recent development of geostatistical packages (GEO-EAS and GEO-PACK) by the Environmental Protection Agency and the software packages availability in the public domain, geostatistical methodologies for establishing compliance with applicable cleanup levels is increasing. The approaches for establishing a contaminant gradient unnecessarily limit the use of these geostatistical methods. E. I. du Pont de Nemours and Company recommended that the Department not limit the use of geostatistics by including the following: "7:26E-4.1(b)2iv. Other methods, such as geostatistical methods, may be used to establish a contaminant gradient with Departmental approval."

1003. COMMENT: Chemical Land Holdings, Inc. commented that the methods for the establishment of a contaminated gradient, as proposed in this rule, are overly simplistic in that their use would likely lead to the develoment of erroneous conclusions. Furthermore, it is inappropriate for the Department to mandate the use of particular technical data evaluation methods, such as in this rule. Soil contamination is typically very heterogeneous. Contamination related to dense non-aqueous phase liquid migration, for example, can vary by more than an order of magnitude on a scale of centimeters (Kueper et al., 1992). The concept of a "concentration gradient" under these heterogeneous conditions must be used judiciously. Under no circumstances should the results from two soil samples be considered as establishing a concentration gradient. Under heterogeneous conditions, it is just as likely for a third sample in a progression to exhibit no relationship to the apparent "gradient" indicated by the first two samples. Unjustified adoption of concentration gradients leads, in turn, to premature identification of "hot spots" which may or may not warrant that distinction. Ultimately, this approach can result in remedial actions characterized by treatment or excavation of supposed "hot spots" while many undetected contamination zones may go unremediated. Such an approach is obviously unacceptable. It leaves the site substantially unremediated, and thus incapable of meeting its cleanup goals. It also calls into question the original remedial decision to excavate or locally treat contaminated hot spots. If, through a more thorough investigation, the full spatial extent of contamination were known, a site wide and more cost-effective approach, such as capping, subsurface cutoff walls, or some site-wide treatment-based alternative, may have been a more appropriate remedial selection. Ultimately, this is the greatest danger of the unsubstantiated "concentration gradient" approach to delineation of soil contamination and the use of such arbitrary factors for pre-assigning concentration gradients is an unacceptable and scientifically indefensible position from which to approach a remedial investigation. We can deceive ourselves into developing a conceptual model of the site as consisting of a series of relatively discrete "hot spots," when in fact a better conceptual model might be one where soil contamination is widely disseminated and heterogenous. Distinguishing which of these two conceptual models is more accurate is critical in developing viable remedial action alternatives for sites with soil contamination. This is especially true for older and often larger industrial facilities with complex histories of hazardous material and waste handling and disposal. The remedial investigation should, therefore, concentrate on determining which conceptual model better fits site conditions. Is the site largely uncontaminated with only a few isolated hot spots, or is the site broadly and heterogeneously contaminated? The goals of the remedial investigation—to define the nature of contamination and to provide data sufficient to evaluate potential remedial alternatives—do not require precise delineation of contamination. Instead, the investigation should focus on determining general site conditions, as indicated above, with the aim of providing sufficient information to select, but not design, a remedial program. Definitive delineation of soil contamination, if it is needed, can ordinarily be conducted as part of the predesign investigative activities. Even then, it may not be necessary. Many remedial actions do not require precise delineation of subsurface contamination.

1004. COMMENT: The Chemical Industry Council of New Jersey commented that it is not clear what the technical basis is for 10 percent between two additional samples, or a factor of five between the initial sample and one additional sample. These approaches to defining the gradient do not recognize the increased use of geostatistical methods in the field of remediation. With the recent development of geostatistical software packages such as GEO-EAS and GEO-PACK by the environmental Protection Agency, and the availability of these packages in the public domain, use of geostatistical methods for establishing compliance with applicable cleanup levels is increasing. The approaches for establishing a contaminant gradient unnecessarily limit the use of such methods. The Chemical Industry Council of New Jersey recommended the following addition to this section. N.J.A.C. 7:26E-4.1(b)2iv. Other methods, such as geostatistical methods, may be used with Department approval, to establish a contaminant gradient.

RESPONSE: The method described in these rules for determining a contaminant gradient has been used by the Department for several years. The approach was also generally described in the Department's Remedial Investigation Guide, which was used as guidance previous to these rules being promulgated. The Remedial Investigation Guide was developed, over time, with input from outside consultants and the regulated community. Therefore, the Department feels this method will meet the objective of the remedial investigation in delineating the extent of the contamination. The Department has recognized, however, that under certain site conditions, other statistical methods for contaminant delineation may be more appropriate than others. Therefore, the Department may allow alternate sampling and statistical analysis under N.J.A.C. 7:26E-1.6(d).

N.J.A.C. 7:26E-4.2

1005. COMMENT: Atlantic Electric urged the Department to delete this entire section on remedial investigation of building interiors.

1006. COMMENT: The General Electric Company stated the proposed technical regulations prescribe procedures for conducting investigations of building interiors. However, the underlying statutes do not authorize the Department to regulate building interiors in the absence of a demonstrated threat to the external environment. As noted, the Department's Spill Act jurisdiction is tied to discharges which enter the waters or lands of the State or which may damage lands, waters and natural resources within the State. N.J.S.A. 58:10-23.11b(h). Likewise, the Department's authority under the Environmental Cleanup Responsibility Act is expressly limited to protection of the "soil, ground water and surface water quality" (N.J.S.A. 13:1K-10(a) and (c)). Under the Water Act, a "discharge" is limited by definition to a release which impacts waters of the State. N.J.S.A. 58:10A-3(e). Thus, there is no statutory basis for the Department's effort to mandate or control investigation or cleanup of building interiors.

1007. COMMENT: Jersey Central Power and Light Company stated this section implies that an investigation of building interiors is required if they may contain contaminants above in applicable cleanup standards.

Requirements for building interiors are not appropriate to these proposed rules unless the site is being transferred and is applicable to Environmental Cleanup Responsibility Act.

1008. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented the Department has no statutory authority requiring remediation of building interiors. This is the focus of Occupational Safety and Health Act and Federal legislation (example asbestos and lead) and is not under the authority of the Department. Therefore, the entire section should be deleted rather than establishing requirements beyond the Department's scope.

1009. COMMENT: Shell Oil Company stated this requirement should only have to be done for a property transfer or for a very complicated site with complex hazard potential.

1010. COMMENT: E. I. du Pont de Nemours and Company commented the Department does not have the statutory authority to require remediation, including sampling, of building interiors. The Department purports under the Environmental Cleanup Responsibility Act to adopt cleanup standards and investigation requirements for specific hazardous substances with respect to building interiors. However, E. I. du Pont de Nemours and Company does not believe that, outside ECRA, the Department has any statutory authority to provide standards or investigation requirements for building interiors. Specifically, the Air Pollution Control Act regulates air contaminants in the outdoor atmosphere; the Solid Waste Management Act regulates the discharge of solid and hazardous wastes into or on any land or water. Both the Spill Act and the Water Pollution Control Act identify specific environmental media (that is, land or water) of concern. Nothing in any of these statutes expressly or implicitly gives the Department the authority to mandate cleanup of building interiors. Even within ECRA, such standards must be based on the potential for injury to public health and safety. Since buildings at industrial sites are typically places of controlled access and controlled exposure, the risk to public health is minimal. Employees at industrial sites are adequately protected by the Occupational Safety and Health Act (OSHA). It is not necessary for the Department to infringe on workplace safety standards contained in Occupational Safety and Health Act and related regulations to protect workers. Further, buildings are intrinsically different from normally recognized environmental media, which are appropriately the focus of these regulations. E. I. du Pont de Nemours and Company urged the Department to delete this portion of the proposed rules. At the very least, the rule should be limited to residential structures or to industrial structures for which public access is not adequately controlled by security meausres, facility fencing, or other means.

1011. COMMENT: New Jersey Natural Gas Company stated this section implies that an investigation of building interiors is required if they may contain contaminants above applicable cleanup standards. Requirements for building interiors are not appropriate to these proposed rules.

1012. COMMENT: Exxon Company U.S.A. recommended deleting N.J.A.C. 7:26E-4.2 since there is no statutory basis.

RESPONSE: Building interiors and structures were included as areas of concern because they are areas that would require consideration should the person conducting the remediation want or be required to conduct interior remediation. In addition, it should be noted that areas inside buildings can be significant sources of contamination to exterior environmental media. Areas such as floor drains, trenches, pits and sumps may leak contaminants to the soils and ground water beneath the building.

The Department disagrees with the comments and refers the commenter to the Department's response to the comments on "environmental media" at N.J.A.C. 7:26E-1.8.

N.J.A.C. 7:26E-4.3

1013. COMMENT: Exxon Company U.S.A. suggested for clarity purposes, adding after "... may ..." the following: "have been impacted by discharges from the areas of concern identified in the preliminary assessment."

RESPONSE: The definition of an area of concern includes any area to which contaminants may have migrated. At the remedial investigation stage a person responsible for conducting the remediation knows not only that an area of concern exists but that it is contaminated. Therefore, the suggested language is not necessary.

N.J.A.C. 7:26E-4.4

1014. COMMENT: Jersey Central Power and Light Company and New Jersey Natural Gas Company commented the requirements for a remedial investigation for ground water and site investigation of ground water (N.J.A.C. 7:26E-3.7) appear to be contradictory. N.J.A.C. 7:26E-3.7 indicates that an initial site investigation (sampling) of ground water is required based upon water solubility of the contaminant and silt/clay content of soils, whereas a ground water remedial investigation is required in N.J.A.C. 7:26E-4.4 in other cases including, for example, when soil samples within two feet of the saturate zone or bedrock contains a contaminant above applicable subsurface soil cleanup standards.

RESPONSE: The requirements of the site investigation and the remedial investigation as it relates to ground water are different because the objectives of the two remedial phases are different. The objective of the site investigation (N.J.A.C. 7:26E-3.3) is to determine if any contamination above the appropriate remediation standard exists at a given site. One of the major objectives of the remedial investigation (N.J.A.C. 7:26E-4.1) is to define the nature and extent of the contamination. The intent of the regulations as written is to allow the person responsible for conducting the remediation to proceed directly to the remedial investigation if any contamination has been found above the appropriate remediation standard in any environmental media. For example, if soil contamination has been found, the person responsible for conducting the remediation may then elect to move onto the remedial investigation to delineate the soil contamination as well as investigate any ground water contamination. However, if any level of contamination has been found in the soil column during the site investigation, a ground water sample must be taken if the contaminant of concern has a solubility of greater than 100 mg/liter and the area contains highly permeable soil (defined as being less than 15 percent silt and clay) between the contaminant and the water table.

In the remedial investigation phase, a ground water sample must be taken if any appropriate remediation standard has been exceeded within two feet of the water table or bedrock regardless of the soil type or contaminant of concern. In those situations where the constituent of concern is very soluble and the site is located in a sandy soil (as defined above), a ground water sample must also be taken in the remedial investigation as well.

In drafting these rules, the Department considered comments and suggestions it has received over the years from various parties, including Department personnel, on all existing rules, guidance and policies from various statutory programs concerning the investigation and remediation of contaminated sites. An evaluation of sampling data collected from the various programs was also conducted prior to the proposal of these rules. The conditions set forth in N.J.A.C. 7:26E-3.7(a) and 4.4(a) outlining when a ground water investigation needs to be completed, are the result of that evaluation.

The Department stresses that the requirements set forth in N.J.A.C. 7:26E represent the minimum sampling requirements for a contaminant investigation. The Department will continue to evaluate the above-mentioned triggering mechanisms, to ensure its effectiveness in evaluating the need for a ground water investigation. As the Department identifies other instances in which a ground water investigation must be completed, the rules will be modified, as needed, in future rulemaking.

In addition, the Department's Division of Science and Research has issued a Request for Proposal pursuant to the Spill Fund Research Program to attempt to develop an appropriate method to determine when a ground water investigation needs to be completed or to confirm the existing approach. When the evaluation is completed and approved, any new methodology will be incorporated into the regulations in future rulemaking.

1015. COMMENT: Mobil Oil Corporation commented that a remedial investigation should not be conducted in all cases where the contaminant concentrations are confirmed to be present at levels exceeding ground water or soil cleanup standards. For areas where there are no receptors, natural remediation should be allowed. This should be determined on a case-by-case basis. The following rewording should be incorporated: "A remedial investigation of ground water for an area of concern, may be required, depending upon site-specific conditions, if:"

RESPONSE: The goal of the remedial investigation and remedial alternative analysis process is to develop a plan for the remediation of a site at which contamination exists. It is during the remedial investigation process that potential receptors may be identified. Based on the results of the remedial investigation, remedial action alternatives are formulated. One of the alternatives may be natural remediation. If it has been determined during the investigation that there are no

receptors in the vicinity of the site, a natural remediation program may be the most appropriate means of remediation for the site in question. During the remedial investigation process the data should be gathered to make this evaluation on a case by case basis. The Department believes that if any contamination has been found above the applicable standard, an investigation into the possible consequences of the discharge must be evaluated. If it is determined that there are no contaminants above the applicable remediation standards, then no further action is required.

1016. COMMENT: Exxon Company U.S.A. stated there is little flexibility in the requirements of a remedial investigation of ground water, and other requirements for source remediation are not considered. Exxon recommended that N.J.A.C. 7:26E-4.4(a)1 be the only qualifier for a remedial investigation of ground water. In the event that no ground water contamination is detected, but contaminants in subsurface soil are detected at concentrations exceeding cleanup criteria, the subsurface soil will require remediation and subsequently the potential source be removed. Therefore, the expense and delay of ground water investigation will not be encountered.

RESPONSE: The intent of N.J.A.C. 7:26E-4.4 is to define when a ground water sample must be obtained. If, after sampling, it has been determined that no ground water contamination exists above the applicable remediation standard, then no further action for the ground water is required at that area of concern. If soil contamination is still present at the site, the soil must still be evaluated according to the remedial investigation requirements and remediated if necessary. The rules only require a ground water investigation when there is evidence of a potential discharge to the ground water.

1017. COMMENT: Shell Oil Company suggested adding "only if three averaged samples collected from the same location are above action levels" to N.J.A.C. 7:26E-4.4(a)1.

RESPONSE: The above referenced provision does not necessarily intend for a one time exceedance in the Ground Water Quality Standard to trigger a remedial investigation. If averaging is appropriate for the site in question, then it may be used in determining the need for a remedial investigation.

1018. COMMENT: Atlantic Electric commented the remedial investigation should not be conducted for all cases where contamination is present at levels exceeding the ground water cleanup standards. In some areas of New Jersey, ground water quality is naturally poor and there are no ground water receptors. Atlantic Electric recommended rewording this subsection as follows: "A remedial investigation of ground water for an area of concern may be required, depending on site-specific conditions if ..."

1019. COMMENT: Exxon Company U.S.A. stated for Class IIA, IIB and III aquifers, the exceedance of subsurface soil standard should not trigger a remedial investigation of ground water. Exxon recommended that the only ground water standards for these areas shall be volatile organic compounds and total organic carbon.

1020. COMMENT: The Chemical Industry Council of New Jersey stated remedial investigations should not be conducted in all cases where contaminant concentrations are detected in subsurface soil above an applicable cleanup standard. In many parts of New Jersey the ground water has been previously degraded from urbanization and salt water intrusion. Where there are existing, area-wide problems such as these, and no actual or potential exposed human populations or sensitive ecosystems, a ground water investigation should not be required. The need for a ground water investigation should be decided on a case by case basis. The Chemical Industry Council of New Jersey recommended the following modification: The words "shall be conducted" (N.J.A.C. 7:26-4.4(a)) should be replaced with "may be required, depending upon site-specific conditions that incorporate ground water use and potential receptors."

RESPONSE: A remedial investigation of ground water must be completed when the applicable remediation standards have been exceeded within two feet of the water table or bedrock. The remediation standards have been developed to be protective of all environmental media, including ground water, potential vapor problems and ecological receptors. The ground water quality standards (N.J.A.C. 7:9-6) are applicable for areas of the state where the quality of the ground water is suitable for drinking water purposes as well as where the ground water is of naturally poor quality and unusable as a potable water source. The ground water quality criteria in designated poor quality areas are less stringent than in those areas designated as drinking water areas. Therefore, the rules already take into account naturally poor quality ground water in evaluating the need for a ground water investigation.

In addition, the Department's Division of Science and Research has issued a Request for Proposal pursuant to the Spill Fund Research Program to attempt to develop an appropriate method to determine when a ground water investigation needs to be completed or to confirm the existing approach. When the evaluation is completed and approved, any new methodology will be incorporated into the regulations in future rulemaking.

1021. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested deleting N.J.A.C. 7:26E-4.4(a)3 because the depth to ground water, migration pathways, and media interactions need consideration rather than evaluating a soil concentration anywhere in the column. Questions needing answers include—Are there ground water receptors? What is the ground water quality? etc.

RESPONSE: The Department's remediation standards are developed on a case-by-case basis to protect against the migration of contaminants into the ground water. Any soil contamination in excess of the remediation standard is considered as a potential ongoing source of ground water contamination, especially if the soils are to remain in place. Therefore, the Department will require a ground water remedial investigation under the circumstances described in N.J.A.C. 7:26E-4.4(a)3, to determine the nature and extent of ground water contamination and the impact the contamination in the soil may have on the underlying ground water quality as well as any possible receptors.

1022. COMMENT: Shell Oil Company suggested defining "actively treated." Is biodegradation active treatment?

RESPONSE: The rules have been modified to state "actively remediated." The Department intends the phrase "actively remediated" to include any type of treatment, be it chemical, physical or biological, including a Departmentally approved natural remediation plan. The person responsible for conducting the remediation must be able to demonstrate through monitoring, that the type of treatment used is working properly.

1023. COMMENT: E. I. du Pont de Nemours and Company stated N.J.A.C. 7:26E-4.4(a)4 is overly restrictive. The data required concerning the discharge may not be available, although other data or information, such as soil contaminant concentrations and depth to ground water, may thoroughly support the contention that no ground water sampling is necessary. The wording requires that all the listed data are submitted in order to make a determination that ground water sampling is unnecessary. In addition, it is unclear why post-remediation sampling would be part of a site investigation. It was suggested that the following revision be added to the section: "(4) Soil sampling data establish that the applicable cleanup standards are not exceeded at the area of concern; or (5) Any other data or information that is relevant to the determination of the likelihood of ground water contamination."

RESPONSE: The intent of N.J.A.C. 7:26E-4.4(a)4 is to allow a facility with a one-time, short duration, known quantity spill to be cleaned up quickly without having to sample the ground water. The post-remediation sample is required to confirm that all of the contaminated soil has been removed or remediated. As for the suggested revision, if it has been determined that no soil contamination exists above the appropriate remediation standard within two feet of the water table, then no ground water sampling is required as a minimum standard. A ground water sample should still be taken, if appropriate, pursuant to N.J.A.C. 7:26E-1.7.

1024. COMMENT: Exxon Company U.S.A. recommended changing "and" to "or." In addition, Exxon suggested adding "or when the applicable oversight document was signed" following "... remedial investigation."

RESPONSE: The language in N.J.A.C. 7:26E-4.4(a)4i will not be changed as all criteria under subparagraph (a)4i must be met. It is with this information that the Department determines if the discharge was remediated completely. The person responsible for conducting the remediation is responsible for meeting all the appropriate standards at the time of the remedial action workplan approval of the case in question.

1025. COMMENT: The Chemical Industry Council of New Jersey stated most of the common priority pollutants with higher solubilities are also biodegradable and volatile. The volatility and biodegradability should also be considered. Decreasing concentrations of the contaminants in soil should also be sufficient to demonstrate no need for ground water investigation. The Chemical Industry Council of New Jersey recommended adding the following condition to this subchapter: "7:26E-4.4(a)4 ... and if soil samples do not show a decreasing concentration of the contaminants such that zero concentrations can be extrapolated at the ground water interface."

RESPONSE: The Department believes that, under some conditions, a contaminant in the vadose may degrade to a non-detectable level after the contaminant plume has already impacted ground water, and so the commenter's suggestion is not appropriate. However, this issue is currently under study by the Department and, if specific conditions under which the commenter's suggestion is viable can be identified, a modification may be made in future rulemaking. In the interim, such an approach may be appropriate on a case-by-case basis pursuant to N.J.A.C. 7:26E-1.6(d).

1026. COMMENT: Environmental Liability Management Inc. recommended that N.J.A.C. 7:26E-4.4(a)4i(2) be modified to include how the volume of a discharged contaminant can be determined. The following modification was suggested: "The identity of the contaminant(s) is (are) known and the volume of the discharged contaminant(s) is (are) known from records or the remaining mass of contaminant(s) in the soil is estimated from soil concentrations."

RESPONSE: The intent of N.J.A.C. 7:26E-4.4(a)4i(2) is to only allow the exemption for ground water sampling when the volume of the discharge is known, not extrapolated through other means. The volume of discharge must be demonstrated through records or reports.

1027. COMMENT: Environmental Liability Management Inc. commented this paragraph indicates the condition under which a ground water investigation may not be needed for the condition described only under N.J.A.C. 7:26E-4.4(a)4i. However, from a technical perspective, N.J.A.C. 7:26E-4.4(a)4i(1), (2) or (3) should also represent the condition under which a ground water investigation may not be needed for any of the conditions listed under N.J.A.C. 7:26E-4.4(a)1, 2 or 3. It is therefore recommended that the following change be made. Delete the sentence after N.J.A.C. 7:26E-4.4(a)4 and combine N.J.A.C. 7:26E-4.4(a)4 and (a)4i to form a new N.J.A.C. 7:26E-4.4(a)4 which would read, "The recent discharge of a contaminant into an area of concern when all the soil between the contaminant and the saturated zone is less than 15 percent silt and clay and the contaminant's water solubility is greater than 100 milligrams per liter as listed in a peer reviewed reference." Also change the codification of paragraph N.J.A.C. 7:26E-4.4(a)4i(1) to N.J.A.C. 7:26E-4.4(a)5.

RESPONSE: N.J.A.C. 7:26E-4.4(a)4 states that a remedial investigation is to be completed under these conditions, while N.J.A.C. 7:26E-4.4(a)4i states that a remedial investigation may **not** be completed if conditions (1) through (5) are met. The provisions have been recodified as suggested.

1028. COMMENT: E. I. du Pont de Nemours and Company stated that requiring the location of all ground water sampling points to be within 10 feet of an area of concern is arbitrary and without scientific basis. Locating all ground water sampling points in the expected downgradient flow direction and within 10 feet of an area of concern does not guarantee that ground water contamination associated with a discharge at the area of concern will be detected. Contaminant migration in the ground water away from the area of concern may have occurred, and ground water contamination could be located closer to or farther away than 10 feet from the area of concern. In order to consider site-specific conditions, E. I. du Pont de Nemours and Company suggested the following modification to the section "the expected downgradient flow direction of the area of concern and at such a location as to determine if ground water contamination associated with a discharge at the area of concern has occurred above the applicable cleanup standards."

1029. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following modifications at N.J.A.C. 7:26E-4.4(d)2: "The expected downgradient flow direction shall be determined at appropriate location(s) from an area of concern to evaluate if a discharge or ground water contamination has occurred." The ground water program should establish the flow direction and hydraulic gradient at an interval (both vertical and horizontal) to characterize an area of concern. Flexibility in determining these locations must be incorporated in the proposed rule.

1030. COMMENT: The Chemical Industry Council of New Jersey stated that the Department requires at least one ground water sample from all areas of concern unless the area of concern is within 10 feet hydraulically upgradient of a ground water sampling location. Ten feet is quite a short distance and it is often possible to strategically locate a ground water sampling point so that it assesses more than one area of concern. The Chemical Industry Council of New Jersey recommended that if one ground water sampling point is to be installed to assess two areas of concern, the person responsible for conducting the ground water investigation should determine ground water flow direction and hydraulic gradient in order to prove that one ground water sampling point will be sufficient to characterize both areas of concern.

1031. COMMENT: E. I. du Pont de Nemours and Company commented that the requirement to take one ground water sample per area of concern is overly restrictive and does not consider site-specific conditions. One ground water sample per area of concern may or may not reveal the presence of ground water contamination associated with a discharge at the area of concern. At both very large and very small areas of concern this requirement may be inadequate because ground water constantly moves in the subsurface. E. I. du Pont de Nemours and Company suggested the following revision of the section, "The site investigation shall include a ground water sampling program designed to determine if an area of concern has caused the ground water to be contaminated above the applicable cleanup standards if:"

1032. COMMENT: Chevron U.S.A., Inc. suggested that N.J.A.C. 7:26E-4.4(d) should be more flexible. Absolute adherence to the 10-foot distance is arbitrary, unduly restrictive and has little hydrogeologic foundation. Properly designed and located monitoring wells as far as 100 feet or more in permeable aquifer material will provide satisfactory upgradient monitoring data for an area of concern.

1033. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following modifications at N.J.A.C. 7:26E-4.4(e)4: delete "At least one ground water sample for all other areas of concern unless the area of concern is within 10 feet hydraulically upgradient of a ground water sampling location." and add: "The ground water monitoring program shall determine if an area of concern has resulted in a discharge or ground water contamination."

RESPONSE: The Department believes that the approach specified in N.J.A.C. 7:26E will detect the presence of ground water contamination emanating from an area of concern. The Department has been using this approach for a number of years in the Environmental Cleanup Responsibility Act and Underground Storage Tank programs. This requirement is designed to determine if any contamination is present above the appropriate remediation standard. Once the contamination has been confirmed, a much more thorough investigation is then required.

However, the Department does agree under certain circumstances that one ground water monitoring point may be able to detect contamination from more than one area of concern. For further detail, refer to response to comments at N.J.A.C. 7:26E-3.7(c)iii.

1034. COMMENT: The Chemical Industry Council of New Jersey commented that at least one ground water sample for all other areas of concern must be taken unless the area of concern is within 10 feet hydraulically upgradient of a ground water sampling location. Based on the 25-foot requirement, if a leaking pump island occurs less than 25 feet downgradient or crossgradient of a ground water sampling point which is intended to monitor a tank field, then an additional ground water sampling point would not be required. If the tanks are tight and the piping associated with the pump island leaks, the leak may not be detected, because only one ground water sampling point is required. Therefore, it is the responsibility of the person conducting the ground water investigation to determine the need for one or two ground water sampling points. Distance should not be the only factor to consider. Flow direction and hydraulic gradient should also be evaluated. In addition, the 25-foot requirement is inconsistent with N.J.A.C. 7:26E-4.4(e)4.

RESPONSE: The Department believes that in a typical service station scenario, one well is appropriate. However these rules detail the minimum amount of work required. If, during the soil sampling phase of the investigation, a discharge was found to have occurred from either the pump island or the associated piping which could potentially impact ground water, it is the responsibility of the person conducting the remediation to demonstrate that the number of wells, be it one or more wells, is adequate to ensure that the ground water emanating from the area of concern is being monitored properly at the site.

1035. COMMENT: Chevron U.S.A., Inc. stated that this citation should be revised to read, "All ground water samples ... shall be obtained from monitoring wells or piezometers. Where appropriate, test pits or excavations may be included in the sampling program." The wording change recognizes the fact that on sites where the water table is very shallow, useful water samples may be taken from shallow test pits or excavations made for soil sampling, water sampling or for other purposes.

1036. COMMENT: The General Electric Company and Allied Signal, Inc. stated this requirement discourages innovative approaches to ground

water monitoring. Flexibility should be included in the new rule for new and innovative methods to be implemented where and when appropriate.

1037. COMMENT: Chemical Land Holdings, Inc. commented that this subparagraph should be modified to clearly permit the use of demonstrated innovative ground water sampling methods such as the HydroPunch, Geoprobe, and similar techniques in the investigative phases of work. These methods are sufficiently well established in accordance with N.J.A.C. 7:26E-1.6(c)3 that a separate demonstration to the Department on a case-by-case basis should not be required. However, it is recognized that demonstration of compliance to ground water standards at the site perimeter would require the use of coventional monitoring wells.

RESPONSE: The Department has deleted N.J.A.C. 7:26E-4.4(f) because it directly contradicts N.J.A.C. 7:26E-4.4(c) and 4.4(g). However, at the present time, the only ground water sampling methods accepted without question by the Department, are those referenced by the Field Sampling Procedures Manual and presently includes ground water samples taken from properly constructed monitoring wells and piezometers. The rules do allow other ground water sampling techniques to be used on a case by case basis if the person responsible for conducting the remediation can demonstrate that the method meets the criteria described in N.J.A.C. 7:26E-1.6(c) and 1.6(d).

In addition, the Department is currently in the process of evaluating several alternate sampling procedures such as Geoprobe and HydroPunch, as well as others. The purpose of this evaluation is to develop standardized guidelines for their use and possible inclusion in the Field Sampling Procedures Manual. At that time, if acceptable, those methods will be able to be used without special Department approval.

1038. COMMENT: Exxon Company, U.S.A. recognizes one cannot always obtain split spoon samples, due to different soil types/conditions, recommend adding after "... samples ..." the following: "if possible."

RESPONSE: The Department recognizes that in certain situations, a split spoon sample cannot be collected. As written, N.J.A.C. 7:26E-4.4(g)4 states a split spoon sample must be collected "if appropriate." The Department believes the commenter's concern is addressed in the regulations as drafted.

1039. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-4.4(g)5 should be changed to lessen emphasis on coring. The proposed language implies that coring is a fundamental source for bedrock structural data in each investigation. However, published reports, maps and other information, and reliance on available outcrops can often provide the requisite understanding of subsurface structural controls on ground water flow and contaminant migration at a site. In other words, coring may or may not be essential. In N.J.A.C. 7:26E-4.4(g)5iv "fracture fit" should be corrected to read "fracture filling."

1040. COMMENT: The General Electric Company commented that other field geology techniques may provide this data if sufficient outcropping of bedrock exists on site, however this determination must be made on a site-specific basis. Published geologic data is ofen sufficient to define area-wide structural trends in bedrock that may effect ground water flow. Rock coring is not always appropriate for all sites.

1041. COMMENT: Shell Oil Company stated the rule should minimize costly rock coring as those point locations would be very difficult to extrapolate to area wide characteristics.

1042. COMMENT: Mobil Oil Corporation commented that obtaining rock core samples is difficult and expensive. This may provide useful information for some situations. However, the costs may outweigh the benefits at a majority of the sites. This should be performed on a site-specific basis. This section should be revised to read as follows: "Have a sufficient number of rock cores collected during the drilling of bedrock monitoring wells, ... and other borings, if appropriate for the site, to obtain ..."

RESPONSE: The Department has clarified this provision at N.J.A.C. 7:26E-4.4(f)6 by stating that published information, available outcrop data, and other pertinent information may be used to determine the bedrock structure in an area, if appropriate. However, site-specific information must be provided by at least one boring to characterize the site. The boring may be done in conjunction with the drilling of required monitoring wells and piezometers. Previously, this task was to be accomplished through the rock coring process described in N.J.A.C. 7:26E-4.4(f)5 (proposed as N.J.A.C. 7:26E-4.4(g)5).

1043. COMMENT: The Chemical Land Holdings, Inc. stated the ASTM reference in N.J.A.C. 7:26E-4.4(g) for the Diamond Drilling Method is out of date and should be corrected. The reference should be stated as "ASTM 2113-83" or preferably "the current version of ASTM 2113." It is well beyond the normal scope of most bedrock investigations to gain the level of understanding of bedrock characteristics required in this subparagraph.

1044. COMMENT: Allied Signal, Inc. and the General Electric Company commented that the rule references ASTM 2113-70, which has been revised in 1983 to ASTM 2113-83, for drilling and sampling in bedrock conditions. This ASTM method is not applicable to study the orientation of the fracture pattern beneath a site because it does not provide for the collection of an oriented core of the bedrock. The method is scoped "in the context of obtaining data for foundation design and geotechnical engineering purposes rather than for mineral and mining exploration" (ASTM 2313-83). Further, the use of the method is "to obtain core specimens of superior quality that reflect the in-situ conditions of the material and structure and which are suitable for standard physical properties tests and structural-integrity determination" (ASTM 2113-83).

RESPONSE: The text of N.J.A.C. 7:26E-4.4(f)5 (proposed as N.J.A.C. 7:26E-4.4(g)5) has been corrected as suggested. The response to the following comment addresses the applicability of ASTM method 2113-83 in the determination of the orientation of the fracture patterns.

1045. COMMENT: The General Electric Company suggested the words "strike," "orientation," and "plunges and trends of folds" be omitted from the rule since conducting ASTM method 2113 will not provide this information. Further, in most cases the large number of data points necessary to provide a reasonable, statistical determination of bedrock orientation would greatly exceed the number of wells necessary to characterize water quality at a site.

1046. COMMENT: Chemical Land Holdings, Inc. commented it may not even be feasible to determine many of the required bedrock characteristics on the basis of rock core data. Bedrock fracture patterns, and the plunges and trends of folds are very difficult to characterize on the basis of an examination of rock core. This is because fracture patterns (particualrly in top of rock zones) and rock folds are often so complex that their characterization would not be feasible without an inordinate number of boreholes. However, these data are often much more easily obtained from the literature and from examination of outcrop exposures. Nor is it feasible to determine some of the required bedrock characteristics including the "strike ... of bedding planes" or "orientation of faults, faults, joints and fractures" through the use of conventional borehole techniques. These characteristics can only be determined through the use of oriented core drilling in which the compass direction of the rock core is maintained during the drilling process. Oriented core drilling is not one of the coring methods described in ASTM 2113-83. Furthermore, oriented core drilling is a very uncommon technique that is difficult and expensive to implement; in fact, very few drilling contractors have the equipment or expertise to implement this technique. On the basis of the above, all references to the determination of strike and orientation of bedding planes, faults, joints and fractures from borehole data should be deleted. Furthermore, any reference to folds should likewise be eliminated.

1047. COMMENT: Allied Signal, Inc. commented the words "strike," "orientation," and "plunges and trends of folds" should be omitted from the rule since conducting ASTM method 2113 will not provide this information. Further, in most cases the large number of data points necessary to provide a reasonable, statistical determination of bedrock orientation would greatly exceed the number of wells necessary to characterize water quality at a site. Other field geology techniques may provide this data if sufficient outcropping of bedrock exists on site, however this determination must be made on a site-specific basis. Published geologic data is often sufficient to define area-wide structural trends in bedrock that may effect ground water flow.

RESPONSE: The Department has clarified the rule at N.J.A.C. 7:26E-4.4(f)6 by stating that although the evaluation of "strike," "orientation" and "plunges and trends of folds" must be included, necessary data may be gathered through other field methods or published geologic data which are more appropriate for the site.

1048. COMMENT: Chemical Land Holdings, Inc. stated that this level of detail is certainly not necessary for most investigations, although such data may be valuable on major bedrock contamination sites. Accordingly, the regulations should permit consideration of the scope of bedrock investigations on a case by case basis.

RESPONSE: The Department believes that if contamination is present in the bedrock aquifer system, the scope of the investigation found in

the rules is necessary. In these types of investigation, the hydrogeology is very complex and to ensure that the correct remedial alternative for the site is chosen, the required information must be obtained.

1049. COMMENT: The Chemical Industry Council of New Jersey recommended the following modification: In addition to the items presented in i through viii, drill rate, rock quality determination (RQD), and zones of lost circulation should be included on the core logs.

RESPONSE: N.J.A.C. 7:26E-4.4(g)5ix has been added to the regulations, stating "Any other information appropriate for the investigation" may also be submitted to the Department.

1050. COMMENT: Shell Oil Company commented regarding N.J.A.C. 7:26E-4.4(g)6, that "A permanent water level measurement mark . . ." is not needed to get accurate water level measurements. The top of the casing has always been used to measure from and this should be more than adequate to get consistent water level measurements.

RESPONSE: The permanent water level measurement mark can be any mark on the casing from which the water level measurements are taken at every sampling event. Using the top of casing is acceptable if it is documented as such. In many situations, the water level measurements may not be taken by the same individual or company over the lifetime of the case. Therefore, by requiring a permanent water level measuring mark, the Department is attempting to get accurate and consistent water level readings.

1051. COMMENT: Exxon Company U.S.A. recommended changing N.J.A.C. 7:26E-4.4(g)6 to state "above mean ... longitude" to "in relation to an on site datum point specified and shown on the applicable site maps and reports." Surveying to .01 foot above mean sea level at every site investigation is not technically justifiable and is not cost-effective.

1052. COMMENT: Colonial Pipeline Company commented that these survey requirements are excessive, especially if there are numerous wells on a facility. These regulations need to be revised to state that one well or reference point should be located to the accuracy described; the remaining wells should be located relative to the facility reference point. It should be noted that since all property descriptions are based on land lot surveys, monitoring well locations following the same land lot descriptions should be sufficient.

RESPONSE: The Department agrees that surveying each ground water monitoring well to 0.01 feet above sea level is not necessary. N.J.A.C. 7:26E-4.4(f)7i (proposed as N.J.A.C. 7:26E-4.4(g)7i) has been changed to specify that ground water monitoring wells must be surveyed to 0.01 foot in relation to a common datum point on site, shown on all applicable site maps and reports.

1053. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-4.4(g)6ii should be revised to read, "... for accurate, consistent and comparable water-level measurements over time." Since water levels in wells fluctuate with time, "reproducible" is inappropriate.

RESPONSE: The Department agrees with this comment and has amended the rule adopted at N.J.A.C. 7:26E-4.4(f)7ii accordingly.

1054. COMMENT: Environmental Liability Management Inc. commented that the requirements listed under N.J.A.C. 7:26E-4.4(h) and (i) are extensive and should not be required of all sites as minimal technical standards. For example, conducting all the extensive activities listed under paragraph (h)3 at a site with a limited area of ground water contamination of naturally degradable compounds, which are already at relatively low concentrations, will usually be excessive and costly to the property owner. Another example is a site where the plume of contaminated ground water is located within the limits of the property, there are monitoring wells between the plume and the property boundary, the contaminants are near health based standards and are degradable. Under this scenario, the information obtained for the items listed under subsection (i) is moot if the property owner is going to monitor the ground water. The information is even of less use if the aquifer is a nonuse one due to low yield. It was recommended that the Department modify N.J.A.C. 7:26E-4.4(h) and (i) to include a list of site conditions which would trigger the various requirements of subsections (h) and (i).

RESPONSE: The purpose of the requirements found in N.J.A.C. 7:26E-4.4(h) and (i) are to delineate the ground water contamination, determine the ground water flow direction, evaluate aquifer properties and to evaluate any potential receptors of the ground water contamination. This information is basic to any ground water evaluation and must be completed to be able to effectively evaluate any type of ground water remediation alternative, whether it be an active system, natural remediation plan or a request for no further action.

1055. COMMENT: Rutgers Environmental Law Clinic commented that remediators must not be permitted to average ground water samples when determining compliance with the cleanup standard. The proposed regulations allow the remediator to average ground water sample results obtained in remedial investigations when determining compliance with the standards. N.J.A.C. 7:26E-4.4(h)2; N.J.A.C. 7:26E-4.9(c)3i. The Department's proposed use of an average to determine compliance is a dramatic departure from the Department's historic regulation of site contamination and from the full protection of public health and the environment. Using an average is a major concession by the Department to polluters who do not want to pay for their misdeeds. The Department should use the most contaminated sample to determine whether the site requires remediation. Compliance with the law should not be based on an average. If a sample is above the health-based standard, it exceeds the standard, and the area must be remediated. Since the cleanup standards are supposed to be based on protection of human health and the environment, any sample which exceeds that standard indicates a problem which must be corrected.

RESPONSE: The intent of the averaging portion of the rules, in regard to ground water, is to allow a person responsible for conducting the remediation to resample and average if the contamination found is slightly above the standard. This takes into account the possibility of laboratory error or other sampling error. The Department believes if contamination is found significantly above the standard, the average would not be below the standard and the person responsible for conducting the remediation would be required to do a further evaluation through the remedial investigation process. As stated in N.J.A.C. 7:26E-4.4(h)2, the Department has limited the amount of time in which the samples can be averaged and at least two additional samples must be taken.

1056. COMMENT: Allied Signal, Inc. and the General Electric Company stated that the basis for the number of sample events and time period between confirmation sampling at N.J.A.C. 7:26E-4.4(h)2 is not clear. The potential use of alternative statistically valid confirmation sampling and waiting time periods should be incorporated into the rule based on site-specific variations in ground water velocities.

RESPONSE: The number of sampling events and the time periods between sampling events found throughout the regulations are based on the Department's experience in the many ground water investigations that have been conducted. N.J.A.C. 7:26E-4.4(c) provides that if the criteria found in the regulations do not conform to a situation on a particular site, the person responsible for conducting the remediation may make a request to the Department for an alternate sampling schedule pursuant to 7:26E-1.6(d).

1057. COMMENT: E. I. du Pont de Nemours and Company stated that the requirement in N.J.A.C. 7:26E-4.4(h)3 assumes that all ground water contamination above the applicable cleanup standard will need to be remediated. This assumption does not consider risk-based site-specific conditions nor the potential for the use of alternate cleanup standards at the site. In proposed N.J.A.C. 7:26D, the Department outlines an approach for application of alternate cleanup standards or deferral of cleanup at a site based on site-specific conditions. The above requirement does not recognize this potential application, since it requires collection of data used to design ground water pump and treat systems without regard for whether a system may be required or not.

RESPONSE: The intent of these rules is not to automatically require an active remediation for any contaminant found above the remediation standards for the site in question. The remedial investigation and remedial alternative analysis are where all necessary data are gathered and evaluated to determine the need for a remedial action and if so, what type of remedial alternative is the most appropriate. The information required in N.J.A.C. 7:26E-4.4(h) is the minimum information required for a ground water investigation whether an active remediation is necessary or not. The information gathered is also an important part of an evaluation for an alternate remediation standard or deferral.

1058. COMMENT: The New Jersey Geological Survey commented that N.J.A.C. 7:26E-4.4(h)3ii gives inadequate instruction to determine mean ground water flow direction in tidally influenced aquifers. The New Jersey Geological Survey proposed revising N.J.A.C. 7:26E-4.4(h)3iii(3) as follows: "If ground water levels under the site are tidally influenced, synoptic ground and surface water levels should be collected during two fair weather sampling events separated by a minimum 30 day period where each event entails collecting hourly water levels from all applicable wells and the surface water body for a minimum 71 hour period as

outlined in Method 1 of Serfes (1991)." This method yields an accurate mean water level for each sampling station that can be compared to determine an accurate ground water flow direction.

RESPONSE: The Department agrees with the above recommendation and has amended the rule accordingly at N.J.A.C. 7:26E-4.4(g)3ii(3) (proposed as N.J.A.C. 7:26E-4.4(h)3ii(3)).

1059. COMMENT: Chemical Land Holdings, Inc. stated the determination of the direction of ground water flow is an important aquifer characteristic that has not been addressed in the proposed rules.

RESPONSE: Ground water flow determination is addressed and required under N.J.A.C. 7:26E-4.4(h)3ii.

1060. COMMENT: Allied Signal, Inc. and the General Electric Company commented that N.J.A.C. 7:26E-4.4(h)3iii(1) requires that aquifer tests be conducted to "adequately define aquifer characteristics including hydraulic conductivity (K), transmissivity (T), storativity (S) . . ."; however, it is the aquifer, not the characteristics that needs to be defined. Often a phased approach is necessary and needs to be considered in the new rule. For example, when conducting slug tests (or rising and falling head tests) it may be determined that conducting pumping tests is not a useful next step based on the identification of an extremely low hydraulic conductivity. Therefore, it was suggested that the aquifer be adequately characterized based on sound professional judgment. The following revision was suggested as a modification to N.J.A.C. 7:26E-4.4: "(1) Conduct aquifer tests (falling and rising head tests, pumping tests, packer tests) and analysis necessary to adequately characterize the impacted aquifer under the site. This characterization should, at a minimum include, the site water table gradient, hydraulic conductivity, and associated estimates of ground water flow through the aquifer. If pumping the aquifer is determined a feasible remedial option, as pursuant to N.J.A.C. 7:26E-5.1, then additional characteristics of the aquifer will be determined as necessary for remedial design such as transmissivity (T)."

1061. COMMENT: Chemical Land Holdings, Inc. commented that a number of misstatements have been made regarding the determinations that shall be made from data obtained from aquifer testing. Therefore, significant revisions to these rules should be made, and were described as follows. Transmissivity and storativity cannot generally be determined through the use of two of the cited aquifer test methods including "packer tests" and "slug tests." These parameters can only be determined through the use of "pump testing," a technique that is very costly compared to the other two methods. This is due, in part, to the potentially significant cost and challenge to manage the large volumes of water derived from pump testing. Lastly, the determination of transmissivity and storativity is generally not necessary as a part of the remedial investigation phase of site characterization. In the remedial investigation phase, estimates of the hydraulic conductivity can be developed using techniques such as in situ slug and packer testing. These techniques provide the necessary level of precision for the selection of remedial alternatives. Only if a ground water recovery alternative is selected is it appropriate to conduct the significantly more costly "pump testing" required in this rule. Accordingly, the requirement for the determination of transmissivity and storativity should be deleted.

The determination of the rate of ground water flow requires knowledge of the hydraulic conductivity, the hydraulic gradient, and the effective porosity of the aquifer. However, hydraulic gradient and effective porosity are not determined from aquifer testing. Therefore, the requirement for the determination of the rate of ground water flow in the context of aquifer testing should be revised appropriately. Contaminant flow rates in the aquifer cannot be determined solely through the use of aquifer test data. Ground water contaminant transport is a function of both the rate of ground water flow and the degree of retardation of individual chemical constituents. The degree of retardation depends upon many complex chemical interactions that occur between the various chemical constituents and the geologic media, none of which are determined through aquifer testing. Therefore, all references to the determination of contaminant flow rates should be deleted from this section.

1062. COMMENT: Exxon Company U.S.A. recommended deleting ". . . rate of ground water and contaminant flow . . ." in N.J.A.C. 7:26E-4.4(h)3iii(1) since this cannot be determined from an aquifer test.

1063. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following modifications, "If ground water contamination above the applicable cleanup standards pursuant to N.J.A.C. 7:26D has been confirmed and a potential exposure to human health or the environment exists based on a site-specific risk analysis, the person responsible for the remediation shall:" The gathering of aquifer information is only critical if a ground water recovery system is to be installed. The results of the various risk assessments must be evaluated prior to determining the need for this aquifer information.

1064. COMMENT: Chevron U.S.A., Inc. stated that N.J.A.C. 7:26E-4.4(h)3iii(1) should be revised to read, "Where appropriate, conduct aquifer test . . ." A pump test is not always appropriate or feasible, particularly in saturated zones of low hydraulic conductivity. Additionally, neither a packer test nor a slug test will yield a value for storativity (S). A pump test must be performed to calculate storativity.

RESPONSE: The Department received many comments on this provision and the Department agrees that it is the aquifer, not its characteristics, that need to be defined. The language adopted in N.J.A.C. 7:26E-4.4(g)3iii(1) has been clarified to state that the results of the aquifer tests will be used to determine hydraulic conductivity, ground water flow velocity and other pertinent aquifer properties. However, if an active ground water pump and treat system is necessary, conducting a long-term pump test to calculate values for hydraulic conductivity (K), transmissivity (T) and storativity (S) will be required. The Department encourages a phased approach of the ground water investigation, when appropriate.

1065. COMMENT: Allied Signal, Inc. and The General Electric Company commented that a decision to use a "model" during a ground water remedial investigation must be based on site-specific conditions and good scientific judgment. It is critical to understand that ground water models do not define the characteristics of "the flow system" as proposed in the new rule. Models can, however, provide quantitative estimates of ground water flow and contaminant transport based on physical parameters of the aquifer and water quality data collected during various aquifer tests and subsurface investigations. It is onerous for the Department to require ground water modeling for every site where "ground water contamination above the applicable cleanup standards, pursuant to N.J.A.C. 7:26D has been confirmed." When required, specific phases of modeling should be jointly defined by both the person responsible for the remediation and the Department. An example of general modeling guidelines are presented by William C. Walton in his publication entitled Practical Aspects of Ground Water Modeling (1985). Guidance documents and procedures requiring compliance with the general modeling guidelines presented above, or similar guidelines, should be referenced or prepared by the Department. In addition, the appropriate expertise, manpower, hardware, software and other necessary supporting resources should be available to the Department for timely review of submitted model results.

1066. COMMENT: The Chemical Industry Council of New Jersey stated that the modeling of all sites with ground water contamination is inappropriate. The geologic complexity of many sites will lead to problematic modeling results.

1067. COMMENT: E. I. du Pont de Nemours and Company stated that the Department is well aware that ground water models are inappropriate for use in numerous cases, especially for bedrock aquifers. Requiring the use of ground water models in all cases, as the proposal implies, is not a technically sound practice. E. I. du Pont de Nemours and Company suggested that the requirement be modified to recognize site-specific conditions as follows, "If ground water contamination above the applicable cleanup standards pursuant to N.J.A.C. 7:26D has been confirmed, and a potential exposure to human health or the environment exists based on a site-specific risk-based analysis, the person responsible for the remediation shall: (1) Conduct aquifer tests; and may (2) Use a model, if appropriate."

1068. COMMENT: Chemical Land Holdings, Inc. stated that the requirement that ground water modeling "to further define characteristics of the ground water flow system" be conducted if ground water contamination above the applicable cleanup standards pursuant to N.J.A.C. 7:26D has been confirmed should not be a requirement of the regulations. Ground water modeling is generally used for one of two purposes. The principal usage is in predicting the response of a ground water system to a particular stress, such as the stress imposed by a ground water extraction system. In this regard, a well-calibrated model can be of enormous value in evaluation and design of ground water extraction systems. The second, although a less common usage, is in the estimation of hydrogeologic parameters. Through sensitivity analyses, a numerical ground water flow model can also help define the likely range of certain key hydrogeologic parameters such as hydraulic conductivity. In the former predictive mode, a ground water flow model is used in the feasibility study and in the engineering design phase. It should therefore

not be required as part of the remedial investigation. It was also recommended that, notwithstanding its potential utility, numerical modeling not be required as part of either the feasibility study or the engineering design. Instead, the appropriateness of numerical modeling should be evaluated on a case by case basis. In regard to the useage of numerical models in the estimation of hydrogeologic parameters, discretion should also be left with the hydrogeologic investigator as to whether such usage is appropriate. Therefore the requirement for use of a model during the remedial investigation should be deleted.

1069. COMMENT: The Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E-4.4(h)3iii(2) assumes that all ground water contamination above the applicable cleanup standard will have to be remedied. This assumption does not consider risk-based site-specific conditions nor the potential for use of alternate cleanup standards at the site. In the proposed N.J.A.C. 7:26D, the Department outlines an approach for application of alternate cleanup standards or deferral of cleanup at a site based onsite conditions. The requirement for aquifer testing and modeling does not recognize this potential application because it requires collection of data to design ground water pump and treat systems without regard for whether such a system may or may not be required. In addition, the Department is well aware that ground water models are not appropriate in a number of cases, especially for bedrock aquifers. Requiring the use of ground water models in all cases, as the proposed rule implies, is not a technically sound practice. Chemical Industry Council of New Jersey recommended that the section be modified as follows: "7:26E-4.4(h)3.iii If ground water contamination above the applicable cleanup standards pursuant to N.J.A.C. 7:26D has been confirmed, and a potential risk to human health or the environment exists based on a site-specific risk analysis, the person responsible for remediation shall ... (1) Conduct aquifer tests ... and may; (2) Use a model, if appropriate ..."

1070. COMMENT: Chevron U.S.A., Inc. stated as proposed, this section mandates use of a model to further define/refine the ground water flow system. In many investigations, drilling and aquifer (for example, pumping) tests will provide the data necessary to characterize the relevant flow system and to design a remediation scheme. Language should be changed to reflect recommending use of a model (1) as a check on a proposed scheme and its calculated results, or (2) if the scope, complexity or urgency of the investigation makes modeling crucial to actual design and (or) to verification of the proposed remediation strategy.

RESPONSE: The intent of the rule was not to require ground water modeling, but rather to allow for a model to be used if so chosen by the person responsible for conducting the remediation. N.J.A.C. 7:26E-4.4(g)3iii(2) (proposed as N.J.A.C. 7:26E-4.4(h)3iii(2)) has been changed upon adoption to clarify this point.

1071. COMMENT: Exxon Company U.S.A. stated that the Department should correct a wrong citation: paragraph (h)2 should be referenced instead of paragraph (g)3.

RESPONSE: The reference to "(g)3" at N.J.A.C. 7:26E-4.4(h) (proposed as N.J.A.C. 7:26E-4.4(i)) has been corrected to read "(g)2."

1072. COMMENT: E. I. du Pont de Nemours and Company stated that the requirement to conduct an extensive well search when no potential exposure has been established is overly burdensome. The proposed rule requires an extensive well search merely because ground water contamination above cleanup standards have been confirmed regardless of the potential for exposure. The ground water contamination could be confined to a small area of the site and the well search required would needlessly alarm well owners and open the responsible party to unwarranted liabilities. E. I. du Pont de Nemours and Company recommended the following language: "When ground water contamination above cleanup standards pursuant to N.J.A.C. 7:26D has been confirmed pursuant to (g)3 above, and a potential exposure to human health or the environment exists based on a site-specific risk-based analysis, the person responsible for the remediation shall perform the following tasks ..."

1073. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following modifications at N.J.A.C. 7:26E-4.4(i): "When ground water contamination above cleanup standards pursuant to N.J.A.C. 7:26D has been confirmed pursuant to g(3) above and a potential exposure to human health or the environment exists based on a site-specific risk analysis, the person responsible for the remediation shall perform the following tasks." The alterting of neighboring well owners is important if there is a potential pathway and exposure/receptor site.

1074. COMMENT: Atlantic Electric commented that the requirement to conduct a well search without taking into account site-specific conditions (such as site history data) is not prudent. At a minimum, it will cause undue public alarm and hysteria. This subsection should be revised as follows: "When ground water contamination above cleanup standards (N.J.A.C. 7:26D) has been confirmed, and a potential exposure to human health or the environment exists (based on site-specific risk-based analysis), a well search of all receptor wells within a one mile circumference shall be conducted which may include:"

1075. COMMENT: Mobil Oil Corporation suggested that prior to a comprehensive well search, site monitoring data should be reviewed very carefully. The site should have the option to use this data to ascertain the need for a well search and how it should be done. To indiscriminately embark on a well search is not beneficial, nor prudent. It will also cause undue public alarm and hysteria. Mobil Oil Corporation recommended this section should be revised as follows: "1. A well search of all receptor wells, as determined on a site-specific risk analysis basis. This may include:"

1076. COMMENT: The General Electric Company and Allied Signal, Inc. stated that this requirement should take into consideration the actual availability of well records, maintained by the Department. The quality of a well search is primarily limited to the availability of records. A field search to augment well records is often not effective and must be considered an excessive burden.

1077. COMMENT: The Chemical Industry Council of New Jersey commented it is often not practical to conduct a field search of all wells on file with the Bureau of Water Allocation, county or municipalities within a one-half to one mile radius of a site. Ground water flow direction and the unit that the contaminated ground water occurs in should be considered before a comprehensive field search is required. Public alarm may become an issue when information is solicited about their drinking water supply. The Chemical Industry Council of New Jersey recommended the following introductory language for this section: "7:26E-4.4(i) When ground water contamination above cleanup standards developed pursuant to N.J.A.C. 7:26D has been confirmed as described in (g)3 above, and a potential risk to human health exists based on a site-specific risk analysis, the person responsible for the remediation shall perform the following tasks ..."

RESPONSE: Because of the large volume of comments on this requirement, the adopted N.J.A.C.. 7:26E-4.4(h) is clarified to state if ground water contamination is found above the appropriate remediation standard, a well search using the Department's Bureau of Water Allocation well records must be completed to determine if the area is a ground water use area. If it is determined to be a ground water use area and ground water contamination may be emanating from the site, further investigation such as evaluation of Health Department records and a field search (door to door survey) will also be required.

1078. COMMENT: The Chemical Industry Council of New Jersey stated that the Department should clarify the meaning of a physical well search.

RESPONSE: A physical well search is a door-to-door canvassing of the neighborhood to determine the existence of potable wells.

1079. COMMENT: Colonial Pipeline Company commented that determining the status of a privately owned well may be difficult or impossible. The following revision was suggested "... the status of the well if possible, (active, inactive ..."

RESPONSE: N.J.A.C. 7:26E-4.4(h)1ii (proposed as N.J.A.C. 7:26E-4.4(i)1ii) has been revised to read "if available" in accordance with the comment.

1080. COMMENT: Exxon Company U.S.A. recommended adding at the end: "only if the contamination is suspected to be from a discharge on the persons site."

1081. COMMENT: Chemical Land Holdings, Inc. commented that N.J.A.C. 7:26E-4.4(i)2 is overly broad in that many wells that would be identified in a well search may no longer exist or be accessible or may be suspected to be contaminated from a variety of sources that may or may not be related to the investigated site. This is particularly true in urban or highly industrialized areas. Therefore, this requirement should be revised to require sampling of off site wells that are suspected to be contaminated only as a result of site-derived contamination that is flowing toward the identified wells and can be located and accessed for sample collection.

1082. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following modifications at N.J.A.C. 7:26E-4.4(i)2: "Any potable water wells identified pursuant to the well search which

have the potential to be contaminated by the site under investigation shall be sampled." Union Carbide Chemicals and Plastics Company, Inc. commented that wells that may be contaminated but are not being used for potable water should be omitted from this requirement. Examples of non potable wells to be omitted include monitor wells and contaminant recovery wells on nearby sites owned by others, and inactive wells.

1083. COMMENT: The Chemical Industry Council of New Jersey and E.I. du Pont de Nemours and Company commented that wells that are suspected to be contaminated and are not being used for consumption (that is, monitoring wells) should not be sampled. Domestic wells located in a downgradient direction of a contaminated site should be sampled only if these wells draw water from the same water bearing zone or aquifer that is contaminated from the site being investigated. Wells that are already being sampled on a routine basis should not be resampled. In addition, access problems to the off-site locations should be anticipated. The Chemical Industry Council of New Jersey recommended that in N.J.A.C. 7:26E-4.4(i)2, "domestic" be inserted following "any," that "are suspected" be changed to "have the potential," and that "shall be sampled" be changed to "may need to be sampled if they draw water from the same water bearing zone or aquifer that is contaminated, and they are not being sampled on a routine basis."

RESPONSE: The rules state that a potable well must be sampled if it is "suspected" to be contaminated. This does not mean that all adjacent wells must necessarily be sampled. For example, wells located downgradient of the site in question may need to be sampled, but upgradient wells may not need to be sampled. The rules contain enough flexibility to allow the person responsible for conducting the remediation to determine which wells need to be sampled. The Department believes N.J.A.C. 7:26E-4.4(h)2 (proposed as N.J.A.C. 7:26E-4.4(i)2) is clear enough and will not be modified. In addition, the phrase "existing supply" will be added to N.J.A.C. 7:26E-4.4(h)2 for additional clarification.

1084. COMMENT: Chevron U.S.A., Inc. stated that the regulations should be changed to read, "Wells identified pursuant to the well search which are suspected to be contaminated will be sampled, if practicable, or available analyses obtained as part of the well search." It is unreasonable to compel a person to sample any or all wells obtained via well search having suspected inaccessible or owned by parties hostile to the facility under investigation. Such sampling also puts nearby property owners in a state of alarm, possibly for no good reason.

RESPONSE: It is the responsibility of person conducting the remediation to ensure access to off-site properties and wells that need to be sampled. The Department has added the words "existing supply" at N.J.A.C. 7:26E-4.4(h)2 (proposed as N.J.A.C. 7:26E-4.4(i)2) to address the issue of accessibility.

1085. COMMENT: Allied Signal, Inc. and the General Electric Company stated that N.J.A.C. 7:26E-4.4(i)4 should be limited to releases where vapor hazards may exist. Ground water impacts from other compounds, such as metals, will not pose a vapor threat. Gasoline-type investigations from underground storage tank releases should and do require surveys of this type under N.J.A.C. 7:14B, Underground Storage Tank regulations.

RESPONSE: The Department agrees the provision at N.J.A.C. 7:26E-4.4(i)4 was not clear. The intent of the rules is to require this evaluation only if a potential vapor hazard exists. N.J.A.C. 7:26E-4.4(h)4 (proposed as N.J.A.C. 7:26E-4.4(i)4) has been clarified.

1086. COMMENT: Mobil Oil Corporation believes that this is excessive, unless it is performed on a site-specific basis. This section should be revised to read as follows: "An evaluation of the current and potential ground water uses based on a 25-year planning horizon utilizing municipality and water purveyor planning data; or an alternative Department approved evaluation on a site-specific basis."

RESPONSE: The condition at N.J.A.C. 7:26E-4.4(h)5 (proposed as N.J.A.C. 7:26E-4.4(i)5) is set forth in these rules to protect the future use of the aquifer in question. It is the Department's responsibility to protect this future resource. Local municipalities, local water purveyors and planning boards many times have developed this information. Therefore, this requirement will remain as part of these rules.

1087. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-4.4(j) should be changed to read, "Soil-gas studies shall be conducted, if appropriate, to locate sources. . ." Soil-gas studies require favorable soil and hydrogeologic conditions to be effective. The contamination, moreover, must have a volatile fraction to be detectable. Mandating soil-gas surveys in every case is therefore unreasonable and a waste of resources.

1088. COMMENT: Chemical Land Holdings, Inc. stated that N.J.A.C. 7:26E-4.4(j) requires performance of a soil gas study whenever ground water contamination is identified but the source is unknown. Since soil gas surveys or similar methods of investigation can only be used to detect the presence of volatile compounds, the regulations should be modified accordingly. An appropriate revision would read as follows: "Soil gas studies or similar investigative efforts shall be conducted to locate sources and help assess the extent of ground water contamination when ground water contamination by volatile organics is identified but no apparent source is identified."

RESPONSE: The purpose of the requirement at N.J.A.C. 7:26E-4.4(i) (proposed as N.J.A.C. 7:26E-4.4(j)) is to ensure that all reasonable efforts have been made to determine the source of ground water contamination. The Department agrees that soil gas studies may not be appropriate for all sites and all types of contamination. The rules have been revised to state that a soil gas survey must be completed if the ground water is contaminated with volatile organic constituents but no source is apparent.

N.J.A.C. 7:26E-4.5

1089. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that the cleanup standards in N.J.A.C. 7:26D have been developed for surface and subsurface soils, and ground water, on the basis of human health concerns. It is unclear what link exists between the concentration of a contaminant in surface water, wetlands, and sediments and cleanup standards for surface and subsurface soils and ground water. Union Carbide Chemicals and Plastics Company, Inc. recommended removing the statement that links contaminant concentrations in surface water, wetlands, and sediments with cleanup standards for soils and ground water and specify under what conditions a remedial investigation of surface water, wetlands and sediment must be carried out.

RESPONSE: The Department has removed any reference to ground water and soil remediation standards from N.J.A.C. 7:26E-4.5(a). The language in subsection (a) now states that the person conducting the investigation must complete an investigation of the surface water, wetlands and sediment if there is reason to believe contamination emanating from the site may be in any way, affecting the quality of the surface water body, wetlands or sediment.

When evaluating the need for an investigation, the person conducting the remediation must take into account the existing ground water quality at the site and compare it with the Surface Water Quality Standards (N.J.A.C. 7:9-4) and the technology based effluent limits (N.J.A.C. 7:14A) for the stream in question.

The Department is in the process of developing more specific criteria in defining when a surface water investigation needs to be completed. Until this criteria is developed, the Department will continue to evaluate the need for a surface water investigation on a case-by-case basis. Once these criteria have been developed, they will be proposed in future rulemaking.

1090. COMMENT: Rutgers Environmental Law Clinic stated that the Department must more specifically define and limit a remediator's ability to ignore the ground water-sediment-surface water pathway. N.J.A.C. 7:26E-4.5(c) must establish a specific objective and stringent test under which remediators must demonstrate that a ground water-sediment-surface water migration pathway is not significant for that site. The regulations must be made more specific in identifying how the remediator is to use the criteria in N.J.A.C. 7:26E-1.6(c) to demonstrate that this pathway need not be further considered on the given site. As written, the remediator will not be required to investigate surface water contamination if the remediator presents "documentation acceptable to the Department . . . specifying why (the ground water-sediment-surface water) pathway was not considered significant" or "the Department approves a less stringent water quality analysis based on site-specific conditions and supported by appropriate supporting documentation." N.J.A.C. 7:26E-4.5(c)(1) and (2). This vague language leaves far too much discretion to the Department and the remediators. Migration from ground water to surface water is a significant human health and environmental concern and responsible parties should not be relieved of the duty to investigate the presence of such contamination unless the responsible party presents detailed evidence to demonstrate that such a migration has not occurred and is not possible on the site in question. Furthermore, the Department provides no criteria or factors it would use to approve a less stringent water quality analysis under N.J.A.C. 7:26E-4.5(c)(2). Stating that the Department will make the decision

"based on site-specific conditions" and "supported by appropriate supporting documentation" is essentially saying the decision will be made arbitrarily.

RESPONSE: The Department agrees that the language in N.J.A.C. 7:26E-4.5(c)1 and 2 needs to be more specific. The Department is currently developing more specific criteria to determine when a surface water, wetlands or sediment investigation needs to be completed. Once these criteria have been developed, they will be proposed in future rulemaking.

Until such time as the specific criteria for the surface water investigation has been developed, the Department will continue to evaluate the need for a surface water, wetlands or sediment investigation on a site-specific basis. When evaluating the need for such an investigation, the person conducting the remediation and the Department shall take into account the existing ground water quality at the site, which may be impacting the surface water body, and compare it to the Surface Water Quality Standards (N.J.A.C. 7:9-4) and the existing technology based effluent limits (N.J.A.C. 7:14A) for the stream in question.

1091. COMMENT: The Chemical Industry Council of New Jersey commented that the end of the sampling and analysis effort is not the proper time for the submission of data to eliminate an important pathway from consideration without Department concurrence. For efficiency of planning and performance of the remedial investigation, the elimination of this pathway should be done in the work plan. By adding this rationale to the work plan, which is subject to Department review, the person responsible for performing the remedial investigation will have more assurance that the investigation can proceed without untimely revisions. The Chemical Industry Council of New Jersey recommended that the text be modified as follows: "7:26E-4.5(c) The surface water investigation shall be conducted to evaluate the relationship between contaminated ground water, sediments and surface waters, unless documentation acceptable to the Department ... is provided with the remedial investigation work plan or report ... specifying why this migration pathway was not considered significant."

1092. COMMENT: E.I. du Pont de Nemours and Company commented the documentation stating why this pathway was not considered should also be able to be given in the work plan. The documentation specifying why this migration pathway was not considered significant could also be provided in the work plan if sufficient information exists. In order to maintain flexibility in the proposed regulation the commenter recommended that work plan also be incorporated into the wording of this section. E.I. du Pont de Nemours and Company suggested the following modification, "The surface water investigation ... is provided with the remedial investigation work plan or report..."

RESPONSE: If the person responsible for conducting the remediation believes that they have enough information to be able to demonstrate that an investigation of the surface water body is not necessary in the remedial investigation work plan phase of the investigation, the rules do not preclude the person conducting the remediation from submitting the information at that time. However, in most instances the information used to determine if a surface water investigation is necessary, is gathered during the remedial investigation phase of the remediation.

1093. COMMENT: Chemical Land Holdings, Inc. commented that the surface water investigation requirements are overly restrictive and should allow the use of a greater degree of professional judgment. An example is the requirement for "obtaining flow proportioned samples." The use of flow proportioned samples should be required only after its need has been demonstrated on the basis of other site characteristics. The term "any surface water body" is overly broad. The term should be redefined on the basis of size and/or intent of the investigation. The phrase "any existing point discharges" should be clarified to include any physically existing discharges, whether or not they are physically active. No discussion is offered regarding the location of surface water quality samples relative to the location of point discharges to be investigated. It is well established that it is difficult to determine the impact on a surface water body from a point discharge by sampling immediately downstream of point discharges (ASTM, 1988; USEPA, 1991). This is because the discharged water often "hugs" the stream bank with very little mixing. therefore, a grab sample collected immediately downstream of a discharge may represent the quality only of the discharge or may miss the effect of the discharge altogether. Therefore, it should be stated that sample stations should be located in approximate downstream locations from the discharge point in areas to address the effects of both vertical and horizontal distribution.

RESPONSE: N.J.A.C. 7:26E-4.5(d)2i requires that downstream samples be taken, but they do not specify precisely where to locate the samples. The rules allow the professional judgment of the person conducting the investigation to be used here. Guidance for the sampling is available in the Department's Field Sampling Procedures Manual and Environmental Protection Agency's Handbook "Instream Sampling for Waste Load Allocation Applications." The regulations also allow the person conducting the remediation to request a variance from the proposed sampling protocol pursuant to N.J.A.C. 7:26E-1.6(d).

1094. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that no person can "own" the sediments in a stream, and therefore cannot be certain of their history and recommended deleting this requirement.

RESPONSE: The sampling of the stream sediment gives an indication of the cumulative effects of a discharge over time and the effects of the discharge on the stream regardless of "ownership." The requirement at N.J.A.C. 7:26E-4.5(a) will remain in the rules.

1095. COMMENT: E.I. du Pont de Nemours and Company commented the basis for eight weeks of water quality sampling is not provided. No basis for this requirement is given; thus, the public and regulated community have no basis for commenting. E.I. du Pont de Nemours and Company recommended that the frequency and number of samples to be collected be provided for public review and comment.

1096. COMMENT: Union Carbide Chemical and Plastics Company, Inc. suggested the following wording modifications at N.J.A.C. 7:26E-4.4(d)2i(1)(A): "Adequate sampling for the various flow conditions specific to the site of water quality for each parameter which has a surface water quality... which is discharging to surface water;" The technical justification for eight weeks is unclear.

1097. COMMENT: The Chemical Industry Council of New Jersey questioned the basis for eight weeks of water quality sampling. If used to confirm valid modeling of ground water impacts, a single sample for a conservative tracer which as chloride may be sufficient, without any analyses of the contaminants. The Chemical Industry Council of New Jersey recommends that the rationale for the frequency and number of samples to be collected be stated, and that provision be made for use of surrogates and tracers.

RESPONSE: The surface water sampling criteria are based on the "Procedures and Requirements for Conducting Water Quality Analysis Programs and Dilution Studies" developed by the Department's surface water programs in conjunction with guidance from the Environmental Protection Agency. For reference see the Department's "Field Sampling Procedures Manual," the Department's "Field Procedures Manual for Water Data Acquisition" and the Environmental Protection Agency's Handbook "Instream Sampling for Waste Load Allocation Applications."

1098. COMMENT: Chemical Land Holdings, inc. commented it is unclear as to what is meant by "eight weeks of water quality sampling." However, it has been assumed, for the purpose of the following comments, that this means eight rounds of samples collected at one week intervals. Clarification should be made regarding this requirement, including the rationale for the duration and whether indicator parameters can be employed after initial screening. A surface water investigation consisting of eight weekly rounds of samples is an unnecessarily burdensome requirement for the purpose of determining the relationship between discharging ground water and the receiving surface waters. For example, an investigation conducted on an eight week schedule may not necessarily be conducted at the proper time in order to obtain data during "critical, low flow conditions." It is largely unnecessary to collect surface water samples for this purpose during any time other than low surface water flow conditions. This is because the ground water discharge rate is generally much more constant than the volume of surface water flow such that "worst case" conditions would typically be observed during periods of low surface water flow. Therefore, the proposed rule should be revised to require two sample sets collected during periods of low flow at times that are convenient to the remedial investigation. Admittedly, historical flow data for the section of the surface water in question should be obtained and used to establish scientifically defensible "low flow conditions."

1099. COMMENT: Colonial Pipeline Company commented that the analytical parameters need to be revised to determine if contaminants detected during a site investigation are impacting a nearby water body. To sample for the New Jersey water quality criterion is excessive and does not demonstrate if a responsible party has impacted nearby water

bodies. This section needs to be revised as follows: "... water quality sampling for all target compounds confirmed during the site investigation."

RESPONSE: Chemical Land Holdings, Inc. is correct in the interpretation of the sampling schedule. The Department agrees that in certain instances the eight weeks of surface water quality sampling may be more than necessary for a particular site and allows the person responsible for conducting the remediation to request a variance from the proposed sampling schedule pursuant to N.J.A.C. 7:26E-1.6(d). In addition, N.J.A.C. 7:26E-4.5(d)2i(1)(A) was clarified to state that during the evaluation of the surface water body, sampling may be restricted to those constituents of concern.

1100. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-4.5(d)2i(1)(B) should be changed to read, "At least two samples shall be taken during critical, low-flow conditions, if practical." While it is desirable and, in some instances, essential to sample surface waters during low-flow conditions, this requirement in some cases may unduly delay important investigations by obligating investigators, for example, to await a summer low-flow or the end of a protracted, unusually wet interval.

RESPONSE: If the requirements outlined in the regulations are not practical, the person conducting the remediation may request a variance from the requirements pursuant to N.J.A.C. 7:26E-1.6(d).

N.J.A.C. 7:26E-4.6

1101. COMMENT: Rutgers Environmental Law Clinic commented that N.J.A.C. 7:26E-4.6 does not explain the relationship, if any, between this regulation and the other regulations controlling discharges to the environment from landfills. For example, N.J.A.C. 7:26-2A.9 provides standards for the closure and post-closure care of sanitary landfills, including preparation of sampling and monitoring plans. In these proposed regulations, the Department makes no reference to these other regulatory programs. N.J.A.C. 7:26E-4.6 should be rewritten to clarify the relationship between the various regulatory programs and to specifically define the procedures which must be undertaken during the remedial investigation of a landfill.

RESPONSE: The Landfill Closure Regulations (N.J.A.C. 7:26-2) provide standards for the closure and post-closure of landfills which operated after January 1, 1982. Those rules do not specifically address other remedial activities that may be necessary at landfills where contamination has been found. N.J.A.C. 7:26E will govern investigations at all landfills that closed prior to January 1, 1982 and landfills that are not in compliance with the closure and post-closure standards.

1102. COMMENT: Rutgers Environmental Law Clinic commented that the Department must provide far more extensive regulation of remediation at landfills. N.J.A.C. 7:26E-4.6 describes the remedial investigation that must be conducted for landfills.

RESPONSE: In addition to the criteria found in N.J.A.C. 7:26E-4.6, the person responsible for the investigation is required to evaluate the impacts to the soil, ground water, air and surface water pursuant to subchapters 3 and 4 of these rules. Because landfills were intended as disposal areas and may contain a large variety of waste types and contaminants, they are different than most areas of concern. Rather than list specific, detailed requirements, the Department recognizes that landfill remedial efforts are more appropriately dealt with on a case-by-case basis which will be conducted with Department oversight. Once the presence of contamination has been confirmed, these rules require the remediation of the contamination. Operating landfills are also regulated by the Solid Waste Management Act (N.J.S.A. 13:1E-1 et seq.) and the Water Pollution Act (N.J.S.A. 58:10A-1).

1103. COMMENT: Rutgers Environmental Law Clinic stated that the regulations do not give enough detail. For example, "the person responsible for the investigation shall review all records pertaining to the landfill to determine if any hazardous waste ... was ever disposed in the landfill." N.J.A.C. 7:26E-4.6(e). The subsection does not identify whose records are involved, what documents must be reviewed, how that information is to be reported to the Department, how the Department will review that information to determine its accuracy, or what will the Department do with the information.

RESPONSE: N.J.A.C. 7:26E-4.6(e) stated that "The person responsible for the investigation shall review **all** available records ..." This includes all Department and other State records, records kept by the facility, local records, county health department records, or any other available records deemed appropriate. This information will be used to determine to what extent the landfill will need to be investigated. This information must be submitted to the Department in the remedial investigation report (N.J.A.C. 7:26E-4.9).

1104. COMMENT: The General Electric Company and Allied Signal, Inc. stated that characterization of the contents of a landfill is often dangerous and unnecessary. A widely utilized approach for investigating landfills is to consider them as a source of ground water contamination and monitor (and possibly remediate) the primary pathway (ground water) of contamination. The characterization of a landfill contents should only be done on a site-specific basis.

1105. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following wording modifications at N.J.A.C. 7:26E-4.6(c): "Landfill investigations shall characterize the horizontal and vertical extent of fill material and impact on the soil, ground water, and surface water." It is not necessary to characterize the contents of the landfilled wastes in the surrounding environmental media are needed. Evaluation of air quality is necessary in only limited special circumstances.

RESPONSE: N.J.A.C. 7:26E-4.6(c) has been clarified to state that the characterization of the contents of the landfill will involve a complete file review for the types of materials deposited in the landfill. The intent of the rules was not to require every person responsible for conducting the remediation of a landfill to sample the wastes to characterize the site. However, a complete evaluation of the other environmental media (soils, ground water) and exposure pathways must be completed. Evaluation of air quality is not required as a minimum standard.

1106. COMMENT: Union Carbide Chemical and Plastics Company, Inc. suggested deleting N.J.A.C. 7:26E-4.6(e) because the past disposal of wasters which may have been classified as hazardous is of no consequence and this determination is extremely difficult, time consuming and the information is typically not available.

1107. COMMENT: E.I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey stated that the landfill may currently contain hazardous waste, but the hazardous waste may have been deposited prior to Resource Conservation and Recovery Act; therefore, it would not be a Resource Conservation and Recovery Act (N.J.A.C. 7:26) landfill. E.I. du Pont de Nemours and Company recommended changing "was ever disposed in the landfill" to "is present in the landfill."

RESPONSE: The changes suggested by the commenters are not appropriate because past disposal of wastes in a landfill may result in a threat to human health or the environment in addition to waste currently present. Waste disposed in the past may not be present at hazardous levels in the landfill but may have migrated out of the landfill at levels which are of concern in the present. Regarding the issue of proper classification of the landfill, the objective of this requirement is not to classify the landfill, but rather to determine if the landfill presents a threat or a potential threat to human health or the environment.

1108. COMMENT: The Chemical Industry Council of New Jersey commented that it is unclear how Environmental Cleanup Responsibility Act is related to landfills.

RESPONSE: Pursuant to the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-1 et seq., landfills "Which are subject to operational closure and post-closure maintenance requirements" are not subject to the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-8(f). Therefore, a facility subject to the Environmental Cleanup Responsibility Act does not have to investigate the landfill as part of the Environmental Cleanup Responsibility Act does not have to investigate the landfill as part of the Environmental Cleanup Responsibility Act submittal. See *Matter of Vulcan Materials Co.,* 225 *N.J. Super.* 212 (App. Div. 1988).

N.J.A.C. 7:26E-4.7

1109. COMMENT: E.I. du Pont de Nemours and Company commended the Department for recognizing that no sound scientific methods currently exist for investigating the potential impact of contaminants on ecological receptors. E.I. du Pont de Nemours and Company advocates the establishment of a technical task force to explore development of information necessary to properly conduct such assessments. The task force should include representatives from government, industry, academia, and environmental groups and should be charged with the responsibility of gathering existing information on current activities in this area by Environmental Protection Agency and other State agencies, reviewing current literature on ecological risk assessment and where appropriate, should be provided with resources to conduct its own appropriate scientific inquiries. The Department

should provide the task force with specific goals, objectives, and time lines to engender proper guidelines. E.I. du Pont de Nemours and Company recommended establishment of a technical task force as described above.

RESPONSE: Proposed Legislation (S1070), as passed by the Senate, would establish an Environmental Advisory Task Force to make recommendations on the feasibility, development and application of remediation standards protective of the environment. If this legislation is enacted, the Department will work with the Task Force and propose additional regulations upon receipt of their recommendations. Until such time as the Department adopts standardized methods for ecological risk assessments, the Department will continue to determine the need for and application of remediation standards protective of the environment on a case by case basis in accordance with the guidance and regulations of the Federal Environmental Protection Agency pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act of 1980," 42 U.S.C. 9601 et seq. and other statutory authorities as applicable.

1110. COMMENT: Public Service Electric and Gas Company commented that it is ambiguous how the ecological assessment/impact determinations are to be performed. Public Service Electric and Gas Company suggested a proposed alteration to the regulations. The references to "ecological impacts" and/or "ecological assessments" should be deleted from the proposed rules until clearer criteria is developed.

1111. COMMENT: Ciba-Geigy Corporation believes that regulation for "Remedial Investigations of Ecological Receptors" should continue to be reserved until the state-of-the-art is better defined.

RESPONSE: The Department is charged with the responsibility to protect human health and the environment. Until such time as the Department adopts standardized methods for ecological risk assessments, the Department will continue to determine the need for and application of remediation standards protective of the environment on a case-by-case basis in accordance with the guidance and regulations of the federal Environmental Protection Agency pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act of 1980," 42 U.S.C. 9601 et seq. and other statutory authorities as applicable.

N.J.A.C. 7:26E-4.8

1112. COMMENT: Exxon Company U.S.A. commented that the Department should either delete this section or propose the criteria the Department will use to determine when it is required.

RESPONSE: A remedial investigation workplan may be required if the person responsible for conducting the remediation is subject to an oversight document. In addition, the person responsible for conducting the remediation may choose to prepare a workplan and if the person responsible for conducting the remediation wants Departmental review and approval of the workplan, it will be done through the issuance of a memorandum of agreement. If the person responsible for conducting the remediation is required to or chooses to complete a workplan, it must be done in accordance with N.J.A.C. 7:26E-4.8.

1113. COMMENT: The General Electric Company and Allied Signal, Inc. state that this section requires the inclusion in the remedial investigation workplan of telephone numbers of a large number of project personnel. Communication is far more effective and confusion is minimized when directed through the project manager. The inclusion of the names of the project team is appropriate for reference purposes, but the telephone numbers requirement should be deleted.

RESPONSE: The Department agrees with this comment and will only require the names of the appropriate members of the project team. The name and phone number of the project manager will still be required. The rule has been modified at N.J.A.C. 7:26E-4.8(b)2i to reflect this change.

1114. COMMENT: Chemical Land Holdings, Inc. stated that the requirement that aerial photographs are to be presented at a scale of one inch to 200 feet should be deleted. For the purpose of viewing stereo pairs, it is common practice to use nine inch square contact prints with the use of magnifying "stereoscope" viewer. Contact prints almost always have a scale that is far larger than one inch to 200 feet. Enlarging aerial photographs to this scale would yield a photograph of an unwieldy size that would likely be impossible to use with a stereo viewer, would be excessively expensive, and would also serve to degrade the quality of the photograph.

RESPONSE: The requirement at N.J.A.C. 7:26E-4.8(b)3ii has been revised to state that aerial photographs must be of an appropriate scale. Most of the historic aerial photographs available through the Department are of a scale appropriate for this purpose.

1115. COMMENT: Chemical Land Holdings, Inc. stated it must be recognized that the requested information including site plans, as built construction drawings, aerial photographs, and other historical data may not be available for all sites. The requirement should be reworded to state that these data would be presented if they are available.

RESPONSE: The Department agrees and has amended the rule at N.J.A.C. 7:26E-4.8(b)3i to add: "if available after completion of a due diligence search."

1116. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented the minimum map scale requirement may not be feasible or practical for sites that are very large. The map scale requirement should be reworded to allow larger map scales where necessary.

RESPONSE: The Department realizes that the required map scale may not be appropriate at every site. However, the Department believes it is the appropriate scale in most cases. Therefore, the person responsible for conducting the remediation may request the use of a different map scale pursuant to N.J.A.C. 7:26E-1.6(d).

1117. COMMENT: The Chemical Industry Council of New Jersey commented the size and flatness of the site should be considered before requiring a topographic map with two-foot contours. On smaller sites the ground surface elevations from soil borings and monitoring wells (provided there is adequate spatial coverage) are sufficient to determine surface topography. The Chemical Industry Council of New Jersey recommended inserting "depending on the site topography" following two-foot contours.

1118. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-4.8(b)3i should be revised to read, "... topography using two-foot contours or other appropriate interval..." On relatively steep sites, or sections thereof, the two-foot contour interval may be inappropriate or undesirable.

1119. COMMENT: The General Electric Company stated that the proposed rule is unclear as to the preparation requirements for site plans and drawings. The detail required for site plans, contour maps, and facility as-built construction drawing preparation is excessive in nature if the rule is requiring the original preparation of the plans and drawings listed and not merely the presentation of existing, available plans. Original plan and drawing preparation of this type is warranted only when phased investigations uncover areas of concern and the detailed documentation is necessary.

RESPONSE: The Department realizes that the required two foot contour interval may not be appropriate at every site. However, the Department believes it is the appropriate interval in most cases. Therefore, the person responsible for conducting the remediation may request the use of a different topographic scale pursuant to N.J.A.C. 7:26E-1.6(d). The requirement to submit scaled historical site plans and facility as built construction drawings has been modified at N.J.A.C. 7:26E-3.2(a)3ii to require such plans "if available."

1120. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following modifications at N.J.A.C. 7:26E-4.8(b)3ii: "An interpretive aerial history pursuant to N.J.A.C. 7:26E-3.1(c)liv. including sufficient photos to see changes over time... Matte finish reproductions are preferred." In addition, Union Carbide Chemicals and Plastics Company, Inc. stated the Department only needs significant and relevant photos for historical purposes. Aerial photos are usually provided on glossy paper. Glossy photos offer better resolution and better reproduction than matte finish photos. The Department should accept glossy photos where they are readily available; to require reprints made in matte finish in this instance is an unnecessary expense.

RESPONSE: The Department agrees with this comment and N.J.A.C. 7:26E-4.8(b)3ii has been modified accordingly.

1121. COMMENT: The Chemical Industry Council of New Jersey believes the submission of all photos is too stringent a requirement. Generally, a selection of key photos is adequate to create the history of a facility. If the photos need to be provided to the Department, only one set of relevant photos should be included and photocopies should be sufficient for the additional copies of the report required by the Department. The Chemical Industry Council of New Jersey recommended deleting the words "all photos" and inserting "at least one photo every 10 years. Those photos showing significant change over time shall be submitted." The Chemical Industry Council of New Jersey also recommended changing "photos shall be enlarged" to "if Possible, photos shall be enlarged..."

1122. COMMENT: Colonial Pipeline Company commented that inclusion of all aerial photographs would be unreasonable. An attempt should be made to provide photographs (including stereo pairs) taken on an annual basis.

1123. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-4.8(b)3ii should be deleted. This requirement is overly burdensome and will provide little useful information for most sites undergoing the remediation process.

RESPONSE: Locating, procuring, and evaluating all existing aerial photographs for a particular site was not the intent of the requirement. This provision has been revised at N.J.A.C. 7:26E-3.1(c)1vi to require a review of readily accessible aerial photographs at a frequency which provides the evaluator with an adequate historic perspective of the site activities for the purposes of determining the existence of any areas of concern.

1124. COMMENT: Jersey Central Power and Light Company commented that the requirements for repeating historical information and physical setting information should be waived if it has been included in previous preliminary assessment reports, site investigation reports, remedial investigation work plans, etc.

1125. COMMENT: E.I. du Pont de Nemours and Company commented the requirement covers information that may have been submitted to the Department previously. Much of the information required (for example, historical site plans, interpretive aerial history) are included in the Preliminary Assessment report requirements (N.J.A.C. 7:26E-3.2). Repetition of this information is a waste of valuable resources. E.I. du Pont de Nemours and Company suggested modifying the requirement by adding the phrase "unless previously submitted to the Department."

1126. COMMENT: New Jersey Natural Gas Company commented the requirements for repeating historical information and physical setting information should be waived if it has been included in previous preliminary assessment reports, site investigation reports, remedial investigation work plans, etc.

1127. COMMENT: The Chemical Industry Council of New Jersey stated this information should have already been presented in the site investigation report. The Chemical Industry Council of New Jersey recommended that it should be acceptable to reference the site investigation report instead of repeating this information in the remedial investigation work-plan.

1128. COMMENT: E.I. du Pont de Nemours and Company commented that requiring information previously presented to be included in its entirety in the remedial investigation report is extremely burdensome and a significant waste of paper. If the site investigation report required in N.J.A.C. 7:26E-3.10 has been submitted to the Department previously, repetition of that information is a redundant requirement. As the Department is aware, site investigation and remedial investigation reports can include several large volumes of information and resubmitting that information is a waste of valuable resources. At the very most, the information from the site investigation report should be summarized in the remedial investigation report. E. I. du Pont de Nemours and Company recommended the following modification to the requirement: "The remedial investigation report shall contain a summary of the information included in the site investigation report and in addition shall present and discuss."

RESPONSE: If the required information has been previously submitted, the person responsible for the remediation is only required to reference the earlier submission and include a summary of the previous investigative phases. This provision has been added at N.J.A.C. 7:26E-1.6(a).

1129. COMMENT: The General Electric Company and Allied Signal, Inc. believes that in addition to a copy of a USGS topographic map, a wetlands map superimposed on a topographic map is not necessary. The preparation of this requirement is excessive based on N.J.A.C. 7:26E-4.8(b)4vi which requires a description of land use within a 1,000-foot radius of the site, including wetlands. It was suggested that if no sensitive wetland receptors are identified within this 1,000-foot radius, the superimposed wetlands map offers no significant, useful information about a specific site. The need to prepare an area-wide wetlands map should be determined based on sound professional judgment concerning specific site conditions.

RESPONSE: The provision at N.J.A.C. 7:26E-4.8(b)4vi is required to determine if any wetlands are a potential receptor for any contamination emanating from the site. If no wetlands are present within the designated area, the person responsible for the investigation needs to indicate that in the remedial investigation workplan. Furthermore, this requirement is not considered oneous because the maps are already imposed on the topographic guadrangle.

1130. COMMENT: Chemical Land Holdings, Inc. commented that the data requested in this rule is not sufficient to evaluate the ground water recharge potential. Other data that would also be required include the ground surface slope and the surficial soil characteristics. This rule should either be deleted or be expanded to request all data necessary in order to make an informed determination of recharge potential.

RESPONSE: The intent of N.J.A.C. 7:26E-4.8(b)4vii is to obtain a general idea of what the recharge potential of an area may be. As these are minimum requirements, more specific information may be necessary for a site-specific determination. Therefore, this requirement will remain in the rule.

1131. COMMENT: Chevron U.S.A., Inc. stated that this citation should be revised to read, "Ground water—indicate aquifer or water-bearing zone to be sampled and if water-table, confined or semi-confined condition, and sample depth;" Where ground water samples are collected within a flow system requires precision and specificity; this suggested change improves on the proposed language.

RESPONSE: The Department agrees that it is appropriate to change "unconfined" to "semi-confined" and has modified the regulations at N.J.A.C. 7:26E-4.8(b)6 accordingly. However, the words "aquifer or" are not appropriate because "water bearing zone" is more comprehensive.

1132. COMMENT: Colonial Pipeline company commented this citation should be changed to read as follows: "If applicable and as agreed to by both parties, a Quality Assurance Plan . . ."

RESPONSE: The Department believes it is good practice to always prepare a Quality Assurance Project Plan (QAPP) prior to commencing any sampling activities at a site. Careful consideration should always be given to determine where and how samples will be collected and subsequently analyzed so that the data generated can be used to make decisions concerning the remedial activities being conducted. A QAPP documents the actions to be taken to generate data of appropriate quality and usability.

The Technical Requirements for Site Remediation, N.J.A.C. 7:26E, however, do not require the preparation and submission of a QAPP for all sampling activities. Rather, these rules specify a more limited set of conditions where the preparation and submission of a QAPP is required. Pursuant to these rules, a QAPP prepared in accordance with N.J.A.C. 7:26E-2.2(a) is required for submission to the Department under the following circumstances:

1. If the person responsible for conducting the remediation wants Department approval of a QAPP prior to the commencement of sampling activities. This would be accomplished through a Memorandum of Agreement (MOA) between the person responsible for conducting the remediation and the Department in accordance with the Procedures for Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C.

2. If, as part of an oversight document, the Department wants the submission of a QAPP prior to the commencement of sampling activities by the person responsible for conducting the remediation. If remediation is to be conducted pursuant to Department oversight under a MOA, the need for a QAPP submission would be determined during MOA negotiations. If remediation is to be conducted pursuant to Department oversight under an Administrative Consent Order (ACO), the need for a QAPP submission would be determined during discussion of workplan submittals. The Department will, in most cases, require the preparation and submission of a QAPP as part of the ACO.

3. If, as part of an oversight document, the Department requires the submission of a remedial action workplan, of which a QAPP is part (see N.J.A.C. 7:26E-6.2(a)8).

4. If the preparation and submission of a QAPP is required pursuant to the Department's Environmental Cleanup Responsibility Act (ECRA) and Underground Storage Tank (UST) programs. Current ECRA and UST program regulations do not specify the preparation and submission of a QAPP as described in N.J.A.C. 7:26E-2.2(a). However, the Department intends to amend both the ECRA (N.J.A.C. 7:26B) and UST (N.J.A.C. 7:14B) regulations so that they conform with the Technical Requirements for Site Remediation (N.J.A.C. 7:26E). The preparation and submittal of QAPPs will be required in the ECRA and UST programs (a) when a facility/party wants Department approval of a QAPP prior to the commencement of sampling activities or (b) as part of the remedial action workplan (see N.J.A.C. 7:26E-6.2(a)8) when such a workplan is required by the Department.

It should also be noted that while not required as a formal QAPP document, much of the information specified in N.J.A.C. 7:26E-2.2(a) is required to be submitted to the Department if the person responsible for conducting the remediation desires a no further action determination from the Department. The information described in N.J.A.C. 7:26E-2.2(a)li, ii, v, and xi, is required in a Site Investigation Report (see N.J.A.C. 7:26E-3.10(b)3 and 3.10(c)) and a Remedial Investigation Report (see N.J.A.C. 7:26E-4.9(a), (b)3 and (c)) and a Remedial Action Report (see N.J.A.C. 7:26E-6.6(b)). It is the submittal of these reports which form the basis of no further action determinations made by the Department.

N.J.A.C. 7:26E-4.9

1133. COMMENT: Exxon Company U.S.A. suggested the following modifications, (b) After "following" add "(if applicable):". (c) After "information" add "(if applicable):". (d) After "diagrams" add "if applicable:". Many of the items in (b), (c) and (d) are not applicable for all sites. This change clarifies that only applicable items are required.

RESPONSE: The rule will not be modified as suggested. Where report items are only applicable for certain sites, or under certain conditions, the qualification "if applicable" is included at the particular item, for example, N.J.A.C. 7:26E-4.9(c)7 and 8. If additional items are not appropriate for the site in question, the person responsible for conducting the remediation may request a variance pursuant to N.J.A.C. 7:26E-1.6(d).

1134. COMMENT: E.I. du Pont de Nemours and Company stated the requirement at N.J.A.C. 7:26E-4.9(c)3i is not scientifically based. Using only the arithmetic average to represent the data set does not consider the distribution of the data (for example, normal, skewed). Depending on the distribution of the data, other statistics, such as geometric mean, may be more representative of the data set. E.I. du Pont de Nemours and Company suggested the following revision: "All summary tables... The data set shall be represented by a statistical parameter (for example, arithmetic average, geometric mean) that best represents the central tendency of the data."

1135. COMMENT: Colonial Pipeline Company commented the Department needs to describe how the arithmetic average of a suite of analytical results will be determined when "below detection limit" results are included.

1136. COMMENT: Chemical Land Holdings, Inc. stated that the requirement that the arithmetic mean be used to summarize contaminant data is contrary to good scientific practice. The arithmetic mean is a valid measure of central tendency only for data that form a normal distribution. If the data do not follow a normal distribution, then the arithmetic mean may be meaningless as a measure of central tendency. It is well established in the literature that environmental parameters are rarely described by a normal distribution (for example, Helsel, 1987; McNichols and Davis, 1988; Travis and Land, 1990). Instead, environmental parameters are most often log-normally distributed. This is true whether the data are for hydraulic conductivity, transmissivity, or contaminant concentrations in soil or ground water. This distribution is characterized most often by significant positive skewness and is easily distinguished from the normal distribution. Recent studies at sites in New Jersey indicate that the following parameters may be log normally distributed: volatile organics in soil, sediment and ground water base-neutral extractable organics in soil, sediment and ground water acid-extractable organics in soil, sediment and ground water volatile tentatively-identified-compound in soil, sediment and ground water semi-volatile tentatively-identified-compounds in soil, sediment and ground water total organics in soil, sediment and ground water PCBs in soil arsenic in soil, sediment and ground water chromium in soil, sediment and ground water copper in soil lead in soil, sediment and ground water mercury in soil, sediment and ground water zinc in soil and ground water. If the arithmetic mean is used to estimate the center of a log normally distributed data set, the result is an over-estimate of the "mean." The median or the geometric mean provide more reasonable estimates of the center of the distribution for log normally distributed data.

This is not simply an arcane argument over statistics. In the assessment of remedial alternatives, the use of a statistical measure that over-estimates the concentrations in a given area of concern may influence the determination of the volume and extent of contamination and the ultimate remedy selected. For example, the method of kriging has been used in recent years to estimate the volume of contaminated soil that must be removed during remediation. Kriging is a geostatistical technique that provides the best, linear unbiased estimate of the data between known measurement points. It can be thought of as a weighted, moving average interpolator in which the weighting factor is some function of the distance between the data points. The weighting factor is determined from the actual field data and is function of the spatial correlation structure of the data. Kriging allows both the volume of contaminated soil and the confidence interval of the estimate to be defined. The accuracy, and thus the utility of the method, however, is dependent upon the ability to accurately model the spatial correlation of the data set. For environmental media this most frequently means performing a log transformation of the data prior to modeling the variogram. To the extent that this subparagraph indicates a bias of the Department against the use of log transformed data, the utility of the kriging method could be severely impacted.

Rather than mandate that a potentially invalid measure of central tendency be used on all data sets, the Department could require that the form of the distribution be determined and an appropriate measure of central tendency selected for each data set. Alternatively, the Department adds to this paragraph the opportunity for Department review of alternative statistical methods under N.J.A.C. 7:26E-1.6(c). It is particularly important that the inherent assumption of normality not be carried forward into the determination of the extent and volume of contamination (N.J.A.C. 7:26E-6.2(a)6).

1137. COMMENT: Chevron U.S.A., Inc. commented that this citation should be changed to read, "shall be the arithmetic average or other applicable statistical parameter." There is no justification, based on physical data, to use an arithmetic average in every case, particularly for soil analytical data. It is well recognized that hydraulic conductivity is related to grain size distribution of a porous media. Hydraulic conductivity, like grain size is typically lognormally distributed in nature. Contaminant migration are a function of hydraulic conductivity and grain size. Therefore, the observed lognormal distributions of contaminant concentrations in soils are entirely consistent with known physical properties.

RESPONSE: The Department believes that the requirement at N.J.A.C. 7:26E-4.9(c)3i to report the arithmetic mean is appropriate because the Department believes that the arithmetic mean provides a reasonable estimate of the true average concentration of a contaminant at a site. Although other statistical methods, such as the geometric mean, may provide a more accurate estimate of the true average concentration of a contaminant for some areas of concern, the greater level of statistical expertise required for proper application of such methods may render them impractical for routine use. Presentation of the arithmetic mean was therefore selected as a minimum requirement. However, as the commenters suggest, alternate statistical methods are sometimes appropriate and may be utilized on a case-by-case basis pursuant to N.J.A.C. 7:26E-1.6(d).

It should be noted that averaging sample results is not appropriate during the site investigation because the objective of the site investigation is to determine if contamination is present above any applicable remediation standard. Therefore, during the site investigation, samples must be biased to the suspected location of greatest contamination and sample results should not be averaged. If such biased samples are contaminated above any applicable remediation standard, contaminant delineation in a remedial investigation pursuant to N.J.A.C. 7:26E-4.1(a)1 is then required. Delineation samples collected during the remedial investigation may be averaged with initial screening samples to determine if the contaminated area is contaminated above the applicable remediation standard, however, clean zone samples may not be included in the average.

1138. COMMENT: The Chemical Industry Council of New Jersey commented that rather than requiring the table to show all analyses, the regulations should require the table to include only the results above applicable cleanup standards, with the remainder of the results (that is, tentatively identified compounds and concentration results below standards) included in the laboratory appendix. Results below cleanup standard levels would be presented only if they are to be used for the purposes of averaging results. The Chemical Industry Council of New Jersey recommended replacing analyses with all analytical results above cleanup standards, and those results below cleanup standards used for purposes of averaging.

RESPONSE: The Department believes all data gathered, whether above or below the appropriate remediation standard or whether used to support a "no further action" request or an active remediation, one important to the investigation and must, therefore, be presented.

1139. COMMENT: Chemical Land Holdings, Inc. commented that clarification is required regarding the use of database reporting for sampling results for sites which have some areas of concern with fewer than 25 samples and others with more than 25 samples: 1. The regulations as written appear to allow, and even encourage, mixed reporting formats: database format for areas with more than 25 samples and hard copy, tabular reporting for areas with fewer than 25 samples. 2. If mixed reporting formats are not allowed, the regulations as written would apparently require hard copy, tabular reporting of all sample results if any area of concern has fewer than 25 samples.

If the purpose of the regulations is to encourage database reporting of results from large investigations, the section should be revised to explicitly allow database reporting of all analytical results whenever a threshold number of samples is reached. The threshold could be based on the total number of samples (for example, 50 or 100) or on the maximum number of samples in any area, of concern (for example, 25).

RESPONSE: The Department agrees and has deleted the 25 sample threshold.

1140. COMMENT: Chemical Land Holdings, Inc. commented that the database structure as presented in Tables 4-2 and 4-3 is extremely inefficient and has the potential to cause data quality problems. Specific problems with the proposed database structure include: 1. The Sample Results Database (Table 4-3) is very wasteful of disk storage space since the sample matrix, sample coordinates, sample depth, and sampling date are repeated for each chemical constituent analyzed. For a site with 400 samples and 150 analytes per sample, the database as presented would require about seven Mb of storage space. A redesigned database that removed the duplicate data (see below) would require about four Mb of storage space. 2. Since data are repeated, data accuracy is more difficult to control. Data may not be duplicated accurately and any changes must be made in many places. 3. Field widths given in Table 4-3 for the concentration (CONC, width 3) and the Minimum Detection Limit (MDL, width 4) are too small for typical concentrations. A field width of seven would handle almost all possible concentration values, plus allow enough room to express a result in scientific notation, if necessary (for example, 1.00E+6).

The above described problems can be avoided by designing a fully relational database consisting of three files: 1. Site Definition Database file which contains information specific to the site. No changes from proposed structure (Table 4-2). The key field isi the SITEID. 2. A Sample Database file containing information specific to each sample. A proposed structure is given in Table 6-1 below. The key fields are SITEID and FIELDID. 3. A revised Sample Results Database containing information specific to the analytical results. A proposed structure is given in Table 6-2 below. The key fields are SITEID and FIELDID.

RESPONSE: The suggested modifications to the database deliverable structure have been incorporated into the rule.

1141. COMMENT: Colonial Pipeline Company commented that this should be revised to include either latitude/longitude or facility northing and easting or equivalent survey locations.

1142. COMMENT: Chemical Land Holdings, Inc. commented the reference to the absolute (latitude-longitude) coordinate system is confusing and contradictory. Furthermore, this section is inconsistent both with later comments about using relative coordinates and with the database definitions in Tables 4-2 and 4-3 which ask for the cartesian coordinates of each sample (presumably State Plane or a local coordinate system) and the latitude and longitude of the site (based on one selected sample). The problem is apparently a missing portion of the first sentence; a possible revision of this sentence is: "An absolute (latitude-longitude) coordinate system shall be used to locate the site, and an absolute or relative plane (Cartesian) coordinate system shall be used to locate each sample."

RESPONSE: The Department agrees with the proposed change and the rule has been modified accordingly.

1143. COMMENT: Chemical Land Holdings, Inc. stated that clarification is required on format and delivery of databases as follows: The reference to databases that "can be converted to line or comma, quote-delimited ASCII format" is confusing. It is unclear whether such an ASCII format is allowable instead of a database format, or whether the Department expects to convert the database format to ASCII format.

RESPONSE: ASCII format was stipulated to allow a person responsible for conducting the remediation having non-standard database management systems to submit data. The Department prefers a .DBF format for efficient processing of the results.

1144. COMMENT: Chemical Land Holdings, Inc. stated it is unclear whether there is a separate Sample Results Database file for each area of concern, or one file for the entire site.

RESPONSE; Since delineated areas of concern are evaluated against applicable standards, it is important that the sampling results from each area of concern be submitted as separate database sets.

1145. COMMENT: Chemical Land Holdings, Inc. further commented the database files may be so large that they exceed the size (1.44 Mb maximum) that will fit on the allowed removable media. Clarification is needed on whether large database files can be sent in backup format or compressed, or whether large files can be broken into smaller units. If backup or compression software can be used, the acceptable types should be specified.

RESPONSE: The Department is aware of this problem and has no objection to submittal of databases in compressed form and the rule has been modified to clarify this.

1146. COMMENT: The General Electric Company and Allied Signal, Inc. stated an absolute coordinate system, incorporating each sample collected at a facility is extreme and not necessary to complete an effective remediation. Further, it is not clear what use this extensive amount of data, presented to the Department in electronic form, will have in remediation of any facility regardless of size.

RESPONSE: The intent of the rule was to provide a reference for the site, not individual samples and the rule has been modified accordingly.

1147. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-4.9(c)4 should be revised to read, "Stratigraphic logs, which include soil/rock physical descriptions and..." Physical "characteristics" may result in confusion with the phrase aquifer characteristics, for example hydraulic conductivity.

RESPONSE: The Department agrees with this comment and the rules have been clarified accordingly.

1148. COMMENT: Exxon Company U.S.A. suggested for clarity adding, at the end of each subchapter add ", if applicable."

RESPONSE: The regulations were not modified as suggested. Where report items are only applicable for certain sites, or under certain conditions, the qualification "if applicable" was included at the particular item, for example, N.J.A.C. 7:26E-4.9(c)7 and 8. If additional items are not appropriate for the site in question, the person responsible for conducting the remediation may request a variance pursuant to N.J.A.C. 7:26E-1.6(d).

1149. COMMENT: Exxon Company U.S.A. recommended adding "all of the requested data be required only if a discharge has occurred."

RESPONSE: All information gathered must be submitted to the Department, including information gathered in making the determination that a discharge has not occurred. The Department will use all of the information gathered to make its determination that no further action is required. Without the submission of this information, the Department would be unable to make that determination.

1150. COMMENT: Chemical Land Holdings, Inc. stated that clarification must be made as to whether the phrase "contaminant concentration" at N.J.A.C. 7:26E-4.9(d)2i refers to individual analytes, to groups of analytes (for example, total volatile organics) or to both. Sites that are highly contaminated with a large number of chemical constituents would require the preparation of an inordinately large number of maps if all individual analytes from every round of sample collection were required to be plotted. Maps of this type may provide little benefit in the implementation of the feasibility study. This rule should be revised to specifically allow contaminant concentration maps to be presented only for groups of parameters and/or for the most important analytical parameters.

RESPONSE: It would not be appropriate to map contaminants using groups of parameters except where a group of parameters was not detected or detected below the applicable remediation standard since the remediation standards are based on individual compounds. However, if the contaminants are too numerous to map, then a request to utilize compounds driving the remediation for mapping purposes, may be made pursuant to N.J.A.C. 7:26E-1.6(d).

1151. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-4.9(d)2v should be revised to read, "Top-of-bedrock contour map if sufficient number of wells encounter rock." In certain investigations, particularly where well data are available and the overburden is relatively thick (for example, greater than about 50 feet), often only one exploratory well will be extended to rock; in some cases, no monitoring wells will be needed to the bedrock surface. As written, the language

requires a top-of-rock map even if only one well reaches bedrock. A family of wells is required for contouring well data.

1152. COMMENT: Exxon Company U.S.A. suggested adding at the end of the sentence "and only if sufficient bedrock data are available." RESPONSE: The Department agrees with this comment and has changed N.J.A.C. 7:26E-4.9(d)2v accordingly.

1153. COMMENT: Chemical Land Holdings, Inc. stated that N.J.A.C. 7:26E-4.9(d)2vi requires presentation of ground water contaminant concentration data in the form of isopleth maps. This requirement may not always be appropriate, depending largely upon the number and spatial distribution of the data points. If insufficient data are contoured, it is possible that erroneous conclusions regarding the extent, spatial distribution, and source(s) of the contamination will result. Other methods of presenting water quality data are available, such as plotting symbols at each sample location that are proportional to the contaminant concentration, that may be more appropriate for a given data set (Hem, 1985). Accordingly, the regulations could be improved by noting the Department's preference that the data be contoured where appropriate, but allowing alternative presentation formats to be used when warranted by the data. This flexibility could either be written directly into this provision, or it could be subject to review and approval under N.J.A.C. 7:26E-1.6(c).

1154. COMMENT: Chemical Land Holdings, Inc. also commented that the Department should recognize that it is not scientifically valid in some instances to contour soil concentrations. Unlike ground water contaminants, which can be transported advectively and dispersed both longitudinally and transversely in the fluid phase, soil contaminants are much less mobile. In other words, soil data are usually spatially correlated over much smaller distances than are ground water data. Sharply defined "hot spots" are, therefore, commonly encountered. If such data are contoured, it is likely that the extent of soil contamination will be overestimated, particularly if linear interpolation of the data is used to determine the placement of the contours. This can be true even when a relatively large number of samples is available. Other approaches are available to graphically portray soil contaminant data in a meaningful and scientifically valid manner. These approaches include the use of proportional symbols, as noted in the comment above, and the use of kriging to determine the actual spatial correlation of the data for contouring. The latter method will usually require a log transformation of the soil data prior to modeling the data distribution. This provision of the regulations would be significantly improved if it were revised to reflect the fundamental differences between soil and ground water contamination. The flexibility to consider alternative data presentation methods could either be written directly into this provision, or it could be subject to review and approval under N.J.A.C. 7:26E-1.6(c).

RESPONSE: The Department agrees that all data may not be appropriately designated on contour maps and isopleth maps at every site. Therefore, the rules have been modified to include additional flexibility for alternate approaches, including data presentation pursuant to N.J.A.C. 7:26E-1.6(d).

1155. COMMENT: Exxon Company U.S.A. stated it is unclear as currently written whether N.J.A.C. 7:26E-4.9(d)2vi requires preparation of maps for every contaminant in each media or whether a technically justifiable sub-set of significant contaminants could be chosen for mapping. The former would be clearly excessive and unwarranted.

RESPONSE: The Department believes that all data gathered, whether above or below the appropriate remediation standard or whether the data used to support a "no further action" request or an active remediation, is important to the investigation and must therefore, be presented. If a class of contaminants was not detected or detected below the applicable remediation standard, only the class of the contaminant may be plotted on the map. In addition, requests for alternate approaches for data presentation may be made pursuant to N.J.A.C. 7:26E-1.6(d).

1156. COMMENT: Chevron U.S.A., Inc. commented the words "and vertical" should be deleted. The requirement for vertical distribution of contaminants in ground water is unnecessary for compounds of light, nonaqueous phase liquids. Unless there is a downward vertical hydraulic gradient, these compounds do not migrate to significant depths.

RESPONSE: The intent of N.J.A.C. 7:26E-4.9(d)2vii(2) is to present the vertical distribution of the contamination in an aquifer system, particularly when more than one water bearing zone is contaminated. This information is necessary to develop an appropriate remediation alternative.

1157. COMMENT: Exxon Company U.S.A. recommended deleting "... structure ..." at N.J.A.C. 7:26E-4.9(d)3 since the Department can only require structural cleanup under Environmental Cleanup Responsibility Act and these are generic technical requirements.

RESPONSE: The Department disagrees. Building interiors and structures were included as areas of concern because they are areas that would require consideration should the person conducting the remediation want or be required to conduct an interior remediation. In addition, it should be noted that areas inside buildings can be significant sources of contamination to exterior environmental media. Areas such as floor drains, trenches, pits and sumps may leak contaminants to the soils and ground water beneath the building. The Department has included a more complete discussion of this issue in its responses to comments on the definition of "Environmental media" at N.J.A.C. 7:26E-1.8.

N.J.A.C. 7:26E-5

1158. COMMENT: E.I. du Pont de Nemours and Company commented that, in general, N.J.A.C. 7:26E-5 provides a sufficient outline for guidance on performing a feasibility study, and advocated the use of guidance documents to support a more general set of regulatory requirements.

RESPONSE: The Department acknowledges this comment and will consider issuance of appropriate guidance documents as allowed by law.

1159. COMMENT: Rutgers Environmental Law Clinic commented that incinerators should be severely limited as a remedial option at N.J.A.C. 7:26E-5.

RESPONSE: The Department recognizes the concern of Rutgers Environmental Law Clinic regarding incineration but does not concur with its proposal to severely limit incineration as a remedial option. The Department encourages and prefers permanent remedies because it is the Department's policy to eliminate contamination in the environment whenever practicable. Thermal destruction is an effective and viable permanent remedy for organic contaminants. The Department also points out to Rutgers Environmental Law Clinic that the remedial action requirements in N.J.A.C. 7:26E-6 state that the remedial action must comply with all applicable Federal, State and local laws, regulations and requirements (see N.J.A.C. 7:26E-6.1(b)3). The Department has confidence that if incineration is managed in accordance with Federal, State, and local requirements, the remedial alternative utilizing incineration will be protective of human health and the environment. The Department also points out that any on-site incinerator would be required to comply with the Air Pollution Control Act and all air permitting requirements.

1160. COMMENT: Public Service Electric & Gas Company and Chevron U.S.A., Inc. commented that the feasibility study technical requirements outlined in N.J.A.C. 7:26E-5.1(a) and 5.2(a)1 should be modified to include a reference to the results of the previous investigative phases and an acknowledgment that remedial action alternatives need only be identified for areas of concern requiring further remediation.

RESPONSE: The Department believes it is unnecessary to make the change requested by the commenters because their concern is already incorporated into the rule. The Technical Requirements for Site Remediation, N.J.A.C. 7:26E, describe a phased approach to site investigations and cleanups. At the end of each phase, a determination is made by the person responsible for conducting the remediation as to whether to proceed with the next phase of the remediation or whether no further action is required. If an investigation reveals the absence of contamination, or the presence of contaminants below all applicable remediation standards, a no further action determination can be made. Thus, N.J.A.C. 7:26E-3.10(b)4 provides that at the end of the site investigation, a party conducting the remediation must evaluate each area of concern to determine whether additional remediation or no further action is necessary. N.J.A.C. 7:26E-4.9(b)4 describes this same evaluation at the end of the remedial investigation phase. If an area of concern meets the no further action criteria, no remedial action is necessary, and therefore, the requirements for a remedial alternative analysis are not triggered.

1161. COMMENT: E.I. du Pont de Nemours and Company, Union Carbide Chemicals and Plastics Company, Inc., and Chemical Land Holdings, Inc. commented that a risk assessment should be included as part of the process to screen remedial alternatives in the feasibility study at N.J.A.C. 7:26E-5.1(b). E.I. du Pont de Nemours and Company stated each alternative should be considered in the light of its potential to reduce risk to acceptable levels, either by reducing exposure or through reduction of constituent concentrations to levels that are of no toxicologic significance. As articulated by E.I. du Pont de Nemours and Company, by selecting an alternative without the benefit of a risk assessment, an

alternative could be selected that would result in greater risk to human health and/or the environment than would be presented by electing the no action alternative.

1162. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested revising N.J.A.C. 7:26E-5.1(b) to read as follows: "The person remediating the site shall select a remedy based on a site specific risk analysis to reduce or eliminate potential exposure to human health or the environment for the site or area of concern unless otherwise approved by the Department."

RESPONSE: The Department does not agree with the commenters suggestion to modify the wording in N.J.A.C. 7:26E-5.1(b) to specifically require the use of a site-specific risk assessment in the selection process. For the vast majority of cases, it is not necessary to perform a risk assessment. However, the Department does not preclude the person responsible for conducting the remediation from performing a risk assessment to assist in the development of site specific remediation standards. In response to the concern of E.I. du Pont de Nemours and Company, the Department notes that the alternative evaluation process already takes into account risk based considerations in remedy selection. Specifically, N.J.A.C. 7:26E-5.2(c)1 and (d)1 through 4 take into account the effectiveness of the remedial action alternative in protecting human health and the environment and the ability of the alternative to reduce toxicity, mobility or volume of contaminants. The process set forth in the regulations is consistent with legislation (S1070) currently being considered by the Legislature.

1163. COMMENT: Allied Signal, Inc., the General Electric Company, Union Carbide Chemicals and Plastics Company, Inc. and E.I. du Pont de Nemours and Company commented that the Department's strong preference for permanent remedies at N.J.A.C. 7:26E-5.1(b) is inappropriate because it does not acknowledge technical limitations on achieving permanent remedies. Allied Signal, Inc. and The General Electric Company specifically suggested that N.J.A.C. 7:26E-5.1(b) and (c)1i be modified to reflect the practicability of achieving a permanent remedy. As an example, Allied Signal, Inc. and the General Electric Company cited a recent directive from the Environmental Protection Agency that summarizes the limitations on groundwater remediation (considerations in Groundwater Remediation at Superfund Sites and RCRA Facilities Update: OSWER Directive #9283.1-06.5-27-92) wherein based on a study conducted by the Office of Emergency and Remedial Response (OERR) several hydrogeologic and contaminant characteristics as well as system design factors that may impede the ability of extraction systems to achieve appropriate cleanup levels over the entire area of contamination were identified. The commenters noted that these characteristics are probably more common at hazardous waste sites than previously realized and should be considered during site characterization and conceptual model development.

RESPONSE: N.J.A.C. 7:26E-5 and 6 specifically acknowledge the practicability and technical limitations of achieving permanent remedies. For instance, N.J.A.C. 7:26E-5.2(c) provides that if an alternative is "technically infeasible," that alternative may be eliminated from the initial screening. Similarly, at N.J.A.C. 7:26E-5.2(e)3, the degree of uncertainty with respect to expected performance of innovative technologies as compared to demonstrated technologies is recognized as a factor to consider in the final comparison of alternatives. At N.J.A.C. 7:26E-5.1(b) the Department has simply articulated a legitimate public policy that permanent remedies, because they ensure the elimination of contamination in the environment and limit the number of sites in the State which will need to be monitored and controlled well into the future, are preferable. This public policy has also been addressed in legislation (S1070) currently being considered by the Legislature. The bill, as approved in the Senate, sets a preference for permanent remedies. Due to the technical and practical limitations of achieving permanent remedies at all sites at this time, the Department agrees that it would be inappropriate to require the selection of permanent remedies in all cases.

1164. COMMENT: Chemical Land Holdings, Inc. comments that the Department's remedy preference list at N.J.A.C. 7:26E-5.1(b) does not include containment with subsequent monitoring and maintenance, as necessary, which in some cases may be the most appropriate remedy or a component of the most appropriate remedy. Chemical Land Holdings, Inc. suggests containment should either be included in the Department's definition of on-site disposal or it should be added to the preference list.

RESPONSE: The on-site disposal remedy at N.J.A.C. 7:26E-5.1(b)3 includes containment with monitoring and maintenance.

1165. COMMENT: E.I. du Pont de Nemours and Company recommended that the elimination of the concept of permanent remedy and suggested the following revision at N.J.A.C. 7:26E-5.1(b): "The person remediating the site shall select a remedy that eliminates exposure pathways or reduces contamination to levels protective of human health and the environment in accordance with N.J.A.C. 7:26D." E.I. du Pont de Nemours and Company commented that the Department's definition of "permanent remedy" as used in N.J.A.C. 7:26E-5.1(b) is inappropriately restrictive since it fails to recognize various technologies such as solidification/stabilization of metals, soil vapor extraction, and soil washing since they may involve chemical or biochemical transformations of contaminants. E.I. du Pont de Nemours and Company noted that these technologies are accepted as permanent by Environmental Protection Agency and the technical community. E.I. du Pont de Nemours and Company further commented that the rule should recognize that engineered controls such as alternate water supplies can provide a permanent remedy to a contamination problem.

1166. COMMENT: Schering Laboratories and the Chemical Industry Council of New Jersey commented that groundwater contamination from a leaking tank is usually treated through air stripping or activated carbon, and that these technologies should be considered a "permanent technology," according to N.J.A.C. 7:26E-5.1(b).

1167. COMMENT: Allied Signal, Inc. and the General Electric Company commented that the definition of permanent remedy at N.J.A.C. 7:26E-1.8, as ". . . contaminant . . .," with the preference for on-site remedies at N.J.A.C. 7:26E-5.1(b) results in a very unclear view of the Department's position on remedies that are in the category of separation technologies. Allied Signal, Inc. and the General Electric Company commented that these separation technologies can be just as effective and permanent as the defined permanent remedies at removing the contaminant from the contaminated medium, and often have significant advantages over the defined permanent remedies. As an example these commenters noted that two effective remedies for soils contaminated with polychlorinated biphenyls (PCBs) are on-site incineration (a permanent remedy by the definition), and on-site thermal desorption (a separation technology). Both are capable of removing PCBs from the soil to below the cleanup standards; however, only incineration is considered an on-site permanent remedy because the PCB molecule is destroyed at the site. Thus, by the rules, incineration is favored over thermal desorption. Thermal desorption however has a significant advantage over incineration; there is little or no concern over toxic emissions from this technology, whereas emissions are a major concern for incinerators. Furthermore, the thermal desorption approach is most often permanent in the end because the small residual PCB by-product waste stream is usually incinerated off-site at a permitted fixed facility. The fact that this small amount of material is destroyed off-site is of no material consequence to the objective of remediating the on-site soils.

Based on the foregoing discussion, the commenters recommended that the Department focus the definition of permanent remedy on the removal of the contaminant from the contaminated medium, and let the ultimate disposition of the contaminant be an engineering feasibility and regulatory issue. For instance, the Toxic Substances Control Act (TSCA) regulations would require the incineration of residuals containing PCBs, whereas solvent residuals possibly could be recycled.

RESPONSE: It is the Department's intent that "permanent remedy" as defined at N.J.A.C. 7:26E-1.8 include separation technologies, such as soil vapor extraction and soil washing, provided that wastes generated from the separation technology remedy are treated in a permanent manner. Additionally, the Department does concur there should be an incentive for separation technologies, which often are the only practical solution.

The Department does not concur with E.I. du Pont de Nemours and Company that permanent remedies should be expanded to include solidification/stabilization of metals because in the solidification/stabilization process, the contaminant is not permanently destroyed. As a result, the contaminants could pose a direct contact threat if the solidified/stabilized media eroded, and a threat to ground water if the solidified/stabilized contaminants became leachable or if the soils were disturbed. However, the remedial alternative analysis process does not preclude the person responsible for conducting the remediation from evaluating technologies such as solidification/stabilization of metals.

Nor does the Department agree with the comment of E.I. du Pont de Nemours and Company that engineered controls such as alternate water supplies should be considered a permanent remedy to a ground

water contamination problem. The department's mission is to conserve, protect, enhance, restore and manage our environment for present and future generations, as well as to prevent pollution. The Department is specifically charged with the authority to promulgate rules that protect and preserve the waters of the State (see generally N.J.S.A. 58:10A-1 et seq.). The remedial action alternative of simply installing an alternate water supply does not aid in restoring or even prevent the spread of further contamination. It merely limits the exposure of contamination due to a drinking water pathway. The remedial alternative analysis process does not prevent the person responsible for conducting the remediation from evaluating remedial action alternatives that utilize engineering controls. The commenter should recognize, however, that the installation of an alternate water supply, by itself, while an important component of some remedial actions, may not meet the policy and regulatory objectives of the Department and therefore, the Department does not consider the selection of this alternative as a permanent remedy.

The Department agrees with E.I. du Pont de Nemours and Company that remedies should be selected based on their ability to meet applicable remediation standards, eliminate exposure pathways, and be completed in a time frame commensurate with other alternatives evaluated. The Department believes that the evaluation criteria presented in N.J.A.C. 7:26E-5 already take these points into account.

The Department does not agree with the suggestion of Allied Signal, Inc. and the General Electric Company to allow the final disposition of the contaminant to be an engineering feasibility and regulatory issue. It is the Department's policy to eliminate contamination in the environment whenever practicable. The Department has a mandate to protect human health and the environment. To carry out this mandate the Department needs to be involved to a certain extent regarding how and where contaminated media are treated, disposed, recycled, and controlled. For instance, the decision of whether to incinerate PCB residuals and recycle solvent residuals, must be determined on a site by site basis. To illustrate, if soils are contaminated with solvents, recycling the solvents may not be feasible, instead, technologies such as vapor extraction may be appropriate.

1168. COMMENT: Chemical Land Holdings, Inc. and E.I. du Pont de Nemours and Company commented that the requirement to conduct a feasibility study at N.J.A.C. 7:26E-5.1(b) will serve as a disincentive to voluntary remediation, is likely to stifle innovation, and that dictating the criteria to evaluate remedial alternatives that are beyond achieving the applicable cleanup standards is not appropriate. Chemical Land Holdings, Inc. said the permanence of a remedial action should not be the sole determining factor when deciding if a feasibility study is required by the Department, and that the selection of an appropriate remedy should be based on the evaluation criteria for feasibility studies included in the National Contingency Plan.

1169. COMMENT: Chevron U.S.A., Inc. noted that at a privately funded cleanup the Department's concerns on the selection of a remedial action at N.J.A.C. 7:26E-5.1(b) should be limited to the protection of human health and the environment, and cost effectiveness. The commenter suggested that if a person responsible for conducting the cleanup (without public funds) chooses to transport material off-site for treatment, disposal, recycling or other purpose, the only applicable requirements should be that the material is handled and transported in accordance with applicable rules, and the off-site facility accepting the material has the appropriate permits or other applicable operating approvals.

RESPONSE: Chemical Land Holdings, Inc. and E.I. du Pont de Nemours and Company appear to want it both ways. They argue that requiring remedial alternative analyses will be a disincentive to voluntary remediations yet at the same time Chemical Land Holdings, Inc. argues that remedy selection "should be based on the evaluation criteria for feasibility studies included in the National Contingency Plan." But the Department wonders how Chemical Land Holdings, Inc. believes the Department should select remedies based on a remedial alternative analysis without requiring that a remedial alternative analysis be conducted? There is obviously a flaw in the logic of Chemical Land Holdings, Inc.

The Department does not agree that the requirement to conduct a remedial alternative analysis for non-permanent remedies or off-site permanent remedies, where the contaminated material taken off-site is greater than 100 cubic yards, will serve as a disincentive to voluntary remediation. A primary objective of these rules is to provide guidance to the regulated community in order to allow for remediation of sites in an efficient manner. The Department's strategy is that the technical requirements, including the remedial alternative analysis process, will enable more accelerated and less costly cleanups than if the Department had to review each site on an individual basis to determine appropriate investigatory and remedial requirements.

The Technical Requirements for Site Remediation, N.J.A.C. 7:26E, contain similar criteria as those contained in the NCP but have been modified based on the Department's experience with a broader range of contaminated sites than those addressed in the Superfund program. These modifications were made to more efficiently review remedial alternatives at contaminated sites. The criteria set forth at N.J.A.C. 7:26E-5 are also substantially the same as the criteria to evaluate remedial actions established in S1070. However, in S1070 these criteria are not defined as a "feasibility study" as it was the Senate's intent that a remedial action alternatives analysis not mirror the Superfund feasibility study process. So that there is no misunderstanding regarding whether the Department is requiring a Superfund type "feasibility," the Department has deleted the phrase "feasibility study" from N.J.A.C. 7:26E and replaced it with the phrase "remedial alternative analysis."

In requiring a party to conduct a remedial alternative analysis prior to implementing a remedial action alternative that involves the transportation of over 100 cubic yards of contaminated material off-site, the Department is not mandating that the person responsible for conducting the remediation select a particular remedy. The Department is simply ensuring that the person responsible for conducting the remediation evaluates all the remedial action alternatives that are protective of human health and the environment prior to implementing a particular remedy. The Department promotes, as part of its systematic approach to the remediation of contaminated sites, the selection of remedial action alternatives that consider long and short term risk and avoid the shifting of contamination to another site or environmental medium.

The remedial alternative analysis need not be of the extent and magnitude of a feasibility study performed for large Superfund sites. The Department emphasizes there is built in flexibility as to the amount of detail necessary for a particular site's remedial alternative analysis, and recommends that the person responsible for conducting the remediation discuss with the Department's case manager the amount of detail needed for a particular site. The Department anticipates that for the vast majority of sites, the remedial alternative analysis should be a relatively simple document to prepare. The Department also presumes that for more complicated sites, the person responsible for conducting the remediation has already been performing remedial alternative analyses in order to fully evaluate the potential alternatives prior to proposing a particular remedial action.

Regarding specific comments on the cost and time to prepare a remedial alternative analysis, the Department believes that for small cases (such as a surficial spill of a petroleum product), the time and cost to conduct a remedial alternative analysis and prepare a remedial alternative analysis report would be approximately 10 person hours, at $75.00 per hour, for a total cost of approximately $750.00. Further, the Department does not expect that it will take five months for the Department to review a remedial alternative analysis. If the case is not complicated and the remedial alternative analysis report is prepared and submitted in accordance with N.J.A.C. 7:26E, the Department anticipates that it will be able to review it relatively quickly. The Department recognizes that there may be additional costs due to the requirement to conduct a remedial alternative analysis. However, the Department believes that the requirement for a remedial alternative analysis is an important and necessary component to a statewide remediation programs.

1170. COMMENT: Ciba-Geigy Corporation and Chevron U.S.A., Inc. commented that since the requirement for a "permanent remedy" at N.J.A.C. 7:26E-5.1(b) may be unrealistic, the person responsible for conducting the remediation should be afforded the opportunity to evaluate containment versus permanent remedies and the availability of cost-effective, proven technology instead. Further, these commenters disagreed with the Department's preference for permanent remedy stating it was limited and biased.

RESPONSE: By stating that parties choosing a permanent remedy will not be required to prepare a remedial alternative analysis or obtain Department approval prior to implementing the remedy, the Department has articulated a policy preference for permanent remedies. The Department has determined that permanent remedies are desirable for a number of reasons. Permanent remedies eliminate contamination in the environment, and minimize the number of sites that need to be

continually controlled and monitored because of contaminants remaining after implementation of the remedial action. The Department agrees that there is a stated preference for permanent remedies since these actions will eliminate the contaminants from the environment. However, the rules provide the opportunity to select non-permanent remedies in specific situations.

As articulated in the rules, the person remediating a site has the opportunity to evaluate containment versus permanent remedies and the availability of cost effective, proven technology. This is done through the remedial alternative analysis process. The Department refers the commenters to N.J.A.C. 7:26E-5.2(c)1, (c)4, (d)1 and (d)5.

1171. COMMENT: E.I. du Pont de Nemours and Company commented that there appears to be no statutory authority or technical basis for the Department's preference for permanent remedies listed at N.J.A.C. 7:26E-5.1(b).

1172. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-5.1(b), which sets remedy selection preferences for remedial actions should be deleted. Chevron U.S.A., Inc. commented that there is no applicable statutory authority given to the Department for promulgating these preferences and that the New Jersey statutory criteria for remedy selection is limited to protection of human health and the environment, and cost effectiveness.

RESPONSE: The Department disagrees with the premise of these comments, namely that there must be a specific and express statement of authority in a statute. As discussed in more detail above in the general comments on the Department's authority for these rules, the Department believes that it has ample statutory authority for these regulations.

In addition, in exercising its statutory duties to develop a systematic and consistent approach to the remediation of contaminated sites, the Department has made a policy decision that permanent remedies are more preferable than non-permanent remedies. When the Department remediates a contaminated site or delegates that authority to a private party, the Department seeks to conduct a complete cleanup that will eliminate or minimize health and environmental risks so that no further remediation will be necessary. Furthermore, as part of a comprehensive approach to the remediation of contaminated sites, movement of contaminated material from one site to another should be avoided.

For the above stated reasons, the Department believes that it has the statutory authority and a basis to state a policy preference for permanent remedies in this rule and to require a remedial alternative analysis prior to the implementation of a non permanent remedy or an off-site permanent remedy if it involves more than 100 cubic yards of contaminated material. This policy matter has also been addressed in legislation (S1070) currently being considered by the Legislature. The bill, as approved in the Senate, sets a preference for permanent remedies. The Department has made a policy preference for permanent remedies, however, the Department in these rules is not requiring their selection at a site.

1173. COMMENT: The Chemical Industry Council of New Jersey, Union Carbide Chemicals and Plastics Company, Inc., Ciba-Geigy Corporation, Chevron U.S.A., Inc. and Schering Laboratories commented that the Department should modify N.J.A.C. 7:26E-5.1(b) since permanent remedies are often times unreasonable or cost prohibitive on small projects and the goal of remediation is to protect health and the environment, not to complete a permanent remedy. These commenters suggested that remedial alternatives should be evaluated primarily for their effectiveness in protecting health and the environment, not for their permanency. The Chemical Industry Council of New Jersey commented that permanent remedies should be recommended but not required, especially on small projects.

1174. COMMENT: Union Carbide Chemical and Plastics Company, Inc., Chevron U.S.A., Inc., Ciba-Geigy corporation and E.I. du Pont de Nemours and Company commented that the preferences of the Department for permanent remedies at N.J.A.C. 7:26E-5.1(b) should not be part of the proposed regulation since it does not address reduction of risks to human health or the environment, or costs to industry.

1175. COMMENT: The General Electric Company commented that the Department proposes to mandate that a permanent remedy be completed at all sites, thus giving permanence primacy over numerous other important criteria, including protectiveness of human health and the environment, short-term effectiveness, community acceptance and cost. The General Electric Company commented this is inconsistent with federal environmental policy (which makes the permanence of the remedy less important than overall protectiveness) and disregards the state statutory requirement that cost and cost-effectiveness be seriously considered in selecting a remedy.

1176. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the preference for permanent remedies at N.J.A.C. 7:26E-5.1(b) will restrict or preclude certain remedial actions that would be protective of human health and the environment. The commenters state that permanent remedy is too narrowly defined, and could discourage the use of other, equally effective technologies.

1177. COMMENT: Chemical Land Holdings, Inc. commented that the permanence of a remedial action should not be the sole determining factor when deciding if a feasibility study is required by the Department at N.J.A.C. 7:26E-5.1(b). Chemical Land Holdings, Inc. also commented that determining when feasibility studies are required based on the permanence of the selected remedy alone may result in the failure to consider important criteria and, ultimately,the selection of permanent but inappropriate remedies.

1178. COMMENT: The General Electric Company commented that the Department's insistence on a permanent remedy at N.J.A.C. 7:26E 5.1(b) unreasonably elevates permanence over other factors. The General Electric Company comments that the Department proposes to insist on a permanent remedy without identifying other remedial options or reviewing comparative protectiveness of human health and the environment, short-term effectiveness and cost of other remedies. The General Electric Company notes this conflicts directly with the approach adopted in the National Contingency Plan (NCP), 40 CFR 300; where the threshold criteria are protectiveness of human health and the environment and compliance with applicable or relevant and appropriate requirement (ARARs), and permanence is one of five lesser criteria (see 40 C.F.R. 300.430(e) and (f)).

RESPONSE: As noted in the earlier responses on the provision, the Department believes that a permanent remedy is the most preferable remedy, because it is the Department's policy to eliminate contamination in the environment wherever practicable. However, the Department does not require that the remedial alternative selected be a permanent remedy. The Department understands there are sites on which non-permanent remedies are chosen for a variety of reasons.

If the person responsible for conducting the remediation proposes a non-permanent remedy, the Department requires that a remedial alternative analysis be conducted pursuant to N.J.A.C. 7:26E-5.1(b) to evaluate remedial alternatives. Each person responsible for conducting the remediation is given the opportunity for selection of a non-permanent remedy, provided the remedy is approved by the Department (see N.J.A.C. 7:26E-5.1(b)). Through the remedial alternative analysis process, the person responsible for conducting the remediation can evaluate non-permanent as well as permanent remedies.

The remedial alternative analysis process in N.J.A.C. 7:26E-5 does address issues such as protection of human health and the environment, and costs of the alternative in N.J.A.C. 7:26E-5.2(c)1, (c)4, (d)1 and (d)5. Additionally, as discussed in the response to comments on N.J.A.C. 7:26E-5.2(c) below, criteria such as effectiveness and implementability are evaluated in the remedial alternative analysis.

As noted above, the Department has a policy preference for permanent remedies. The requirement to conduct a remedial alternative analysis if the remedy selected is not a permanent remedy, or one involving less than 100 cubic yards of contaminated material, was designed to be an incentive for permanent remedies. By conducting a remedial alternative analysis, the Department has some degree of assurance that the person responsible for conducting the remediation has evaluated a permanent remedy for the site, and is not automatically selecting a temporary remedy when a permanent remedy may not be significantly more expensive. The Department does not believe that the requirement to evaluate a permanent remedy is overly burdensome. The remedial alternative analysis can be directly linked to the size and complexity of the problem.

1179. COMMENT: Chemical Land Holdings, Inc. requested clarification of N.J.A.C. 7:26E-5.1(c) regarding whether a feasibility study will need to be prepared if a site has less than 100 cubic yards of soil requiring remediation, but has groundwater remedial concerns. Chemical Land Holdings, Inc. suggested that a feasibility study should be conducted if there are ground water concerns at a site.

RESPONSE: The phrase "total volume of contaminated material" at N.J.A.C. 7:26E-5.1(c) pertains to all media, including contaminated material from ground water remediation. For example, the 100 cubic yards trigger for a remedial alternative analysis at N.J.A.C. 7:26E-5.1(c)

also applies to ground water remediation treatment residue, such as activated carbon being taken off-site for regeneration or disposal. The determination of whether ground water remediation treatment residue would exceed 100 cubic yards would be determined by engineering calculations. The Department expects that most ground water remediation cases will need to conduct a remedial alternative analysis.

1180. COMMENT: The Chemical Industry Council of New Jersey commented that pursuant to N.J.A.C. 7:26E-5.1(c), the removal of an underground storage tank will usually require an approved feasibility study before remediation because the volume of contaminated material excavated can easily exceed 100 cubic yards. The Chemical Industry Council of new Jersey stated that no permanent technologies are practicable for such a small on-site remediation project.

1181. COMMENT: Schering laboratories commented the N.J.A.C. 7:26E-5.1(c) would add excessive burden to small remedial projects. Schering Laboratories noted that most permanent remedies are cost prohibitive to small projects, and therefore a costly feasibility study ($10,000 minimum) would be required to justify not using a costly remedial alternative. Schering Laboratories proposed that a feasibility study should only be required for the worst remedial sites in the State as ranked by the Department.

1182. COMMENT: Schering Laboratories and the Chemical Industry Council of New Jersey commented that the trigger for a feasibility study at N.J.A.C. 7:26E-5.1(c) should be changed because the process is burdensome and inappropriate for most remedial sites. The commenters stated that the feasibility study is designed for big Superfund projects where only the worst sites are addressed, not for all remedial work. The commenters noted that this section will postpone remediation since the most basic feasibility study takes four to six weeks to prepare and, accounting for Department review time, the feasibility study requirement would overall add four to six months minimum to almost all current remedial projects. Second, unlike the economic impact section which estimates "The cost of conducting a remedial investigation and feasibility study can from about $10,000 to $2,000,000," baseline feasibility studies alone cost at least $10,000 to $15,000. Finally, in contrast to the Regulatory Flexibility Analysis which claims that "the regulations do not impose any new reporting, recordkeeping or compliance requirements on small businesses," these rules will require most spill, underground tank, and ECRA projects to prepare feasibility studies.

1183. COMMENT: Allied Signal, Inc. and the General Electric Company commented that the proposed threshold of 100 cubic yards of contaminated material at N.J.A.C. 7:26E-5.1(c)2 should be increased to 1,000 cubic yards in order to justify the expense of preparing a feasibility study. The commenters provided a hypothetical site example of a lined lagoon containing metal hydroxide sludge (as a result of wastewater treatment). Removal of the sludge for off-site stabilization and landfilling will rapidly remove the potential health threat from the site, comply with environmental laws on waste handling, and utilize the best available technology for handling the waste. Under the proposed regulations, however, the site owner would have to perform a feasibility study. The commenters further note that off-site disposal is not a permanent remedy by definition, although it is the only option practically available for the metal sludge. Thus, a feasibility study would be required by both criteria: The waste exceeds the 100 cubic yard cutoff and the remedy is not a permanent remedy. The commenters suggest that performing a feasibility study would delay site cleanup and add costs without increasing the level of protectiveness.

1184. COMMENT: The Chemical Industry Council of New Jersey recommended that the criteria for a feasibility study at N.J.A.C. 7:26E-5.1(c) be based on a priority listing of sites rather than a permanent remedy criteria. The Chemical Industry Council of New Jersey stated that to impose these standards on a small site is expensive, time consuming, and an administrative burden which inhibits remedial implementation.

1185. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that N.J.A.C. 7:26E-5.1(c), which requires a feasibility study to be conducted unless an on-site permanent remedy is implemented or an off-site permanent remedy involved less than 100 cubic yards, has the effect of requiring a feasibility study for offsite disposal actions. This requirement will inappropriately apply to many small scale remediation projects, will slow down many cleanups and increase costs or remediation.

1186. COMMENT: Public Service Electric & Gas Company and Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-5.1(c)2, which triggers a feasibility study unless an off-site remedy involves less than 100 cubic yards of contaminated soil, should be deleted because there is no technical or legal basis for this limitation. Specifically, Public Service Electric & Gas Company proposed deleting this requirement if an off-site remedy inlcudes a recycling solution such as using hydrocarbon contaminated soil as asphalt feed stock, regardless of the quantity of material taken off-site.

1187. COMMENT: The Chemical Industry Council of New Jersey and Schering Laboratories commented that, based on the Department's definition of permanent, N.J.A.C. 7:26E-5.1(c) which requires a feasibility study of the remedial action is to dispose, off-site more than 100 cubic yards of contaminated material, would add excessive cost and time to small remedial projects. The Chemical Industry Council of New Jersey noted that in the case of a leaking underground storage tank containing heating oil, the volume of contaminated material excavated can easily exceed 100 cubic yards and no permanent technologies are practicable for such a small on-site remediation project. Further, groundwater contamination from a leaking tank is usually treated through air stripping or activated carbon. Neither technology is a "permanent technology." The Chemical Industry Council of New Jersey recommended that instead of the criteria set forth in N.J.A.C. 7:26E-5.1, the Department should rank sites and require feasibility studies for only the worst sites.

1188. COMMENT: Chemical Land Holdings, Inc. commented that the proposed threshold of 100 cubic yards of soil at N.J.A.C. 7:26E-5.1(c)2 is not a sufficient volume to justify conducting a feasibility study, and recommended that N.J.A.C. 7:26E-5.1(b)2 be revised by passing the threshold to a maximum 1,000 cubic yards of material to be remediated and requiring demonstration that the site does not require ground water remediation. Chemical Land Holdings, Inc. specifically commented that volumes of less than 1,000 cubic yards do not warrant the effort by responsible parties to prepare a feasibility study, nor do they warrant the efforts of the Department in reviewing such studies. Moreover, conformance with current Department regulations will adequately control both waste classification and disposal requirements for small volume disposal, and the proposed cleanup standards already address as minimal remedial measures. Chemical Land Holdings, Inc. stated that a responsible party should have the right to commit to cleanup without conducting a feasibility study where circumstances do not merit a feasibility study and cleanup criteria are agreed to by the Department.

1189. COMMENT: Environmental Liability Management, Inc. commented that removal of 100 cubic yards in which the average contaminant value is 10 ppm would represent only about 25 pounds of contaminant, and that this mass of contaminant does not seem to justify the cost of conducting a feasibility study. Environmental Liability Management, Inc. stated the issue of protecting human health and the environment should be related to the amount, toxicity and persistence of the contaminant, and recommended that the trigger for a feasibility study at N.J.A.C. 7:26E-5.1(c)2 be revised to be based on the mass of the contaminant, its toxicity and persistence rather than whether more than 100 cubic yards of contaminated material is at issue. As an example, Environmental Liability Management, Inc. suggested that the removal of soil containing 750 pounds of a contaminant with low toxicity and moderate persistence should not require a feasibility study.

1190. COMMENT: American Cyanamid Company commented that the 100 cubic yard limit for requiring a feasibility study at N.J.A.C. 7:26E-5.1(c)2 should be deleted since there is no basis for choosing 100 cubic yards as a determining factor. Instead, American Cyanamid Company suggested that the requirement for a feasibility study be based on the complexity of the site.

RESPONSE: In proposing N.J.A.C. 7:26E-5.1(c)2, the Department made a policy decision that if a person intended to take more than 100 cubic yards of contaminated material off-side, that person would have to conduct a remedial alternative analysis. The Department does not concur with the commenters who suggested raising the 100 cubic yards trigger to 1,000 cubic yards or requiring remedial alternative analyses only for the "worst sites," or "most complex sites." The Department has a policy preference for permanent remedies and to eliminate and prevent contamination in the environment wherever practicable. The 100 cubic yards criteria was selected because Department experience has shown that below 100 cubic yards, an on-site permanent remedy is currently impracticable. However, practicable on-site permanent remedies are available when there is less than 1,000 cubic yards at issue. The Department recognizes there are presently only a limited number of cost effective permanent remedies for small volume cleanups, but expects that as more permanent remedies become available, and

technology and market forces change, the cost of these remedies will decrease. If there is no requirement for the regulated community to evaluate permanent remedies, cost effective options may be or become available, but the person responsible for conducting the remediation would be unaware of them.

The Department has a strong preference for permanent remedies, and this preference is independent of the contaminant mass, toxicity and persistence. These factors are all taken into consideration during the evaluation of alternatives in the remedial alternative analysis. Regarding the example presented by Environmental Liability Management, Inc., 750 pounds of a contaminant may be dispersed in thousands of tons of contaminated media. Although the contaminant may be of low toxicity, to simply dispose of this media offsite without the requirement to evaluate other more permanent remedies would be inconsistent with the Department's goal of seeking permanent remedies whenever possible.

Regarding the cost and review of the remedial alternative analysis for simple sites, the remedial alternative analysis need not be a complicated document. The remedial alternative analysis should be very easy to prepare and review for uncomplicated sites. The remedial alternative analysis for a particular site need not be of the extent and magnitude of a feasibility study performed on large Superfund sites. The Department has emphasized this by replacing the phrase "feasibility study" with "remedial alternative analysis" throughout N.J.A.C. 7:26E. The Department emphasizes there is built in flexibility as to the amount of detail necessary for a site's remedial alternative analysis, and recommends that the person responsible for conducting the remediation discuss with the Department's case manager the amount of detail needed for their particular site. The Department anticipates that for the vast majority of sites, the remedial alternative analysis should be a relatively simple document to prepare.

Furthermore, the Department expects that for cases such as leaking underground storage tanks, a standardized remedial alternative analysis could be used. The Department also presumes that, prior to these Technical Requirements for Site Remediation, for more complicated cases, that person responsible for conducting the remediation has already been performing internal remedial alternative analyses.

Regarding specific comments on the cost and time to prepare remedial alternative analyses, the Department believes that for small cases (such as a surficial spill of a petroleum product), the time and cost to conduct a remedial alternative analysis and prepare a remedial alternative analysis report would be approximately 10 person hours, at $75.00 per hour, for a total cost of approximately $750.00. Further, the Department does not expect that it will take the Department five months to review a remedial alternative analysis. If the case is not complicated and the remedial alternative analysis report is prepared and submitted in accordance with N.J.A.C. 7:26E, the Department anticipates that it will be able to review it relatively quickly. The Department recognizes that there may be additional costs as a result of the requirement to prepare a remedial alternative analysis. However, the Department believes that the requirement for a remedial alternative analysis is an important and necessary component to a statewide remediation program.

The Department agrees with the suggestion of Public Service Electric & Gas Company that a party selecting an off-site remedy which includes a recycling solution such as using hydrocarbon contaminated soil as asphalt feed stock should be exempt from the requirements of conducting a remedial alternative analysis regardless of the quantity of material taken off-site. It is important to promote the use of re-use or recycling of contaminated material. However, the Department views this suggested modification as a substantive change requiring additional public notice and comment. Therefore, the Department intends to propose this change as an amendment to N.J.A.C. 7:26E in the future.

1191. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the waiver of the requirement to perform a feasibility study at N.J.A.C. 7:26E-5.1(c)a should be expanded to include sites where remediation has been completed by offsite disposal; for metallic contaminants, the regulations concede that permanent remedies are unavailable.

RESPONSE: The Department does not concur with the suggestion. The Department has a legislative mandate to protect human health and the environment. In carrying out this mandate, the Department must control how and where contaminated media are treated, disposed, recycled, and controlled. Furthermore, the definition of permanent remedy clearly states that metals may be permanently remediated by reprocessing or reusing the metals. The off-site disposal of metallic contaminants merely move the contaminants from one place to another and therefore, cannot be considered a permanent remedy.

N.J.A.C. 7:26E-5.2

1192. COMMENT: The General Electric Company and Allied Signal, Inc. stated that, in general, the proposed regulations at N.J.A.C. 7:26E-5.2 outline a logical process for performing feasibility studies.

RESPONSE: The Department appreciates the support implicit in this comment.

1193. COMMENT: Chemical Land Holdings, Inc. commented that the technical requirements for a feasibility study set forth at N.J.A.C. 7:26E-5.2 should be consistent with the established procedures for conducting remedial investigations and feasibility studies set forth in the CERCLA and RCRA programs. Specifically, Chemical Land Holdings, Inc. suggested that like the CERCLA Remedial Investigative/Feasibility Study (RI/FS) process, the Technical Requirements for Site Remediation should be based upon an interactive approach between the feasibility study and the remedial investigation, with appropriate integration of risk assessment results. This approach would appropriately focus the remedial investigation on obtaining the information required for the feasibility study while minimizing supplemental investigations and schedule delays to the extent practicable.

Chemical Land Holdings, Inc. further commented that a technology screening, which is also included in the CERCLA RI/FS process, should be conducted as an early phase of the feasibility study. The technology screening serves two primary purposes. First, the technology screening identifies clearly inappropriate technologies prior to the development and initial evaluation of alternatives. Second, the technology screening is conducted during the remedial investigation to identify those technologies which have potential applicability for the site under remediation. In this manner, the data needs associated with those techologies can be identified and included in the remedial investigation prior to its completion.

RESPONSE: The Department believes that N.J.A.C. 7:26E recognizes, encourages and provides for an interactive approach between the remedial investigation and remedial alternative analysis. For example, at N.J.A.C. 7:26E-4.1(a)4, the rule states that one of the purposes of the remedial investigation is to collect all the data necessary to evaluate remedial action alternatives including treatability studies. The Department, however, does not advocate the specific step wise approach used by the Environmental Protection Agency in the CERCLA RI/FS process because the Department does not believe it is necessary or appropriate for all sites.

Chemical Land Holdings, Inc. suggests a preliminary screening of technologies be conducted during the RI, similar to the CERCLA RI/FS process. The Department agrees that for more complex sites, this may be appropriate. However, the Department emphasizes to Chemical Land Holdings, Inc. that the Technical Requirements for Site Remediation establish minimum requirements and it is therefore, not appropriate to require the technology screening in these rules.

1194. COMMENT: Chemical Land Holdings, Inc. and Chevron U.S.A., Inc. commented that a responsible party should have the right to commit to cleanup without conducting a feasibility study where circumstances do not merit feasibility study, and cleanup criteria are agreed to by the Department.

RESPONSE: The Department agrees, but points out that the issue is who makes such a merit decision and what criteria is that decision based upon. It is the Department that the Legislature delegated the responsibility to protect human health and the environment from contaminated sites. It is the Department, therefore, rather than the person responsible for conducting the remediation, that the public has entrusted with making the decision as to when a remedial alternative analysis is required. The Department has articulated the criteria for this decision in N.J.A.C. 7:26E-5.1.

Evaluating remedial alternatives pursuant to the remedial alternative analysis process using criteria such as effectiveness (see N.J.A.C. 7:26E-5.2(c)1 and (d)3 and 4), implementability (see N.J.A.C. 7:26E-5.2(c)2 and (d)2), and reduction of toxicity/mobility/volume through treatment (see N.J.A.C. 7:26E-5.2(d)1) are paramount to the Department's ability to protect human health and environment.

1195. COMMENT: Environmental Liability Management, Inc. commented that since most feasibility studies produce an extensive listing of alternatives which are then reduced to a common sense list, which in turn is reduced further to a standard few alternatives a more practical and cost-effective approach at N.J.A.C. 7:26E-5.2(a)1 and 2 is to suggest that the alternative list start with three to five standard alternatives and

at least one innovative or emerging alternative. Environmental Liability Management, Inc. stated that N.J.A.C. 7:26E-5.2(a) should recognize that in many cases there is no need to go through the screening and evaluation process because there is an obvious, best choice remedial solution for a site which will ensure compliance with cleanup standards and be cost-effective.

1196. COMMENT: Colonial Pipeline Company commented that the Department should allow for focused feasibility studies to be conducted at the option of the responsible party at N.J.A.C. 7:26E-5.2(a).

1197. COMMENT: The General Electric Company and Mobil Oil Corporation proposed that the requirement to perform an initial screening at N.J.A.C. 7:26E-5.2(a)2 should be optional since in many cases, only a relatively small number of alternatives are identified. The screening step is optional in feasibility studies prepared for Federal Superfund sites. Once potential alternatives have been developed, it may be necessary to screen out certain options in order to minimize the resources dedicated to evaluating options that are less promising. The necessity of this screening effort will depend on the number of alternatives initially developed, which will depend partially on the complexity of the site and/or the number of available, suitable technologies.

1198. COMMENT: Shell Oil Company commented that N.J.A.C. 7:26E-5.2(a) should be modified so that the feasibility study should, based upon professional judgment, identify only five of the potentially most feasible alternatives based upon criteria stated plus cost, rather than identify every possible alternative.

RESPONSE: It is not the Department's intent to require extensive listings of technologies and alternatives where such an evaluation is not appropriate. As noted in N.J.A.C. 7:26E-5.2(a)1, the initial identification of remedial action alternatives is for those alternatives which may be appropriate for the site or the area of concern. If there are a limited number of alternatives that are appropriate, then the person responsible for conducting the remediation should only address the limited number of alternatives. For example, at the present time, it would not be appropriate for the person responsible for conducting the remediation to evaluate bioremediation of inorganic contaminants because bioremediation has not been shown to be an effective remedy for inorganic contaminants.

Environmental Liability Management, Inc. commented that in many cases there is no need to go through the screening and evaluation process because there is a best choice remedy for a site. The Department concurs and feels that the language in N.J.A.C. 7:26E-5.1(c) takes this into account. If the person responsible for conducting the remediation meets the criteria in N.J.A.C. 7:26E-5.1(c), the Department recognizes there is no need for a remedial alternative analysis at all.

The remedial alternative analysis for a particular site need not be of the extent and magnitude of a feasibility study performed on large Superfund sites. The Department has emphasized this by replacing the phrase "feasibility study" with "remedial alternative analysis" throughout N.J.A.C. 7:26E. The Department emphasizes there is built in flexibility as to the amount of detail necessary for a site's remedial alternative analysis, and recommends that the person responsible for conducting the remediation discuss with the Department's case manager the amount of detail needed for their particular site.

The Department does not agree with the suggestion to automatically limit and restrict remedial options in N.J.A.C. 7:26E to specific numbers of alternatives because an applicable technology might be overlooked. However, if approved by the Department beforehand, the person responsible for conducting the remediation may limit the number of technologies screened and alternatives evalauted in the remedial alternative analysis. This prior approval will provide the person responsible for conducting the remediation with certainty that the Department has approved reducing the number of technologies and/or alternatives evaluated. The Department also emphasized that it does not preclude the person responsible for conducting the remediation from limiting the number of technologies screened and alternatives evaluated without Department preapproval. However, in this instance, the regulated community is taking a chance that the Department will not concur with their position.

1199. COMMENT: Allied Signal, Inc. and the General Electric Company commented that N.J.A.C. 7:26E-5.2(b) should be modified so that remedial action alternatives need only be identified for areas of concern that require remediation.

RESPONSE: The Department does not believe it is necessary to make the change requested by the commenters. The Technical Requirements for Site Remediation, N.J.A.C. 7:26E, describe a phased approach to site investigations and cleanups. At the end of each phase, a determination is made by the person responsible for conducting the remediation as to whether to proceed with the next phase of the remediation or whether no further action is required. If an investigation reveals the absence of contamination, or the presence of contaminants below all applicable remediation standards, a no further action determination can be made. Thus, N.J.A.C. 7:26E-3.10(b)4 provides that at the end of the site investigation, a party conducting the remediation must evaluate each area of concern to determine whether additional remediation or no further action is necessary. N.J.A.C. 7:26E-4.9(b)4 describes this same evaluation at the end of the remedial investigation phase. If an area of concern meets the no further action criteria, no remedial action is necessary, and therefore, the requirements for a remedial alternative analysis are not triggered.

1200. COMMENT: The Chemical Industry Council of New Jersey and Schering Laboratories commented that N.J.A.C. 7:26E-5.2(b), which requires identification of innovative and emerging technologies for remediation, should be less comprehensive because past experience under Superfund has indicated that a full feasibility study analysis of innovative technologies is not practicable and limits innovative thinking. Developing new and innovative products requires flexibility in research and testing. Such flexibility cannot be defined in a rigid feasibility study structure. As a result most Superfund studies screen out innovative technologies due to lack of information and flexibility in decision making.

RESPONSE: The Department believes that the remedial alternative analysis process does not discourage innovative thinking and is not too rigid. On the contrary, by requiring that remedial alternative analyses be conducted unless the site meets the criteria in N.J.A.C. 7:26E-5.1(c), the Department ensures that innovative remedial technologies are evaluated. The Department also points out that innovative technologies are not solely addressed by the remedial alternative analysis. N.J.A.C. 7:26E-4.1(a)4i discusses conducting treatability studies during the remedial investigation process, so that information is available to make informed decisions regarding innovative technologies during the remedial alternative analysis (see also N.J.A.C. 7:26E-5.2(e)3).

1201. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the phrase "innovative and emerging treatment technologies" used in N.J.A.C. 7:26E-5.2(b) needs to be defined. The General Electric Company suggested the following definition: An innovative technology is any technology that has been conceived to the conceptual level. An emerging technology is an innovative technology that shows enough promise to undergo further testing. The technology "emerges" through bench-scale studies and pilot scale testing. The technology, if successful, transitions from the emerging phase to proven status through field-scale demonstrations.

RESPONSE: The Department agrees with the commenters recommendation to define the phrase "innovative and emerging treatment technologies," and has added such a definition at N.J.A.C. 7:26E-1.8.

1202. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the proposed regulation needs to distinguish between the level of effort and detail required for the initial screening at N.J.A.C. 7:26E-5.2(c) and the detailed evaluation at N.J.A.C. 7:26E-5.2(d). The commenters suggested that N.J.A.C. 7:26E-5.2(c) and (d) should be modified to indicate the degree of sophistication of the conceptual design required at each stage and the relative level of effort required for the initial screening and detailed evaluation, and that such modifications will make the feasibility study process more efficient. Because the purpose of the screening evaluation is to reduce the number of alternatives that will undergo a more thorough and extensive analysis, alternatives will be evaluated more generally in this phase than during the detailed analysis. However, evaluations at this time should be sufficiently detailed to distinguish among alternatives. In addition, the commenters note that one should ensure that the alternatives are being compared on an equivalent basis (that is, definitions of treatment alternatives are approximately at the same level of detail to allow preparation of comparable cost estimates).

RESPONSE: In the initial screening, at N.J.A.C. 7:26E-5.2(c), less effort should be directed at the cost evaluation. Relative capital and operation and maintenance costs should be used, based on engineering judgment, rather than detailed estimates. Information that could be utilized would include generic unit costs, vendor information, and prior similar estimates as modified by site specific information. Essentially, the emphasis in the initial screening should be to provide comparative

estimates for the alternatives with relative accuracy. During the detailed analysis of alternatives, the costs should be further refined.

The Department recognizes the costs presented in the remedial alternative analysis are estimates, and that uncertainties associated with the alternatives reduce the level of the estimate's accuracy. However, it is the Department's opinion that the cost criteria should be included in the analysis of alternatives, nonetheless, because it is an important criteria in the selection of an alternative.

The Department does not agree that N.J.A.C. 7:26E-5.2(c) requires a relatively sophisticated conceptual design and a very detailed analysis for the initial screening. The remedial alternative analysis need not be of the extent and magnitude of a feasibility study performed on large Superfund sites. There is built in flexibility as to the amount of detail necessary for a site's remedial alternative analysis, and the Department recommends that the person responsible for conducting the remediation discuss with the Department's case manager the amount of detail needed for their particular site. The Department anticipates that for the vast majority of sites, the remedial alternative analysis should be a relatively simple document to prepare.

1203. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that N.J.A.C. 7:26E-5.2(c)1i, which states that remedial action alternatives that do not meet cleanup standards shall be eliminated from consideration in the feasibility study process, should be clarified. Is it the Department's intent that the alternative of leaving contamination above cleanup standards in place under a deed restriction should be eliminated from consideration in a feasibility study?

1204. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-5.2(c)1i should be modified so that it would recognize that some sites may be subject to an alternate cleanup standard or deferral pursuant to N.J.A.C. 7:26D. Chevron U.S.A., Inc. proposed the following wording changes: "Its effectiveness in meeting either (1) the applicable cleanup standards, (2) alternate cleanup standard or (3) deferral of cleanup standard as appropriate for the site, pursuant to N.J.A.C. 7:26D. Alternatives which do not meet any of the three standards shall be eliminated from further consideration."

1205. COMMENT: Public Service Electric & Gas Company and the General Electric Company commented that the sentence "alternatives that do not meet cleanup standards shall be eliminated from further consideration" at N.J.A.C. 7:26E-5.2(c)1i should be deleted because eliminating alternatives that cannot meet the cleanup standards in N.J.A.C. 7:26D may eliminate all alternatives. In addition, eliminating all alternatives that do not meet N.J.A.C. 7:26D at the initial screening level, rather than using this as a criteria for comparison, defeats the purpose of the feasibility study. Public Service Electric & Gas Company specifically stated that the initial screening is meant only to reject those technologies which will be ineffective or worse, increase risks to human health and the environment.

1206. COMMENT: Exxon Company U.S.A. recommended, to clarify that there may be alternative cleanup standards, adding the following: "or alternative cleanup standards" after the phrase "cleanup standards" at N.J.A.C. 7:26E-5.2(c)1i.

RESPONSE: The Department identifies the remediation standards applicable to a particular contaminated site, whether on a case-by-case basis or pursuant to regulation, which ensure that the exposure of risks to human health and the environment are reduced to acceptable levels. While preferred, consistent with the Department's preference for permanent remedies, it is not imperative that the person responsible for conducting the remediation remove all contaminants which are above the applicable remediation standards. As the commenters point out, there are other means of complying with the applicable remediation standards, such as the use of engineering and institutional controls. The Department's deferral of a remediation standard would also be a temporary compliance with the remediation standard. Compliance with a Department approved alternate remediation would also constitute appropriate compliance. There is no need, therefore, to make the changes suggested by the commenters.

The Department believes that the situation to which Public Service Electric & Gas Company and the General Electric Company describe, that there are no available alternatives which comply with the applicable remediation standards, will be the exception rather than the rule. Furthermore, the Department does not believe that it is prudent to draft regulations to specifically address circumstances which are expected to arise infrequently. Such situations are more appropriately dealt with on a case-by-case basis and must be addressed as beyond the minimum requirements articulated in these rules.

1207. COMMENT: Shell Oil Company commented that N.J.A.C. 7:26E-5.2(c)1i should be revised to allow for the use of alternate cleanup levels established through exposure and risk assessment.

RESPONSE: This comment is more appropriately directed at the Department's future proposal of remediation standards and, therefore, is beyond the scope of this proposal.

1208. COMMENT: E.I. du Pont de Nemours and Company proposed eliminating treatment from the criteria for reduction of toxicity, mobility, or volume at N.J.A.C. 7:26E-5.2(c)1ii and (d)1i, where reduction of toxicity, mobility, or volume through treatment is required. E.I. du Pont de Nemours and Company commented that evaluation of reduction of mobility, toxicity, and volume solely through treatment is illogically narrow. E.I. du Pont de Nemours and Company stated the reduction of contaminant mobility can reduce or eliminate potential risks associated with contamination. This can be accomplished through engineered controls such as slurry walls and caps as well as treatment methods like stabilization and solidification.

1209. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. commented that the word "treatment" should be deleted from N.J.A.C. 7:26E-5.2(c)1ii because the use of treatment techniques is only one of many options for reduction of toxicity, mobility, or volume of potential contaminants.

RESPONSE: The Department has not made the wording modifications suggested by E.I. du Pont de Nemours and Company and Union Carbide Chemicals and Plastics Company, Inc. The Department has a legitimate policy preference for treatment technologies that are permanent remedies. This public policy is based on the Department's preference to eliminate contamination in the environment whenever practicable, and minimize the number of sites requiring continued control and monitoring because of contaminants remaining after implementation of the remedy. The Department does, however, recognize and agree that where permanent remedies are impracticable, reduction of contaminant mobility, toxicity and volume is desirable. The remedial alternative analysis process does not preclude the person responsible for conducting the remediation from evaluating alternatives that reduce or eliminate potential risk through engineering controls.

1210. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the phrase "potential contaminants" used at N.J.A.C. 7:26E-5.2(c)1ii and (d)1ii should be clarified as the contaminants should be known at the feasibility study stage. The commenters recommended deleting the word "potential" where the phrase is used.

RESPONSE: The Department concurs that the N.J.A.C. 7:26E-5.2(c)1ii and 5.2(d)1ii could be clarified, and has deleted the word "potential" where it is used in these provisions.

1211. COMMENT: Shell Oil Company commented that timeliness should only be considered separate from a cost analysis at N.J.A.C. 7:26E-5.2(c) when human health and the environment are being or are likely to be threatened if a longer remediation strategy is selected. Shell Oil Company stated it should be acceptable to take much longer approaches to cleanup if there is no exposure and it is cost effective, from the owner's perspective.

RESPONSE: The Department does not concur with the commenter's proposal to separate timeliness from a cost analysis because the Department believes that the timeliness and cost criteria are both individually important criteria in the initial screening process, and thereby warrant being evaluated separately. Based on the site, it may be appropriate to take a much longer approach to cleanup if there is no exposure and it is a cost effective alternative.

1212. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-5.2(c)3ii should be modified to expressly consider that at a privately funded cleanup, the Department's concerns should be limited to protection of human health and the environment, and cost effectiveness. If a person responsible for conducting the cleanup (without public funds) chooses to transport material off-site for treatment, disposal, recycling or other purpose, the only applicable requirements should be that the material is handled and transported in accordance with applicable rules and the off-site facility accepting the material has the appropriate permits or other applicable operating approvals.

Chevron U.S.A., Inc. commented that the phrase "timeliness shall not be used to select non-treatment over treatment alternative" at N.J.A.C. 7:26E-5.2(c)3ii should be deleted since the Department has provided no

justification for this restrictive provision, and does not have the statutory authority to mandate criteria for treatment over non-treatment.

1213. COMMENT: E.I. du Pont de Nemours and Company and Chevron U.S.A., Inc. recommended deleting the last clause of N.J.A.C. 7:26E-5.2(c)3ii, which states "however, timeliness shall not be used to select non-treatment over treatment alternative." E.I. du Pont de Nemours and Company comments that this requirement is unnecessarily strict, and that non-treatment alternatives often offer the advantage of achieving risk reduction more quickly, effectively, and reliably than treatment alternatives. E.I. du Pont de Nemours and Company noted that, for example isolation or containment of contaminated ground water and soil can often be implemented more quickly, achieve risk reduction more quickly, and reliably achieve greater success than treatment alternatives. Because all remedial alternatives should be objectively evaluated, at a minimum, on their effectiveness, implementability, timeliness, and cost. Serious shortcomings in any of these categories should be condition enough to eliminate an alternative, treatment or otherwise, from further consideration.

1214. COMMENT: Mobil Oil Corporation noted that if a regulator were to compare the time to achieve cleanup for bioremediation versus incineration, the regulator may interpret that this time is grossly excessive, requiring the site to opt for the less environmentally sound option of incineration. Mobil Oil Corporation recommended revising N.J.A.C. 7:26E-5.2(c)3ii as follows: "Timeliness will not be the primary reason for elimination from further consideration. Elimination will be based on determining which alternative produces the most cost effective environmentally sound solution."

1215. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested that N.J.A.C. 7:26E-5.2(c)3ii be revised as follows: Alternatives where the time needed to achieve the applicable cleanup standard ... however, timeliness shall not be the sole selection factor for the potential alternatives; and" since the consideration of time is only one of the many factors in the selection process. Other key factors include effectiveness, constructability, implementability, and cost.

1216. COMMENT: Exxon Company U.S.A. commented that since timeliness and cost are both very important factors that need to be considered along with all other factors, they should not be arbitrarily totally eliminated from the decision making process, as N.J.A.C. 7:26E-5.2(c)3ii requires.

RESPONSE: The Department has a mandate to protect human health and the environment. This includes regulatory input on how and where the contaminated media is treated, disposed, recycled, controlled, etc. Evaluating remedial alternatives via the remedial alternative analysis using criteria such as effectiveness (see N.J.A.C. 7:26E-5.2(c)1, (d)3 and 4), implementability (see N.J.A.C. 7:26E-5.2(c)2 and (d)2), and reduction of toxicity/mobility/volume through treatment (see N.J.A.C. 7:26E-5.2(d)1) are paramount to the Department's ability to protect the public and environment.

The Department is statutorily authorized to establish a systematic and consistent approach to the remediation of contaminated sites in New Jersey pursuant to N.J.S.A. 58:10-23.20. In implementing that statutory mandate, the Department is requiring, in the context of N.J.A.C. 7:26E-5 that all contaminated sites be held to the same remedial selection criteria, regardless of whether the site is a privately funded cleanup or a publicly funded cleanup. The Department has authority under, among other statutes, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11f, to dictate the remedial alternative selected. To ensure that the most appropriate remedial action alternative is selected at privately funded cleanups as well as publicly funded cleanups, the Department is requiring that all appropriate remedial actions are evaluated according to standardized criteria.

The Department has a policy preference for alternatives using permanent solutions and treatment technologies that destroy or reduce the inherent hazards posed by contaminated media, to the maximum extent practicable. This is a preference, not a requirement. The Department has not required that non-treatment alternatives be removed from the evaluation process. The Department believes that the screening criteria and analysis of alternatives in N.J.A.C. 7:26E-5.2(c) takes into account the other key factors mentioned by the commenters such as effectiveness, constructability, implementability and cost.

The Department believes the language in N.J.A.C. 7:26E-5.2(c)3 does allow for objective consideration of timeliness, and therefore has not made the wording changes proposed by the commenters. The Department's intent N.J.A.C. 7:26E-5.2(c)3 is to ensure that the person responsible for conducting the remediation does not screen out treatment alternatives based on the timeliness or cost criteria in the initial screening process. The Department points out that timeliness is also one of the criteria evaluated in the detailed analysis of alternatives.

1217. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company comment that the phrase "grossly excessive" used in connection with the time, labor, and cost criteria at N.J.A.C. 7:26E-5.2(c)3ii and 4 should be defined.

1218. COMMENT: Rutgers Environmental Law Clinic commented that the Department must define what constitutes "grossly excessive" time or cost of a given alternative at N.J.A.C. 7:26E-5.2(c)3 and 4. Rutgers Environmental Law Clinic comments that without any guidance, remediators will attempt to rule out more effective and less harmful remedial alternatives on the basis of cost alone. Without specific standards regarding the specific circumstances under which the Department would permit refief under this provision, the Department will be flooded with such requests and be forced to develop such standards on a case-by-case basis.

RESPONSE: It is the Department's belief that the term "grossly excessive" need not be defined because it is a relative term used when comparing one alternative to another. However, the Department recognizes that it would be helpful to the person responsible for conducting the remediation if additional guidance, particularly for the cost criteria, were provided. The Department is presently working on such guidance and it will be the subject of a future regulatory proposal.

The Department does not agree with the comment of Rutgers Environmental Law Clinic that without a specific definition of "grossly excessive" the person responsible for conducting the remediation will attempt to eliminate remedies on the basis of cost alone because, as detailed in N.J.A.C. 7:26E-5.2(c) and (d), remedial alternatives are evaluated on many more criteria than cost or time. Further, language is already included in the initial screening process described at N.J.A.C. 7:26E-5.2(c)3 and 4 to ensure that the person responsible for conducting the remediation does not screen out treatment alternatives based on the timeliness or cost criteria. The Department agrees that the ultimate alternative chosen must be protective of human health and the environment.

1219. COMMENT: Exxon Company U.S.A. commented that under certain conditions, non-treatment or "natural remediation," provided for in N.J.A.C. 7:26D, should be considered a viable alternative at N.J.A.C. 7:26E-5.2(c)3ii and (c)4.

RESPONSE: The remedial alternative analysis process outlined in N.J.A.C. 7:26E-5 does not preclude the evaluation of natural remediation.

1220. COMMENT: E.I. du Pont de Nemours and Company recommended deleting the last cause of N.J.A.C. 7:26E-5.2(c)4, which states "however, cost shall not be used to select non-treatment over treatment alternatives" because all remedial alternatives should be objectively evaluated, at a minimum, on their effectiveness, implementability, timeliness, and cost. Serious shortcomings in any of these categories should be condition enough to eliminate an alternative, treatment or otherwise, from further consideration. E.I. du Pont de Nemours and Company commented that this requirement is unnecessarily strict, and that non-treatment alternatives often offer the advantage of achieving risk reduction more quickly, effectively, and reliably than treatment alternatives. E.I. du Pont de Nemours and Company noted that isolation or containment of contaminated ground water and soil can often be implemented more quickly, achieve risk reduction more quickly, and reliably achieve greater success than treatment alternatives.

1221. COMMENT: Chevron U.S.A., Inc. suggested deleting the phrase "however, cost shall not be used to select non-treatment over treatment alternatives" at N.J.A.C. 7:26E-5.2(c)4 since the Water Pollution Control Act and Spill Act encourage cost effectiveness.

1222. COMMENT: Chemical Land Holdings, Inc. commented that the last clause at N.J.A.C. 7:26E-5.2(c)4 should be deleted because it is entirely appropriate and important to consider the benefit achieved based on the additional spending when comparing treatment versus non-treatment alternatives, and this comparison should be included in the screening process to limit the alternatives considered in the detailed evaluation to those with some potential for selection. Chemical Land Holdings, Inc. states the limitation that is placed on cost comparisons ignores the reality of the magnitude of cost associated with some permanent remedies. In many cases, the cost associated with only the treatment based alternatives may impose unacceptable hardships on

those conducting the remediation and, in some instances, may exceed the financial resources of those parties or even public funding.

1223. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested that N.J.A.C. 7:26E-5.2(c)4 be revised as follows: The cost of each alternative, including those costs listed below; alternatives where the cost of achieving the applicable cleanup standard ... however, cost shall not be the sole selection factor for the potential alternatives" since the consideration of cost is only one of the many factors in the selection process. Other key factors include effectiveness, constructability, and implementability.

1224. COMMENT: Exxon Company U.S.A. commented that since timeliness and cost are both very important factors that need to be considered along with all other factors, they should not be arbitrarily totally eliminated from the decision making process as N.J.A.C. 7:26E-5.2(c)4 presently requires.

RESPONSE: The Department has not made the changes which the commenters suggest. The Department agrees that the consideration of cost is one of many factors in the selection process. The Department feels that the language in N.J.A.C. 7:26E-5.2(c)4 does allow for objective consideration of cost and that the screening criteria and analysis of alternatives in N.J.A.C. 7:26E-5.2(c) and (d) takes into account the other key factors mentioned by Union Carbide Chemicals and Plastics Company, Inc. The Department's intent in N.J.A.C. 7:26E-5.2(c)4 is to ensure that the person responsible for conducting the remediation does not screen out treatment alternatives based on the cost criteria in the initial screening process. The Department points out that cost is also one of the criteria evaluated in the detailed analysis of alternatives.

1225. COMMENT: Chevron U.S.A., Inc. recommended that N.J.A.C. 7:26E-5.2(d) and (e), which set forth the criteria for analyzing remedial action criteria after the initial screening, and conducting a comparative analysis of each alternative, should be deleted. Chevron U.S.A., Inc. stated that the Department has no authority to promulgate all the criteria listed in these two sections and that to the extent that these criteria are identical to the feasibility study criteria listed in the National Contingency Plan, 40 C.F.R. 300, they should only be required only for sites on the National Priority List or where public funds are being spent. Chevron U.S.A., Inc. commented that based upon the applicable statutes, the Department can only evaluate remedial actions based on whether they are protective of human health and the environment, and cost effective.

RESPONSE: The Legislature has charged the Department with the responsibility of ensuring that all contaminated sites in New Jersey are remediated in a systematic and consistent manner to protect public health and the environment (See N.J.S.A. 58:10-23.11f and 23.20). In order to ensure that all appropriate factors are consistently taken into account in a remedial alternative analysis, the Department set forth detailed criteria regarding how to analyze and compare remedial actions at N.J.A.C. 7:26E-5.2(d) and (e). The Department acknowledges that many of the criteria listed in these two sections are also listed in the National Contingency Plan, 40 C.F.R. 300. This is because the Department believes that these are important criteria to use to evaluate and select the most appropriate remedial action alternatives for all contaminted sites, not just those sites on the National Priority List or being remediated with public funds. Evaluating remedial actions based on the criteria set forth in N.J.A.C. 7:26E-5.2(d) and (e) will ensure that a cost effective and environmentally sound remedial action is selected.

1226. COMMENT: New Jersey Natural Gas Company and Jersey Central Power & Light Company commented that the detailed analysis of alternatives at N.J.A.C. 7:26E-5.2(d) should include compliance with applicable regulatory cleanup levels.

RESPONSE: By requiring that all alternatives be evaluated in the initial screening based on its effectiveness in meeting applicable remediation standards and protecting human health and the environment at N.J.A.C. 7:26E-5.2(c)1, the Department has ensured that alternatives are evaluated based on compliance with applicable remediation standards.

1227. COMMENT: Exxon Company U.S.A. recommended that the phrase "through treatment" be deleted at N.J.A.C. 7:26E-5.2(d)1i because some site cleanups will not require a treatment methodology.

RESPONSE: The Department does not agree with the recommendation to delete the words "through treatment" at N.J.A.C. 7:26E-5.2(d)1i. Treatment is an evaluation criterion in the remedial alternative analysis process that reflects the Department's policy preference for remedial actions that utilize treatment technologies to reduce the toxicity, mobility or volume of the contaminated media. Alternatives that do not use treatment technologies would still be evaluated under this criterion; however, the evaluation would state that the particular alternative does not use treatment technologies.

1228. COMMENT: Exxon Company U.S.A. recommended changing the word "the" after the word "address" to "any" at N.J.A.C. 7:26E-5.2(d)1iii because there will be many occasions where no threat to human health and environment exists.

RESPONSE: By definition, if a remedial action is required, there is a threat to human health and the environment. Therefore, the Department feels the requested wording change at N.J.A.C. 7:26E-5.2(d)1iii is not necessary.

1229. COMMENT: Chemical Land Holdings, Inc. commented that the criteria for evaluation of short-term effectivenss at N.J.A.C. 7:26E-5.2(d)4 should be expanded to include social impacts related to the implementation of an alternative. As an example, remediation of an industrial facility, which requires accessibility to subsurface soils in areas of ongoing plant activities or beneath active plant structures, may result in temporary or permanent unemployment due to disruption of plant activities or structures.

RESPONSE: The Department does not agree with the suggestion of Chemical Land Holdings, Inc. to include social impacts as part of the short-term effectiveness analysis The purpose of the short-term effectiveness criteria is to analyze the technical effectiveness of an alternative in terms of protecting human health and the environment. This position is consistent with the Environmental Protection Agency (EPA) Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA, Interim Final, October 1988 (EPA/540/G-89/004). The social impacts of an alternative are best addressed pursuant to N.J.A.C. 7:26E-5.2(d)6.

1230. COMMENT: Rutgers Environmental Law Clinic commented that N.J.A.C. 7:26E-5.2(d)4i should be modified to define what criteria will be used to evaluate the short term impacts to workers and members of a community from a given alternative. Cleanup of contaminated sites should not come at the expense of the health and safety of community members who have already suffered with the contaminated property in their midst nor should it come at the expense of the workers who must undertake the cleanup. All remedies must include full protection of the communities and the workers during the pendency of the cleanup as well as after the cleanup is completed.

RESPONSE: The commenter appears to have misunderstood the terminology "risks" as used in N.J.A.C. 7:26E-5.2(d)4i and the purpose of the short-term effectiveness evaluation. The word "risk" in this provision refers to the short-term "impacts" of an alternative, and not risk assessment. One of the primary purposes of the short-term effectiveness evaluation criteria is to ensure that potential adverse impacts to human health and the environment are identified, and that measures for mitigating the impacts are specified. Mitigative actions might include, to illustrate, health and safety protection for workers performing the remediation, employing engineering controls to suppress dust generated and runoff, and alerting and involving local authorities (for example, fire department) in contingency plans. Mitigative measures are addressed in the discussion of the short-term effectiveness of each alternative.

1231. COMMENT: Chemical Land Holdings, Inc. questioned whether "measures" referenced at N.J.A.C. 7:26E-5.2(d)4ii are to be considered part of "alternatives."

RESPONSE: "Measures" at N.J.A.C. 7:26E-5.2(d)4ii refers to mitigative actions taken during (and/or prior to) implementing the remedial action in order to protect human health and the environment. Such measures might include, for example, addressing health and safety protection for workers performing the remediation, and employing engineering controls to suppress dust generated and control runoff. Mitigative measures should be addressed in the discussion of the short-term effectiveness of the alternative.

1232. COMMENT: Public Service Electric & Gas Company suggested adding the words "above background levels" every time cleanup standards are referenced at N.J.A.C. 7:26E-5.2(d)4iii and 5.3(a)1 to limit requirements for achieving applicable cleanup standards to identified areas of concern. It is unreasonable to require a site to be remediated to cleanup levels that are lower than background levels of contamination.

RESPONSE: The Department feels that the existing rule does in fact limit requirements for achieving applicable remediation standards to identified areas of concern, and therefore does not concur with the

commenter's proposed wording modification. Specifically, N.J.A.C. 7:26E-5.3(a)1 states, "A list of the cleanup standards applicable to the contamination in the area of concern."

The Department recognizes that contamination associated with regional background conditions or the presence of naturally occurring contaminants may not need to be remediated by the person responsible for conducting the remediation. The Department will be proposing a definition of background and naturally occurring contamination, as well as technical criteria to determine if the contamination is from background conditions or is from naturally occurring contaminants. The burden of proof is on the person responsible for conducting the remediation to demonstrate to the Department that contamination is due to background conditions or is naturally occurring.

1233. COMMENT: Rutgers Environmental Law Clinic commented that the "community concerns" language at N.J.A.C. 7:26E-5.2(d)6 should be expanded to provide for public notice and comment on the evaluation and selection of all remedial alternatives. The community has to be given notice and opportunity to comment in order to express its concerns. The community must be informed in order to be able to intelligently voice its concerns. Rutgers Environmental Law Clinic states that the Department's abandonment of the permitting program and the elimination of the right of public notice and comment on the proposed site remediation will result in the selection of remedial alternatives which could cause great public concern, if only the public knew about it. Public hearings and informal meetings should be held where the responsible parties for the site, government and the public can thoroughly discuss the proposed remedial alternatives, so that alternatives can be rejected when they pose an unacceptable risk to the community.

1234. COMMENT: Allied Signal, Inc. and the General Electric Company commented that N.J.A.C. 7:26E-5.2(d)6 should not require that community acceptance be considered during the feasibility study. Consideration of community acceptance should be part of the Department's approval process after a study has been released for public comment. The commenters note that frequently one cannot gauge public reaction to a remedial action alternative until the feasibility study has been presented to the public for comment. In recognition of this difficulty, the requirements for the detailed evaluation of alternatives during the feasibility study in the National Contingency Plan note that, with respect to community acceptance, "[t]his assessment may not be completed until comments on the proposed plan are received" (40 CFR 300.430(e)(9)(iii)(I)).

1235. COMMENT: The Chemical Industry Council of New Jersey, Schering Laboratories and E.I. du Pont de Nemours and Company commented that N.J.A.C. 7:26E-5.2(d)6, which requires the evaluation of "which alternatives interested persons in the community support," should be modified because although citizen views must be considered, direct citizen involvement in the actual decision process, involving highly technical issues, should not be required, nor is it conducive to "timely" remedial actions. The Chemical Industry Council of New Jersey noted that past experience has indicated that rightly concerned citizens do not always possess the educational background to understand highly technical issues. In addition, a postponement of remedial decisions occurs as regulatory bodies attempt to handle irreconcilable views. Finally, the Federal Superfund program has shown that citizens will always desire off-site removal over on-site treatment. This is decidedly against the Department's preference.

E.I. du Pont de Nemours and Company recommended that N.J.A.C. 7:26E-5.2(d)6 be modified to include community involvement as follows: "The community will be informed of the remedial alternatives considered, the advantages and disadvantages of each, and the final recommended remedy at the time that final recommendation is made."

1236. COMMENT: Mobil Oil Corporation recommended revising N.J.A.C. 7:26E-5.2(d)6 to read as follows: "Community concerns, if applicable" because as presently written N.J.A.C. 7:26E-5.2(d)6 could be broadly interpreted to require industry to solicit community input for every site, which could unnecessarily slow down remediation efforts significantly.

RESPONSE: As shown from the comments on N.J.A.C. 7:26E-5.2(d)6, it is apparent there are concerns from both industry and public interest groups regarding the appropriate level of community involvement in the remedial alternative analysis process. Some commenters appear to have misunderstood this provision. Direct decision making is not being made by the community. However, it is essential to the Department that community concerns be taken into consideration in the remedial alternative analysis process. It is the Department's position that the community needs to be aware of all proposed remedial activities in their community. In order to clarify, the Department will modify N.J.A.C. 7:26E-5.2(d)6 to delete the wording "if applicable."

In order to help inform the public of site remediation activities, the Department will include all contaminated sites on the comprehensive site list which will be available to the public and sent to each municipality. The Department currently publishes, on an annual basis, the New Jersey Department of Environmental Protection and Energy Status Report which includes the status of over 600 major sites.

The Department seeks public input on the process and mechanism by which the public is involved and intends to propose an amendment to these rules in the summer of 1993 requiring a person remediating a site to notify the municipality prior to the implementation of the remedial action. Until the process and mechanism is clarified in the future rule proposal, it is the Department's position that, at a minimum, the municipality should be notified by the person responsible for conducting the remediation of its intentions. This notification should occur regardless of whether the person responsible for conducting the remediation is or is not required to conduct a remedial alternative analysis.

In response to the commenters concern about citizen involvement resulting in a delay of decision making and a slowing down of remedial actions, it is the Department's experience from Superfund projects that the overall balance between community involvement, and remedy selection and implementation is worthwhile and workable.

Regarding the comment that the Department has not always been the best at communicating risk-related and remedial process issues to the community, the Department is committed to and continually strives to improve its skills in risk communication and explaining the remedial process, in order to improve dialogue with communities.

Rutgers Environmental Law Clinic proposes community concerns should be given more weight, such as public notice and comment for all sites. It is the Department's belief that it is not necessary to have the same level of community involvement on every site. Given the large universe of contaminated sites in New Jersey, the Department does not anticipate that every site will necessitate the extent of community participation seen at Superfund sites. The Department's priority sites are handled under administrative consent orders. As part of the administrative consent order, the Department can require public notice/public meetings. For non-priority sites, such a high level of community involvement may not be needed. Should it be deemed appropriate for the non-priority sites, the Department can hold a public meeting on the proposed remedial alternative.

The Department points out that it is not abandoning its permitting program. The exemption to obtain a Resource Recovery and Conservation (RCRA) Treatment/Storage/Disposal (TSD) facility permit at N.J.A.C. 7:26E-7.1(a)31 is not an exemption for all other permitting requirements. Furthermore, the Department will still thoroughly review all pertinent technical information that would have been submitted for a RCRA TSD facility permit. The major difference is that the review of information will be conducted by the Department case team, which is the staff who are responsible for all of the different aspects of site investigation and remediation. This will provide a more efficient utilization of staff time and reduce redundancy in Department work efforts which, the Department anticipates, will result in more timely remediation of contaminated sites. (See responses to comments concerning N.J.A.C. 7:26E-7 for more discussion of this issue.)

N.J.A.C. 7:26E-5.3

1237. COMMENT: E.I. du Pont de Nemours and Company suggested that a new provision be added to N.J.A.C. 7:26E-5.3(a) whereby the responsible party will have the opportunity to recommend an appropriate remediation alternative and to provide supporting discussions for that recommendation.

1238. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. recommended an addition to N.J.A.C. 7:26E-5.3 as follows: "A recommended remediation method may be specified, based upon the information provided in the Feasibility Study Report." Although the Department may ultimately choose and approve the remedial alternative, the responsible party should recommend a method and support the recommendation.

RESPONSE: The Department recognizes the commenters' concerns. However, in order to maintain consistency with sites handled under the Department's publicly funded program, the Department will not modify

the rule language. Nothing in the rule prevents the person responsible for conducting the remediation from adding a recommendations section to a remedial alternative analysis report.

N.J.A.C. 7:26E-6

1239. COMMENT: Atlantic Electric expressed concern with the Remedial Action requirements at N.J.A.C. 7:26E-6. They commented that the rule eliminates flexibility, stifles innovation and causes costs to escalate when conducting remediations. Atlantic Electric commented that they average about 150 small petroleum hydrocarbon releases each year. Many of these releases are beyond their control as they are, in most cases, caused by public vehicular accidents (vehicles striking utility poles). Most of the releases are in residential areas (privately owned properties). It is Atlantic Electric's policy to immediately respond to these releases terminating, controlling, containing, and remediating the release. Atlantic Electric believes the requirements are overly restrictive, extremely time consuming (delaying the remediation) and prohibitively expensive. Atlantic Electric requested a de minimis exemption for small (< 20 gallons) petroleum hydrocarbon (oils, used oils, fuels, dielectric fluid, hydraulic fluid, etc.) releases.

RESPONSE: One of the most important goals of these rules is to allow responsible parties the flexibility to apply the amount of effort, in both remediation and reporting to the Department, that is appropriate for the situation. Small discharges or spills should be cleaned up expeditiously and the size and complexity of the final report to the Department should be reflective of the size and complexity of the cleanup effort. That is, a small spill could have a simple report. Conversely, responsible parties that are dealing with environmental contamination that is severe and complex can find the detailed guidance that they need in N.J.A.C. 7:26E.

Also, the Department will entertain a "generic remedial action plan" that could be used for small routine spill incidents like those described in the comment. It is conceivable that "generic remedial actions" could be updated and approved on a periodic basis. Detailed guidance on generic remedial action workplans would be an issue the Department may consider for addtional rule making in the future.

1240. COMMENT: E.I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey commented that placing the requirements at N.J.A.C. 7:26E-6 into a regulation eliminates the flexibility to perform safe, timely, and cost-effective remediations. N.J.A.C. 7:26E-6 is missing a step commonly performed as part of remedial actions: the remedial design. Several items required under N.J.A.C. 7:26E-6.2, remedial action workplan, would normally be performed during preparation of a workplan for design, while other requirements would be proposed in the workplan. E.I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey recommended inserting a paragraph that acknowledges that remedial design would occur after Department approval of a remedy developed during the feasibility study and before submittal of the remedial action workplan.

RESPONSE: The intent of the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, is not to reduce the flexibility to perform safe, timely and cost-effective remediations, but to provide detailed technical guidance to allow for thorough and consistent remediation throughout the State. If a person conducting remediation wishes to proceed without the Department's express oversight, following these rules assures the person that the remediation will be acceptable to the Department if performed consistently with this chapter. However, flexibility has been expanded by adding N.J.A.C. 7:26E-1.6(d) which allows a variance from specific conditions of the rule when the Department's prior approval is obtained.

Reports and submissions to the Department should be short and simple for small remedial efforts, and detailed and thorough for complex sites. It is logical that a remedial design phase would be necessary before a remediation can begin. However, the Department does not need to review or approve a remedial design. The Department will approve the remedial approach and will set remedial goals for the cleanup. The Department is confident that persons conducting the remediation will have the interest and the expertise to properly design systems that will accomplish the site specific remediation goals. As a remediation proceeds the Department will review the site progress reports and the remedial action report to determine the adequacy of the remedial action.

1241. COMMENT: Continental Vanguard, Inc. commented that enforcement provisions are already well established within the framework of the law. Under the Department's proposal for the Procedures for Department Oversight of the Remediation of Contaminated Sites established in N.J.A.C. 7:26C, it is the Department's intention to establish a priority site list similar to the National Priority List created under the Comprehensive Environmental Response Compensation and Liability Act program. The Department's hope is that sites on the list, which are not high priority, will voluntarily come forward and begin remediation on all or part of their contaminated sites. The technical requirements and remediation standards are being established to provide the necessary guidance in which to do so. Do these proposed regulations require ALL contaminated sites to comply with the criteria, or only those as established on the priority list? Does, for example, a spill of fuel oil at a residence require the same procedures (that is, QA project plan, site and remedial investigation, feasibility studies) as established as does a manufacturing operation which requires remediation from an unintentional release? There must be some clarification as to the magnitude and scope that the technical requirements must adhere to.

RESPONSE: The rules require that all contaminated sites for which Department oversight is sought should comply with these minimum requirements. It is anticipated, however, that the magnitude and scope of the reporting will be commensurate with the magnitude and scope of the environmental hazard and remedial action to be taken. For example, in instances such as a specific discharge event, including a residential spill, a preliminary assessment is not required pursuant to N.J.A.C. 7:26E-3.1(c)1.

The overall intent of these rules is to provide the regulated community with consistent detailed technical requirements to assure that all remediation work conducted in the state is conducted pursuant to the same criteria. All work must be carefully documented in a specific format so that when the site becomes a priority and comes under the scrutiny of the Department, the case can be quickly reviewed to determine if the remediation was done in accordance with the regulations and is protective of human health and the environment.

N.J.A.C. 7:26E-6.1

1242. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-6.1(a) should be revised to read, "The person responsible for implementing a remedial action in accordance with Department oversight requirements at a contaminated site . . .". A person conducting an at-risk cleanup should not be subject to these requirements. This will only serve as a disincentive to at-risk remedial actions.

RESPONSE: The purpose of these rules is to detail remedial requirements so that a responsible party may proceed without the Department's oversight. These rules should serve as an incentive to clean up without the Department's oversight, since these rules represent thorough direction on the minimum technical requirements for site remediation and consequently, there will be less risk to the responsible party that the Department will not accept the work conducted. There is still the possibility that the person conducting the remediation will be required to go beyond the minimum as dictated by site specific conditions. It is only necessary to submit remediation documentation to the Department when the person conducting the remediation wishes to have the Department's approval of no further action for a site or a subsite, or when implementing a nonpermanent remedy.

1243. COMMENT: Atlantic Electric and E.I. duPont de Nemours and Company commented that N.J.A.C. 7:26E-6.1(a) is a redundant requirement and that all notification requirements should be included in the notification portion of the rule proposal (N.J.A.C. 7:26E-1.4). Both commenters proposed that N.J.A.C. 7:26E-6.1(a) be deleted from the rule.

1244. COMMENT: Jersey Central Power & Light Company commented that the remedial action requirements at N.J.A.C. 7:26E-6.1(a) and (b) indicate that the Department must be notified prior to the start of any remedial action, but that the Department approval of the remedial action is not required if a permanent remedy is implemented. Since the definition of permanent remedy does not appear to include removal actions, no removal of discharge could occur without the Department approval. This requirement is inconsistent with the Spill Act requirement to immediately take action to mitigate discharges.

1245. COMMENT: Chemical Land Holdings, Inc. commented that while it is reasonable to give preference to permanent remedies, it is not considered reasonable for the Department to require approval of non-permanent remedies at N.J.A.C. 7:26E-6.1(b)1.

RESPONSE: The notification reference to the requirement at N.J.A.C. 7:26E-1.4 is not inconsistent with the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11a et seq. If the person conducting a

remediation notifies the Department pursuant to N.J.A.C. 7:1E that a spill has occurred and that they will implement a remedial action, they have satisfied both notification requirements. Also, these rules allow the person conducting a remediation to discontinue the site investigation and continue the remediation at the remedial action phase pursuant to N.J.A.C. 7:26E-3.3(d).

The Department has a strong preference for permanent remedies and has included the requirement for prior remedial action approval so that the Department can have input at this critical stage in the remediation process prior to implementation of the remedy. Removal actions can be considered a permanent remedy if the following conditions are met: 1) if the removal action results in the removal of contamination from the site so that the levels remaining are appropriate for unrestricted use for both soil and ground water, and 2) the waste generated by the remediation is treated using a permanent remedy such as incineration or bioremediation, and 3) the total volume of contaminated material taken offsite for permanent treatment is less than 100 cubic yards.

The Department recognizes that the requirement at N.J.A.C. 7:26E-6.1(b) to obtain prior approval of any non-permanent remedy differs in language contained in Senate Bill S1070. In S1070, as passed by the Senate, the Department's pre-approval of a remedy is conditioned upon the timeframe in which the remediation will be completed. For example, S1070 as passed by the Senate, requires Department pre-approval of any proposed soil remedial action (whether permanent or non-permanent) at an Environmental Cleanup Responsibility Act subject facility if the time to complete the remedial action is greater than five years. Further S1070 allows a soil remedial action to be implemented at an Environmental Cleanup Responsibility Act subject facility without prior approval if the remedy will meet the applicable residential or non-residential soil remediation standard in less than five years, and if the Environmental Cleanup Responsibility Act trigger was a transfer of ownership or operations. In addition, S1070 will allow a soil remedial action to be implemented at an Environmental Cleanup Responsibility Act subject facility without prior approval if the remedy will meet the residential soil cleanup standard in less than five years, if the Environmental Cleanup Responsibility Act trigger was a cessation of operations.

The Department intends to propose amendments to N.J.A.C. 7:26E in the summer of 1993 to make N.J.A.C. 7:26E-6.1(b) consistent with the public policy articulated in S1070.

1246. COMMENT: New Jersey Natural Gas Company commented that the remedial action requirements at N.J.A.C. 7:26E-6.1(a) and (b) indicate that the Department must be notified prior to the start of any remedial action, but that the Department approval of the remedial action is not required if a permanent remedy is implemented.

RESPONSE: New Jersey Natural Gas Company's interpretation of this requirement is correct.

1247. COMMENT: Atlantic Electric commented that N.J.A.C. 7:26E-6.1(b)1 is excessive and burdensome and will only serve to slow down remediations that do not fit the "permanent remedy" scenario. This subsection will cause companies, not in the waste hauling business, to store hazardous wastes while waiting for Department approval. Atlantic Electric recommended rewording as follows: "Be acceptable to the Department as a readily recognizable remedial action for the type and extent of contamination at a remedial site."

1248. COMMENT: E.I. duPont de Nemours and Company commented that N.J.A.C. 7:26E-6.1(b)1 is too restrictive and commented that the Department intends to be involved in the majority of the cases where remediation will occur, especially at sites containing metals, because the Department believes no permanent remedies for these compounds exist. This particular rule will cause an enormous backlog to the Department and, consequently, exceedingly long turn-around times for responsible parties attempting to gain approvals. The solution is to allow more categories of remediation to proceed without Department involvement. After all, the responsible parties will be complying with all applicable existing regulations, including Resource Conservation and Recovery Act, Comprehensive Environmental Response Compensation and Liability Act, Environmental Cleanup Responsibility Act, and Underground Storage of Hazardous Substances Act. The proposed prioritization of remedies (N.J.A.C. 7:26E-5, on-site disposal preferred over off-site disposal) will present the Department with hundreds of encapsulated tombs of metal-tainted soil sprinkled throughout the state, being managed and monitored by companies not in the business of management of waste disposal units. E.I. duPont de Nemours and Company proposed modifying the language at N.J.A.C. 7:26E-6.1(b)1 to the following: "Be acceptable to the Department as a recognized remedial alternative for the type and extent of contamination at the remedial site."

RESPONSE: The purpose of these rules is to provide the person conducting remediation with detailed technical requirements so that remediations may proceed without the Department's oversight in appropriate situations. Atlantic Electric implied that the Department should not review and approve any remedial actions because the Department's approval will cause undue delay in remediation and even cause the person conducting a remediation to violate other existing waste regulations. The Department disagrees with this comment and contends that such a change would be inconsistent with the Legislature's mandate to the Department to protect human health and the environment. The remedial action approval is a critical step in ensuring protective remedies are implemented throughout the State.

The person conducting a remediation is responsible for proper handling and disposal of wastes generated by remedial actions pursuant to N.J.A.C. 7:26E-6.1(b)3. Proper waste handling starts with thorough planning in the remedial investigation phase. Even where all Federal, State and local permits are complied with, the Department has an interest in promoting permanent remedies.

N.J.A.C. 7:26E provides a balance between allowing responsible parties to proceed without the Department's oversight and providing adequate controls to assure the protection of human health and the environment. The Department will strive to respond in a timely manner so as not to delay the implementation of site remediations.

It is true that parties responsible for conducting a remediation will be complying with applicable existing regulations including the Resource Conservation and Recovery Act and the Environmental Cleanup Responsibility Act; however, the Department has strived for technical consistency across program lines with the promulgation of these rules. If followed, N.J.A.C. 7:26E will satisfy the technical requirements of site remediation conducted pursuant to the other referenced regulations. The Department will be reviewing and amending as necessary all other associated remediation regulation to assure consistency with N.J.A.C. 7:26E.

1249. COMMENT: Mobil Oil Corporation commented that the Department currently does not require prior approval of remedial action plans at service stations. The only delay today is the time required to obtain discharge permits for water treatment systems. The new requirements for prior approval at N.J.A.C. 7:26E-6.1(b)1 do not enhance the environment, it only delays efforts to protect the environment and associated receptors. Perhaps this requirement is valid with other contaminants where various options are available; however, there are very few options available to remediate petroleum discharges. Mobil Oil Corporation recommended that the Department allow the regulated community to initiate Remedial Actions at petroleum contaminated sites such as service stations without prior approval.

RESPONSE: The commenter is correct in noting that in some underground storage tank cases the Department did not review corrective action plans prior to implementation. Currently, the Department is reviewing completed corrective actions and is finding that many remediations conducted without Department approval or oversight are deficient and will require additional work.

In regard to Mobil Oil Corporation's concern that there are very few options for the remediation of petroleum discharges, it is the Department's opinion that there are a number of viable alternatives for the remediation of petroleum contaminated soil and ground water including, but not limited to, bioremediation, vapor extraction, thermal treatment, excavation and off site disposal, soil washing and air sparging. The remedial alternative selected can be driven by a number of site specific conditions which must be evaluated on a site by site basis, which will be accomplished through the remedial investigation/remedial alternative analysis process outlined in these rules.

1250. COMMENT: Chevron U.S.A., Inc. commented that N.J.A.C. 7:26E-6.1(b)1 should be deleted because the Department should be concerned with the attainment of remediation standards (which is adequately dealt with in N.J.A.C. 7:26E-6.1(b)2. The actual method used is secondary and should not be a concern as long as all applicable permits or approvals are obtained. This requirement will serve as a disincentive for at-risk remedial efforts and possibly delay response actions by requiring Departmental approval prior to responding to an immediate spill.

RESPONSE: The need for prior remedial action approval is based on the remedy chosen, prior remedial action approval is not necessary

if a permanent remedy is implemented at a site. Non-permanent remedies require prior Department approval because the Department has a clearly stated preference for permanent remedies which comply with applicable remediation standards at contaminated sites in New Jersey. N.J.A.C. 7:26E provides sufficient information to allow the person conducting the remediation to immediately respond to spills and other areas of contamination as they occur. The Department anticipates that responsible parties will continue to respond to spills of hazardous materials to the environment in a timely manner after promulgation of these rules.

1251. COMMENT: The General Electric Company commented that N.J.A.C. 7:26E-6.1(b)1 requires prior approval by the Department before implementation of any remedial action. Remedial action includes not only major cleanup action but many activities that occur as part of routine operation and maintenance, such as "collection of leachate and runoff," "neutralization," and "diversion, destruction and segregation of wastes." If the Department were to require prior approval for all of these activities, it would seriously hinder and delay the functioning of a facility. In addition, plant managers should be able to collect and remove spilled materials without prior approval. Therefore, The General Electric Company recommended that N.J.A.C. 7:26E-6.1(b) be revised to require prior approval only by remediation of hazardous substances that have been discharged into the environment above a threshold level.

RESPONSE: N.J.A.C. 7:26E-6.1(b)1 and all other requirements in these rules are only applicable if a discharge to the environment has resulted in contamination of some environmental media above a threshold, that threshold being the applicable remediation standards. In regard to General Electric Company's concern about the application of these rules for routine plant maintenance, the definition of remedial action includes the "collection of leachate and runoff" or "construction activity," for example, in relation to those actions taken at a contaminated site as specified in a decision document, record of decision, or other oversight document. It does not refer to routine plant operations or maintenance and therefore should not cause any delay in the implementation of these routine activities.

1252. COMMENT: The General Electric Company commented that section N.J.A.C. 7:26E-6.1(b)1 is too restrictive. Private parties should have the option to clean up their own sites at their own risk. Under this provision, every action (no matter how small) would need the Department's approval.

RESPONSE: The Department disagrees with The General Electric Company's comment. Every remedial action will not need the Department's prior approval. Only those instituting non-permanent remedies are required by N.J.A.C. 7:26E-6 to come to the Department for their remedial action workplan approval. For persons implementing non-permanent remedies, those sites will come under the Department's review pursuant to the Procedures for Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C. N.J.A.C. 7:26E provides detailed technical requirements for site remediation such that, if followed, with or without Department oversight, the action taken will be acceptable to the Department should the person conducting a remediation wish to obtain the Department's approval, unless conditions at N.J.A.C. 7:26E-1.7 apply.

In addition, the Department intends to propose amendments to N.J.A.C. 7:26E in the summer of 1993 to make N.J.A.C. 7:26E-6.1(b) consistent with the preapproval requirements contained in Senate bill S1070.

1253. COMMENT: Rutgers Environmental Law Clinic commented that all remedial actions, including permanent remedies, should require prior the Department approval pursuant to N.J.A.C. 7:26E-6.1(b)1.

RESPONSE: The Department will be notified when all remediations are commenced, including permanent on site remedies, and will review the final reports when the remedial goals have been achieved before an official "no further action" approval is provided to the person conducting a remediation. The Department will require remedial action reports upon request or when the site comes up as a priority site, in line with the worst case first strategy. Numerous remediations are currently being conducted throughout the State and these rules will provide more consistency for all remediations conducted with or without the Department's oversight.

The Department clearly states its preference for the most environmentally protective remedy, which is on site permanent remedies. In addition, other applicable permits will still be required such as NJPDES, Air Pollution Control and Wetlands. The Department is confident that these permits will allow for a sufficient amount of control for those cases that are not required to have prior remedial action approval.

1254. COMMENT: Allied Signal, Inc. commented that N.J.A.C. 7:26E-6.1(b)1 is too restrictive and suggested that this requirement be modified to parallel N.J.A.C. 7:26E-5.1(c): Be approved by the Department prior to implementation, unless the remedial action is either a permanent on-site remedy, pursuant to N.J.A.C. 7:26E-5.1(b), or either a permanent off-site remedy or off-site disposal when the total volume of contaminated material taken off-site from the entire site, not just the individual area of concern undergoing remediation, is less than 1,000 cubic yards.

RESPONSE: The Department has modified N.J.A.C. 7:26E-6.1(b)1 to include reference to N.J.A.C. 7:26E-5.1(c) for consistency. However, a permanent off site remedy will need prior remedial action approval when the total volume of contaminated material taken off site from the entire site, not just the individual area of concern undergoing remediation, is less than 100 cubic yards, not 1,000 cubic yards. While this requirement does allow some flexibility for small remediations it still strongly supports the Department's commitment to permanent remedies.

1255. COMMENT: The Chemical Industry Council of New Jersey commented that the Department should bear in mind that the responsible party retains liability for the site. Therefore, it is in the interest of the responsible party to develop and implement an enviromentally sound and effective remedy. The commenter believes that obtaining the Department's approval pursuant to N.J.A.C. 7:26E-6.1(b)1 is an unwieldy process. The persons involved on the Department side are, by the nature of their responsibilities, "risk averse," even at low levels. By having the Department approve all alternatives selected as non-permanent remedies, there will be significant delays in the process of remediation. Instead, the Department should focus on acting as a clearing house for information on remedies successfully implemented elsewhere. The regulatory focus should be on the product, not the process. The Chemical Industry Council of New Jersey recommended modifying the language in N.J.A.C. 7:26E-6.1(b)1: "... unless the remedial action is a permanent remedy or the site is being remediated due to metallic contamination only, and the contaminated waste materials will be disposed offsite."

RESPONSE: The Department is charged with the responsibility of ensuring that contaminated sites are remediated to levels which are protective of human health and the environment. The Department does not anticipate that the approval of remedial action plans will be an "unwieldy process" as it is in effect implementing the review process in many of the site remediation programs already without significant delay.

In regard to the Chemical Industry Council of New Jersey's comment about Department staff being averse to risk from contamination at vanishing low levels, the staff will review remedial plans in a timely manner for compliance with whatever remediation standards are applicable and appropriate to the site.

In addition, the Chemical Industry Council suggested that the Department act as a clearing house for remediation information and technologies. While the Department attempts through its public outreach programs and in its interactions with responsible parties to advise on possible successful remedies that have been implemented, it is not the Department's mandate to specifically act as a clearing house for information on remedies.

1256. COMMENT: Mobil Oil Corporation commented that the petroleum industry as a whole cannot meet N.J.A.C. 7:26E-6.1(b)2 as no technology exists that will achieve the remediation standards without natural remediation. Mobil Oil Corporation recommended the following modification to N.J.A.C. 7:26E-6.1(b)2: "Technologies which reduce contaminants to levels which will permit the use of natural remediation should be authorized."

RESPONSE: The Department allows natural remediation as one remediation strategy for contaminated ground water. Natural remediation can be utilized in conjunction with more aggressive remediation techniques such as free product removal or active pump and treatment systems. Natural remediation can be used if the site specific conditions are sufficient to safely support using natural remediation to treat the dissolved portion of a plume. Factors that would need to be considered include, but are not limited to, low levels of contamination, lack of exposure pathways, and degradability of the

contaminants. The petroleum industry can utilize the natural remediation strategy as long as human health and the environment are not compromised.

1257. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested wording modifications for N.J.A.C. 7:26E-6.1(b)2 as follows: "Achieve site-specific cleanup goals which reduce or eliminate the risks to human health and the environment." Union Carbide Chemicals and Plastics Company, Inc. was concerned that the cleanup standards in N.J.A.C. 7:26D may not be attainable due to site-specific conditions.

RESPONSE: This section of the rule has been modified because N.J.A.C. 7:26D has not been adopted. N.J.A.C. 7:26E-6.1(b)2 now references site specific remediation standards. However, the Department recognizes that site conditions will exist which will not allow all environmental media to be remediated to the site specific remediation standards. An example of this may be metal contaminated soils beneath the foundation of a building. In this case it may be impractical to implement a complete remediation of the site, as long as the building remains, but with the proper institutional controls a remediation can often be designed to eliminate exposure pathways resulting in a remediation that is protective of human health and the environment. For this reason the Department provided a mechanism in N.J.A.C. 7:26E-6.1(b)5 to adequately address these types of situations. This requirement will allow the Department to ensure, in the long term, that the controls installed at a site are in place, appropriate and protective.

1258. COMMENT: The Chemical Industry Council of New Jersey, E.I. duPont de Nemours and Company, Chemical Land Holdings, Inc. and Mobil Oil Corporation commented that N.J.A.C. 7:26E-6.1(b)4 removes some of the more common remedial actions from consideration. For example, ground water pump and treat systems and soil vacuum extraction systems transfer organic contamination from water and soils to another media, yet these technologies have been effective in reducing risk to the public—the key objective of cleanups.

The Chemical Industry Council of New Jersey recommended the following modification to the rule: "Not in itself cause an uncontrolled discharge or merely transfer contaminant from one media to another in an unpermitted manner: and ...". In addition, E.I. du Pont de Nemours and Company recommended modifying the rule as follows: "Be conducted in accordance with accepted remedial alternatives and in compliance with all applicable permits." The Chemical Industry Council of New Jersey, E.I. duPont de Nemours and Company and Chemical Land Holdings, Inc. commented that N.J.A.C. 7:26E-6.1(b)4 which contains the term "merely transfer," if narrowly interpreted, would limit the use of appropriate remediation technologies.

1259. COMMENT: Chevron U.S.A., Inc. commented that the term "uncontrolled discharge" in N.J.A.C. 7:26E-6.1(b)4 should be replaced with "unpermitted discharge." Chevron commented that the phrase, "or merely transfer contaminants from one media to another" at N.J.A.C. 7:26E-6.1(b)4. In many instances limited amounts of contaminants will likely be transferred from one media to another. The criteria should be that all discharges obtain an applicable permit and discharge in accordance with permit limits.

RESPONSE: The Department has no intention of limiting properly evaluated and engineered remediation technologies for the cleanup of contaminated sites. N.J.A.C. 7:26E-6.1(b)4 refers to the uncontrolled transfer of contamination that will cause illegal or unacceptable releases of contaminants to the environment. The Department's concern was to prohibit, for example, the uncontrolled aeration of volatile organic contaminated soils which could cause the volatilization of contaminants to the air. N.J.A.C. 7:26E-6.1(b)4 was not intended to refer to the transfer of contaminants via the use of environmentally sound engineering technologies such as carbon adsorption for the treatment of organic contaminants in ground water. The purpose of this section is to encourage holistic, environmentally responsible remediation of contaminated sites as an overall goal. To clarify its intent the Department has modified N.J.A.C. 7:26E-6.1(b)4 by deleting the word "merely" and added the word "unpermitted."

1260. COMMENT: Continental Vanguard, Inc. commented that N.J.A.C. 7:26E-6.1(b)5 poses a questionable loop hole. If the Department is referencing here the alternative cleanup standards or deferral requirements found in N.J.A.C. 7:26D-7.4, which is the only section of the cleanup standards that makes the provision to allow contaminants to remain on site over the remediation standard, then they should say so specifically. Otherwise, N.J.A.C. 7:26E-6.1(b)5 could be misinterpreted to mean that the scenario described there could easily become an established norm should remediation become difficult. Sites which cannot be remediated as required must be made to follow the formal alternative or deferral procedures established in N.J.A.C. 7:26D-7.4.

The following revision was suggested: "If contaminants remain on site after remediation, as approved by the Department pursuant to N.J.A.C. 7:26D-7.4, in excess of the applicable remediation standards, they should be reevaluated at regular intervals ..."

1261. COMMENT: CIBA-GEIGY Corporation, The General Electric Company and Allied Signal, Inc. commented that the requirements at N.J.A.C. 7:26E-6.1(b)2 and (b)5 appear to contradict each other; the first requires that remedial actions must achieve cleanup levels, and the second specifies procedures to be followed if cleanup levels are not met. It may not always be technically practicable to meet cleanup levels (for example, when dense non-aqueous phase liquids contaminate groundwater in fractured bedrock). Allied Signal, Inc. suggested that the language of N.J.A.C. 7:26E-6.1(b)2 be modified as follows: "Achieve all applicable remediation standards pursuant to N.J.A.C. 7:26D, to the extent practicable."

RESPONSE: The commenters have apparently misunderstood the relationship between contaminant concentrations at a site after remediation has been performed and compliance with the applicable remediation standards. The removal of all contaminants in concentrations above the applicable remediation standards is not the only way to comply with the remediation standards. In certain circumstances, appropriate engineering and institutional controls may be used to achieve compliance even though contaminant concentrations exceed the remediation standards. N.J.A.C. 7:26E-6.1(b)5 was designed to address this latter situation. There is, therefore, no contradiction in the two reference provisions.

1262. COMMENT: Exxon Company U.S.A. requested that the Department clarify N.J.A.C. 7:26E-6.1(b)5 such that there may be alternative remediation standards, by adding after "...standards..." the following: "alternative remediation standards." Also, no time limit has been specified (other than once every five years) to determine whether or not the remediation continues to ensure adequate protection of human health and the environment. Exxon Company U.S.A. recommended that a time limit be set forth in the Feasibility Study or the Remedial Action Work Plan for the Department's review.

RESPONSE: There is no need to make the commenter's first suggested change because if the Department approves an alternate remediation standard, that alternate becomes the remediation standard and therefore the commenter's concern is not valid.

The Department has replaced the five-year interval with an interval the Department can identify on a case by case basis at N.J.A.C. 7:26E-6.1(b)5. The Department will consider proposed time frames for the reevaluation of a remedial action if proposed by the party conducting the remediation in its review of the remedial alternative analysis or remedial action workplan reports.

1263. COMMENT: Mobil Oil Corporation, Chevron U.S.A., Inc. and Environmental Liability Management Inc. commented that N.J.A.C. 7:26E-6.1(b)5 does not recognize alternate cleanup standards, the deferral process nor acknowledge the difficulties of monitoring sites indefinitely as natural remediation occurs. The process of reducing contaminants until they are eliminated or reduced to background levels could take many years. A five year sampling program will not expedite the process. Mobil Oil Corporation recommended that the rule be modified to read, "If contaminants remain on site after remediation in excess of the applicable remediation standards or alternate remediation standards pursuant to N.J.A.C. 7:26D, be re-evaluated after five years, and if levels have remained at or below those levels five years earlier, the case should be closed with no further reevaluation." In addition, Chevron U.S.A., Inc. commented that the regulated community needs to be assured of finality of cleanups. The open ended approach is unacceptable.

RESPONSE: As discussed in response to previous comments on this subchapter, N.J.A.C. 7:26E-6.1(b)5 does in fact recognize alternate remediation standards.

Mobil Oil Corporation appears to suggest that the Department should close a case and not look back as long as there was no increase in contaminant concentration at the site after five years, regardless of the subsequent concentration or risk. Such a provision would be a complete derogation of the Department's mandate to protect human health and the environment.

In response to Chevron U.S.A., Inc.'s concern regarding the finality of cleanups, the Legislature has placed the responsibility for discharges

and their consequences on persons that handle hazardous substances. N.J.S.A. 50:10-23.11gc specifically states that "any person who has discharged a hazardous substance" is strictly liable, without regard to fault and jointly and severally, for all cleanup and removal costs. It is clear that the Legislature's intent is that the liability remain with those persons responsible for the hazardous substance and its discharge. In addition, it is the Department's responsibility to develop remediation standards that are protective of human health and the environment. As science and technolgoy changes the Department must be responsive by utilizing the most current scientific, state of the art knowledge, to modify or develop appropriate remediation standards. The Legislature is currently considering legislation (Senate Bill 1070) that addresses the issue of finality of cleanups.

1264. COMMENT: E.I. du Pont de Nemours and Company commented that the requirement at N.J.A.C. 7:26E-6.1(b)5 for a reevaluation once every five years is arbitrary and may not be appropriate. Groundwater containing compounds in excess of applicable cleanup standards would likely have periodic monitoring, and should be reevaluated only upon an exceedance of the allowed monitoring concentration. In addition, another example of the inappropriateness of this requirement would be a situation where soil contamination of limited mobility remained, and were subsequently covered with pavement or a building (with Department approval), thus nearly prohibiting future exposure or migration. The need to reevaluate this type of remediation at all, much less every five years, is burdensome to both the Department and the regulated community. It was recommended that the rule be modified to read as follows: "... be reevaluated when monitoring exceeds allowable limits, or no less frequently than every five years if no monitoring systems were required...and a significant change that may affect human health or the environment has occurred." In addition, E.I. du Pont de Nemours and Company recommended that the following sentence be added to paragraph 5: "The Department may approve a less frequent reevaluation cycle simultaneously with approval of the remedial action."

1265. COMMENT: The Chemical Industry Council believes reevaluation of the remediation of contaminants on a five year basis as found at N.J.A.C. 7:26E-6.1(b)5 is arbitrary and may not be appropriate. The stated intent of the cleanup standards is the protection of groundwater. Groundwater monitoring will likely be required on a site with contaminants remaining above the applicable remediation standards. This monitoring will identify any groundwater impact of the remaining contaminants. If there is an impact on the groundwater, then it is appropriate to reevaluate the remediation. If contaminants remaining on a site are not impacting the groundwater, then there should not be a requirement to reevaluate the remediation. The Chemical Industry Council of New Jersey recommended that the rule be modified to read as follows: "...be reevaluated when groundwater quality limits are exceeded."

RESPONSE: The Department is modifying the time frame in N.J.A.C. 7:26E-6.1(b)5 from a minimum of once every five years to "as determined by the Department" to allow for greater flexibility in determining the appropriate frequency for reevaluations. E.I. du Pont de Nemours and Company suggested that a ground water monitoring permit should suffice as a ground water reevaluation. The data from groundwater monitoring, whether conducted under a permit or other type of oversight document, could be used as part of a reevaluation submittal. The appropriateness of this information would be decided on a case-by-case basis. Furthermore, the Department disagrees with the commenter's suggestion that it is inappropriate to reevaluate a remedial action that involved covering contaminated soil with pavement. This is not a permanent remedy. Pavement, for example, can be removed and buildings can be razed.

1266. COMMENT: The Rutgers Environmental Law Clinic commented that no contaminants should remain on-site in excess of the Department cleanup standards, but if they do, those sites must be limited to industrial sites which have been deed restricted to industrial use and subject to strict monitoring and oversight. N.J.A.C. 7:26E-6.1(b)5 appears to relate to the deed restriction utilized for cleanups to non-residential standards under the first round of remediation standards. N.J.A.C. 7:26D. All contaminated sites should be cleaned up to the most stringent levels, or, in the alternative, that alternate remediation standards or deferrals of the stricter standard should only be permitted under very narrow circumstances. The Department should clarify that N.J.A.C. 7:26E-6.1(b)5 only applies to "non-residential" areas under the cleanup standards. At least these properties would be subject to deed restriction. Surely the Department does not intend to allow exceedances of the standards without deed restrictions. The Department should clarify the practical impact of this subsection.

RESPONSE: In situations where contaminants will remain above the remediation standards the Department will ensure that the remedy chosen will be protective of human health and the environment and appropriate to the future use. The Department included N.J.A.C. 7:26E-6.1(b)5 to allow for a periodic reevaluation of these sites. The nature and extent of the reevaluation will be determined on a case by case basis so that particular concerns at different sites can be adequately addressed.

The Department notes that this comment also relates to the proposed cleanup standards, N.J.A.C. 7:26D, which the Department did not adopt. Therefore, to the extent that this comment is beyond the scope of N.J.A.C. 7:26E, the Department will not offer any further response.

1267. COMMENT: Chemical Land Holdings believes N.J.A.C. 7:26E-6.1(b)5 should be expanded to define who should perform the reevaluation, what the reevaluation should consist of, and the basis for determining the continuing adequacy of the remediation. Reevaluation should primarily consider potential changes to the site conditions or to the actual or intended use of the site and possible changes to health-based risks associated with constituents of concern at the site.

RESPONSE: The person responsible for conducting the remediation as defined in N.J.A.C. 7:26E-1.8 is responsible for conducting the reevaluation. What is to be included in the reevaluation will be determined on a case-by-case basis.

1268. COMMENT: Exxon Company U.S.A. recommended that Department either delete N.J.A.C. 7:26E-6.1(b)5 or define specific criteria they will use to determine when it is required.

RESPONSE: A reevaluation may be required by the Department when contaminant levels higher than the remediation standards developed for the site are left after the remediation. The criteria for the frequency and what would be required in a reevaluation will be determined on a case-by-case basis and detailed in a Department oversight document.

A reevaluation could be as simple as a periodic site inspection report to assure that the future site is consistent with the institutional controls or inspection of a cap or containment system to assure that it is in place and functioning as it was designed. Periodic sampling (once every five or 10 years) may be necessary to determine if contaminants fixed through vitrification or solidification, are still immobile and not migrating to nearby receptors. Ground water monitoring could be required under a long term NJPDES permit, or a Department oversight control document for contaminated ground water remediation could satisfy this reevaluation requirement.

N.J.A.C. 7:26E-6.2

1269. COMMENT: Exxon Company U.S.A. commented that the remedial action workplan at N.J.A.C. 7:26E-6.2 either be deleted or propose the criteria the Department will use to determine when it is required.

RESPONSE: The criteria for when a remedial action workplan is required is contained by agreement in the site specific oversight document as stated in the Procedures for Department Oversight of the Remediation of Contaminated Sites N.J.S.A. 7:26C or when one is required by a specific program such as the Underground Storage Tank program or the Environmental Cleanup Responsibility Act program as specified in N.J.A.C. 7:26E-6.2(a).

1270. COMMENT: The General Electric Company and Allied Signal, Inc. commented that N.J.A.C. 7:26E requires redundant submittals; many of the components of the remedial action workplan will have been previously submitted to the Department. The degree of detail required for different components of the remedial action plan varies greatly. Some of the requirements are truly workplan level requirements, while others require a degree of detail corresponding more to final design/ construction plans.

RESPONSE: The remedial action workplan is essentially a plan or proposal which details how the person conducting the remediation will implement the remedial action. A certain amount of professional judgement should be used in the preparation of the required workplan which will have sufficient detail and information to allow the Department to review and approve remedial proposals in a timely manner. N.J.A.C. 7:26E-6.2(a)2 states that if the remedial investigation report was previously submitted to the Department, a summary of the report may

be submitted. Further, N.J.A.C. 7:26E-1.6(a) has been modified to clarify that summaries of reports previously submitted to the Department can be submitted in lieu of the entire report.

Furthermore, the Department has modified N.J.A.C. 7:26E-6.2(a) to clarify that the remedial action workplan need not contain the level of detail appropriate for a final design/construction plan.

1271. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the rule specifies that the format of the Remedial Action Workplan will correspond directly with the outline of the proposed rule. This outline, however, contains several logic anomalies, where there is not a clear ordering of information either by subject matter or chronologically. The following outline was suggested:

1) 2 Remedial investigation report or summary.

2) 5 Applicable remediation standards under N.J.A.C. 7:26D.

3) 9 Description of remedial action and remedial technology for each area.

4) 6 Scaled site map identifying areas to be remediated.

5) 7 Sampling summary table per N.J.A.C. 7:26E-4.8.

6) 13 Cost estimate, per N.J.A.C. 7:26E-5.2.

7) 16 Permits required for remedial action.

8) 4 If construction activity is planned, the location and design of construction facilities and requirements and standards for remedial construction on-site.

9) 3 Procedure for soil and sediment erosion control and monitoring, and dust and odor control and monitoring.

10) 12 Description of procedures for dismantling and removal of remedial structures and equipment.

11) 11 Description of source/quantity of backfill pursuant to N.J.A.C. 7:26E-6.4.

12) 10 Description of site restoration plans to comply with N.J.A.C. 7:26E-6.4.

13) 1 Statement of compliance with N.J.A.C. 7:26E-6.3 and 6.4.

14) 14 If the remedial action duration will be less than three months, the proposed completion date or if the remedial action duration will be greater than three months, the schedule and progress reports.

15) 15 Health and Safety Plan.

16) 8 QAPP Sampling Analysis.

In addition, the General Electric Company and Allied Signal, Inc. commented that this format/content should be imposed only to the extent that specific requirements apply to a specific site.

RESPONSE: The Department agrees and has reordered the format of the remedial action workplan at N.J.A.C. 7:26E-6.2 so that the contents are presented in a more logical flow. In addition, particular sections of the workplan that do not pertain to a site will not be required. For example, a soil erosion plan will not be required for a ground water remediation site that will not disturb soils.

1272. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following wording modifications to N.J.A.C. 7:26E-6.2(a): "If a remedial action workplan is required by the Department in an oversight document or pursuant to the Environmental Cleanup Responsibility Act or Underground Storage Tank programs, the workplan shall be submitted in accordance with the schedule contained in that document and shall be presented in a format that corresponds directly to the outline of this section. The workplan shall either include the following or provide an explanation for any omissions." Omission or substitution may be necessary in some instances.

1273. COMMENT: Atlantic Electric and E.I. duPont de Nemours and Company commented that the requirements in N.J.A.C. 7:26E-6.2(a)3 may not be necessary and recommended adding to the beginning of the sentence "If necessary ..."

RESPONSE: The Department recognizes that a certain amount of flexibility is needed in the preparation of the remedial action workplan. Therefore, the Department has modified N.J.A.C. 7:26E-6.2(a) by deleting the requirement to submit information regarding the source and quality of backfill at N.J.A.C. 7:26E-6.2(a)11, and by adding the words "if applicable" to N.J.A.C. 7:26E-6.2(a)3 (recodified at N.J.A.C. 7:26E-6.2(a)10 upon adoption) and N.J.A.C. 7:26E-6.2(a)12 (recodified at N.J.A.C. 7:26E-6.2(a)13 upon adoption). The Department has not modified the rules as requested by the commenters because the required information is essential for the thorough and expedient review of the remedial action workplan. Furthermore, a party may request a variance from workplan requirements pursuant to N.J.A.C. 7:26E-1.6(d).

1274. COMMENT: Rutgers Environmental Law Clinic commented that N.J.A.C. 7:26E-6.2(a)3 states that the remediator's remedial action work plan must include "a description of soil and sediment erosion control and monitoring, and dust and odor control and monitoring procedures to be implemented during remedial activities." To avoid the annoying and even dangerous effects of remedial activities on nearby residents, the regulations should set forth a protocol required for each remediator to follow to limit soil erosion, dust and odor during remedial activities.

RESPONSE: Soil erosion protocols have been developed in detail by the State Soil Conservation Service. The Department refers responsible parties to the Soil Conservation Service for compliance with their rules at N.J.A.C. 2:90. Therefore, there is no need for the Department to develop duplicate rules. In addition, N.J.S.A. 7:26E requires that remediations must be implemented in accordance with the law, to ensure no off-site air pollution occurs, including air pollution in the form of dust and odor.

1275. COMMENT: The Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E-6.2(a)3 is appropriate as part of a remedial action workplan, but the procedures would be determined during remedial design.

RESPONSE: The Department acknowledges this comment and agrees that the detailed procedures would be determined during remedial design. A description of the general procedures to be utilized is all that is necessary in the remedial action workplan.

1276. COMMENT: Chemical Land Holdings, Inc. commented that the currently accepted terminology for monitoring of construction by a professional engineer is "construction observation." Therefore, "inspection" should be replaced at N.J.A.C. 7:26E-6.2(a)4 with "construction observation." In addition, consideration should be given to requiring individuals performing feasibility studies to be licensed as professional engineers in order to ensure a reasonable level of competence of persons evaluating remedial alternatives.

1277. COMMENT: E.I. du Pont de Nemours and Company, The General Electric Company, Allied Signal, Inc. and the Chemical Industry Council of New Jersey commented that the requirement at N.J.A.C. 7:26E-6.2(a)4ii(1) is inaccurate or inappropriate. An inspection cannot be performed at the workplan stage of the project when the facility to be inspected has not yet been constructed. A professional engineer can certify design drawings which would be prepared during the remedial design. The commenters proposed deleting the words "Inspection and ..."

RESPONSE: N.J.A.C. 7:26E-6.2(a) sets forth the requirements for a plan to conduct remedial action. By its terms, it does not require the specific items identified to be completed. It only requires that certain items must be considered prior to implementing a remedial action. The Department is aware that an inspection cannot be conducted and certified until construction is complete. The Department believes that the term inspection is sufficient for the purposes of this requirement. The intention of this requirement is to have a professional, with an engineer's certification, inspect any remedial action construction to assure that it is in conformance with the design plans.

1278. COMMENT: Chemical Land Holdings, Inc. stated that it is not necessary to present the data for the location, depth, and concentration of all contaminants in excess of the remediation standards as required in N.J.A.C. 7:26E-6.2(a)6. This requirement could result in the preparation of an inordinate number of maps that may have little use for the purpose of the remedial action work plan. As an alternative, this rule should be revised to specifically allow contaminant concentration maps to be presented only for groups of parameters (for example, total volatile organics) and/or for the most important analytical parameters. N.J.A.C. 7:26E-6.2(a)6i through iv should be qualified as anticipated or approximate measurements rather than exact measurements due to the uncertainties inherent in these quantities prior to remediation in many projects.

RESPONSE: Properly prepared site maps are essential for the timely and efficient review of contaminant delineation and remediation. It is not appropriate to map contamination using groups of parameters since remediation standards, which will be developed on a case by case basis, will be developed for specific compounds, not contaminant groups. If contaminants are too numerous to map, alternate approaches for data presentation may be requested pursuant to N.J.A.C. 7:26E-1.6(d). The Department is aware that items N.J.A.C. 7:26E-6.2(a)6i through iv are estimated values.

1279. COMMENT: The General Electric Company stated that the remedial action work plan should specify the type and quantity of backfill, not the specific source as is presently required at N.J.A.C. 7:26E-6.2(a)11. That detail may not be determined until contracts are awarded.

RESPONSE: The Department agrees with the commenter. The provision that requires that the details of the source and quality of backfill should be reported as a post-remediation action; therefore, N.J.A.C. 7:26E-6.2(a) has been modified accordingly by the deletion of proposed N.J.A.C. 7:26E-6.2(a)11.

1280. COMMENT: Allied Signal, Inc. commented that N.J.A.C. 7:26E-6.2(a)12 is only appropriate for temporary equipment and structures. Remedial actions often require construction of semi-permanent facilities such as a building to house groundwater treatment equipment. The commenter suggested modifying the language of the proposed rule to read: "A description of procedures for dismantling and removal of temporary remedial structures and equipment from the site."

RESPONSE: If permanent structures are built at a remediation site, this section requires only that a responsible party needs to report that the structures are permanent and will not be dismantled.

1281. COMMENT: The Chemical Industry Council of New Jersey commented that the submission of progress reports pursuant to N.J.A.C. 7:26E-6.2(a)15 should be no more frequent than quarterly.

RESPONSE: The schedule for submission of progress reports will be dictated by the specific oversight document or oversight program, and the type and duration of a cleanup will dictate the frequency of progress reports. For example, quarterly reporting may be required for a long term ground water pump and treatment remediation and a monthly schedule might be required if a number of areas of concern are being remediated at one time or if the progress of a remediation is contingent upon the review of partial remediation results.

N.J.A.C. 7:26E-6.3

1282. COMMENT: Atlantic Electric, Chemical Land Holdings, Inc., the Chemical Industry Council of New Jersey and E.I. du Pont de Nemours and Company commented that the requirement at N.J.A.C. 7:26E-6.3(a) is not realistic in many cases as it may be impossible to immediately contain and stabilize. The first priority should be to terminate the cause of contamination and then proceed with containment and remediation. In addition, E.I. du Pont de Nemours and Company and the Chemical Industry Council of New Jersey commented that as proposed, the requirement is too broad. While the intent of the requirement is commendable and appropriate, requiring the prevention of "further movement of contaminants through any pathway" is overly broad. This requirement suggests that, realistically, an area of concern cannot have any priority; that they will all become a priority at the same time. It was recommended that the requirement be more focused by adding the following statement "as needed to protect human health and the environment from imminent and substantial endangerment." Chemical Land Holdings, Inc. added that interim remediation measures should be included only when warranted, based on specific site conditions which may result in imminent hazards to human health or the environment if not addressed expeditiously.

RESPONSE: This requirement refers to remedial actions such as securing the site from uncontrolled access, covering soil piles and segregating and overpacking leaking drums to prevent additional discharge or explosion hazard. The Department agrees that the requirement is broad and is currently evaluating more specific criteria. In the interim, anytime contaminants are known to be migrating off site such that they may pose a threat to human health or the environment, such contaminants should be contained or stabilized as a first priority.

1283. COMMENT: Shell Oil Company commented that further migration should be allowed pursuant to N.J.A.C. 7:26E-6.3(a) if the further migration still does not threaten human health or the environment.

RESPONSE: Remedial action will only be required in areas that exceed applicable remediation standards. Contaminant levels above those goals are considered to be a threat to human health and the environment. Migrating contaminants above the applicable remediation standards will often require active remediation to protect human health and the environment. However, with prior approval, the migration of contaminated ground water may be allowed as part of a monitored natural remediation strategy.

1284. COMMENT: Schering Laboratories and Public Service Electric and Gas Company commented that N.J.A.C. 7:26E-6.3(b) does not corroborate parallel regulations, particularly the underground storage tank regulations (N.J.A.C. 7:14B-9.2). One example is leak reporting. N.J.A.C. 7:14B requires site monitoring systems for underground storage tanks. This system can detect a leak without excavation. In addition, such leaks are reportable to the Department hotline. Yet this regulation requires leak reporting again if the tank is found to have holes after excavation. This is redundant. Another example is the requirement that the excavated tank be labeled prior to transport. This contradicts N.J.A.C. 7:14B-9.2 which references the American Petroleum Institute guidance. This guidance recommends that the tank be destroyed prior to transport. The labeling is also unnecessary as the bill of lading will contain the pertinent information. In addition, both Schering Laboratories and Public Service Electric and Gas Company commented that the Department should reference N.J.A.C. 7:14 for all underground storage tank requirements rather than attempt to rewrite the rule for this regulation.

RESPONSE: N.J.A.C. 7:26-6.3(b)4 has been modified so that if a person has notified the Department pursuant to other regulatory programs, such notification will satisfy N.J.A.C. 7:26-6.3(b)4.

In response to comments, the Department has modified N.J.A.C. 7:26E-6.3(b)1 and N.J.A.C. 7:26E-6.3(b)6iii(1) to reference tank closure procedures developed by the American Petroleum Institute.

In addition, the Department has developed these Technical Requirements for Site Remediation to provide a systematic and consistent approach for the remediation of all contaminated sites throughout the State. After the rules are adopted, the Department intends to review and where necessary, modify other regulations to ensure that the Department's technical requirements for the remediation of contaminated sites are consistent across program lines.

1285. COMMENT: Jersey Central Power & Light Company and New Jersey Natural Gas Company commented that N.J.A.C. 7:26E-6.3(b) includes various requirements for underground storage tank removals and indicates that pipes and tanks be drained, pumped, and cleaned out thoroughly. However, it does not state that the contents be disposed of in accordance with appropriate State and/or Federal regulations.

The rule also indicates that soil samples must be collected along the centerline of underground storage tank excavations, but does not mention collecting samples from sidewalls just above the water tables if groundwater is encountered in the excavation area. The commenters indicated that these requirements are inconsitent with current underground storage tank guidance.

RESPONSE: Any remediation performed pursuant to N.J.A.C. 7:26E must also be performed in compliance with all other applicable laws and regulations. Therefore, the person conducting a remediation shall dispose of the contents of pipes and tanks in accordance with appropriate State and Federal regulations.

The Department has modified N.J.A.C. 7:26E-6.3(b)6i(3) to include the sampling of excavation side walls after the removal of underground storage tanks. In addition, the Department will be reviewing the Underground Storage of Hazardous Substances regulation at N.J.A.C. 7:14B to ensure consistency with N.J.A.C. 7:26E.

1286. COMMENT: Environmental Liability Management Inc. commented that the requirement to call the Department's HOTLINE at N.J.A.C. 7:26E-6.3(b)4 should not pertain to a tank which was known to have leaked from a previous investigation and the Department so notified then.

RESPONSE: One call to the Department's HOTLINE per incident is sufficient. N.J.A.C. 7:26E-6.3(b)4 has been modified accordingly.

1287. COMMENT: E.I. duPont de Nemours and Company commented that the requirement in N.J.A.C. 7:26E-6.3(b)6i(3) may not be possible to meet in a safe manner. The requirement for field screening calls for entering open excavations which can be a very dangerous procedure. Occupational Safety and Health Administration guidelines require that all excavations deeper than four feet must have some form of engineering control before personnel are allowed to enter. This engineering control could include shoring and cutting back excavation sidewalls. Both of these procedures make it impossible to screen sidewalls. In one situation the sidewalls are covered, and in the other situation the sidewalls have been cut back so that screening would provide potentially inappropriate, impertinent data. It was recommended that the following changes be made: "When tanks that contained volatile organics are removed, post-remediation soil samples for laboratory analysis shall be taken immediately after tank and/or contaminated soil removal at a frequency of one per five linear feet along the center line of the excavation."

RESPONSE: The safety issues should be the same for collecting samples from the bottom of excavations as they are when collecting field screening measurements in deep excavations. Excavation sidewalls and bottom may be field-screened using extension connectors for monitoring devices which will involve the collection of the screening data without

entering the excavation. Laboratory samples may also be taken using the aid of extension connectors without actually entering the excavation. Alternately, the excavation walls may be graded to 45 degrees to allow a sampler to enter the excavation and screen the bottom and the sloped sidewalls. These approaches are consistent with Occupational Safety and Health Administration safety guidelines.

1288. COMMENT: E.I. duPont deNemours and Company and the Chemical Industry Council of New Jersey commented that N.J.A.C. 7:26E-6.3(b)6i(4) was awkward and should be re-worded. Both commenters recommended inserting the words "of the" before the word "quality."

RESPONSE: The Department agrees that N.J.A.C. 7:26E-6.3(b)6i(4) was not clear and has modified it accordingly.

1289. COMMENT: E.I. duPont de Nemours and Company commented that the requirement at N.J.A.C. 7:26E-6.3(b)6ii is too limiting because it allows abandonment of a tank in place only where it is impractical to remove the tank. The Department must have evidence of a release from a tank to require removal of that tank. Lacking evidence of a release, a responsible party should have the option of abandoning the tank in place. It was suggested that the addition of the following condition: "There is no evidence of a release as documented through accepted methods such as tank tightness testing or soil sampling."

RESPONSE: The Department intentionally limited the tanks that could be abandoned in place since it is the Department's experience that the most definitive way to determine if a discharge has occurred from an underground storage tank is to remove the tank, visually inspect the condition of the tank and conduct the appropriate field screening or sampling. In addition, removal of deteriorated or damaged tanks will also prevent use of the tank in the future, which could result in an additional discharge of hazardous material.

1290. COMMENT: E.I. duPont de Nemours and Company and Chevron U.S.A., Inc. commented that the use of the word "thoroughly" is inappropriate for defining standards at N.J.A.C. 7:26E-6.3(b)1 and N.J.A.C. 7:26E-6.3(b)6iii(1). The American Petroleum Institute has published procedures for the proper cleaning of storage tanks. These procedures should be the standard for tank and piping cleanliness. It was recommended the following changes be made: the tank system and associated piping shall be drained and the system pumped out and cleaned in accordance with current American Petroleum Institute standards. Chevron U.S.A., Inc. commented that these sections should be revised to read, "The tank system and associated piping shall be drained and the system pumped out and cleaned thoroughly if the tank(s) and piping are reasonably accessible to these activities."

RESPONSE: N.J.A.C. 7:26E-6.3(b)1 and N.J.A.C. 7:26E-6.3(b)6iii(1) have been modified to reference the most updated version of the American Petroleum Institute's Recommended Practice for Abandonment or Removal of Used Underground Service Station Tanks as the industry standard for the cleaning and removal of underground storage tanks. Tanks and associated piping are to be cleaned out to the extent that they are accessible.

1291. COMMENT: Shell Oil Company commented that the soil sampling procedure at N.J.A.C. 7:26E-6.3 is very cumbersome and the same procedure is repeated nearly verbatim in other sections. The number of borings and samples for underground storage tanks (including service stations) is way too many. Only four borings are needed to characterize a tank pit area, as well as one on the downgradient side of each of the pump islands and every 25 feet along product lines. Soil samples should be taken every five feet and vapor concentrations measured by a PID/FID or similar instrument. The "hottest" sample should be sent to a laboratory for analysis. If vertical delineation of the soil is required then one boring near the source area (or suspected source area) should have samples taken every five feet and all samples should be field screened and sent in for laboratory analysis.

RESPONSE: The sampling frequency described in N.J.A.C. 7:26E-6.3 is based on the Department's extensive experience with underground storage tank removal and remediation. This frequency is needed to ensure that contamination from a discharge from any section of the tank will not go undetected. However, the Department recognizes that for large tanks or multiple tank excavations, these requirements result in a large number of samples. The Department refers the commenter to N.J.A.C. 7:26E-2.1(b)2 which allows half of the sampling locations to be analyzed using field screening methods if 10 or more samples are required in the area of concern. In addition, alternate sampling approaches may be requested pursuant to N.J.A.C. 7:26E-1.6(d).

1292. COMMENT: Jersey Central Power & Light Company and New Jersey Natural Gas Company commented that asbestos abatement requirements at N.J.A.C. 7:26E-6.3(c) should reference Federal NESHAPS or OSHA requirements and only apply to Environmental Cleanup Responsibility Act transactions.

RESPONSE: Upon review, the Department believes that the requirement to conduct all asbestos abatement activities in accordance with N.J.A.C. 5:23-8 at N.J.A.C. 7:26E-6.3(c) are not appropriate as a minimum standard because N.J.A.C. 5:23-8 only applies to educational facilities and public buildings. Therefore, the Department has deleted this section. The Department may propose more specific requirements for asbestos remediation in future rulemaking. In the interim, the Department will review asbestos remedial action on a case-by-case basis. The Department recommends that asbestos abatement activities for any site, including industrial facilities, be in accordance with N.J.A.C. 5:23-8 because the Department believes that the requirements therein adequately protect human health. However, as a minimum standard, any asbestos abatement activities must be in accordance with all applicable Federal and State regulations including NESHAPS and OSHA. Please refer to responses at N.J.A.C. 7:26E-3.5 in this document for a discussion for the Department's authority to remediate building interiors.

N.J.A.C. 7:26E-6.4

1293. COMMENT: The Chemical Industry Council of New Jersey commented that the purpose of post-remedial action sampling is to confirm the removal of contaminants. Therefore, the post-remedial action sampling requirements at N.J.A.C. 7:26E-6.4 should not be as stringent as the site investigation sampling requirements.

RESPONSE: The sampling frequency described in N.J.A.C. 7:26E-6.4 is based on the Department's extensive experience with site remediation. The frequencies described are needed to ensure that contamination is fully remediated in accordance with the appropriate remediation standard. The Department is aware that site specific considerations may make following N.J.A.C. 7:26E impractical. In those cases a request to modify these minimum requirements may be submitted for the Department's approval pursuant to N.J.A.C. 7:26E-1.6(d).

1294. COMMENT: E.I. duPont de Nemours and Company, Public Service Electric and Gas Company and Union Carbide Chemicals and Plastics Company, Inc. commented that the requirements at N.J.A.C. 7:26E-6.4(a) are arbitrary. Post-remediation sample locations should not be required on an arbitrary grid of, for example, one sample every 900 square feet. Numerous statistical and geostatistical methods exist that can be used to develop a realistic post-remediation sampling plan based on the remedial action itself and the remedial investigation data on extent and magnitude of contamination. E.I. duPont de Nemours and Company proposed the following additions to N.J.A.C. 7:26E-6.4(a): "(a)6. Or post-remediation samples can be based on accepted statistical and geostatistical methods, and (a)7. Samples shall be taken at a frequency sufficient to ensure the quality of the remediation. The reliability of remediation, as documented by the feasibility study, remedial action workplan, and inspection of remediation, will be used to determine sampling frequency."

1295. COMMENT: The Chemical Industry Council of New Jersey commented that post-remediation sample locations should not be required at N.J.A.C. 7:26E-6.4(a) on an arbitrary grid of, for example one sample every 900 square feet. Numerous statistical and geostatistical methods exist that can be used to develop a realistic post-remediation sampling plan based on the remedial action itself and the remedial investigation data on extent and magnitude of contamination. The Chemical Industry Council of New Jersey recommended the addition of paragraph (a)6 as follows: "Post-remediation samples can be based on accepted statistical and geostatistical methods."

1296. COMMENT: Public Service Electric and Gas Company proposed that the phrase "for each two feet of depth" be added to the end of N.J.A.C. 7:26E-6.4(a)2ii. Public Service Electric and Gas Company added that the sample frequency requirements contained in N.J.A.C. 7:26E-6.4(a) should be based on size of area of concern, and toxicity of the contaminant(s).

RESPONSE: The Department has provided additional detail at N.J.A.C. 7:26E-6.4(a)2ii with regard to sampling required for surface and subsurface discharges. The suggested addition to N.J.A.C. 7:26E-6.4(a)2ii is not necessary since the modification provided by the Department addresses the issue of depth. Sampling frequency requirements are minimum technical requirements which are necessary to ensure that remedial actions are complete. In addition, N.J.A.C. 7:26E-6.4 does

provide for the lowering of sampling frequency for larger excavations. If the contamination at a site is particularly toxic, or if other site specific conditions exist, sampling frequency should be increased, as appropriate pursuant to N.J.A.C. 7:26E-1.7.

1297. COMMENT: Public Service Electric and Gas Company also suggested that the rationale for the proposed sampling frequency at N.J.A.C. 7:26E-6.4(a) should be added, if one exists. If there is no technical basis for the sampling requirement, then appropriate qualifiers should be added, such as: sampling frequency will be decided on a site by site basis and is dependent on area of site or size of area of concern, toxicity of contaminants present, etc.

1298. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested that the phrase "the post remediation sampling frequency shall be one per 900 square feet of contaminated area" be replaced with "post remediation sampling frequency shall be sufficient to ensure the quality of the remediation" in N.J.A.C. 7:26E-6.4(a)3.

1299. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the phrase "sufficient to ensure the quality of the remediation" be added at N.J.A.C. 7:26E-6.4(a)2iv.

1300. COMMENT: Shell Oil Company commented that too many samples are required in N.J.A.C. 7:26E-6.4(a) and that the regulations should bias post-remediation sampling based upon remedial investigation characterization, and only re-sample the highest previously identified areas/locations/depths.

RESPONSE: The Department disagrees that the number of samples required at N.J.A.C. 7:26E-6.4(a) is excessive. The minimum sampling frequency provided in N.J.A.C. 7:26E-6.4(a) was developed with input from members of the regulated community via technical committees that worked on the development of the Department's Division of Hazardous Waste Management Remedial Investigation Guide. In addition, the Department also worked with members of the regulated community on the Hazardous Waste Advisory Council. In utilizing these sampling frequencies as guidelines, the Department has reviewed a substantial number of remedial reports and has determined that the sampling frequencies provide adequate documentation of clean zones. Re-sampling only in the highest previously identified areas will only provide the necessary post-remedial information about these areas, giving the Department an incomplete picture on the remediation. The only way to assure that contamination was adequately remediated is to conduct the sampling in accordance with the rule as written.

1301. COMMENT: Allied Signal, Inc. and the General Electric Company commented that the Department appropriately has provided the option of reducing the frequency of post-remediation sampling for larger sites at N.J.A.C 7:26E-6.4(a)2iii. The commenters believe the requirements for smaller sites are not onerous. In addition to physical attributes such as high groundwater or other geologic considerations of a site that may justify reducing sampling frequency, predictive techniques for identifying which soils require remediation are likely to become very accurate and thus more commonly used. The better the prediction of contaminant distribution is to begin with, the less post-remediation sampling will be needed. The new rule will allow fewer post-remediation samples based on better predictions.

RESPONSE: The Department is open to the development and use of technical methods that will allow for the reduction of time and costs associated with the remediation of contaminated sites that could be realized through the use of the predictive technique described in comment above. However, at this time these techniques are not well documented nor have they been widely used. Therefore, until a method is fully developed and appropriate for broad application, the Department will require the prior approval of alternate techniques pursuant to N.J.A.C. 7:26E-1.6(d) as adopted.

It appears that the commenters have misinterpreted the rule at N.J.A.C. 7:26E-6.4(a)2iii. While it is true that the Department has provided the option of reducing the frequency of post-remediation sampling for larger areas of concern in some cases, the Department has not allowed for sample frequency reduction based on other physical attributes of a site, such as depth to groundwater or geologic conditions except as pre-approved under N.J.A.C. 7:26E-1.6(d).

1302. COMMENT: The Chemical Industry Council of New Jersey commented that during the remedial investigation phase of a remediation, the nature and extent of contamination are defined. This will usually indicate the volume and limits of soil to be remediated. Under the circumstances where the extent of a soil excavation is constrained by permanent physical structures, such as buildings, all of the contaminated soils may not be removed by design. In this circumstance, post-excavation sampling requirements contained in N.J.A.C. 7:26E-6.4(a) should be waived.

RESPONSE: The Department does not agree with the suggestion to waive post excavation sampling where the extent of a soil excavation is constrained by permanent physical structures, such as buildings. In such cases, while excavation beneath the structure may not be required, the nature and extent of the remaining contamination beneath the structure must still be determined in order to notify a future occupant/owner of the structure of the remaining contamination. Furthermore, it may be appropriate in some cases to require excavation of contamination beneath a structure, if, for example, the contamination represents a potential threat to ground water or some other environmental media or receptor.

1303. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested that N.J.A.C. 7:26E-6.4(a)4 be deleted. The Department has no statutory authority requiring remediation of building interiors. This is the focus of Occupational Safety and Health Administration and Federal legislation (for example, asbestos and lead) and is not under the authority of the Department.

RESPONSE: These rules only detail the technical approach for the evaluation and remediation of contaminated sites and structures; they do not determine when remediation must take place. If a person conducting a remediation wants to conduct asbestos remediation and receive the Department's review and approval, these are the technical requirements that should be followed. The Department refers the commenter to the Department's responses on similar issues raised on the definition of "environmental media" at N.J.A.C. 7:26E-1.8.

1304. COMMENT: The Chemical Industry Council of New Jersey commented that the Department is to be commended for allowing cleaned or decontaminated soil from a remediation to be returned to the excavation at N.J.A.C. 7:26E-6.4(b). Washing or screening of soils and soil fractions are technologies to remove contaminants from the bulk of the soil. This can reduce the volume of contamination to be treated. Allowing the bulk of the soil to be returned to an excavation will promote cost effective cleanups.

RESPONSE: The Department appreciates the support for this provision.

1305. COMMENT: Chevron U.S.A., Inc. and Chemical Land Holdings, Inc. commented that all of N.J.A.C. 7:26E-6.4(b) should be deleted and that the Department's concern should be compliance with remediation standards and not site use. With the exception of wetland issues, the Department's authority to require specific site restoration requirements is questionable. A person may choose to cleanup a contaminated vacant plot of land and upon completion construct an office building. As written, N.J.A.C. 7:26E-6.4(b) would prevent a person from doing this. The person would be required to first regrade and revegetate the property back to its original preremediation conditions. A similar problem exists for the backfill requirements in N.J.A.C. 7:26E-6.4(b). The Department's only concern should be requiring that fill material be clean. Documentation requirements, permeability and similar requirements go beyond the Department's mandate and serve little useful purpose. Chemical Land Holdings, Inc. suggested that this requirement should be revised to provide an option for restoration other than to original conditions, even when such restoration is practicable.

RESPONSE: The Department is concerned about restoration after a site has been remediated. For example, backfilling an excavation is important to eliminate the physical risks associated with open excavations. In addition, open excavations represent increased risk of contamination to the ground water from future spills. With prior Department approval, an excavation may be left open to accommodate unrelated site improvements such as a new building foundation. The backfill requirements described in N.J.A.C. 7:26E-6.4(b)2i and ii differentiate between native versus non-native soil areas. It is important to restore natural areas to their previous uncontaminated state since they may be ecologically significant. The Department does agree, however, that in some circumstances, restoration to pre-remedial conditions may not be appropriate, for instance to accommodate new construction. In those circumstances, the person responsible for conducting the remediation may petition the Department to deviate from this minimum requirement pursuant to N.J.A.C. 7:26E-1.6(d) as adopted.

Regarding the comment questioning the Department's statutory authority to develop specific site restoration requirements, the Department may direct how all contaminated sites are to be remediated pursuant to N.J.S.A. 58:23-11f. Further, the Legislature mandated that

the Department develop a systematic approach for the remediation of all sites and in implementing its statutory authority the Department has determined that backfill with soil that is dissimilar to the native soil is inappropriate. Clean fill with equal or less permeability is environmentally important because soils with greater permeability can act as a conduit for future surface spills to discharge to the ground water.

1306. COMMENT: Allied Signal, Inc. and The General Electric Company commented that the draft regulations at N.J.A.C. 7:26E-6.4(b) provide relatively detailed specifications for fill material and require extensive documentation regarding the source and nature of the fill. Appropriate backfill for a site should be specified during remedial design, based on site-specific characteristics and concerns. It is not appropriate to impose specifications in the regulation. In addition, the commenters suggested that waivers for commercial fill sources should be provided for documentation requirements.

RESPONSE: The Department does not agree that the requirements for fill material contained in N.J.A.C. 7:26E-6.4(b)2 are excessive. Although the Department agrees that the person conducting the remediation has an interest in providing clean fill to a site, there have been cases where contaminated fill has been brought to sites. These requirements seek to minimze emplacement of contaminated fill and require the use of fill that is appropriate for the intended use of the site. Clean fill with equal or less permeability is environmentally important because soils with greater permeability can act as a conduit for future surface spills to discharge to the ground water.

The commenters suggested that the Department grant a waiver for commercial fill sources. The Department disagrees with this suggestion and is unsure what a waiver process would entail. Currently the regulations only require that the source of the fill be reported, which the Department feels is a reasonable and straightforward process. In addition, the permeability of the fill would still need to be evaluated to determine its acceptability for use at a particular site. Just because the material originated from a commercial facility does not fully address the Department's concerns regarding the quality of backfill, or its appropriateness for a particular site.

Rather than specify fill requirements on a site specific basis, and, in so doing, delay the remedial process because of Department review time, the rule provides requirements which can automatically be applied to each site, thereby expediting the remedial process. For exemptions to these rules, the person responsible for conducting the remediation may petition the Department to deviate from this minimum requirement pursuant to N.J.A.C. 7:26E-1.6(d).

1307. COMMENT: Schering Laboratories, E.I. du Pont de Nemours and Company, the Chemical Industry Council of New Jersey and Chemical Land Holdings, Inc. stated several concerns with N.J.A.C. 7:26E-6.4(b)2, particularly regarding the extent of documentation and the need to use fill of a similar nature. For present remedial projects only certification that the fill is clean is requested. To require detail on the precise location and history of the fill is new. This is an added record burden, not a current one, and will produce such a volume of data so as to be unmanageable. Certification and its associated liability is adequate. Secondly, the need to replace excavated soil with similar material is not acceptable. Several remedial projects require the installation of structural foundations in contaminated areas. The current fill was unsuitable foundation material. As a result sand had to be specified. It was suggested to only require fill to be certified as clean and delete the requirement that fill similar to the original material be used.

RESPONSE: The requirement to report the source of fill material is not new as the Environmental Cleanup Responsibility Act program has been requiring this information for some time. Regarding the need for documentation of the quality of the fill, there have been cases, where contaminated fill has been brought onto sites to fill excavations. These requirements seek to minimize emplacement of contaminated fill. N.J.A.C. 7:26E-6.2 requires the anticipated source and quality of backfill, the details regarding the source of the backfill is actually a post-remedial requirement N.J.A.C. 7:26E-6.4(b)2. In addition, the Department will allow use of fill that is dissimilar to native soil; however, prior Department approval would be required to modify the minimum requirement pursuant to N.J.A.C. 7:26E-1.6(d).

1308. COMMENT: Environmental Liability Management Inc. commented that the purpose of replacing native soil with fill of equal or less permeability, as required at N.J.A.C. 7:26E-6.4(b)2ii, is to preclude the fill from being a preferential migration pathway. This is appropriate for sites containing native soil. On a large filled site, the proposed requirement is that the fill be of equal or less permeability than the native soil in or adjacent to the area of concern. This requirement will not enhance environmental protection. Furthermore, the native soil adjacent to filled sites is usually very high in organic material since many filled sites are adjacent to wetlands. Such material, which has a low permeability, is usually not appropriate to place in an active area of an industrial site. It is also not usually suitable for construction purposes. It was recommended that the permeability of the fill used on a filled site be comparable to that of the existing fill.

RESPONSE: The Department does not consider it appropriate to replace highly permeable fill material with equally highly permeable replacement fill material, unless warranted by site conditions and approved in advance by the Department. The Department does agree, however, that it is not appropriate to emplace fill that has a very low permeability, as may be typical of many wetlands, on active industrial sites and the Department recognizes that many such sites are adjacent to wetlands. Therefore, N.J.A.C. 7:26E-6.4(b)2ii has been modified on adoption to allow for replacement of non-native soil with fill having permeability equal to or less than that of loam.

1309. COMMENT: Environmental Liability Management Inc. commented that N.J.A.C. 7:26E-6.4(b)2iii would require that fill for an industrial site meet residential soil standards. There is no technical basis for this requirement and the use of fill which meets industrial soil standards should be allowed.

RESPONSE: The rule has been modified at N.J.A.C. 7:26E-6.4(b)2iii to specify that the fill must meet "any applicable remediation standard." Because soil contaminated above the most protective standard may require institutional controls, it is not appropriate to automatically allow contaminated soil to be emplaced on sites. In some cases, soil contaminated above the most protective standard may be appropriate for use as fill on a site pursuant to N.J.A.C. 7:26E-1.6(d).

1310. COMMENT: Environmental Liability Management Inc. suggested the following change to N.J.A.C. 7:26E-6.4(b)2v: "soil in compliance with appropriate standards (N.J.A.C. 7:26D) may be returned to excavations or used elsewhere on-site."

RESPONSE: The Department agrees with this suggestion and has modified N.J.A.C. 7:26E-6.4(b)2v accordingly.

1311. COMMENT: Allied Signal, Inc. commented that extraction wells should also be abandoned at the completion of remediation pursuant to N.J.A.C. 7:26E-6.4(c).

RESPONSE: The Department agrees with Allied Signal, Inc.'s suggestion and has modified N.J.A.C. 7:26E-6.4(c) accordingly. It should be noted that the owner of the property has the option of maintaining monitoring or extraction wells pursuant to N.J.S.A. 58:4A-4.1 et seq.

N.J.A.C. 7:26E-6.5

1312. COMMENT: Mobil Oil Corporation commented that the entire proposed process for the remedial action schedule and progress reports pursuant to N.J.A.C. 7:26E-6.5 is excessive, virtually impossible to estimate and totally unnecessary based on the scope of work required on most service station and other petroleum cleanup projects. The workload required by industry and the Department to review such a report will once again, create unnecessary administrative work and delays. Particularly unnecessary is the requirement for industry to project the Department's time frame to review the project. Mobil Oil Corporation recommended that this entire section only apply to the Department's top priority sites operating under consent orders.

RESPONSE: It is the Legislature's mandate that the Department protect human health and the environment, and the monitoring of remediation activities is certainly a significant part of the Department's implementation of that mandate. Developing a remedial action work schedule and progress reports do not represent an extensive or time consuming process for responsible parties. The person conducting the remediation needs to have such a schedule for their own purposes to efficiently implement a remediation project. It would be important to know the timing of different aspects of the project for bidding and contracting purposes and, in addition to other things, making arrangements for the disposal of wastes generated by the remediation.

The preparation of progress reports need not be burdensome. Progress reports are an effective way to report a variety of technical or administrative questions or problems encountered during the remediation. It provides a conduit for communication between the Department and the person conducting the remediation which aids the timely completion of any remediation project. The reports may be short and simple, and are not usually time consuming to review.

It is important that work plan schedules include review time for both responsible party representatives, as well as the Department, to be complete and useful. The rule does not require industry to project the time needed for the Department's review, only to allow target time frames in the remediation action schedule for the Department's review.

1313. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following modifications to N.J.A.C. 7:26E-6.5(a)6: replace "... a critical patch schedule ..." with "... a critical path schedule ..."

RESPONSE: The Department has corrected this typographical error at N.J.A.C. 7:26E-6.5(a)6.

1314. COMMENT: Continental Vanguard, Inc., Atlantic Electric, Union Carbide Chemicals and Plastics Company, Inc. and E.I. du Pont de Nemours and Company commented that in N.J.A.C. 7:26E-6.5(a)9 and 10, the Department should establish an estimated time frame for its own review in order to give the individuals preparing the schedule some idea of what they can anticipate. Continental Vanguard, Inc. further commented that, considering the fact that the remediator must pay a fee to the state based on hours worked times an established rate, it would be most appropriate for the State to give some indication as to their own time frame requirements for the review process. In establishing an estimated time frame for reviews, the Department should consider establishing a threshold limit on each area of review. The responsible party to a remedial action must be given an estimate of both time and costs. Without some kind of ceiling or threshold, the costs to have the State oversee and review a project, especially a lengthy one, may have a negative economic impact, above and beyond the costs associated with carrying out the technical requirements and remedial actions. With the Department having unlimited time frames and associated costs, remediators would see the Department as a punitive force rather than as a consulting force as the proposal seeks to establish. Union Carbide Chemicals and Plastics Company, Inc. suggested that the Department's review time should not exceed 90 days.

1315. COMMENT: Chemical Land Holdings Inc. commented that N.J.A.C. 7:26E-6.5(a)10 should be revised to require an approximate time for obtaining waste classification from the Department. While it is reasonable for parties conducting remediation to recognize that time is required in the schedule for waste classification, it is not reasonable to require the exact time to receive a response from the Department or to hold the parties responsible for schedule delays related to prolonged Department waste classification efforts when no standard response period exists.

1316. COMMENT: Colonial Pipeline Company commented that these proposed regulations require that schedules, without dates, only time frames, be submitted pursuant to N.J.A.C. 7:26E-6.5(a). As part of the schedules, no time period for Department review is to be included. This is an unfair burden; if a remedial schedule must be developed, then all parties should be able to abide by the schedule.

RESPONSE: The issue raised by these comments is really one of how to best use the Department's limited resources in reviewing submittals. The Department is striving to conduct reviews as rapidly as possible. Complexities of the site and the quality of the submittals will affect the time it takes to review documents and therefore the establishment of regulatory time periods for review is not appropriate. However, it is in the Department's best interest to complete these reviews as expeditiously as possible so that the necessary remedial actions are implemented at a site as quickly as possible.

Response times for related Department approvals such as waste classification do not fall under the responsibility of these rules. N.J.A.C. 7:26E-6.5(a)10 simply requests that the responsible party consider the time needed to obtain waste classification information in the preparation of the remedial action schedule.

1317. COMMENT: The General Electric Company and Allied Signal, Inc. commented that the reporting of the percentage of the total number of all proposed remedial action tasks completed to date pursuant to N.J.A.C. 7:26E-6.5(b)1 is not a meaningful indication of progress toward completing remedial action and suggested the deletion of this reporting requirement.

RESPONSE: The Department agrees that the percent reporting requirement is ambiguous. Therefore, the Department has deleted that portion of N.J.A.C. 7:26E-6.5(b)1.

1318. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested modifying N.J.A.C. 7:26E-6.5(b)2 as follows: "All modifications shall be approved by the Department prior to enactment, unless made necessary by unforeseen field conditions and the change results in a remedy which is equal or more protective of human health and the environment than the approved remedy." Union Carbide Chemicals and Plastics Company, Inc. further commented that the Department's procedures require weeks of time for approval of any change. Delays in construction projects are extremely costly. Modifications which are equally or more protective should be allowed to be made in the field by the responsible party in response to unforeseen field conditions.

1319. COMMENT: Atlantic Electric and E.I. du Pont de Nemours and Company commented that the requirement at N.J.A.C. 7:26E-6.5(b)3 may delay remedial action. It was recommended the words "and shall be approved by the Department prior to the reporting period" be deleted. A mechanism where schedule changes are submitted and deemed to be acceptable unless disapproved by the Department is more practical and achievable.

1320. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. and the Chemical Industry Council of New Jersey suggested the deletion of the following from N.J.A.C. 7:26E-6.5(b)3: "Reporting of problems or delays in the remedial action workplan. A revised schedule shall be submitted as part of the progress report. The status of all permit applications shall be included in this schedule;" The requirement that the schedule be revised to reflect changes was apparently stated twice; the revision deletes one of the redundant statements. Responsible parties cannot be responsible for assuring that Department actions such as approving schedule changes prior to the reporting period. Also, the meaning of this requirement is unclear.

The Chemical Industry Council of New Jersey also commented that, as a practical matter, the Department will often need to approve or disapprove requests within one to two weeks of the request. The phrase "prior to the reporting period" is of concern because the Department often cannot respond this quickly. The Chemical Industry Council of New Jersey believes a mechanism where schedule changes are submitted, and deemed to be acceptable unless disapproved by the Department, is more practical and achievable. The Chemical Industry Council of New Jersey recommends deleting the words "shall be approved by the Department prior to the reporting period" from N.J.A.C. 7:26E-6.5(b)3.

RESPONSE: The Department agrees that the wording in N.J.A.C. 7:26E-6.5(b)3 is confusing and has amended this provision accordingly. Proposals to change workplan schedules are to be submitted to the Department for approval because the Department needs to be informed of delays in implementation of remedial actions to ensure that site remediation progresses in a timely manner.

1321. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the deletion of N.J.A.C. 7:26E-6.5(b)5. There is no reason identified for reporting this information to the Department. Requesting this information may be outside the statutory authority of the Department.

RESPONSE: The reporting of remediation activity costs is a valuable program statistic that indicates the amount of remediation that is being conducted in the state and the amount of remedial activities that is being monitored by the Department. Both the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 et seq., and the Spill Compensation and Control Act, N.J.S.A. 58:10-20.11(a), allow for the reporting of remediation costs. This information will also assist the Department in its future evaluation of the costs of implementing these rules when it considers amendments to this chapter.

1322. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested modifying N.J.A.C. 7:26E-6.5(b)7 as follows: "A listing of all types and quantities of hazardous waste generated during the reporting period as a result of the remediation." For active production facilities, the scope of the reporting should be limited to the actions related to the remediation, not to all the activities at the site. It is unnecessarily burdensome to report all historical waste data in each periodic report. The wastes to be reported should be limited to the hazardous wastes; non hazardous wastes such as sanitary wastewater, office trash, lawn clippings, etc. should not be reported.

RESPONSE: This regulation pertains to the remediation of discharges of hazardous waste, hazardous substances and pollutants and does not imply that all historical non-hazardous waste information should be reported. The Department has amended N.J.A.C. 7:26E-6.5(b)7 to include only those wastes generated by the remedial activities.

1323. COMMENT: Union Carbide Chemicals and Plastics Company, Inc. suggested the following modification to N.J.A.C. 7:26E-6.5(b)8: "Any additional support documentation that is available (e.g., photographs) shall be referenced and made available for agency review." Providing

all the available information is simply not necessary. The Department requests progress reports in triplicate. Reproduction of all the available reports, photographs, daily logs, checklists, etc. and transmitting this information to the agency is burdensome for the responsible parties and will create tremendous filing problems for the agency. Making the information available to agency personnel minimizes the cost, copying, and filing for all.

RESPONSE: The person responsible for conducting the remediation should apply sound judgment when deciding what documentation to submit. If the additional documentation is needed to support a "no further action" claim or justify a deviation from these rules then it should be submitted to the Department. If additional documentation is extraneous, then it does not need to be submitted.

N.J.A.C. 7:26E-6.6

1324. COMMENT: Chevron U.S.A., Inc., The General Electric Company and Allied Signal, Inc. commented that the Department should evaluate all submittal requirements in N.J.A.C. 7:26E-6.6 and delete all redundant submittal requirements. Additionally, the submittal requirements should be limited to those areas of a facility or site to which the remediation program is applicable. They should also be limited to those which the Department truly intends to look at, not might look at. In many instances the proposed regulation requires the submittal of the same or similar information more than once.

1325. COMMENT: The General Electric Company and Allied Signal, Inc. commented that N.J.A.C. 7:26E-6.6(b)1 is a redundant requirement; the Department will already have received a copy of the remedial investigation report. Given that remedial investigation reports can comprise many volumes, including "all the information contained in the remedial investigation report" will make the remedial action report voluminous and unwieldy. At most, a summary of the remedial investigation report should be included, similar to the requirement at N.J.A.C. 7:26E-6.2(a)2.

RESPONSE: In response to comments on this topic, the Department has modified the rule at N.J.A.C. 7:26E-6.6(b)1 to allow summaries of previously submitted reports to be acceptable pursuant to N.J.A.C. 7:26E-1.6(a). In addition, reports and supporting documentation are only necessary for the area(s) that are being remediated. It should be noted that unless a whole site or industrial establishment is investigated, a "no further action" approval by the Department will only apply to the area(s) that have completed the investigation/remediation process pursuant to these rules.

N.J.A.C. 7:26E-7

N.J.A.C. 7:26E-7.1

1326. COMMENT: CIBA-GEIGY Corporation commented that at N.J.A.C. 7:26E-7.1(a), a total of 31 "potential" State permits are identified. While only a few may be required for remediation, it is clear that the process will impede the cleanup. If the Department is interested in cleanup, it should develop a "Supra-Remediation Permit" which can be obtained from the remediation division and address all other relevant permit limitations.

1327. COMMENT: Chemical Land Holdings, Inc. commented that as with the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) Remedial Investigative/Feasibility Study process, parties conducting remediations should not be required to submit and obtain all applicable permits pursuant to N.J.A.C. 7:26E-7.1(b) as this would result in a more expeditious schedule for implementation of remediation.

1328. COMMENT: E.I. duPont de Nemours and Company, Public Service Electric & Gas, Ciba-Geigy Corporation, American Cyanamid Company, the Chemical Industry Council of New Jersey and Allied Signal, Inc. commended the Department for eliminating the requirement at N.J.A.C. 7:26E-7.1(a)31 that a Resource Conservation and Recovery Act Facility Permit be obtained at a site conducting a remediation pursuant to either an administrative consent order or a memorandum of agreement.

It was suggested that this concept be expanded to include all the Department permit requirements related to a remediation performed under Department oversight. The commenters stated that the permit applicant is placed in the difficult position of coordinating and meeting all the different permit requirements while completing a remediation that meets the remedial action approved by the Department. It was recommended that it be the responsibility of the Department to coordinate the permit application and review process of all non-State permitting authorities to ensure that the remedial action implemented meets all the Department's criteria.

The following modification to N.J.A.C. 7:26E-7.1(a) was recommended: "Any person conducting a remediation under Department oversight shall submit all Federal and local permit applications to the Department, which will submit the permit applications to the appropriate permitting authorities. All communication between the person conducting the remediation and the appropriate permitting authority shall be conducted through the Department."

RESPONSE: The commenter's rationale supporting the elimination of all Department permit requirements when a remedial action is being implemented at a site was that the Site Remediation Program case management team would be able to address the substance of permit requirements in the remediation activities. The same is not true for all other permits. Air pollution control, surface water pollution control and wetlands protection are, just to name a few, extremely diverse Department programs both technically and administratively. The Department is committed to improved coordination between the different arms of the Department and setting consistent program goals, but cannot expand the scope of this provision.

The commenters should be aware that the Environmental Management Accountability Package, P.L. 1991 c.423, states that permits that are required for site remediation work are a priority for the Department and requires certain time frames for their completion to ensure their timely issuance.

The Department is very interested in streamlining permitting activities to allow for timely remediation of contaminated sites, however, permits are mandated by other laws that cannot be superseded by this rule. It is important that the Department streamline and coordinate all necessary permitting functions to minimize the amount of time and resources that the regulated community has to expend in the process of remediating contaminated sites.

1329. COMMENT: Rutgers Environmental Law Clinic strongly opposed the abdication of the Department's responsibility pursuant to N.J.A.C. 7:26E-7.1(a)31, to thoroughly review new sources of hazardous emissions, particularly since there is no public right to notice and comment on the administrative consent orders or other oversight documents. The Department's decision to shift these decisions away from a formal permitting process removes the public from the process and circumvents the public's right to participate in this process. The Department must abandon its proposal to replace a formal and enforceable permitting process with public notice and comment with merely an approval of a document, perhaps an unenforceable document, in the case of a memorandum of agreement, without public input. Neighbors of a contaminated site are entitled to the same level of environmental protection and procedural due process as the neighbors of any other hazardous waste facility which must seek a permit from the Department and undergo thorough public scrutiny. The Department's attempt to eliminate the public's rights is totally irresponsible and must be rejected.

RESPONSE: The Department will still thoroughly review all pertinent technical information that would have been submitted for the Resource Conservation and Recovery Act Treatment, Storage, or Disposal facility permit which will result in site remediations that are protective of human health and the environment. The major difference is that the review will be conducted by the site remediation case team with the appropriate input from units in the respective permitting areas of the Department. The Department believes that this is a more efficient use of staff time and will result in more timely remediation of contaminated sites, which is the primary goal. A remedial action should not be delayed until a Resource Conservation and Recovery Act permit can be issued, as long as an appropriate waiver mechanism applies and adequate measures are taken to protect human health and the environment. The Environmental Protection Agency's Office of Solid Waste Emergency Response (OSWER) Policy Directive #9522.00-2 supports this approach.

The Department will continue to require all permits that are appropriate for site remediation activities. Permits provide the appropriate vehicle for controlling discharges to the environment by setting standards that are protective of human health and the environment.

The Department believes that community concerns must be taken into consideration during the remedial action process. This is why the Department requires that community concerns be part of the remedial alternative analysis process to evaluate remedial alternatives.

Furthermore, the community needs to be aware of all the proposed remedial activities in their community. It is not necessary to have the same level of community involvement on every site. Given the large universe of contaminated sites in New Jersey, the Department does not anticipate that remedial actions on every site will necessitate the extent of community participation that is currently seen at Superfund sites. The Department's priority sites are handled under administrative consent orders. As part of the administrative consent order, the Department can specifically require public notice and/or public meetings. However, for the non-priority sites, such a high level of community involvement may not be warranted. Should it be deemed appropriate for the non-priority sites, the Department can hold public meetings on the specific remedial action.

1330. COMMENT: Allied Signal, Inc. commented that it is commendable that the proposed rule at N.J.A.C. 7:26E-7.1(a) provide an easily-referenced list of potentially applicable permits. However, Allied Signal, Inc. stated that it was disappointing that the Department has not resolved the permitting bottleneck that plagues most Superfund sites under the Department's lead by requiring at N.J.A.C. 7:26E-7.1(b) that a person conducting a remedial action to apply for and obtain all required permits prior to initiating the remedial action. The National Contingency Plan (NCP) has for some time now waived the permit requirements for on-site Superfund site remediations, only requiring that the substantive requirements of the permits be fulfilled (40 CFR 300.400(e)). The commenter suggested that the proposed rules need to explicitly state that New Jersey will conform with the NCP by waiving permit requirements.

1331. COMMENT: The General Electric Company commented that the Department proposes to require at N.J.A.C. 7:26E-7.1(b) that parties performing remedial work to obtain all applicable State and local permits, even for on-site work. This is inconsistent with Federal policy under Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and would delay remediation at many sites. Even at non-CERCLA sites, the Department should only require attainment of State-level substantive standards, not any permit or other procedural requirements at the State or local level.

RESPONSE: The Department does not believe that the requirement to obtain all required permits is inconsistent with the Comprehensive Environmental Response Compensation and Liability Act or that the Department should not require a party to obtain State and local permits necessary to remediate contaminated sites. The Department refers the commenters to reponse to comments on N.J.A.C. 7:26E-1.1(b) for further detail.

Appendix A

1332. COMMENT: The Chemical Manufacturers Association commented that it has a problem with the Department's implicit incorporation of the Environmental Protection Agency (EPA) use of flagging codes to report data, or, as they are more commonly known, "J" codes at N.J.A.C. 7:26E-Appendix A. The EPA appears to be willing to use observations below the practical quantitation level (PQL) and use a "J" code to flag these observations. Quite often most of the data are flagged with a "J" code and a major portion of the risk assessment is based on these highly unreliable observations. The Chemical Manufacturers Association recommended that the industry practice of reporting only observations at or above PQLs be followed. Any values below PQLs should not be reported with numeric estimation or "J" codes.

RESPONSE: Currently, only the EPA Contract Laboratory Program (CLP) analytical methods specify the use of flagging codes such as the "J" code. The Technical Requirements for Site Remediation, N.J.A.C. 7:26E, which specify data deliverable package formats in Appendix A, only specify the use of flagging codes in those methods which currently have such codes (that is, only EPA CLP methods). The Department believes the reporting of data using flagging codes as done in EPA CLP analytical methods is both appropriate and beneficial. The use of "J" coded data allows for the reporting of analytes which are above method detection limits but below PQLs. While the Department does use "J" code data in risk assessments, such data is used knowing that the value of the analyte is an estimation. The Department treats "J" coded data in risk assessments in accordance with current EPA risk assessment guidelines.

1333. COMMENT: Chevron U.S.A., Inc. requested the source for each of the data deliverables formats in Appendix A be given to aid the generator of this information.

RESPONSE: The laboratory data deliverables formats contained in Appendix A are the required formats for all data generated pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. The person responsible for conducting the remediation does not need to go to any other source for information concerning laboratory data deliverables formats. For general information, however, the full and reduced laboratory data deliverables formats for Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) methods as contained in Appendix A of these rules were derived from the data deliverables formats specified by the EPA Contract Laboratory Program. The full and reduced laboratory data deliverables formats for non-USEPA/CLP methods as contained in Appendix A of these rules were derived from the New Jersey Professional Analytical Services Contract data deliverables formats and the various Tier I and Tier II data deliverables formats used by the Department's Site Remediation Program.

1334. COMMENT: Envirotech Research, Inc. recommended that the Department eliminate the requirement in Appendix A for internal chain of custody. Envirotech Research, Inc. stated a typical sample may change hands 40 or more times as analysis is conducted. To document each intralaboratory change of custody requires substantial administrative overhead, increased cost, slows laboratory turnaround time and provides little or no benefit.

1335. COMMENT: Laboratory Resources commented that there are logistic problems with maintaining an internal chain of custody for samples pursuant to N.J.A.C. 7:26E-Appendix A. In particular, Laboratory Resources noted that where operations continue for over more than two shifts, there is a problem as to how someone working on one of these shifts would be able to sign out and sign back a sample when the person whose samples were signed over is not there. Laboratory Resources noted that the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP), which is equally concerned with the security of samples, does not require this type of internal chain of custody. Instead, the EPA requires that a secure area must be demonstrated; that the area where the samples are stored is not accessible to the general public or some casual visitor to the laboratory. Laboratory Resources suggested that the Department follow the EPA approach.

1336. COMMENT: Ms. Ellen Pollack questioned why the Department is now requiring an internal chain of custody for incoming samples in N.J.A.C. 7:26E-Appendix A. She notes that this is a new requirement.

RESPONSE: An internal chain of custody is the means by which a laboratory documents all phases of sample handling from receipt to final analysis. The requirement to include internal chain of custodies in data deliverables is not new to the Department's programs. Internal Chain of custodies have been an integral part of (1) the Professional Laboratory Analytical Services contract and (2) the quality assurance requirements attached to the Department's Site Remediation Program engineering/ design and remedial investigation/feasibility study (RI/FS) contracts for publicly funded remediation projects for the better part of two years. The use of internal chain of custodies has proven to be a successful approach in fulfilling the sample documentation requirements with minimal logistical problems.

The Environmental Protection Agency (EPA) approaches the issue of chains of custodies in similar fashion. As stated by the EPA in the Contact Laboratory Program Statement of Work OLMO1.0:

The custody of (EPA) samples must be traceable from the time the samples are collected until they are introduced as evidence in legal proceedings. The Contractor shall have procedures ensuring that (EPA) sample custody is maintained and documented. A sample is under custody if:

- It is in your possession, or
- It is in your view after being your possession, or
- It was in your possession and you locked it up, or
- It is in a designated secure area. (Secure areas shall be accessible only to authorized personnel).

For documentation purposes, the Department believes that the use of internal chain of custodies is both consistent with EPA procedures and is the most effective way to accurately monitor the movement of samples through the laboratory. Therefore, the Department will not delete the requirement to include internal chain of custodies in data deliverables formats at N.J.A.C. 7:26E-Appendix A.

1337. COMMENT: The Chemical Industry Council of New Jersey stated it is not clear from N.J.A.C. 7:26E-Appendix A when full data

deliverables or reduced data deliverables should be requested from the laboratory.

RESPONSE: N.J.A.C. 7:26E-2.1(a)11 specifies the types of samples which require either full or reduced laboratory data deliverables.

1338. COMMENT: Envirotech Research, Inc. noted the proposed laboratory deliverables at Appendix A, Section I introduce a modification to the Environmental Protection Agency (EPA) Contact Laboratory Program (CLP) method by not allowing "clean" soil method blanks. Envirotech Research, Inc. recommended that the Department use the soil method blank requirements as currently contained in the EPA Contract Laboratory Program analytical methods.

RESPONSE: Clean soil method blanks for nonaqueous samples are not permitted by the Department. The extraction and/or analyis of "clean" soil used in a blank may either introduce contaminants unrelated to those found at the site, or introduce contaminants from exposure to a substance that would not come in contact with the sample itself. This has the potential to negatively impact the data usability.

The requirement at Appendix A, Section I should have very little effect on laboratory operations and have no negative economic impact on either the laboratory or regulated community. This requirement in no way constitutes the creation of another methodology. It does not add any additional steps to a method or pose any significant inconvenience. In fact, the laboratory actually will have one less operation to perform because the method blank will consist of performing the entire analytical procedure without any sample being present.

1339. COMMENT: The Chemical Industry Council of New Jersey requested the portion of Section 1 of Appendix A which states "Additionally, mass spectral negative proofs are required where applicable, clean soil method blanks for nonaqueous samples are not permitted" be clarified.

RESPONSE: The Department has modified Section I of Appendix A to clarify that mass spectral negative proofs are required where applicable and that clean soil method blanks for nonaqueous samples are not permitted.

1340. COMMENT: E.I. duPont de Nemours and Company commented that the reduced deliverables at Section III, Appendix A do not allow sufficient flexibility for remediation investigations. E.I. duPont de Nemours and Company stated that an inconsistency exists in reduced deliverables requirements between organics and inorganics in that organics requirements are virtually the same as full deliverables and the reduced deliverables for inorganics are limited to the Data Reporting Forms given in the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) Statement of Work (SOW).

E.I. du Pont de Nemours and Company proposed creating two levels of reduced deliverables which are subsets of EPA CLP SOW deliverable requirements. Level I would be composed of all required forms in the SOW. Other deliverables requirements would be as enumerated in N.J.A.C. 7:26E-2.1(a)11iii. Level II would include FORM I (Analysis Data Sheet) for organics and inorganics in addition to the requirements in N.J.A.C. 7:26E-2.1(a)11iii.

RESPONSE: EPA CLP methodologies are used in the Department's Site Remediation Program when defensible data of high quality are required. These methods give rise to data which, when submitted as full deliverables, allow for a complete validation of the data. Reduced laboratory data deliverables for EPA CLP methods were developed to moderately decrease the amount of materials submitted for review, while maintaining the Department's ability to perform a validation of the data without a significant compromise in the Department's ability to determine if the data are acceptable. The Department believes that other reductions in deliverables would result in a decrease in that confidence with a subsequent decrease in the value. (in terms of usability) of the data. Therefore, the Department will not consider further reductions in deliverables at this time.

1341. COMMENT: E.I. du Pont de Nemours and Company commented that there was an error in Section III.A, Appendix A because mass spectra are not required by the current Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) Statement of Work (SOW) for matrix spikes and matrix spike duplicates.

RESPONSE: While mass spectra for matrix spikes and matrix spike duplicates are not required under the current USEPA CLP Statements of Work, they are on occasion submitted as part of a full deliverable package. The reference that mass spectra for matrix spikes and matrix spike duplicates are not required is contained in Appendix A to reinforce the fact that they need not be submitted.

1342. COMMENT: E.I. du Pont de Nemours and Company proposed that in Section III, Appendix A, reduced data deliverables be extended to the Environmental Protection Agency (EPA) Contract Laboratory (CLP) Statements of Work (SOWs) for high and low concentration analyses using the reduced data deliverable format as proposed in an earlier comment. E.I. du Pont de Nemours and Company commented that reduced data deliverables are presently excluded for EPA CLP SOWs for high and low concentrations. E.I. du Pont de Nemours and Company stated reduced deliverables are appropriate in certain cases when high level wastes are analyzed.

RESPONSE: The Department has decided that data from EPA CLP High Concentration Organics and Inorganics Statements of Work may also be submitted in the reduced laboratory data deliverables format. As these High Concentration Statements of Work would be used in situations similar to those used for analyses using the EPA CLP Multi-Concentration Organics and Inorganics Statements of Work, the use of a reduced laboratory data deliverables format would be appropriate and acceptable. Therefore, Section III, Appendix A has been modified accordingly.

As stated in N.J.A.C. 7:26E-2.1(a)11i, "Full laboratory data deliverables shall be submitted for all potable water and polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans sample results." The EPA Contract Laboratory Program Statement of Work for Low Concentration Water for Organic Analysis, the EPA Contract Laboratory Program Statement of Work for Low Concentration Water for Volatile Organic Analysis, and the EPA Contract Laboratory Program Statement of Work for Low Concentration Water for Inorganic Analysis are used in conjunction with potable sampling events. Therefore, the Department does not believe it to be appropriate to allow a reduced data deliverable format for analyses using these EPA CLP Statements of Work.

1343. COMMENT: The Chemical Industry Council of New Jersey stated the reduced data deliverables package at Section IV, Appendix A is identical to current TIER II package under the Environmental Cleanup Responsibility Act (ECRA) regulations.

RESPONSE: The reduced laboratory data deliverables for non Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) methods was derived, in part, from the ECRA TIER II data deliverable format but it is not identical in content to the ECRA TIER II data deliverable format. This chapter replaces the previous Tier I and Tier II data deliverables formats.

1344. COMMENT: E.I. duPont de Nemours and Company stated that the method detection limit (MDL) as required in the data deliverable format in Section IV, Item 2A of Appendix A is used as a reporting threshold and recommended replacing "method detection limit" with "practical quantitation level or other quantitative reporting threshold appropriate for the method." E.I. duPont de Nemours and Company stated that the method detection limit is defined as a level at which an analyte may be detected at a level greater than zero with a high degree of confidence. Nothing in the definition or the prescribed method to measure MDL deals with reliable quantitation with known precision and accuracy. E.I. duPont de Nemours and Company noted that the Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) uses the contract-required quantitation limit (CRQL) as a reporting threshold. CRQLs for volatiles are 10 ug/L, while MDLs are predictably much lower. Quantitative reporting thresholds must not be set at MDL. Practical quantitation level (PQL), or something similar in concept, must be used as reporting threshold.

RESPONSE: The Department agrees with this comment concerning method detection limits (MDLs) and practical quantitation levels (PQLs). The Department also agrees that method PQLs should be included as part of the Analytical Results Summary. However, the Department believes that MDLs should remain as part of the Analytical Results Summary. The Department has modified Appendix A, Section IV, Item 2A accordingly.

1345. COMMENT: The Chemical Industry Council of New Jersey stated that for positive identification of compounds found, mass spectral matches and retention time matches should be included in the data deliverables package along with chromatograms at Section IV, Items 2D and 2H of Appendix A. In addition, the Chemical Industry Council of New Jersey noted there is also no mention of level of data review that will be required to assess the laboratory data.

RESPONSE: The Department agrees that retention time matches are needed to verify identification of compounds found. Section IV, Item 2D of Appendix A has been modified to include retention times for each analyte and surrogate as a requirement in both the initial calibration

summary and the continuing calibration summary. Additionally, Section IV, Item 2H of Appendix A has been modified to require all peaks on a chromatogram to be associated with retention times, either directly on the chromatogram or identified and cross-referenced in tabular form.

The Department is evaluating the inclusion of mass spectral matches in reduced data deliverables formats. Potential inclusion of this material in the reduced data deliverables formats pursuant these regulations will be addressed in future rulemaking.

It is the responsibility of the person conducting the remediation to ensure that analytical data used in all phases of remediation is of sufficient quality to meet the intended goal or objective of a specific project or activity. This is accomplished, in part, by the evaluation of analytical results and associated raw data to determine if the analysis was conducted in accordance with the specific analytical method used including all method specific quality control procedures. This evaluation process has been termed data validation.

N.J.A.C. 7:26E-3.10(b)3i specifies some data validation parameters that must be evaluated. In addition, N.J.A.C. 7:26E-2.2 specifies quality assurance and quality control procedures that must be addressed as part of every phase of remediation where analytical data are generated. Adherence to these procedures is the responsibility of the person responsible for conducting the remediation.

The Department is currently evaluating the possibility of expanding data validation requirements in these regulations. Any such new requirements will be part of future rulemaking efforts.

Appendix C

1346. COMMENT: General Electric Company and Allied Signal, Inc. commented that Appendix C is not titled; it includes the limited number of individual parameters for which New Jersey surface water quality criteria (N.J.A.C. 7:9-4) have been established and a large number of specific additional chemicals. The proposed rule will require analyses for these parameters over eight weeks of sampling for remedial investigations of surface waters and sediments (N.J.A.C. 7:26E-4.5(d)2i(1)(A)). Appendix C contains a list of target analytes which extends beyond those normally required for Superfund and Resource Conservation and Recovery Act site investigations. In addition to the major regulatory categories of contaminants (volatile organics, semivolatile organics, chlorinated pesticides and PCBs, and metals), the list contains a variety of other chemicals, including some which are only generically defined as a class, others which would require additional analytical methods and expense, and some for which performance data are not available for applicable methods. Performance of this program would be costly, particularly in light of earlier requirements for method validation. Comparable requirements for analyses of soil and groundwater samples are not included, so that the data base generated from these analyses would not be analogous to that for other media.

RESPONSE: The Department has deleted Appendix C to be consistent with modifications made to N.J.A.C. 7:26E-4.5 upon adoption.

Summary of Changes to N.J.A.C. 7:26E on Adoption:

1. The Department made a number of minor grammatical and typographical changes to the rule text.

2. The Department deleted the reference to N.J.S.A. 26:1A-45 et seq. in N.J.A.C. 7:26E-1.2 as it was an improper reference in the proposal.

3. The Department modified the language in N.J.A.C. 7:26E-1.3(a) to clarify that these rules were not intended to preclude "at risk" remediations, but rather that the rules form the basis of the Department's view of remediation activities conducted at a site in New Jersey.

4. The Department has modified and restructured N.J.A.C. 7:26E-1.4 to clarify that the Department only needs to be notified of remediation activities which involves sampling activities or remedial actions described at N.J.A.C. 7:26E-5.1(c). Further, The Department has clarified its intent to eliminate duplicative notifications to the Department regarding remediation activities. If the Department was already aware of the sampling activities or remedial action, then the person responsible for conducting the sampling activities or remedial action does not have to again notify the Department of these activities. Finally, the Department has added a new subsection (b) which allows for notifications of remediation activities made to the Department pursuant to N.J.A.C. 7:1E to satisfy the notification requirements of N.J.A.C. 7:26E-1.4(a) in emergency situations.

5. In N.J.A.C. 7:26E-1.4(b) (now recodified as subsection(d)), the address to which the notification was to be sent was corrected.

6. The Department has deleted the detailed certification requirements in N.J.A.C. 7:26E-1.5, as these requirements are set forth in detail in the programmatic rules through which documents prepared pursuant to N.J.A.C. 7:26E will be submitted to the Department. The Department has modified N.J.A.C. 7:26E-1.5(a) to reference that documents prepared in accordance with N.J.A.C. 7:26E shall be signed and certified pursuant to the procedures for Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C, the Underground Storage Tank rules, N.J.A.C. 7:14B and the Environmental Cleanup Responsibility Act rules, N.J.A.C. 7:26B. The requirement that documents prepared pursuant to N.J.A.C. 7:26E "shall contain the certification required by N.J.A.C. 7:26E-1.5" has been deleted throughout the rule text to be consistent with this change.

7. The Department has added language to N.J.A.C. 7:26E-1.6(a) which allows a report summary to be submitted if a full report was previously submitted to the Department pursuant to another regulatory program, and allows multiple reports prepared pursuant to N.J.A.C. 7:26E to be combined into a single report.

8. The Department has added the phrase "as specified throughout this chapter" at N.J.A.C. 7:26E-1.6(c) to clarify that the alternate sampling, analytical, or investigatory methods referred to therein may only be used as specified throughout N.J.A.C. 7:26E. In addition the Department has modified N.J.A.C. 7:26E-1.6(c) to clarify that alternate methods may be used pursuant to this section without Department pre-approval. The Department has further revised N.J.A.C. 7:26E-1.6(c)1 and 2 to clarify the process for later obtaining Department review and acceptance of an alternate method.

9. The Department has modified and restructured N.J.A.C. 7:26E-1.6(c)1 to 3 for clarity. The Department has added the word "or" at N.J.A.C. 7:26E-1.6(c)3i to clarify that in addition to meeting the requirements at N.J.A.C. 7:26E-1.6(c)3iii to vi, the alternate method must either be used and approved by the Department or reflective of current technology as documented in peer-reviewed journals.

10. The Department has added a new N.J.A.C. 7:26E-1.6(d) to set forth a procedure by which a party can request a variance from requirements in N.J.A.C. 7:26E. N.J.A.C. 7:26E-1.6(d)1 lists the information which must be included in a complete petition for a variance request. This information includes such things as the location of the site and the name and address of the person submitting the petition as well as a description of the site specific conditions and the technical basis for requesting the variance. The substantive criteria for approving a variance request is referred to in N.J.A.C. 7:26E-1.6(d)2 and is the same as the Department's substantive criteria for approving an alternate method pursuant to N.J.A.C. 7:26E-1.6(c).

11. In N.J.A.C. 7:26E-1.7(a)7, the Department has deleted the phrases "based on its review of data or other information submitted" and "conditions for which the data or information was submitted" and added the word "site" to clarify the provision.

12. In N.J.A.C. 7:26E-1.8, the Department added a definition of "acid extractable organic compounds" in order to better clarify and differentiate the terms "semivolatile organic compounds," "base neutral organic compound" and "acid extractable organic compounds."

13. The Department added a new definition of "applicable remediation standard" at N.J.A.C. 7:26E-1.8 to reflect the fact that the Department did not adopt the Cleanup Standards for Contaminated Sites, N.J.A.C. 7:26D. Throughout the rule, the Department has replaced "cleanup standard pursuant to N.J.A.C. 7:26D" with "applicable remediation standard."

14. In N.J.A.C. 7:26E-1.8, the Department added the phrase "including industrial process sewers" to the definition of "area of concern" to indicate that such sewers are considered an area of concern.

15. In N.J.A.C. 7:26E-1.8, the Department deleted the definition of the term "coastal wetland" as this term is not used in N.J.A.C. 7:26E.

16. In N.J.A.C. 7:26E-1.8, the Department added language to the definition of "CERCLA" to clarify that the Comprehensive Environmental Response, Compensation, and Liability Act was amended by the Superfund Amendments and Reauthorization Act of 1986. This change makes the definition consistent with the definition of "CERCLA" as contained in N.J.A.C. 7:26C.

17. In N.J.A.C. 7:26E-1.8, the Department added language to the definition of "Commissioner" to expand the definition to include the authorized representative of the Commissioner. This change makes this definition consistent with the definition of "Commissioner" as contained in N.J.A.C. 7:26C.

18. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "contaminant" by replacing the term "discharged" with the phrase "discharged by a person" to clarify that any of the referenced substances

do not become contaminants unless discharged. This change makes the definition consistent with the definition of "contaminant" as contained in N.J.A.C. 7:26C.

19. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "contaminanted site" by adding the phrase "at the site" and replacing the term "exceeds" with the phrase "fails to satisfy" to more accurately describe the Department's application of the narrative and numerical standards to a site. This modification makes the definition consistent with the definition of "contaminated site" as contained in N.J.A.C. 7:26C.

20. In N.J.A.C. 7:26E-1.8, the Department in the definition of "discharge" has deleted the phrase "including building interiors" to eliminate the confusion created by this phrase. The Department has also deleted the sentence "A discharge does not include a discharge pursuant to and in compliance with a valid State or Federal permit" to make the definition more closely track the statutory definition. These modifications make the definition consistent with the definition of "discharge" as contained in N.J.A.C. 7:26C.

21. The Department has corrected the definition of "ECRA" at N.J.A.C. 7:26E-1.8 by deleting the word "and."

22. The Department replaced the definition of "feasibility study" with "remedial alternative analysis" to emphasize that the Department is not requiring a Superfund type feasibility study. On adoption, the Department has deleted the phrase "feasibility study" from N.J.A.C. 7:26E and replaced it with the phrase "remedial alternative analysis" throughout these rules to be consistent with this change.

23. In N.J.A.C. 7:26E-1.8, the Department deleted the definition of the term "freshwater wetland" as this term is not used in N.J.A.C. 7:26E.

24. In N.J.A.C. 7:26E-1.8, the Department deleted the phrase "below the seasonally high water table" from the definition of "ground water" because the top of the zone of saturation and the seasonally high water table rarely coincide.

25. In N.J.A.C. 7:26E-1.8, the Department added a sentence to the definition of "highly permeable soils" to clarify that soils can be classified in the field using standard system texture analysis.

26. In N.J.A.C. 7:26E-1.8, the Department added a definition of "innovative and emerging treatment technology" to clarify its interpretation in N.J.A.C. 7:26E-5.

27. In N.J.A.C. 7:26E-1.8, the Department added a definition of "method detection limit" to clarify its interpretation in N.J.A.C. 7:26E.

28. In N.J.A.C. 7:26E-1.8, the Department deleted the phrase "owned managed, held in trust or otherwise controlled by the State" from the definition of "natural resources" to clarify that natural resources includes all natural resources in the State, whether they are on private or public property.

29. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "non-targeted compound" to clarify that a non-targeted compound is a compound as opposed to only a contaminant; and indicating that a system monitoring compound is not a non-targeted compound.

30. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "permanent remedy" by replacing the term "cleanup standard" with the term "remediation standard" and deleting the phrase "pursuant to N.J.A.C. 7:26D" to improve clarity and eliminate the reference to the Cleanup Standards for Contaminated Sites, proposed at N.J.A.C. 7:26D, which was not adopted by the Department.

31. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "person" by deleting the terms "and its agent," "or agent" and "and their agents," and added the term "estate" to eliminate any confusion caused by these phrases. These modifications make the definition consistent with the definition of "person" as contained in N.J.A.C. 7:26C.

32. In N.J.A.C. 7:26E-1.8, the Department added a definition of "practical quantitation level" to clarify its interpretation in N.J.A.C. 7:26E.

33. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "preliminary assessment" by replacing the terms "hazardous substances," "hazardous wastes," "hazardous constituents" and "pollutants" with the term "contaminants" as the replaced terms are all "contaminants." These changes make the definition consistent with the definition of "preliminary assessment" as contained in N.J.A.C. 7:26C.

34. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "receptor" to clarify that receptors are ecological components. Wells and structures are not receptors.

35. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "remedial action" to indicate that remedial action applies only to discharged contaminants; that the term includes the restoration of natural resources; and to be consistent with the definition of "remedial action" as contained in N.J.A.C. 7:26C.

36. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "remedial investigation" by replacing the phrase "is a process to determine the nature and extent of site" with the phrase "are actions to investigate" to clarify the definition. The Department also added the phrase "and to support the evaluation of remediation alternatives" as this activity is also important during the remedial investigation. These changes make the definition consistent with the definition of "remedial investigation" as contained in N.J.A.C. 7:26C.

37. In N.J.A.C. 7:26E-1.8, the Department modified the definition of "site investigation" by replacing the term "adequate" with the term "necessary" for clarity; replacing the term "exceeds" with the phrase "fails to satisfy" to more accurately describe the Department's application of the narrative and numerical standards to a site; and to be consistent with the definition of "contaminated site" as contained in N.J.A.C. 7:26C.

38. In N.J.A.C. 7:26E-1.8, the Department deleted the definition of "surface soil" as it was linked to the definition of "surface soil" which was proposed at N.J.A.C. 7:26D but was not adopted by the Department.

39. The Department has added a new N.J.A.C. 7:26E-1.11 to codify the Department's bias for action as detailed in the rule summary. Contaminant containment and/or stabilization should be a first priority during remediation.

40. N.J.A.C. 7:26E-2.1(a)1i has been clarified to state that for the analysis of any aqueous samples for a parameter or category of parameters for which laboratory certification exists pursuant to N.J.A.C. 7:18, or use of an analytical method for which laboratory certification exists pursuant to N.J.A.C. 7:18, the laboratory shall be certified for that specific parameter, category of parameters or analytical method pursuant to N.J.A.C. 7:18. This section also provides an exemption from Department laboratory certification if a laboratory is using Environmental Protection Agency Contract Laboratory Program analytical methods pursuant to N.J.A.C. 7:26E-2.1(a)1iii as adopted.

41. N.J.A.C. 7:26E-2.1(a)1ii and iii as proposed have been deleted. N.J.A.C. 7:26E-2.1(a)1iv has been modified and codified at N.J.A.C. 7:26E-2.1(a)1ii. This provision has been clarified to state that for the analysis of aqueous and non-aqueous samples using specific analytical methods contained in the third edition or most recent edition of EPA publication SW-846, "Test Methods for Evaluating Solid Waste" the laboratory shall be a Department Certified Laboratory as described in Table 2-1.

42. Table 2-1 has been expanded to include EPA publication SW-846 analytical methods for metals and cyanide. In addition, wording was deleted which had restricted the use of EPA publication SW-846 analytical methods to the analysis of non-aqueous samples.

43. A new N.J.A.C. 7:26E-2.1(a)1iii has been added upon adoption which addresses laboratory qualifications for the analysis of samples using Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical methods. This section states that for the analysis of samples using EPA CLP analytical methods, the laboratory shall be (1) a Department Certified Laboratory as described in Table 2-2; or (2) a participant in good standing in the EPA CLP for the applicable Statement of Work protocol as described in the contract the laboratory has with the EPA as of the date on which the laboratory is performing the analysis; or (3) a contract awardee for the applicable methods under Task IV of the version of the Professional Laboratory Analytical Services contract issued by the New Jersey Department of Treasury, Division of Purchase and Property, in effect as of the date on which the laboratory is performing the analysis.

44. A new table, Table 2-2, has been added upon adoption which matches a specific Environmental Protection Agency (EPA) Contract Laboratory Program (CLP) analytical method with the most comparable analytical method(s) for which Department laboratory certification currently exists.

45. N.J.A.C. 7:26E-2.1(a)1v has become N.J.A.C. 7:26E-2.1(a)iv upon adoption and has been clarified to state that for the analysis of aqueous and non-aqueous samples for parameters or categories of parameters not contained in N.J.A.C. 7:26E-2.1(a)1i through iii, or use of analytical methods not contained in N.J.A.C. 7:26E-2.1(a)1i through iii, the person responsible for conducting the remediation is also responsible for ensuring that the selected laboratory is capable of performing the analysis.

46. N.J.A.C. 7:26E-2.1(a)2 has been modified such that it corresponds with modifications made to N.J.A.C. 7:26E-2.1(a)1 upon adoption. N.J.A.C. 7:26E-2.1(a)2i through v as proposed have been deleted.

47. A new N.J.A.C. 7:26E-2.1(a)2i has been added upon adoption stating that if a laboratory is performing analyses pursuant to N.J.A.C. 7:26E-2.1(a)1i as adopted, the suspension or decertification of a laboratory for a given parameter, category of parameters or analytical method pursuant to the Department's laboratory certification program, N.J.A.C. 7:18, shall result in the rejection of all analytical data generated after the date of suspension or decertification for the given parameter, category of parameters or analytical method.

48. A new N.J.A.C. 7:26E-2.1(a)2ii has been added upon adoption stating that if a laboratory is performing analyses pursuant to N.J.A.C. 7:26E-2.1(a)1ii as adopted, the suspension or decertification of a laboratory for a given parameter, category of parameters or analytical method pursuant to the Department's laboratory certification program, N.J.A.C. 7:18, that is contained in Table 2-1 shall result in the rejection of all analytical data generated after the date of suspension or decertification for the comparable Environmental Protection Agency (EPA) publication SW-846 method listed in Table 2-1.

49. A new N.J.A.C. 7:26E-2.1(a)2iii has been added upon adoption stating that if a laboratory is performing analyses pursuant to N.J.A.C. 7:26E-2.1(a)1iii(1) as adopted, the suspension or decertification of a laboratory for a given parameter, category of parameters or analytical method pursuant to the Department's laboratory certification program, N.J.A.C. 7:18, that is contained in Table 2-2 shall result in the rejection of all analytical data generated after the date of suspension or decertification for the comparable Environmental Protection Agency Contract Laboratory Program analytical method listed in Table 2-2.

50. A new N.J.A.C. 7:26E-2.1(a)2iv has been added upon adoption stating that if a laboratory is performing analyses pursuant to N.J.A.C. 7:26E-2.1(a)1iii(2) as adopted, suspension of a laboratory by the Environmental Protection Agency (EPA) from the Contract Laboratory Program (CLP) for a given Statement of Work protocol or loss of a given EPA CLP contract shall result in the rejection of all data from the given EPA CLP Statement of Work protocol generated after the date of suspension or loss of contract.

51. A new N.J.A.C. 7:26E-2.1(a)2v has been added upon adoption stating that if a laboratory is performing analyses pursuant to N.J.A.C. 7:26E-2.1(a)1iii(3) as adopted, placement of a laboratory on non-engagable status by the New Jersey Department of Treasury for a given method under Task IV of the Professional Laboratory Analytical Services Contract or loss of a Professional Laboratory Analytical Services Contract shall result in the rejection of all data from the given method under Task IV of the Professional Laboratory Analytical Services Contract generated after the date of non-engagable status or loss of contract.

52. In N.J.A.C. 7:26E-2.1(a)3, the Department added the phrase "or approved" to indicate that analytical methods published or approved by organizations with recognized expertise in the development of standardized analytical methods shall be used for the analysis of samples collected pursuant to N.J.A.C. 7:26E.

53. In N.J.A.C. 7:26E-2.1(a)3, the Department added the United States Department of Defense and the United States Department of Energy as organizations with recognized expertise in the development of standardized analytical methods.

54. N.J.A.C. 7:26E-2.1(a)4 was modified to allow for analytical method development in those instances where a published or approved analytical method does not exist pursuant to N.J.A.C. 7:26E-2.1(a)3 for a specific contaminant or parameter in a specific sample matrix, or if a published or approved analytical method pursuant to N.J.A.C. 7:26E-2.1(a)3 is demonstrated to be inappropriate for the sample matrix being analyzed.

55. N.J.A.C. 7:26E-2.1(a)4 was modified to state that the responsibility of selecting and documenting analytical method development is with the person responsible for conducting the remediation and not with the laboratory.

56. N.J.A.C. 7:26E-2.1(a)5 was clarified to indicate that laboratories shall follow all quality assurance/quality control procedures specified in the analytical methods that are used.

57. In N.J.A.C. 7:26E-2.1(a)7, the Department deleted the phrase "no later than 24 hours after sample collection for a one day sampling effort, of if either overnight carrier is required or if sampling effort exceeds one day" as it was determined that a 24 hour handling time would place an added burden on the sample collector without significantly reducing potential sample contamination from field sources.

58. In N.J.A.C. 7:26E-2.1(a)9ii, the Department changed the definition of chromatographic peak separation such that inadequate peak separation is defined as a rise in baseline or interference by extraneous chromatographic peaks which interfere in the instrumental ability to correctly identify compounds and/or interfere with the integration of peak area and subsequent compound quantification.

59. In N.J.A.C. 7:26E-2.1(a)11iii(4), the Department added the phrase "practical quantitation level" as analytical method practical quantitation levels represent the lowest quantitation level of a given analyte in a given matrix that can be reliably achieved within specified limits of precision and accuracy of a given analytical method during routine laboratory operating conditions.

60. N.J.A.C. 7:26E-2.1(c)1 was expanded to allow sample analyses for organic compounds using non-gas chromatography methods when applicable.

61. In N.J.A.C. 7:26E-2.1(c)2ii, the Department changed the criteria for chromatographic peak resolution such that peak resolution is considered adequate when adjacent or coeluting chromatographic peaks do not result in retention time shifts causing misidentification, coeluting chromatographic peaks do not interfere with quantification of the contaminant's chromatographic peak, and matrix interferences as described in N.J.A.C. 7:26E-2.1(a)9ii as adopted are not present.

62. N.J.A.C. 7:26E-2.1(c)2iii was expanded to allow sample analyses for organic compounds using non-gas chromatography methods when applicable.

63. The Department added to Table 2-2 (recodified and adopted as Table 2-3) lead as a screening parameter for water suspected to be contaminated with leaded gasoline because lead is a significant component of leaded gasoline. This change will have minimal impact on the regulated community because most gasoline discharge investigations do not involve leaded fuel and, even if lead analysis is required, it is a relatively inexpensive test.

64. The Department removed from Table 2-2 (recodified and adopted as Table 2-3) total petroleum hydrocarbons analysis as a target parameter for water suspected to be contaminated with kerosene, jet fuel, #2 fuel oil or diesel fuel because water contaminated with these fuels is required to be analyzed for a broad range of specific petroleum constituents which will be adequate to detect any fuel contamination. Significant petroleum constituents will be detected using target compound analyses.

65. The Department modified Table 2-2 (recodified and adopted as Table 2-3) by deleting the phrase "and Unknown Hazardous Waste" to specify that the analytical requirements in the table apply only to waste oil and not unknown hazardous waste. Analytical requirements when contaminants in an area are unknown are already specified in N.J.A.C. 7:26E-2.1(c)4.

66. The Department added Target Analyte List (TAL) metals as an alternate analysis to Priority Pollutant metals specified for soil contaminated with waste oil at N.J.A.C. 7:26E-2.1(d), Table 2-2 (recodified and adopted as Table 2-3). This was done as TAL metals are substantially equivalent to the list of Priority Pollutant metals.

67. The Department modified footnotes 2 and 4 to Table 2-2 (recodified and adopted as Table 2-3) to clarify that, where Priority Pollutant volatile organics analysis is specified, xylene analysis will also be specified. This is required because xylene is not a listed Priority Pollutant volatile organic compound yet it is a constituent of the volatile organics fraction of petroleum products. The addition of xylene as a target parameter will not require a separate analysis. Furthermore, xylene is already typically analyzed as a target compound by most laboratories because it is known to be a common fuel constituent.

68. The Department modified footnote 3 to Table 2-2 (recodified and adopted as Table 2-3) to clarify that the analysis for tertiary-butyl alcohol (TBA) and methyl tertiary-butyl ether (MTBE) is required for tanks operational after 1969 and 1979 respectively, the dates these compounds were first used as additives to gasoline.

69. The Department modified footnote 5 to Table 2-2 (recodified and adopted as Table 2-3) to specify an acceptable approach for methylnaphthalene and dimethylnapthalene isomer quantitation.

70. The Department modified footnote 6 to Table 2-2 (recodified and adopted as Table 2-3) by deleting the requirement for the sole use of Environmental Protection Agency (EPA) method 418.1, modified for soil, for the analysis of total petroleum hydrocarbons in soil. It was not the Department's intent to limit total petroleum hydrocarbons analysis to modified EPA Method 418.1.

71. The Department modified footnote 6 to Table 2-2 (recodified and adopted as Table 2-3) to indicate that analysis for parameters other than

total petroleum hydrocarbons is required on 25 percent of the samples in which total petroleum hydrocarbons are detected.

72. The Department modified footnote 8 to Table 2-2 (recodified and adopted as Table 2-3) to indicate that analysis for total petroleum hydrocarbons is required for all samples and the analysis of polycyclic aromatic hydrocarbons is required on 25 percent of the samples that have a total petroleum hydrocarbons concentration in excess of 100 ppm.

73. The Department modified footnote 9 to Table 2-2 (recodified and adopted as Table 2-3) to specify that, for #2 Fuel Oil and Diesel Fuel, 25 percent of samples in which the total petroleum hydrocarbons level in soil exceeds 1,000 ppm must also be analyzed for volatile organics + 10 (VO+10). The 25 percent frequency is adequate because of the low occurrence of significant volatile organic contamination in soils contaminated with these fuels.

74. The Department added footnote 11 to Table 2-2 (recodified and adopted as Table 2-3) to clarify that analyses are required on all samples unless otherwise noted.

75. The Department added the phrase "so that a remediation standard can be developed" at N.J.A.C. 7:26E-2.1(e)2 to clarify why it is necessary to positively identify and accurately quantify the tentatively identified/unknown compounds.

76. N.J.A.C. 7:26E-2.2(a)1iii was expanded to include the submission of the Department laboratory certification number as this will allow for easier verification of a laboratory's certification status by the Department's Office of Quality Assurance.

77. In N.J.A.C. 7:26E-2.2(a)1iii, the phrase "This shall be updated if changes occur during the project" was added to be consistent with N.J.A.C. 7:26E-2.2(a)1iv.

78. In N.J.A.C. 7:26E-2.2(a)1v(2), the phrase "or frequency" was added to allow for the specification of the number of trip and field blanks as either an estimated number or as a calendar frequency.

79. A new N.J.A.C. 7:26E-2.2(a)1v(6) has been added upon adoption which requires, if proposed by the person responsible for conducting the remediation, the number of samples to be collected for matrix spike and matrix spike duplicate analyses be included in the Analytical Methods/Quality Assurance Summary Table of the Quality Assurance Project Plan.

80. N.J.A.C. 7:26E-2.2(a)2i was modified such that it incorporated by reference the project coordinator name and telephone requirements at N.J.A.C. 7:26E-2.2(a)1iv.

81. N.J.A.C. 7:26E-2.2(a)2ii was deleted as the Department determined that many of the requirements contained in N.J.A.C. 7:26E-2.2(a)2ii were excessive and would not enhance data quality, which is the primary purpose of a Quality Assurance Project Plan, compared to the requirements contained at N.J.A.C. 7:26E-2.2(a)1iv. Therefore, the Department deleted N.J.A.C. 7:26E-2.2(a)2ii and incorporated the requirements contained at N.J.A.C. 7:26E-2.2(a)1iv by reference into N.J.A.C. 7:26E-2.2(a)2i.

82. N.J.A.C. 7:26E-2.2(a)2v was deleted as the Department determined that the laboratory auditing requirement was redundant.

83. In N.J.A.C. 7:26E-3.1(c)1, the Department has replaced the phrase "area of a site" with "area of concern" to provide consistency throughout N.J.A.C. 7:26E and clarify the intent of the requirement.

84. In N.J.A.C. 7:26E-3.1(c)1i, the Department is deleting the phrase "the following" and adding the phrase "including, but not limited to the following" to encourage the use of other sources of information, in addition to those required, to obtain the necessary site history information to satisfy the requirements of N.J.A.C. 7:26E-3.1(c)1.

85. The Department has deleted N.J.A.C. 7:26E-3.1(c)1ii(4) because the requirement to obtain current addresses of each owner and operator is excessive and inconsistent with the intent of N.J.A.C. 7:26E-3.1, which is to identify the presence of any potentially contaminated areas of concern.

86. The Department has moved and recodified the requirement pursuant to N.J.A.C. 7:26E-3.4(d), to review inventory control records, to N.J.A.C. 7:26E-3.1(c)1v(9) where, as an activity relating to site history and operations, it is more appropriate. The requirement has also been modified to require an evaluation of inventory control records, unless a Department-approved leak detection system pursuant to N.J.A.C. 7:1E or N.J.A.C. 7:14B has always been in place and there is no discharge history.

87. In N.J.A.C. 7:26E-3.1(c)1vi, the Department has deleted the term "all" and added the phrase "at a frequency which provides the evaluator with a historical perspective of site activities" because the requirement, as proposed, was unclear and easily misinterpreted. In addition, the Department has replaced the phrase "when the site was naturally vegetated or farmland" with "1932" because, in many instances, aerial photographs reveal disposal activities which are not associated with industrial properties, but warrant further investigation. The year 1932 was selected because this is the earliest year for which aerial photographs for many areas of the state became widely available. Further, the Department has identified a repository with sufficient aerial photographic coverage to satisfy the requirement to review aerial photographs, when applicable.

88. In N.J.A.C. 7:26E-3.1(c)1ix, the Department has added the term "environmental" to clarify that only environmental sampling data need be evaluated.

89. In N.J.A.C. 7:26E-3.1(c)2, the Department has replaced the term "certifying" with "conducting" and eliminated the phrase "pursuant to N.J.A.C. 7:26E-1.5" because the Department has eliminated the certification requirements pursuant to N.J.A.C. 7:26E-1.5 from the rule.

90. The Department has divided N.J.A.C. 7:26E-3.2(a)3i, which required the submittal of both scaled historical and current site plans and facility as-built construction drawings, into two separate provisions (a)3i and ii and, in (a)3ii, added language to require the submittal of scaled historical site plans and facility as-built construction drawings, only if available. It was the Department's intent to require the submittal of scaled current site plans for every site, but historical site plans and facility as-built construction drawings only when they were available.

91. The Department has moved and recodified the requirement pursuant to N.J.A.C. 7:26E-3.10(b)2iii, to submit a copy of the United States Geological Survey (USGS) 7.5 minute topographic quadrangle that includes the site and an area of at least a one mile radius around the site, to N.J.A.C. 7:26E-3.2(a)3iii because this requirement provides valuable site location information to the Department at the preliminary assessment phase.

92. In N.J.A.C. 7:26E-3.2(a)4ii, the Department has deleted the phrase "pursuant to N.J.A.C. 7:26E-1.6(c)" because the reference to N.J.A.C. 7:26E-1.6(c) is inacurrate and a reference to another citation is not appropriate.

93. In N.J.A.C. 7:26E-3.2(b), the Department has deleted the sentence "Previous submissions or other previously completed work may satisfy specific items required for the preliminary assessment if approved in advance by the Department (for example, through the MOA process or an ECRA or UST approval)." because the sentence was confusing and rendered the intent of N.J.A.C. 7:26E-3.2(b) unclear. The remainder of N.J.A.C. 7:26E-3.2(b) is clear in its intent that the Department will determine the extent to which prior submissions or completions will satisfy the specific items required for the preliminary assessment and, if the Department approves such prior work in writing, then that work may be submitted as part of the preliminary assessment.

94. In N.J.A.C. 7:26E-3.3(b), the Department has replaced the term "developed" with "conducted" to more accurately reflect the Department's intent at N.J.A.C. 7:26E-3.3(b) that the site investigation shall be "conducted" based upon the information collected pursuant to the preliminary assessment requirements in N.J.A.C. 7:26E-3.1.

95. In N.J.A.C. 7:26E-3.3(b)2, the Department has added the phrase "if applicable" to require compliance with the building interior sampling requirements in N.J.A.C. 7:26E-3.5 only when the remediation of building interior is applicable to the site.

96. In N.J.A.C. 7:26E-3.3(b)4, the Department has added the phrase "if applicable" to require compliance with the ground water sampling requirements in N.J.A.C. 7:26E-3.7 only when the remediation of ground water is applicable to the site.

97. The Department has deleted all references to "wetlands" in N.J.A.C. 7:26E-3 because the investigation of wetlands as a receptor is inconsistent with the intent of subchapter 3 and is already addressed in subchapter 4. Wetlands which are identified as potentially contaminated areas of concern, like any other potentially contaminated area of concern, will be identified in the preliminary assessment. Wetlands which are identified in the preliminary assessment as a potentially contaminated area of concern must be sampled during the site investigation pursuant to the appropriate section of subchapter 3. N.J.A.C. 7:26E-3.6(a)7 already provides for the collection of saturated soils, therefore, no specific reference to wetlands in N.J.A.C. 7:26E-3 is required.

98. In N.J.A.C. 7:26E-3.3(b)5, the Department has added the phrase "if applicable" to require compliance with the surface water and sediment sampling requirements in N.J.A.C. 7:26E-3.8 only when the remediation of surface water and/or sediment is applicable to the site.

99. In N.J.A.C. 7:26E-3.4(a), the Department added the phrase "potentially contaminated" to clarify that sampling is only required for potentially contaminated areas of concern.

100. The Department has moved and recodified the requirement pursuant to N.J.A.C. 7:26E-3.4(d), to review inventory control records, to N.J.A.C. 7:26E-3.1(c)1v(9) where, as an activity relating to site history and operations, it is more appropriate. The requirement has also been modified to require an evaluation of inventory control records, unless a Department-approved leak detection system pursuant to N.J.A.C. 7:1E or 7:14B has always been in place and there is no discharge history.

101. In N.J.A.C. 7:26E-3.5(a), the Department has replaced the term "shall" with "may" to make the site investigation of building interiors voluntary as a minimum standard, except where contaminants inside the building are a source of contamination to the environment. The site investigation of building interiors may be required pursuant to other statutes. The Department has also reorganized N.J.A.C. 7:26E-3.5(a) to provide for a more logical progression through the requirements for the site investigation of building interiors.

102. In N.J.A.C. 7:26E-3.5(a)4, the Department added the phrase "in a wipe or chip sample" to specify the type of sample being evaluated when documenting that the contaminant present above the applicable remediation standard is not the result of a discharge.

103. In N.J.A.C. 7:26E-3.6(a)2iii, the Department has deleted the phrase "to first water or" to provide consistency with the Subsurface and Percolating Waters Act, N.J.S.A. 58:4A-4.1 et seq.

104. The Department has revised and reorganized N.J.A.C. 7:26E-3.6(a)4 to clarify the requirements when sampling for volatile organics in soil and added N.J.A.C. 7:26E-3.6(a)4iii which requires the use of a coring device when sampling for volatile organics, "if practicable," to allow greater flexibility for those instances when sampling with a coring device is not practical.

105. In N.J.A.C. 7:26E-3.7(b)4, the Department has added the term "soil" and replaced the phrase "site investigation" with "remedial action workplan approval" to state that a remedial action must meet the applicable remediation standard set forth at the time of the remedial action workplan approval.

106. The Department added the phrase "pursuant to N.J.A.C. 7:26E-1.16(c)" at N.J.A.C. 7:26E-3.7(c)2 to clarify that a party may use alternate ground water sampling methods without pre-approval during the site investigation.

107. In N.J.A.C. 7:26E-3.7(c)3i; the Department has replaced the term "tank" with the phrase "underground storage tank" to clarify that the requirement at N.J.A.C. 7:26E-3.7(c)3i to locate ground water sampling points in the excavation is specific to underground storage tanks.

108. In N.J.A.C. 7:26E-3.7(d)1, the Department has added the phrase "and shall be sampled pursuant to N.J.A.C. 7:26E-3.9(e)3" to provide sampling consistency throughout N.J.A.C. 7:26E-3 for all discharge and waste disposal systems and areas.

109. The Department has revised N.J.A.C. 7:26E-3.8(a) to clarify that surface water and sediment may be investigated as part of the remedial investigation if contamination is found in any other area of concern.

110. In N.J.A.C. 7:26E-3.8(b)2, the Department has replaced the phrase "site contaminants may have been discharged to surface water" with "surface water may have been impacted by contamination emanating from the site" as the trigger for conducting a surface water investigation. Unlike discharges to other soil or ground water, discharges to surface water may have no lasting effect; therefore, sampling in every instance of a discharge is not warranted.

111. In N.J.A.C. 7:26E-3.8(b)3, the Department has replaced the phrase "the sediments contain potential contaminants" with "sediments may have been impacted by contaminants emanating from the site" as the trigger for conducting a sediment investigation to clarify that sediments need only be investigated when contamination is believed to be associated with the site.

112. The Department has deleted the phrase "to verify tank integrity" at N.J.A.C. 7:26E-3.9(a)1i(2), because the integrity of a tank or tank system is not the purpose of the site investigation. The purpose of the site investigation is to determine if any contaminants are present at the site above any applicable remediation standard. In addition, in N.J.A.C. 7:26E-3.9(a)1i(2), the Department has added the phrase "[u]nless the tank has always been in compliance with N.J.A.C. 7:1E-2 and has no discharge history," to exempt tanks which have been in compliance with N.J.A.C. 7:1E-2 from this requirement. It is the Department's position that the requirements of N.J.A.C. 7:1E-2 adequately address the objectives of N.J.A.C. 7:26E-3.9(a)1i(2). In addition, the Department has added the sentence "If there is no evidence of contamination, samples shall be collected from the zero to six inch interval above the saturated zone" to provide guidance for the collection of samples when there is no evidence of contamination.

113. In N.J.A.C. 7:26E-3.9(a)1i(3), the Department has added the sentence "if there is no evidence of contamination, samples shall be collected at 9.5 to 10 feet" to provide guidance for the collection of samples where there is no evidence of contamination.

114. In N.J.A.C. 7:26E-3.9(a)3i, the Department has deleted the phrase "double-walled containment with" to exempt tanks which have leak detection per N.J.A.C. 7:14B and no discharge history from the requirement to identify any past or present discharges. It is the Department's position that the requirements of N.J.A.C. 7:14B adequately address the objectives of N.J.A.C. 7:26E-3.9(a)3i. In addition, the Department has moved the phrase "At least four soil borings or test pits around each tank shall be used" and subparagraphs (1) through (6) from N.J.A.C. 7:26E-3.9(a)3ii to 3.9(a)3i to better organize the requirements in N.J.A.C. 7:26E-3.9(a)3. The Department has also deleted the phrase "or to document the integrity of a tank system" herein doing so is not the purpose of a site investigation. The purpose of a site investigation is to determine if any contaminants are present at the site above any applicable remediation standard.

115. In N.J.A.C. 7:26E-3.9(a)3ii(2), the Department has deleted the phrase "assuming cylindrical tank configurations" to expand the sample frequency requirements to include non-cylindrical tanks.

116. The Department has deleted the reference to underground storage tanks at N.J.A.C. 7:26E-3.9(a)5i because the requirements in this provision apply to above ground tanks as well. The Department has also replaced the phrase "tested for integrity" with phrase "evaluated to identify any past or present discharges" because the purpose of a site investigation is not to determine the integrity of a tank but to determine if contaminants are present at the site above any applicable remediation standard.

117. In N.J.A.C. 7:26E-3.9(b)2ii and 3.9(e)1ii, the Department has replaced "400" with "900" because it was deemed excessive as a minimum standard and to provide consistency with the sample frequency specified in Subchapter 6.

118. The Department has modified N.J.A.C. 7:26E-3.9(c). The sentence "Active surface impoundments with impermeable liners which may be damaged as a result of sample collection shall have liner integrity verified by physical inspection and/or evaluation of monitoring well water quality data associated with the surface impoundment, if available." has been added to N.J.A.C. 7:26E-3.9(c), replacing the requirement at N.J.A.C. 7:26E-3.9(c)6 which has been deleted. The modifications provide alternatives for evaluating active surface impoundments with impermeable liners by methods other than the collection of a soil core.

119. In N.J.A.C. 7:26E-3.9(d)1, the Department has added the phrase "if there is reason to believe contaminants were discharged" to provide consistency with other area specific requirements.

120. The Department has deleted the requirement at N.J.A.C. 7:26E-3.9(d)4iv for additional sampling of sediments within the system to assess the migration of potential contaminants through the drainage network because it is beyond the scope of the site investigation. The requirements have been moved to subchapter 4 where more appropriate.

121. The Department has revised N.J.A.C. 7:26E-3.9(e)3ii to incorporate terminology used by the Department in other rules at N.J.A.C. 7:9A, which address septic disposal fields, and for technical accuracy.

122. The Department has replaced the phrase "soils or bedding material" at N.J.A.C. 7:26E-3.9(e)3ii(6) with "material to be sampled" since it is possible that the material to be sampled may not be classified as either soil or bedding material.

123. The Department added "cesspools" at N.J.A.C. 7:26E-3.9(e)3iii because cesspools are a specific unit used for wastewater disposal.

124. The Department has deleted the requirement for additional soil samples outside the pit walls at N.J.A.C. 7:26E-3.9(e)3iii(2) and (3) because the bottom sample specified at N.J.A.C. 7:26-3.9(e)3iii(1) is adequate to determine if a discharge has occurred.

125. In N.J.A.C. 7:26E-3.9(f), the Department has added the phrase "potentially contaminated" to clarify that sampling is only required for potentially contaminated areas of concern.

126. In N.J.A.C. 7:26E-3.10(b)2, the Department has replaced the phrase "area of a site" with "area of concern" to provide consistency throughout N.J.A.C. 7:26E and clarify the intent of the requirement.

127. The Department has moved and recodified the requirement pursuant to N.J.A.C. 7:26E-3.10(b)2iii, to submit a copy of the United States Geological Survey (USGS) 7.5 minute topographic quadrangle that includes the site and an area of at least a one mile radius around the site, to N.J.A.C. 7:26E-3.2(a)3iii because this requirement provides valuable site location information to the Department at the preliminary assessment phase.

128. Consistent with the deletion of all references to "wetlands" from N.J.A.C. 7:26E-3 as inconsistent with the intent of Subchapter 3, the Department has deleted N.J.A.C. 7:26E-3.10(b)2iv. The Department feels the investigation of wetlands as a receptor is inconsistent with the intent of the site investigation and should be performed in the remedial investigation.

129. The Department has added a subparagraph iii to N.J.A.C. 7:26E-3.10(c)3 which requires that soil/solids sample results be reported in milligrams per kilogram on a dry weight basis and aqueous sample results be reported in micrograms per liter to provide reporting consistency.

130. In N.J.A.C. 7:26E-3.10(c)5, the Department has added the term "if available" to require the submittal of stratigraphic cross sections only when they are already available. The Department believes this requirement is overly burdensome for the purposes of the site investigation; therefore, the submittal of stratigraphic cross sections will only be required when available.

131. In N.J.A.C. 7:26E-3.10(c)6, the Department has added the term "if applicable" to require the submittal of soil boring, piezometer, and monitoring well records only when these activities pertain to the site.

132. The Department has deleted N.J.A.C. 7:26E-3.10(c)7 to be consistent with the deletion and recodification of N.J.A.C. 7:26E-3.4(d) which required a review of inventory control records.

133. In N.J.A.C. 7:26E-3.10(d)2i, the Department has added the sentence "where an entire contaminant class is not detected or is below the applicable remediation standard, contaminants need not be listed individually" to provide more practical reporting requirements.

134. In N.J.A.C. 7:26E-3.10(d)2iv, the Department has added the sentence "Alternatively, individual maps may be submitted which have a common coordinate system and common scale, provided each map details the features of the base map in (d)1 above" to allow for greater flexibility when preparing the required site maps.

135. In N.J.A.C. 7:26E-4.1(a) a statement has been added clarifying that a remedial investigation is necessary at each area of concern in which the levels of contaminants exceed the applicable remediation standard.

136. Language has been added to N.J.A.C. 7:26E-4.1(a)4 to clarify that treatability, bench scale and pilot studies are not mandatory in all cases. However, if a study is to be completed it must be done during the remedial investigation phase of the remediation.

137. In N.J.A.C. 7:26E-4.2(a), the Department has replaced the term "shall" with "may" to make the remedial investigation of building interiors voluntary as a minimum standard, except where contaminants inside the building are a source of contamination to the environment. The remedial investigation of building interiors may be required pursuant to other rules such as N.J.A.C. 7:26B.

138. N.J.A.C. 7:26E-4.4(a)5iv (proposed as N.J.A.C. 7:26E-4.4(a)4i(4)) has been clarified to state that a remedial action must meet the applicable remediation standard set forth at the time of remedial action workplan or remedial action report approval.

139. N.J.A.C. 7:26E-4.4(f) has been deleted. This citation directly contradicted N.J.A.C. 7:26E-4.4(c).

140. N.J.A.C. 7:26E-4.4(f)5 (proposed as N.J.A.C. 7:26E-4.4(g)5) has been clarified to state that the "latest ASTM 2113" method is to be used when coring is conducted. The provision as proposed required rock coring be done with an outdated method.

141. N.J.A.C. 7:26E-4.4(f)5ix has been added to allow the submission of additional data and information if appropriate to the coring investigation.

142. N.J.A.C. 7:26E-4.4(f)6 has been added to clarify that the determination of the bedrock structure at the site may be accomplished through a field investigation or a literature search, if appropriate. Previously, this task was to be accomplished through the rock coring process described in N.J.A.C. 7:26E-4.4(f)5 (proposed as N.J.A.C. 7:26E-4.4(g)5).

143. In N.J.A.C. 7:26E-4.4(f)7i (proposed as N.J.A.C. 7:26E-4.4(g)7i) language has been added stating a well or piezometer must be surveyed relative to a permanent, on-site datum point. Previous language required the wells and piezometers to be surveyed to mean sea level which can be extremely expensive and unnecessary in some cases.

144. N.J.A.C. 7:26E-4.4(g)3ii(3) (proposed as N.J.A.C. 7:26E-4.4(h)3ii(3)) has been revised to more specifically define how to evaluate the ground water flow directions at a site in a tidally influenced area.

145. N.J.A.C. 7:26E-4.4(g)3iii(1) (proposed as N.J.A.C. 7:26E-4.4(h)3iii(1)) language has been added to clarify that a pump test is required when the person responsible for the remediation chooses to use a ground water pump and treat technology to remediate a site.

146. In N.J.A.C. 7:26E-4.4(g)3iii(2) (proposed as N.J.A.C 7:26E-4.4(h)3iii(2)) language has been added to clarify what information is required to be submitted to the Department "if" a ground water model is used. Previous language required a model to be used in every case.

147. In N.J.A.C. 7:26E-4.4(h)1i (proposed as N.J.A.C. 7:26E-4.4(i)1i) language has been added stating that initially a well search utilizing existing well records must be conducted. If the site is determined to be in a water use area and the potential exists for the off-site wells to be impacted, a physical, door-to-door well search would then be required.

148. In N.J.A.C. 7:26E-4.4(h)1ii, the Department added the words "If available" because the information specified may not be available in all cases.

149. In N.J.A.C. 7:26E-4.4(h)2 (proposed as N.J.A.C. 7:26E-4.4(i)2) the words "existing supply" have been added to more clearly define which wells are to be sampled. Previous language required "any" wells suspected of being contaminated be sampled, including wells no longer in use or accessible. The Department agreed with the commenters that this requirement was onerous in all situations.

150. N.J.A.C. 7:26E-4.4(h)4 (proposed as N.J.A.C. 7:26E-4.4(i)4) has been clarified to state that subsurface utilities and basements must be evaluated if they may be impacted by a vapor hazard as a result of ground water contamination.

151. In N.J.A.C. 7:26E-4.4(i) (proposed as N.J.A.C. 7:26E-4.4(j)) the statement "by volatile organic compounds" was added to clarify when a soil gas survey is to be conducted. Volatile organic compounds are the only compounds able to be monitored using this method.

153. N.J.A.C. 7:26E-4.5(a) has been revised to state that an investigation of surface water, wetlands or sediments must be completed if the area in question has been impacted from contaminants emanating from the site.

154. In N.J.A.C. 7:26E-4.5(b), wording has been added to reference the appropriate technical requirements for surface water, wetlands and sediment in N.J.A.C. 7:26E-3.4 and 4.1. Although "wetlands" is not referenced in N.J.A.C. 7:26E-3.4, media which may be present in wetlands (soil, sediment, surface water, ground water) are referenced there. N.J.A.C. 7:26E-3.4(b)2 has been deleted as it was no longer needed.

155. N.J.A.C. 7:26E-4.5(d)2i(1)(A) has been revised to delete the requirement for eight weeks of water quality sampling. The time table for when or how long sampling is required is now left up to the discretion of the person responsible for the investigation based on site specific conditions. In addition, all references to the sampling parameters listed in Appendix C have also been deleted. The sampling requirements are now consistent with the sampling parameter requirements pursuant to N.J.A.C. 7:26E-2.2.

156. N.J.A.C. 7:26E-4.6(c) has been modified to clarify that the contents of the landfill are to be characterized through a thorough file review, not sampled directly. As a minimum standard, characterizing the landfill by direct sampling would be overly expensive, onerous and in many cases dangerous.

157. N.J.A.C. 7:26E-4.8(b)2i has been modified to only require the submission of the telephone number of the project manager, rather than the entire project team. It is the project manager's responsibility to contact the rest of the project team.

158. N.J.A.C. 7:26E-4.8(b)3i has been modified to state that historic site plans are to be submitted if available after a due diligence search.

159. N.J.A.C. 7:26E-4.8(b)3ii has been modified to state that aerial photos must be provided at a scale suitable to determine the history of the site in question. The Department has further deleted the requirement that matte finished reproductions be provided to the Department.

160. In N.J.A.C. 7:26E-4.9(c)3i the Department added language to clarify how analytical results which are estimated, not detected, or for diluted samples should be averaged. The Department also clarified that clean zone sample may not be included in the average.

161. In N.J.A.C. 7:26E-4.9(c)3ii language has been revised regarding the appropriate format of a computerized data submittal to conform with the requests of the commenters. Tables 4-2 and 4-3 have also been revised accordingly. Further, the Department has clarified that submitting information in the database format is optional.

162. In N.J.A.C. 7:26E-4.9(d)2v, a statement has been added clarifying that a bedrock contour map is required only if sufficient data exists to do so.

163. In N.J.A.C. 7:26E-5.2(c)1ii, the word "potential" was deleted as the evaluation of remedial alternatives is based on actual contamination present at a site rather than potential contamination at a site.

164. In N.J.A.C. 7:26E-5.2(d)1ii, the word "potential" was deleted as the evaluation of remedial alternatives is based on actual contamination present at a site rather than potential contamination at a site.

165. In N.J.A.C. 7:26E-5.2(d)6, the phrase "if applicable" was deleted to clarify that the evaluation of remedial alternatives always includes an evaluation of community concerns.

166. In N.J.A.C. 7:26E-6.1(b)1 the Department has replaced the citation N.J.A.C. 7:26E-5.1(b) with N.J.A.C. 7:26E-5.1(c) to correct a typographical error in the rule. This clarification makes the requirement for the prior approval of a remedial action consistent with the requirement for remedial alternative analyses based on the implementation of a permanent remedy at a contaminated site.

167. In N.J.A.C. 7:26E-6.1(b)2 the Department replaced the word "achieve" with the words "comply with." The Department believes that the word "achieve" may be misleading in that it implies that every sampling point on a site would have to meet the standard. By replacing "achieve" with the words "comply with" the Department better describes the concept that compliance with remediation standards may involve other concepts such as concentration averaging, natural remediation or institutional controls.

168. The Department reworded N.J.A.C. 7:26E-6.1(b)4. The word "merely" in relation to the transfer of contaminants from one media to another was deleted. The section was further modified to clarify that the Department is concerned about the uncontrolled "or unpermitted" transfer of contaminants.

169. In N.J.A.C. 7:26E-6.1(b)5 the Department has replaced the language to clarify the intent of this requirement, describe the conditions when a reevaluation would be required, who would be required to conduct the reevaluation and to provide flexibility with regard to the frequency of site specific reevalautions. The Department included the following wording "Be reevaluated, as determined necessary by the Department, if contaminants remain on site after the remediation in excess of the site specific remediation standards. The reevaluation shall be conducted, at a frequency to be determined by the Department, by the person responsible for the remediation. The reevaluation shall determine, at a minimum, the continued adequacy of the chosen remedy, including the implemented institutional controls."

170. In N.J.A.C. 7:26E-6.1(c) the Department added a provision that clarifies that single phase remedial actions are acceptable to the Department when conducted in accordance with these rules.

171. In N.J.A.C. 7:26E-6.2 the Department reordered the sections required in the remedial action workplan to follow a more logical order which will make remedial action workplans easier to prepare and review.

172. In N.J.A.C. 7:26E-6.2(a)1 (recodified at N.J.A.C. 7:26E-6.2(a)3) the Department has added a "proposal to complete" to clarify that the remedial action workplan is essentially a proposal to conduct a remedial action pursuant to N.J.A.C. 7:26E.

173. N.J.A.C. 7:26E-6.2(a)6 was modified to require that remedial treatment units be included on the site map to make review of the project easier.

174. In N.J.A.C. 7:26E-6.2(a)4ii (recodified at N.J.A.C. 7:26E-6.2(a)9ii) the Department deleted the following requirements because they were too onerous as a minimum requirement and not appropriate for the workplan stage of remediation: measurement and daily logging procedures; field performance and destructive testing procedures; as built drawings and construction logs; and testing criteria for approval or rejection of the work conducted. The Department still will require inspection and professional engineer certification for applicable construction of on site remedial units.

175. In N.J.A.C. 7:26E-6.2(a)3 (recodified at N.J.A.C. 7:26E-6.2(a)10) the Department added the words "if applicable" to the requirement for the submission of a soil and sediment erosion control and monitoring plan. This section is now clear that such a plan is not required, if soil and sediment erosion is not a problem at a site.

176. In N.J.A.C. 7:26E-6.2(a)11 the Department deleted the requirement to provide a detailed description of the source and quality of backfill since this requirement is pertinent as a post remediation requirement.

177. In N.J.A.C. 7:26E-6.2(a)12 (recodified at N.J.A.C. 7:26E-6.2(a)13) the Department added the words "if applicable" to the requirement for the submission of a procedures for dismantling and removal of remedial structures and equipment, if one is not needed at a site.

178. In N.J.A.C. 7:26E-6.2(a)14 the Department combined items N.J.A.C. 7:26E-6.2(a)14 and (a)15 to clarify that remedial action schedules and progress reports are needed when the remedial action will exceed three months and when they are not needed if the remedial action is less than three months.

179. In N.J.A.C. 7:26E-6.3(b)1 and (b)6ii(1) the Department has added reference to the current American Petroleum Institute guidance to clarify the appropriate techniques that are required for the draining and cleaning of underground storage tanks and associated piping.

180. In N.J.A.C. 7:26E-6.3(b)4 has been clarified to require only one notification to the Department when a spill from an underground storage tank is detected.

181. In N.J.A.C. 7:26E-6.3(b)6i(2) the Department has provided additional detail to clarify underground tank removal and sampling procedures by specifying that both the excavation floor and sidewalls shall be examined for any physical evidence of soil contamination.

182. In N.J.A.C. 7:26E-6.3(b)6i(2)(A) the Department has provided additional detail to clarify that tanks containing volatile organics include: No. 2 fuel oil, diesel fuel, gasoline, kerosene, jet fuel and waste oil.

183. In N.J.A.C. 7:26E-6.3(b)6i(2)(B) the Department has included the requirements for tanks that did not contain volatile organics such as No. 4 and No. 6 fuel oil. The added requirement states that the excavation shall be examined visually for evidence of a discharge.

184. In N.J.A.C. 7:26E-6.3(b)6i(3) the Department has included requirements for sampling in a tank excavation if there is no evidence of a discharge such that sampling locations shall be at the bottom of the side walls since this would be the most likely contaminated area if a discharge had occurred. In addition, for clarity, this section refers the reader to N.J.A.C. 7:26E-6.4 if there is a discharge and remediation will occur.

185. The requirements to conduct asbestos abatement activities in accordance with the N.J.A.C. 5:23-8 the Asbestos Hazard Abatement Subcode has been deleted from N.J.A.C. 7:26E-6.3(c) as it was determined to be onerous as a minimum standard.

186. In N.J.A.C. 7:26E-6.4(a)2ii(1) the Department specified that samples must be collected from the top of each sidewall for excavations where the source of contamination was surface spills.

187. In N.J.A.C. 7:26E-6.4(a)2ii(2) the Department specified that samples must be collected from the bottom of each sidewall for every 30 linear feet of sidewall and one sample from the excavation bottom for every 900 square feet of bottom in excavations where the source of contamination was subsurface spills.

188. In N.J.A.C. 7:26E-6.4(a)2v the Department specified that each excavation within a larger excavation shall be considered a separate excavation and shall comply with N.J.A.C. 7:26E-6.4(a)2i through iv to ensure that adequate post-remediation sampling is conducted in these situations.

189. In N.J.A.C. 7:26E-6.4(a)2ii(2)vi the Department specified sampling requirements for tank excavations where soil has been removed to ensure that remediation is complete. Post remediation sampling shall be conducted immediately after contaminated soil removal at a frequency of one per five linear feet along the center line of each tank and at least two of the excavation sidewalls shall be sampled at the bottom of the side wall. In addition, if the excavation is enlarged horizontally beyond the immediate tank removal area, additional soil samples shall be taken pursuant to N.J.A.C. 7:26E-6.4(a)2ii(2)i through iv.

190. In N.J.A.C. 7:26E-6.4(b) the Department has added the flexibility for the person conducting a remediation to restore the site to conditions other than pre-remedial conditions if an alternative plan is approved by the Department.

191. In N.J.A.C. 7:26E-6.4(b)2 the Department has deleted the requirement that fill material must be of a similar soil type since fill with similar physical properties alone should suffice. In addition, the Department has added an exemption to allow a dissimilar fill type that may be used for new building foundations or other construction in remediated areas when it is warranted for construction design.

192. In N.J.A.C. 7:26E-6.4(b)2ii the Department has added that fill, for areas where the excavated material is not native material, at a minimum, have the permeability equal to or less than that of loam. This provides a reasonable minimum permeability for fill material without requiring that the person conducting a remediation to provide fill with the permeability of the non-native material which may be inappropriate.

193. In N.J.A.C. 7:26E-6.4(b)2v allows the person conducting a remediation to reuse uncontaminated fill elsewhere on site.

194. In N.J.A.C. 7:26E-6.4(c) the Department included the requirement that extraction wells must be sealed in accordance with N.J.A.C. 7:9-9 after the completion of remediation in addition to sealing monitoring wells.

195. In N.J.A.C. 7:26E-6.5(b)1 the Department removed the requirement to report the percent of the remedial action tasks completed from the progress report since this requirement was ambiguous and would not provide the Department with usable information.

196. In N.J.A.C. 7:26E-6.5(b)3 the Department deleted the phrase "prior to the reporting period" with regard to when problems or delays in the implementation of the remedial action workplan must be reported to the Department. Many commenters were confused by the logistics of the required reporting. As adopted the rule requires that a revised schedule with proposed correction be submitted to the Department for approval.

197. In N.J.A.C. 7:26E-6.5(b)7 the Department added the phrase "by the remedial action" to clarify that the Department requires the reporting of all types and quantities of waste generated by the remedial action in the progress report, and not other waste generated at a site during the reporting period.

198. In N.J.A.C. 7:26E-6.6(b)1 the Department clarified that a summary of the remedial investigation report may be submitted in the remedial action report.

199. In N.J.A.C. 7:26E-6.6(c) the Department modified the language to clarify that the remedial action report shall state for each area of concern either that no remediation was conducted or where remedial actions were completed the information at N.J.A.C. 7:26E-6.6(c)1 through 9 shall be provided.

200. In N.J.A.C. 7:26E-6.6(c)8 the Department added the words "fully executed" in regard to waste manifests since the manifest needs to document receipt of the waste at an acceptable receiving facility to document that the waste has been properly disposed.

201. The Department has modified the language in N.J.A.C. 7:26E-6.6(c)9 to clarify what detail is required for the any use restrictions. The Department requires the submission of a copy of the filed, Department approved, use restriction for the site.

202. In N.J.A.C. 7:26E-7.1(a)31 the Department has added clarification that Resource Conservation and Recovery Act Treatment Storage and Disposal Facility Permits will not be required for sites that have Department approval under the authority of the Environmental Cleanup Responsibility Act, the New Jersey Underground Storage of Hazardous Substances Act or State publicly funded projects. This will allow the Department to oversee these sites in a manner consistent with its oversight pursuant to Memorandums of Agreement or Administrative Consent Orders. The Department has the same oversight authority and control in Environmental Cleanup Responsibility Act or New Jersey Underground Storage of Hazardous Substances Act cases as it does in memorandums of agreement or administrative consent order cases. The omission of these types of cases at N.J.A.C. 7:26E-7.1(a)31 was inadvertent.

203. In Appendix A, Section 1, the Department added two footnotes which clarified the meaning of a mass spectral negative proof, and method blank requirements for non-aqueous samples.

204. The Department modified Appendix A, Section III, include EPA Contract Laboratory Program statements of work for high concentration organics and inorganics as these protocols and appropriate for the reduced data deliverable format.

205. In Appendix A, Section IV 2A, the Department added the reporting of analyte practical quantitation levels as part of the analytical results summary in order to better interpret the analytical results.

206. In Appendix A, Section IV 2D, the Department added the reporting of retention times for each target analyte and surrogate compound as part of the calibration summary as this information is necessary to verify instrument calibration.

207. In Appendix A, Section IV 2H, the Department added the requirement that all peaks on chromatograms be associated with retention times, either directly on the chromatogram or identified and cross referenced in tabular form in order to better review and interpret chromatograms.

208. Appendix C was deleted as the only reference to this appendix was deleted from N.J.A.C. 7:26E-4.5 upon adoption.

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

CHAPTER 26E
TECHNICAL REQUIREMENTS FOR SITE REMEDIATION

SUBCHAPTER 1. GENERAL INFORMATION

7:26E-1.1 Scope

(a) This chapter constitutes the minimum technical requirements to investigate and remediate contamination at any site.

(b) Any remediation performed pursuant to this chapter shall not relieve any person from:

1. Complying with more stringent requirements or provisions imposed by any other Federal, State or local applicable statutes or regulations; or

2. Obtaining any and all permits required by State, Federal or local statute or regulation, except as expressly provided herein.

(c) No provision of this chapter shall be construed to limit the Department's authority to require additional remediation based upon site-specific conditions in order to protect human health and the environment.

7:26E-1.2 Liberal construction

These rules, being necessary to promote the public health and welfare, shall be liberally construed in order to permit the Commissioner and the Department to effectuate the purposes of N.J.S.A. 13:1D-1 et seq., 13:1E-1 et seq., 13:1K-6 et seq., *[26:1A-45 et seq.,]* 58:10-23.11a et seq., 58:10A-1 et seq., and 58:10A-21 et seq.

7:26E-1.3 Applicability

(a) *[The requirements of this]* ***This*** chapter *[apply to any person conducting remediation at any site in New Jersey whether or not the Department is overseeing]* ***establishes the minimum technical requirements which form the basis of the Department's review of*** the remediation ***of any contaminated site in New Jersey***, including, without limitation, those sites and activities subject to:

1. The Environmental Cleanup and Responsibility Act (ECRA);
2. The New Jersey Underground Storage of Hazardous Substances Act (UST);
3. The Spill Compensation and Control Act;
4. The Solid Waste Management Act; and
5. The Water Pollution Control Act.

(b) Any person seeking Department review of work undertaken pursuant to this chapter shall:

1. Execute an oversight document with the Department pursuant to N.J.A.C. 7:26C;
2. Comply with the requirements of N.J.A.C. 7:26B; or
3. Comply with the requirements of N.J.A.C. 7:14B.

(c) For any site at which a particular phase of remediation was commenced prior to *[the effective date of this chapter]* ***July 1, 1993***, the Department may evaluate such work to determine whether the work is in substantial compliance with this chapter, and therefore acceptable to the Department.

7:26E-1.4 Notification

(a) *[Prior to the start of any remediation at a site pursuant to this chapter the]* ***The*** person responsible for *[implementing]* ***conducting*** the *[remedial action]* ***remediation*** shall notify the Department in writing *[and include the following information]* ***as follows***:

1. Prior to the initiation of any sampling activities at a site which is not already known to the Department pursuant to either a Department regulatory reporting requirement or Department oversight of the remediation; and

2. Prior to the implementation of a remedy described at N.J.A.C. 7:26E-5.1(c), unless the Department has been otherwise notified of the remedy selected pursuant to Department oversight of the remedial action.

(b) If the remediation is being conducted in response to an emergency situation, the notifications to the Department required pursuant to (a) above will be satisfied through compliance with N.J.A.C. 7:1E.

(c) The notification to the Department pursuant to (a) above shall be in writing and shall include the following information:*

1. The name and address of the person responsible for implementing the remedial action;
2. The name of the site;
3. The street address of the site;
4. The lot and block of the site;
5. A brief description of the current use and occupancy of the site;
6. The nature of the ***sampling activities or*** remedial action to be performed; and
7. The anticipated start date of the ***sampling activities or*** remedial action.

*[(b)]****(d)*** The information required pursuant to (a) above shall be submitted to:

Division of Responsible Party Site Remediation
[Bureau of Site Assessment]
Bureau of Field Operations
[CN-028] ***CN 407***
[401 E. State Street]
Trenton, NJ 08625***-0407***
Attention: Site Assessment

7:26E-1.5 Certifications

*[(a) Any person making a submission to the Department pursuant to this chapter shall include the following signatures and two-part certification pursuant to (b) and (c) below.

(b) The following certification shall be signed by the highest ranking individual with overall responsibility for implementing the investigation and/or remediation of a site:

"I certify under penalty of law that the information provided in this document is true, accurate and complete. I am aware that there are significant civil penalties for knowingly submitting false, inaccurate or incomplete information and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of any statute, I am personally liable for the penalties."

(c) The person designated in (c)2 below shall sign the following certification:

1. "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this application and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant civil penalties for knowingly submitting false, inaccurate or incomplete information and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of any statute, I am personally liable for the penalties."

2. The certification in (c)1 above shall be signed as follows:

i. For a corporation, by a person authorized by a resolution of the board of directors to sign the document. A copy of the resolution, certified as a true copy by the secretary of the corporation, shall be submitted along with the certification;

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

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

iv. For a natural person, by that person, provided that if the person is a minor, incompetent as defined under New Jersey law, or is deceased, the signatory should be the parent, guardian, executor, or court appointed representative, as applicable.]*

(a) If a document prepared pursuant to this chapter is to be submitted to the Department, it shall be signed and certified pursuant to N.J.A.C. 7:26C, 7:26B or 7:14B.

7:26E-1.6 Documenting compliance with the technical requirements

(a) All work being conducted at a site pursuant to this chapter, whether or not being done with Department oversight, shall be documented and included in reports which follow the format and contain the information required pursuant to the reporting sections of N.J.A.C. 7:26E-2 through 7 *[and shall contain the certifications required by N.J.A.C. 7:26E-1.5]*. ***If a report has already been submitted to the Department pursuant to another Department regulatory program, including but not limited to, N.J.A.C. 7:14B, 7:26B or 7:26C, then a summary of what was included in the previously submitted report may be submitted. The summary shall include a reference to the Department program to which the report was submitted and the date that it was submitted. Any reports prepared pursuant to this chapter may be combined into a single report.***

(b) When the remediation is conducted with Department oversight (see N.J.A.C. 7:26E-1.3 above), the person responsible for conducting the remediation shall submit workplans (if applicable) and reports pursuant to the schedule contained in the oversight document which the person executed with the Department pursuant to N.J.A.C. 7:26C, or as the Department requires pursuant to ECRA or UST. The workplan and/or report shall comply with the format and contain the information required pursuant to N.J.A.C. 7:26E-2 through 7.

(c) In order to provide flexibility in the technical requirements for site remediation described in this chapter, the Department has identified certain limited situations***, as specified through this chapter,*** when alternate sampling, analytical, or investigatory methods may be used ***without Department pre-approval***.

1. Such alternate methods may be used if the person responsible for conducting the remediation*[:

i. Documents]* ***documents*** in the applicable remedial phase report (that is, preliminary assessment, site investigation, remedial investigation, remedial action) rationale acceptable to the Department for using the alternate method*[; and

ii. The Department reviews and approves the alternate method*[.

2. The Department will review the documentation, either as part of the Department's oversight during the remediation or at a later time when the site becomes a Department priority for site remediation.

3. The Department will evaluate the alternate method in terms of its site-specific application, based upon the documentation provided and other appropriate information available to the Department, in terms of the extent to which the alternate method:

i. Has previously been either used successfully or approved by the Department in writing in other similar situations; ***or***

ii. Reflects current technology as documented in peer-review***ed*** professional journals; ***and***

iii. Provides results which are verifiable and reproducible;

iv. Can be expected to achieve the same results or objectives as the method which it proposes to replace;

v. Furthers the attainment of the goals of the specific remedial phase for which it is used; and

vi. Is consistent with the overall scheme of this chapter to ensure the remediation of contaminated sites in a manner which is protective of human health and the environment.

(d) Any person responsible for conducting the remediation may petition the Department for a variance from any of the requirements in N.J.A.C. 7:26E-2 through 6 inclusive pursuant to the procedural criteria in (d)1 below and the substantive criteria in (d)2 below. The petition shall include a request for use of an alternate approach to be utilized in place of the requirement for which the variance has been requested. The variance is not effective until it has been approved by the Department. The decision as to whether or not to grant the variance rests solely with the Department. The Department will review a petition for a variance pursuant to an oversight document executed in accordance with N.J.A.C. 7:26C, or

pursuant to the program requirements of N.J.A.C. 7:26B or 7:14B.

1. To petition for a variance from a requirement in N.J.A.C. 7:26E-2 through 6, the petitioner shall submit the following information to the Department at the address in the applicable oversight document or in accordance with the program requirements of N.J.A.C 7:26B or 7:14B prior to the utilization of the alternate approach:

i. The name and address of the person submitting the petition;

ii. The name and address of the person conducting the remediation;

iii. The names and addresses of the owner(s) and occupant(s) of the site which is the subject of the variance;

iv. The street address and all tax block and lot numbers of the site which is the subject of the variance;

v. A description of the proposed alternate approach;

vi. A description of site specific conditions applicable to the variance;

vii. The technical basis for the variance pursuant to (c) above; and

viii. Any other information or data the Department requests to thoroughly evaluate the petition.

2. The Department will evaluate the petition for a variance from the requirements of N.J.A.C. 7:26E-2 through 6 according to the same criteria as those listed in (c) above for approval of alternate methods.*

7:26E-1.7 Criteria for going beyond the minimum technical requirements

(a) The Department may require additional work beyond the minimum technical requirements set forth in this chapter for whenever necessary for the Department to ensure adequate protection of human health and the environment based upon a review of the following areas:

1. The number or magnitude of the discharge(s) being investigated;

2. The nature of the substances discharged;

3. A change in the certification or other authorization of the laboratory performing analyses previously submitted for the site in question or any other site;

4. The identification of additional exposure pathways not otherwise fully investigated pursuant to the minimum requirements;

5. The identification of additional receptors not otherwise fully investigated pursuant to the minimum requirements;

6. Distance to and sensitivity of receptors;

7. When the Department determines *[based on its review of data or other information submitted,]* that additional data or information is needed to fully evaluate the *[conditions for which the data or information was submitted]* ***site***; and

8. Any other site-specific conditions the Department identifies which necessitate the need for additional work.

7:26E-1.8 Definitions

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

***"Acid extractable organic compounds" means semivolatile compounds amenable to analysis by extraction of the sample with a pH acidic organic solvent. For the purposes of this chapter, analysis of acid extractable organic compounds means the analysis of a sample for either:**

1. Those priority pollutants listed as acid compounds in Appendix B, Table II of N.J.A.C. 7:14A; or

2. Those target compound list compounds which are phenol and phenolic compounds under the listing of semivolatile compounds in the version of the EPA Contract Laboratory Program Statement of Work for Organic Analysis, Multi-Media, Multi-Concentration in effect as of the date on which the laboratory is performing the analysis.

"Applicable remediation standard" means the numeric standard to which contaminants must be remediated for soil, ground water or surface water, or other environmental media, as provided by the Department pursuant to rule, including without limitation the Ground Water Quality Standards, N.J.A.C. 7:9-6, and Surface Water Quality Standards, N.J.A.C. 7:9-4, or as determined by the Department on a case-by-case basis.*

"Area of concern" means any existing or former location where hazardous substances, hazardous wastes, hazardous constituents or pollutants are or were known or suspected to have been discharged, generated, manufactured, refined, transported, stored, handled, treated, disposed, or where hazardous substances, hazardous wastes, hazardous constituents or pollutants have or may have migrated, including, but not limited to, all current and former:

1. Bulk storage tanks and appurtenances, including, without limitation:

i. Tanks and silos;

ii. Rail cars;

iii. Piping, above and below ground pumping stations, sumps and pits; and

iv. Loading and unloading areas;

2. Storage and staging areas, including:

i. Storage pads and areas;

ii. Surface impoundments and lagoons;

iii. Dumpsters; and

iv. Chemical storage cabinets or closets;

3. Drainage systems and areas, including, without limitation:

i. Building floor drains and piping, including trenches and piping from sinks that potentially received process waste;

ii. Roof leaders (when process operations vent to roof);

iii. Drainage swales and culverts;

iv. Storm sewer collection systems;

v. Storm water detention ponds and fire ponds;

vi. Surface water bodies;

vii. Leach fields; and

viii. Dry wells and sumps;

4. Discharge and disposal areas, including, without limitation:

i. Areas of discharges pursuant to N.J.A.C. 7:1E;

ii. Waste piles as defined by N.J.A.C. 7:26;

iii. Waste water treatment, collection and disposal systems, including, without limitation, septic systems, seepage pits and dry wells;

iv. Landfills;

v. Landfarms;

vi. Sprayfields; and

vii. Incinerators;

5. Other areas of concern, including, without limitation:

i. Electrical transformers and capacitors;

ii. Building material and insulation with asbestos;

iii. Building interiors including, without limitation:

(1) Floor drains;

(2) Trenches;

(3) Pits or sumps;

(4) Hazardous materials storage or handling areas;

(5) Equipment;

(6) Loading or transfer areas;

(7) Air vents and ducts;

(8) Areas around boilers/mechanical device areas;

(9) Transformers;

(10) Laboratory;

(11) Waste treatment areas; and

(12) Discolored areas or spill areas;

iv. Open areas away from production operations;

v. Areas with stressed vegetation;

vi. Other discharge areas;

vii. Underground piping ***including industrial process sewers***;

viii. Compressor vent discharges;

ix. Non contact cooling water discharges;

x. Areas that may have received floodwater or stormwater runoff from potentially contaminated areas; and

xi. Any other area suspected of containing contaminants;

6. Ground water areas of concern, including, without limitation, present or past regulated activities under the New Jersey Pollutant Discharge Elimination System (NJPDES) Discharge to Ground Water regulations, N.J.A.C. 7:14A, including: seepage pits; dry wells;

lagoons; and septic systems which received industrial waste; and

7. Surface water areas of concern, including, without limitation, all surface water areas and associated sediment which receive or may have received any point or non-point source discharge from the site.

"Base neutral organic compound" means semivolatile compounds amenable to analysis by extraction of the sample with a pH neutral and a pH basic organic solvent. For the purposes of this chapter, analysis of base neutral organic compounds means the analysis of a sample for either:

1. Those priority pollutants listed as base neutral compounds in Appendix B, Table II of N.J.A.C. 7:14A; or

2. Those target compound list compounds identified as semivolatiles except phenol and phenolic compounds in the version of the EPA Contract Laboratory rogram Statement of Work for Organic Analysis, Multi-Media, Multi-Concentration in effect as of the date on which the laboratory is performing the analysis.

["Coastal wetland" means any area defined as such pursuant to N.J.S.A. 13:9A-1 et seq.]

"CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ***by Superfund Amendments and Reauthorization Act of 1986*** (42 U.S.C. 9601 et seq.).

"Commissioner" means the Commissioner of the Department of Environmental Protection and Energy ***or his or her authorized representative***.

"Containment" or "containment activities" means actions to limit or prevent discharges or the spread of contamination.

"Contaminant" means any *[discharged]* hazardous substance, hazardous constituent, hazardous waste or pollutant ***discharged by a person***.

"Contaminated site" means all portions of environmental media ***at a site*** that contain one or more contaminants at a concentration which *[exceeds]* ***fails to satisfy*** any applicable *[cleanup]* ***remediation*** standard, and includes all contamination at an individual establishment, facility or other site, and all contamination which is emanating*,* or has emanated*,* therefrom.

"Contract laboratory program" or "CLP" means a program of chemical analytical services developed by the EPA to support CERCLA.

"Department" means the New Jersey Department of Environmental Protection and Energy.

"Department certified laboratory" means a laboratory that is currently certified pursuant to N.J.A.C. 7:18, the Regulations Governing Laboratory Certification and Standards of Performance, to perform laboratory analyses for a specific certification category and a specific parameter within the certification categories.

"Diligent inquiry" means:

1. Conducting a diligent search of all documents which are reasonably likely to contain information related to the object of the inquiry, which documents are in such person's possession, custody or control, or in the possession, custody or control of any other person from whom the person conducting the search has a legal right to obtain such documents; and

2. Making reasonable inquiries of current and former employees and agents whose duties include or included any responsibility for hazardous substances, hazardous wastes, hazardous constituents, or pollutants, and any other current and former employees or agents who may have knowledge or documents relevant to the inquiry.

"Discharge" means any intentional or unintentional act or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of a hazardous substance, hazardous constituent, hazardous waste or pollutant into the waters or onto the lands of the State, *[including building interiors;]* or into waters outside the jurisdiction of the State when damage may result to the lands, waters, or natural resources within the jurisdiction of the State. *[A discharge does not include a discharge pursuant to and in compliance with a valid State or Federal permit.]*

"ECRA" means the Environmental Cleanup *[and]* Responsibility Act, N.J.S.A. 13:1K-6 et seq.

"Environmental medium" means any component such as soil, air, sediment, structures, ground water or surface water.

"EPA" means the United States Environmental Protection Agency.

["Feasibility study" means a study to develop and evaluate options for remedial action. The feasibility study emphasizes data analysis and is generally performed concurrently and in an interactive fashion with the remedial investigation. The feasibility study process uses data gathered during the remedial investigation to develop conceptual remedial action alternatives based on the characterization of the nature and extent of contamination. The remedial investigation data are used to define the objectives of the remedial action and to develop remedial action alternatives. Next, an initial screening of these alternatives is conducted to reduce the number of alternatives to a workable number. Finally, the feasibility study involves an analysis for engineering, scientific, institutional, human health, environmental and cost factors of a limited number of alternatives which remain after the initial screening stage.]

"Fill material" means any material not indigenous to the site or area of concern including, but not limited to, non-homogeneous, unconsolidated material such as demolition debris, dredge spoils, or ash by-products of fossil fuels, which has been used as fill or as cover.

"Free product" means a separate phase material present in concentrations greater than a contaminant's residual saturation point.

["Freshwater wetland" means any area defined as such pursuant to N.J.S.A. 13:9B-1 et seq.]

"Full laboratory data deliverables" means those deliverables identified as follows:

1. For non-EPA/Contract Laboratory Program analyses, the regulatory format data deliverables listed in the version of the Professional Laboratory Analytical Services contract issued by the New Jersey Department of Treasury, Division of Purchase and Property in effect as of the date on which the laboratory is performing the analysis; and

2. For EPA/Contract Laboratory Program analyses, the deliverables listed in the EPA Contract Laboratory Program "Statement of Work" documents in effect as of the date on which the laboratory is performing the analysis as modified by specific requirements listed in Appendix A, incorporated herein by reference.

"Ground water" means the portion of the water beneath the land surface that is within the zone of saturation *[(below the seasonally high water table)]* where all pore spaces of the geologic formation are filled with
water.

"Hazardous constituent" means any substance defined as such pursuant to the Hazardous Waste Regulations, N.J.A.C. 7:26-8.16.

"Hazardous substance" means any substance defined as such pursuant to the Discharges of Petroleum and Other Hazardous Substances Regulation***s***, N.J.A.C. 7:1E.

"Hazardous waste" means any solid waste as defined in the Solid Waste Regulations, N.J.A.C. 7:26-1.4, that is further defined as a hazardous waste pursuant to the Hazardous Waste Regulations, N.J.A.C. 7:26-8.

"Highly permeable soils" means soils having less than 15 percent silts and/or clays. ***Soils may be classified in the field using a standard system texture analysis.***

"Impermeable" means a layer of natural and/or man-made material of sufficient thickness, density and composition so as to have a maximum permeability for water of 10^{-7} cm/sec at the maximum anticipated hydrostatic pressure.

"Innovative and emerging treatment technologies" means any developed technology for which performance information is limited or incomplete (innovative) or a technology in an early stage of development for which there is sufficient data to validate its basic concepts (emerging). An innovative treatment technology may have been successfully used at a limited number of contaminated sites but generally requires more extensive field testing and evaluation before it is considered a proven and readily available technology. An emerging treatment technology may have been successfully applied at a bench top or pilot scale level but has not yet been demonstrated to be effective at a full scale level.

"Landfill" means a sanitary landfill as defined pursuant to N.J.S.A. 13:1E-1 et seq.

"Method detection limit" or "MDL" means the minimum concentration of a substance that can be measured and reported with a 99 percent confidence that the analyte concentration is greater than zero and is determined from the analysis of a sample in a given matrix containing the analyte.

"Natural resources" means all land, biota, fish, shellfish, and other wildlife, *[biota,]* air, waters and other such resources *[owned, managed, held in trust or otherwise controlled by the State]*.

"Non-targeted compound" means a *[hazardous substance, hazardous waste, hazardous constituent or pollutant]* ***compound*** detected in a sample using a specific analytical method that is not a targeted compound, a surrogate compound***, a system monitoring compound*** or an internal standard compound.

"Oversight document" means any document defined as an oversight document pursuant to N.J.A.C. 7:26C.

"Permanent remedy" means a remedy resulting in chemical or biochemical transformation of the contaminant from a concentration that is above the then-applicable residential *[cleanup]* ***remediation*** standard *[pursuant to N.J.A.C. 7:26D]* to a concentration that is below the then-applicable residential *[cleanup]* ***remediation*** standard, such that no further action is required to ensure the contaminant remains at a concentration that is below the then-applicable residential *[cleanup]* ***remediation*** standard, or a remedy that allows the contaminant to be reused as a product. Permanent remedies for organic contaminants include, without limitation, thermal destruction, biotransformation, chemical oxidation, or vitrification. Permanent remedies are currently considered unavailable for metallic contaminants except where metal-contaminated media can be reprocessed or reused. If the applicable *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]* are amended, however, additional remediation may be necessary in order for a previously implemented "permanent remedy" to meet the amended *[cleanup]* ***remediation*** standard.

"Person" means any individual or entity, including without limitation, a public or private corporation, company, ***estate,*** association, society, firm, partnership, joint stock company***,*** foreign individual, or entity *[and its agents]*, interstate agency or authority, the United States, and any of its political subdivisions *[or agents]*, the State of New Jersey *[and its agents]*, or any of the political subdivisions of or found within the State of New Jersey *[and their agents]*, or any of the other meanings which apply to the common understanding of the term.

"Person responsible for conducting the remediation" includes any person who executes or is otherwise subject to an oversight document, and any person who is performing the remediation or has control over the person (for example, contractor or consultant) who is performing the remediation, including, without limitation, an owner or operator who is subject to either ECRA or UST.

"Pollutant" means any substance defined as such pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

"Practical quantitation level" or "PQL" means the lowest quantitation level of a given analyte that can be reliably achieved among laboratories within the specified limits of precision and accuracy of a given analytical method during routine laboratory operating conditions.

"Preliminary assessment" means the initial search and evaluation of existing site specific operational and environmental information to determine if further investigation concerning the documented, alleged, suspected or potential discharge of any contaminant is required by the Department. The preliminary assessment is the first phase in the process of determining whether *[hazardous substances, hazardous wastes, hazardous constituents or pollutants]* ***contaminants*** are present at a site.

"Priority pollutant plus 40" or "PP+40" means the priority pollutant list of 126 compounds and elements developed by the EPA pursuant to Section 307(a)(1) of the Clean Water Act and 40 non-targeted organic compounds detected by gas chromatography/mass spectroscopy (GC/MS) analysis. For the purposes of this chapter, a PP+40 scan means the analysis of a sample for all priority pollutants except asbestos and 2,3,7,8-tetrachloro-dibenzo-p-dioxin, and up to 15 non-targeted volatile organic compounds and up to 25 non-targeted semivolatile organic compounds as analyzed using GC/MS analytical methods. Non-targeted compound criteria shall be used pursuant to the version of the EPA "Contract Laboratory Program Statement of Work for Organic Analysis, Multi-media, Multi-concentration" in effect as of the date which the laboratory is performing the analysis.

"Quality assurance" means the total integrated program for assuring the reliability of monitoring and measurement data which includes a system for integrating the quality planning, quality assessment and quality improvement efforts to meet data end-use requirements.

"Quality assurance project plan" means a document which presents in specific terms the policies, organization, objectives, functional activities and specific quality assurance/quality control activities designed to achieve the data quality goals or objectives of a specific project or operation.

"Quality control" means the routine application of procedures for attaining prescribed standards of performance in the monitoring and measurement process.

"Receptor" means any human*[, ecosystem or part thereof, surface water, well (other than a monitoring well), structure (for example, basement)]* ***or other ecological component*** which is or may be affected by a contaminant from a contaminated site.

"Reduced laboratory data deliverables" means, for both EPA/Contract Laboratory Program and non-EPA/Contract Laboratory Program analyses, the laboratory data deliverables listed in Appendix ***[B]* *A, Sections III and IV***.

"Remedial action" means those actions taken at a contaminated site as may be specified in a decision document, record of decision or other document the Department determines appropriate. The term includes, but is not limited to, ***such*** actions at the location of a contaminated site *[in]* ***as*** compliance with the applicable *[cleanup]* ***remediation*** standards, storage, confinement, perimeter protection using dikes, trenches, or ditches, clay or other covers, neutralization, cleanup of ***discharged*** contaminants and associated contaminated materials, ground water pumping and treatment, recycling or reuse, diversion, destruction, segregation of wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, treatment, off-site transport and off-site storage, treatment, destruction, or secure disposition of contaminants and associated contaminated materials, or any monitoring required to assure that such actions protect *[the]* human health or the environment. The term includes the temporary or permanent relocation of residents and businesses and community facilities where the Department determines that, alone or in combination with other measures, such relocation is more cost-effective than, and environmentally preferable to, the transportation, storage, treatment, destruction, or secure disposition off-site of such contaminants, or may otherwise be necessary to protect the human health and the environment. ***The term includes the restoration of natural resources.***

"Remedial alternative analysis" means a study to develop and evaluate options for remedial action. The remedial alternative analysis emphasizes data analysis and is generally performed concurrently and in an interactive fashion with the remedial investigation. The remedial alternative analysis process uses data gathered during the remedial investigation to develop conceptual remedial action alternatives based on the characterization of the nature and extent of contamination. The remedial investigation data are used to define the objectives of the remedial action and to develop remedial action alternatives. Next, an initial screening of these alternatives is conducted to reduce the number of alternatives to a workable number. Finally, the remedial alternative analysis involves an analysis for engineering, scientific, institutional, human health, environmental and cost factors of a limited number of alternatives which remain after the initial screening stage.

"Remedial investigation" means *[a process to determine the nature and extent of site]* ***actions to investigate*** contamination and the problems presented by a discharge. The remedial

investigation emphasizes data collection and site characterization, and is generally performed concurrently and in an interactive fashion with the *[feasibility study]* ***remedial alternative analysis***. The remedial investigation includes sampling and monitoring, as necessary, and includes the gathering of sufficient information, to determine the necessity for remedial action ***and to support the evaluation of remediation alternatives***.

"Remedial phase" means a distinct component of the remediation process. Such components may include preliminary assessment, site investigation, remedial investigation, *[feasibility study]* ***remedial alternative analysis***, and remedial action.

"Remediation" means all necessary actions to investigate and cleanup any known or suspected discharge or threatened discharge of contaminants, including, without limitation, preliminary assessment, site investigations, remedial investigations, *[feasibility studies]* ***remedial alternative analyses***, and remedial actions.

"Semivolatile organic compounds" means compounds amenable to analysis by extraction of the sample with an organic solvent. For the purposes of this chapter, analysis of semivolatile organic compounds means the analysis of a sample for either:

1. Those priority pollutants listed as base neutral and acid compounds in Appendix B, Table II of N.J.A.C. 7:14A; or

2. Those target compound list compounds identified as semivolatiles in the version of the EPA Contract Laboratory Program Statement of Work for Organic Analysis, Multi-Media, Multi-Concentration in effect as of the date on which the laboratory is performing the analysis.

"Site investigation" means the collection and evaluation of data *[adequate]* ***necessary*** to determine whether or not contaminants exist at the site *[in excess of]* ***which fails to satisfy*** the applicable *[cleanup]* ***remediation*** standard*[s pursuant to N.J.A.C. 7:26D]*.

"Soil" means the unconsolidated mineral and organic matter on the surface of the earth that has been subjected to and influenced by geologic and other environmental factors.

"Spill Act" means the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11a et seq.

["Surface soil" means the top two feet of soil below existing grade.]

"Surface water" means water defined as surface water pursuant to the Surface Water Quality Regulations, N.J.A.C. 7:9-4.

"SWMA" means the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.

"Tank" means a stationary device designed to contain an accumulation of hazardous substances, hazardous constituents, hazardous wastes, or pollutants which is constructed of non-earthen materials (for example, concrete, steel, plastic) that provide structural support.

"Target analyte list" or "TAL" means the list of inorganic compounds/elements designated for analysis as contained in the version of the EPA Contract Laboratory Program Statement of Work for Inorganics Analysis, Multi-Media, Multi-Concentration in effect as of the date on which the laboratory is performing the analysis. For the purpose of this chapter, a Target Analyte List scan means the analysis of a sample for Target Analyte List compounds/elements.

"Targeted compounds" means a hazardous substance, hazardous waste, hazardous constituent or pollutant for which a specific analytical method is designed to detect that potential contaminant both qualitatively and quantitatively.

"Target compound list plus 30" or "TCL+30" means the list of organic compounds designated for analysis (TCL) as contained in the version of the EPA "Contract Laboratory Program Statement of Work for Organics Analysis, Multi-Media, Multi-Concentration" in effect as of the date on which the laboratory is performing the analysis, and up to 30 non-targeted organic compounds (plus 30) as detected by gas chromatography/mass spectroscopy (GC/MS) analysis. For the purposes of this chapter, a Target Compound List +30 scan means the analysis of a sample for Target Compound List compounds and up to 10 non-targeted volatile organic compounds and up to 20 non-targeted semivolatile organic compounds using GC/MS analytical methods. Non-targeted compound criteria shall be pursuant to the version of the EPA "Contract Laboratory Program Statement of Work for Organics Analysis, Multi-Media, Multi-Concentration" in effect as of the date on which the laboratory is performing the analysis.

"Tentatively identified compound" or "TIC" means a non-targeted compound detected in a sample using a GC/MS analytical method which has been tentatively identified using a mass spectral library search. An estimated concentration of the TIC is also determined.

"Unknown compound" means a non-targeted compound which cannot be tentatively identified. Based on the analytical method used, the estimated concentration of the unknown compound may or may not be determined.

"Underground storage tank" means any one or combination of tanks, including appurtenant pipes, lines, fixtures, and other related equipment, used to contain an accumulation of hazardous substances, hazardous constituents, hazardous wastes or pollutants, the volume of which, including the volume of the appurtenant pipes, lines, fixtures and other related equipment, is ten percent or more beneath the surface of the ground.

"UST" means the New Jersey Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq.

"Volatile organics" means organic compounds amenable to analysis by the purge and trap technique. For the purposes of this chapter, analysis of volatile organics means the analysis of a sample for either those priority pollutants listed as amenable for analysis using EPA method 624 or those target compounds identified as volatiles in the version of the EPA "Contract Laboratory Program Statement of Work for Organics Analysis, Multi-Media, Multi-Concentration" in effect as of the date on which the laboratory is performing the analysis.

"Waters" means the ocean and its estuaries to the seaward limit of the State's jurisdiction, all springs, streams and bodies of surface or ground water, whether natural or artificial, within the boundaries of this State.

"Wetland" means any freshwater or coastal wetland.

"WPCA" means the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

7:26E-1.9 Health and safety plan

Any person conducting remediation activities shall prepare a site-specific health and safety plan which shall be adhered to by all personnel involved in the remediation. The plan shall be in accordance with the most recently adopted and applicable general industry (29 CFR 1910) and construction (29 CFR 1926) standards of the Federal Occupational Safety and Health *[Administrative]* ***Administration*** (OSHA), U.S. Department of Labor, as well as any other Federal, State or local applicable statutes or regulations.

7:26E-1.10 Severability

If any section, subsection, provision, clause or portion of these regulations is adjudged invalid or unconstitutional by a court of competent jurisdiction, the remainder of these regulations shall not be affected thereby.

***7:26E-1.11 Bias for action**

As a first priority during remediation, contaminants in all media should be contained and/or stabilized to prevent contaminant exposure to receptors and to prevent further movements of contaminants through any pathway.*

SUBCHAPTER 2. QUALITY ASSURANCE FOR SAMPLING AND LABORATORY ANALYSIS

7:26E-2.1 Quality assurance requirements

(a) The person responsible for conducting the remediation shall ensure that the following quality assurance procedures shall be followed for all sampling and laboratory analysis activities.

1. Laboratories performing *[analysis]* ***analyses*** shall conform to the following:

i. For the analysis of ***any*** aqueous samples ***for a parameter or category of parameters for which laboratory certification exists pursuant to N.J.A.C. 7:18 except for that provided in 2(a)1iii below,***

or use of an analytical method for which laboratory certification exists pursuant to N.J.A.C. 7:18*, the laboratory shall be *[a New Jersey Certified Laboratory for all]* ***certified for that specific*** parameter*[s or appropriate]***,*** category of parameters ***or analytical method*** *[for which analysis will be performed for which certification exists]* pursuant to N.J.A.C. 7:18;

*[ii. For the analysis of aqueous and non-aqueous samples for applicable organics and inorganics including polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans, the laboratory shall be a participant in good standing in the EPA Contract Laboratory Program (CLP) for the applicable Statement of Work protocol as described in the version of the EPA Contract Laboratory Program "Invitation for Bid" (IFB) contract documents in effect as of the date on which the laboratory is performing the analysis;

iii. For the analysis of aqueous and non-aqueous samples for applicable organics and inorganics, the laboratory shall be a contract awardee able to perform sample analyses in the applicable analytical task under the version of the Professional Laboratory Analytical Services contract issued by the New Jersey Department of Treasury, Division of Purchase and Property, in effect as of the date on which the laboratory is performing the analysis;]*

*[iv.]****ii.*** For the analysis of non-aqueous samples *[for selected organics and inorganics]* using ***specific analytical*** methods contained in the ***third edition or most recent*** edition of EPA Publication SW-846, "Test Methods for Evaluating Solid Waste" *[in effect as of the date on which the laboratory is performing the analysis]*, the laboratory shall be a New Jersey Certified Laboratory *[which is certified in a specific category of analysis]* as described in Table 2-1; or

iii. For the analysis of samples using USEPA Contract Laboratory Program (CLP) analytical methods, the laboratory shall be:

(1) A New Jersey Certified Laboratory as described in Table 2-2; or

(2) A participant in good standing in the USEPA CLP for the applicable Statement of Work protocol as described in the contract the laboratory has with the USEPA as of the date on which the laboratory is performing the analysis; or

(3) A contract awardee for the applicable methods under Task IV of the version of the Professional Laboratory Analytical Services contract issued by the New Jersey Department of Treasury, Division of Purchase and Property, in effect as of the date on which the laboratory is performing the analysis;*

*[v.]*****iv.*** For the analysis of aqueous and non-aqueous samples for *[contaminants/parameters not applicable to]* ***parameters or categories of parameters not contained in*** (a)1i through *[iv]* ***iii*** above, the person responsible for conducting the remediation is also responsible for ensuring that the selected laboratory is capable of performing the analysis.

TABLE 2-1

Laboratory Requirements
for *[Non-Aqueous]* Sample*[s]* Analysis
Using Selected USEPA SW-846 Analytical Methods

USEPA SW-846 Analytical Method	Required NJDEPE Drinking Water or Water Pollution method/category certification
8240—Volatile Organics by GC/MS	624 or 524.1 or 524.2
8250, 8270—Semivolatile Organics by GC/MS	625 or 525
8080—Organochlorine Pesticides and PCBs by GC	608 or 508 or 505 or "Organochlorine Pesticides—Drinking Water" or "Pesticides—Water Pollution"
8010—Halogenated Volatile Organics by GC	601 or 502.1 or 502.2 or "Trihalomethanes—Drinking Water"
8020—Aromatic Volatile Organics by GC	602 or 502.2 or 503.1
8120—Chlorinated Hydrocarbons by GC	612
8150—Chlorinated Herbicides by GC	515.1 or "Chlorophenoxy Acid Herbicides"
***6010—Metals by ICP**	**Specific Metal by ICP**
Various Methods—Metals by AA Furnace	**Specific Metal by Graphite Furnace**
Various Methods—Metals by Flame AA	**Specific Metal by AA**
7471—Mercury by Cold Vapor	**Mercury—Cold Vapor**
Various Methods—Cyanide	**Cyanide***

***TABLE 2-2**

Laboratory Requirements for Sample Analysis
Using USEPA Contract Laboratory Program Analytical Methods

USEPA CLP Statement of Work	Required NJDEPE Drinking Water or Water Pollution Method/Category Certification
1. Organics Analysis, Multi-Media, Multi-Concentration	**624[1] or 524.1[1] or 524.2[1] and 625[2] or 525[2] and 608[3] or 508[3] or 505[3] or "Organochlorine Pesticides—Drinking Water"[3] or "Pesticides—Water Pollution"[3]**
2. Organics Analysis, Multi-Media, High Concentration	**624[1] or 524.1[1] or 524.2[1] and 625[2] or 525[2] and 608[3] or 508[3] or 505[3] or "Organochlorine Pesticides—Drinking Water"[3] or "Pesticides—Water Pollution"[3]**
3. Low Concentration Water for Organic Analysis	**524.1[1] or 524.2[1] and 625[2] or 525[2] and 608[3] or 508[3] or 505[3] or "Organochlorine Pesticides—Drinking Water"[3] or "Pesticides—Water Pollution"[3]**
4. Low Concentration Water for Volatile Organic Analysis	**524.1[1] or 524.2[1]**
5. Inorganics Analysis, Multi-Media, Multi-Concentration	**Al, Sb, Ba, Be, Cd, Ca, Cr, Co, Cu, Fe, Mg, Mn, Ni, K, Ag, Na, V, Zn by ICP and As, Pb, Se, Tl by Graphite Furnace and Hg by Cold Vapor and CN**

6. Inorganics Analysis, Multi-Media, High-Concentration	**Al, Sb, Ba, Be, Cd, Ca, Cr, Co, Cu, Fe, Mg, Mn, Ni, K, Ag, Na, V, Zn by ICP and As, Pb, Se, Tl by Graphite Furnace and Hg by Cold Vapor and CN**
7. Low Concentration Water for Inorganic Analysis	**Al, Sb, Ba, Be, Cd, Ca, Cr, Co, Cu, Fe, Mg, Mn, Ni, K, Ag, Na, V, Zn by ICP and As, Pb, Se, Tl by Graphite Furnace and Hg by Cold Vapor and CN**

[1]Required for the analysis of volatile organics
[2]Required for the analysis of semi-volatile organics
[3]Required for the analysis of pesticides and PCBs*

2. The Department shall reject *[all applicable]* analytical data *[generated after the date of]* ***as follows***:

*[i. Decertification or suspension of a laboratory by the Department pursuant to N.J.A.C. 7:18;

ii. Suspension of a laboratory by the EPA from the Contract Laboratory Program;

iii. Loss of a Contract Laboratory Program contract;

iv. Placement of a laboratory on non-engagable status by the New Jersey Department of Treasury for the Professional Analytical Services contract; or

v. Loss of the Professional Analytical Services Contract.]*

i. For laboratories performing analyses pursuant to (a)1i above, decertification or suspension of a laboratory pursuant to N.J.A.C. 7:18 for any given parameter, category of parameters or analytical method shall result in the rejection of all analytical data for that given parameter, category of parameters or analytical method generated after the date of decertification or suspension.

ii. For laboratories performing analyses pursuant to (a)1ii above, decertification or suspension of a laboratory pursuant to N.J.A.C. 7:18 for any given parameter, category of parameters or analytical method contained in Table 2-1 shall result in the rejection of all analytical data from the comparable USEPA Publication SW-846 analytical method generated after the date of decertification or suspension.

iii. For laboratories performing analyses pursuant to (a)1iii(1) above, decertification or suspension of a laboratory pursuant to N.J.A.C. 7:18 for any given parameter, category of parameters or analytical method contained in Table 2-2 shall result in the rejection of all analytical data from the comparable USEPA Contract Laboratory Program (CLP) analytical method generated after the date of decertification or suspension.

iv. For laboratories performing analyses pursuant to (a)1iii(2) above, suspension of a laboratory by the USEPA from the Contract Laboratory Program for a given Statement of Work protocol or loss of a given USEPA Contract Laboratory Program Contract shall result in the rejection of all data from the given USEPA Contract Laboratory Program Statement of Work protocol generated after the date of suspension or loss of contract.

v. For laboratories performing analyses pursuant to (a)1iii(3) above, placement of a laboratory on non-engagable status by the New Jersey Department of Treasury for a given method under Task IV of the Professional Laboratory Analytical Services Contract or loss of a Professional Laboratory Analytical Services Contract shall result in the rejection of all data from the given method under Task IV of the Professional Laboratory Analytical Services Contract generated after the date of non-engagable status or loss of contract.*

3. Except as provided in (a)4 below, analytical methods used shall have been published ***or approved*** by organizations with recognized expertise in the development of standardized analytical methods. These organizations include, without limitation:

i. The EPA;

ii. The American Society for Testing and Materials (ASTM);

iii. The American Public Health Association (APHA);

iv. The National Institute for Occupational Safety and Health (NIOSH);

v. The Association of Official Analytical Chemists (AOAC);

vi. The U.S. Army Toxic and Hazardous Materials Agency *[(USATHEMA)]* ***(USATHAMA)***;

vii. The American Water Works Association (AWWA); *[and]*

viii. The Department*[.]***;***

ix. The United States Department of Defense; and

x. The United States Department of Energy.*

4. If an analytical method as described in (a)3 above does not exist for a specific contaminant or parameter ***within a specific matrix, or if an analytical method as described in (a)3 above for a given contaminant or parameter is demonstrated to be inappropriate for the matrix analyzed****, then the *[laboratory]* ***person responsible for conducting the remediation**** shall:

i. Select an appropriate method from another source;

ii. Document the rationale for selecting the method pursuant to N.J.A.C. 7:26E-1.6(c); and

iii. Develop a standard operating procedure for the method, including a quality control section.

5. *[All]* ***Laboratories shall follow all**** quality assurance/quality control *[requirements and criteria]* ***procedures**** specified in the analytical methods *[used shall be met]*.

6. Sampling methods, sample preservation requirements, sample handling times, decontamination procedure for field equipment, and frequency for field blanks, field duplicates and trip blanks shall conform to applicable industry methods such as those specified in the NJDEPE "Field Sampling Procedures Manual" in effect as of the date on which samping is performed. The person responsible for conducting the remediation shall document the rationale for any deviations from the methods in the "Field Sampling Procedures Manual" pursuant to N.J.A.C. 7:26E-1.6(c).

7. Samples shall be preserved in the field immediately after collection and submitted to the laboratory as soon as possible and *[no later than 24 hours after sample collection for a one day sampling effort, or if either overnight carrier is required or if sampling effort exceeds one day,]* no later than 48 hours after sample collection.

8. For solid sample analysis, including without limitation, soils and sediments, all results shall be reported on a dry weight basis, except for those results required by the method to be otherwise reported.

9. Sample matrix cleanup methods shall be performed if:

i. Petroleum contaminated soils, sediments, or other solids are analyzed for semivolatile organics, and the method detection limits are elevated above the applicable *[cleanup]* ***remediation**** standard *[pursuant to N.J.A.C. 7:26D]* because of matrix interference;

ii. Gas chromatographic peaks are not adequately separated due to matrix interference***.*** *[(inadequate peak separation is indicated by baseline elevation at the analyte retention time which is greater than three times the peak height of the nearest interval standard)]* ***A peak shall be considered inadequately separated when a rise in baseline or extraneous peaks interfere with:***

(1) The instrumental ability to correctly identify compounds present (including internal standards and surrogates); and/or

(2) The integration of peak area and subsequent quantification*;

iii. So specified by the analytical method; or

iv. Matrix interferences prevent accurate quantification and/or identification of target compounds.

10. Acceptable matrix cleanup methods include, without limitation, those methods contained in the EPA Publication SW846 or the EPA "Contract Laboratory Statement of Work for Organics Analysis, Multi-Media, Multi-Concentration" in effect as of the date of sample analysis.

11. Laboratory data deliverables shall be as follows unless otherwise specifically required pursuant to a NJPDES permit:

i. Full laboratory data deliverables shall be submitted for all potable water and polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans sample results;

ii. Reduced laboratory data deliverables shall be submitted for all other analyses; and

iii. Analytical results without all quality control and raw data as required in full and reduced laboratory data deliverables, may be provided for all delineation samples which necessitate additional delineation sampling, provided the following information is submitted:

(1) A cover page, including facility name and address, laboratory name and address, laboratory certification number, if applicable, date of analytical report preparation and signature of laboratory director;

(2) A listing of all field sample identification numbers and corresponding laboratory sample identification numbers;

(3) A listing of all analytical methods used;

(4) The method detection limit ***and practical quantitation level*** for each analyte for each sample analysis;

(5) All sample results including date of analysis;

(6) All method blank results; and

(7) All chain of custody documentation.

iv. Upon written request, the Department may require that a "reduced" data deliverables package shall be upgraded to a "full" data deliverables package for any sample analysis pursuant to N.J.A.C. 7:26E-1.7.

(b) Field screening methods are limited as follows:

1. Field screening methods for all sampling matrices (soil, water, air, interior surfaces) can only be used under the following conditions:

i. For contaminant delineation if contaminant identity is known or if there is reasonable certainty that a specific contaminant may be present (for example, benzene, toluene, ethylbenzene, xylene in the case of sampling for a gasoline release); or

ii. To bias sample location to the location of greatest suspected contamination.

2. Field screening methods shall not be used to verify contaminant identity or clean zones. However, where 10 or more samples are required for initial characterization sampling at an area of concern, field screening methods listed in (b)3 and 4 below may be used to document that up to 50 percent of sampling points within the area of concern are not contaminated.

3. The field analytical methods described in the version of the following references in effect as of the date of the field screening activities may be used:

i. The NJDEPE "Field Sampling Procedures Manual";

ii. The NJDEPE Site Remediation Program "Field Analysis Manual";

iii. "Field Measurements," EPA/530/UST-90-003; or

iv. The "Field Screening Methods Catalog," EPA/540/2-88/005.

4. Other field analytical methods may be acceptable, subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c).

(c) The following requirements apply for selection of analytical parameters:

1. Samples from each area of concern shall be analyzed for contaminants which may be present provided***:***

i. *[that]* ***That*** gas chromatography methods with a mass spectrometer detector system are used for analysis of volatile/semi-volatile contaminants (exclusive of herbicides, pesticides, and PCBs); ***and***

ii. Chromatography methods with a mass spectrometer detector system are used for the analysis of organic analytes amenable only to non-gas chromatographic techniques.

2. A mass spectrometer detector system pursuant to (c)1 above is not required if:

i. Contaminant identity is known;

ii. The contaminant chromatographic peak is *[100 percent]* ***adequately*** resolved from any other peak***. A peak is considered adequately resolved when:**

(1) Adjacent or coeluting chromatographic peaks do not result in retention time shifts causing misidentification;

(2) Coeluting chromatographic peaks do not interfere with quantification of the contaminant's chromatographic peak; and

(3) Matrix interferences as described in (a)9ii above are not present*; and

iii. At least 10 percent of the sample analyses are confirmed using *[gas chromotography]* ***the appropriate chromotograph*/** mass *[spectrometry]* ***spectrometer detection system*.**

3. If analytical methods are not available for a contaminant, analysis of indicator parameters (for example, pH may be used as an indicator parameter for acid or base discharges) may be acceptable, subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c).

4. Analysis of Target Compound List plus 30/Target Analyte List (TCL+30/TAL) or Priority Pollutant plus 40 (PP+40) scans, petroleum hydrocarbons, and pH shall be conducted when contaminants in an area are unknown or not well documented, although a limited contaminant list may be used subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c).

5. Analysis of soil and sediment samples for petroleum hydrocarbons may be in accordance with the "Interim Petroleum Hydrocarbon Guideline" prepared by the Department.

(d) For all petroleum storage and discharge areas, sample analysis shall be conducted pursuant to the requirements in Table 2*[.2]* ***-3***. Samples taken in non-petroleum storage and discharge areas shall be analyzed for the stored material.

TABLE 2-*[2]****3***

ANALYTICAL REQUIREMENTS FOR
PETROLEUM STORAGE AND DISCHARGE AREAS***ii***

Sampling Objective	Soil Initial Screening/ Post-Remediation[1]	Water Initial Screening
Gasoline, Mineral Spirits	VO+10[2], Lead[7]	VO+10[2], MTBE[3] TBA[3]*****, **Lead[7]***
Kerosene, Jet Fuel	VO+10[2] Nap***h***thalene*s*[5]	B/N+15[10], VO+10[2] *[TPHC[6]]*
Fuel Oil No. 2, Diesel Fuel	TPHC*[6]*[9]	*[TPHC[6],]* B/N+15[10], VO+10[2]
Fuel Oil Nos. 4 & 6, Hydraulic Oils, Cutting Oil, Crude Oil, Lubricating Oil	TPHC*[6]*, PAH[8]	B/N+15[10], VO+10[2]
Waste Oil *[and Unknown Hazardous Waste]*	TPHC[6], VO+10[2], B*/*N+15[10], PCBs, Priority Pollutant Metals ***or EPA Target Analyte List***	PP+40 or TCL/TAL[4]

1. Analytical parameters may be limited based on previous analytical results.
2. EPA target compound list volatile organic or priority pollutant volatile organic scans ***including xylene*** with a library search.
3. Methyl-tertiary-butyl-ether (MTBE), tertiary-butyl alcohol (TBA) ***analysis required if gasoline tanks were in service after 1979 and 1969 respectively*.**
4. Priority Pollutant plus forty (PP+40) ***including xylene*** or EPA Target Compound List plus 30 and EPA Target Analyte List.
5. *[Napathalenes]* ***Naphthalene***, including *[Napathalene]* ***Naphthalene***, Methyl *[Napathalenes]* ***Naphthalenes***, Dimethyl Naphthalenes; may be analyzed in B*/*N+15 fraction or in VO fractions; if analyzed in VO fraction, instrument must be calibrated for these analytes. ***Quantitation of all isomers found shall be performed against at least one Methyl Naphthalene standard and at least one Di-Methyl Naphthalene standard.***
6. Total Petroleum Hydrocarbon (TPHC) analysis *[of soil using EPA Method 418, modified for soil.]* ***required on all samples. Other**

parameters required on 25 percent of samples where TPHC was detected (minimum of one sample); other parameters shall be analyzed for in the sample with the highest TPHC.*

7. Lead Analysis required if source was or is leaded gasoline.
8. ***TPHC analysis required on all samples.*** Polynuclear aromatic hydrocarbons (per EPA Priority Pollutant List) ***analysis required on 25 percent of samples where TPHC exceeds 100 ppm (minimum of one sample); samples for PAH analysis shall be those with the highest TPHC concentration***.
9. ***TPHC analysis required on all samples;*** VO+10 analysis required *[if]* ***on 25 percent of samples in which*** TPHC level in soil exceeds 1000 PPM ***(minimum of one sample); samples for VO analyses shall be those with the highest TPHC concentration***.
10. EPA Target Compound List Base Neutral or Priority Pollutant Base Neutral scan with a library search.

11. Analyses are required on all samples unless otherwise noted.

(e) If tentatively identified compounds or unknown compounds are detected at concentrations in excess of the applicable *[cleanup]* ***remediation*** standard *[pursuant to N.J.A.C. 7:26D]*, they shall be addressed in either of two ways:

1. If the area will be remediated and it is likely that the concentration of the tentatively identified compounds/unknown compounds will be reduced by the remediation, the tentatively identified compounds/unknown compounds shall be analyzed in post remediation samples to document that it is no longer present in excess of the applicable *[cleanup]* ***remediation*** standard; or

2. An attempt shall be made to positively identify and accurately quantify the tentatively identified compounds/unknown compounds using an analytical method consistent with this section ***so that a remediation standard can be developed***.

7:26E-2.2 Quality assurance project plan

(a) If the Department requires a Quality Assurance Project Plan (QAPP) pursuant to an oversight document or the ECRA, UST, or any other regulatory program, the person responsible for conducting the remediation shall submit the Quality Assurance Project Plan in accordance with the schedule contained in the oversight document or applicable regulation, and in a format that corresponds directly to the outline of this section.

1. For each remedial phase at a site involving less than 10 areas of concern, the following shall be included in the Quality Assurance Project Plan:

i. The project's scope and complexity and how the project relates to the overall site remediation strategy;

ii. The data quality objectives specific to the site and sampling event (for example, initial site characterization, delineation of contamination, selection of a remedial action);

iii. The names*,* *[and]* addresses ***and Department laboratory certification number (if applicable)*** of the laboratories to be used for sample analysis***. This shall be updated if changes occur during the project***;

iv. The name and telephone number of each of the individuals responsible for the following functions. (This shall be updated if changes occur during the project):

(1) Overall project coordination;

(2) Sampling activities, including quality assurance and quality control; and

(3) Laboratory activities, including quality assurance and quality control;

v. An "Analytical Methods/Quality Assurance Summary Table" which shall include the following information for all environmental, performance evaluation, and quality control samples:

(1) Matrix type;

(2) Number ***or frequency*** of samples to be collected per matrix;

(3) Number of field and trip blanks per matrix;

(4) Analytical parameters to be measured per matrix;

(5) Analytical methods to be used per matrix pursuant to N.J.A.C. 7:26E-2.1;

(6) If proposed, the number and type of matrix spike and matrix spike duplicate samples to be collected;

*[(6)]***(7)*** If proposed, the number and type of duplicate samples to be collected;

*[(7)]***(8)*** If proposed, the number and type of split samples to be collected;

*[(8)]***(9)*** If proposed, the number and type of performance evaluation samples to be analyzed;

*[(9)]***(10)*** Sample preservation to be used per analytical method and sample matrix;

*[(10)]***(11)*** Sample container volume and type to be used per analytical method and sample matrix; and

*[(11)]***(12)*** Sample holding time to be used per analytical method and sample matrix;

vi. A detailed description of site specific sampling methods to be used pursuant to N.J.A.C. 7:26E-2.1(a)6, sample storage in the field and sampling handling time requirements;

vii. A detailed description of all calibration and preventative maintenance procedures for all field analytical instrumentation;

viii. A detailed description of procedures used to obtain duplicate and split samples, if applicable;

ix. A detailed description of the chain of custody procedures to be utilized in the field and in the laboratory;

x. A detailed description of sample storage procedures to be utilized by the laboratory; and

xi. Laboratory data deliverable formats to be used.

2. For any remedial phase at a site involving 10 or more areas of concern, the following shall be included in the Quality Assurance Project Plan:

i. The requirements contained in (a)1i through *[iii, and (a)1v through]* x above;

*[ii. The name and telephone number of each of the individuals responsible for the following functions. (This shall be updated if changes occur during the project):

(1) Overall project coordination;

(2) Overall project quality assurance;

(3) Health and safety coordination;

(4) Sampling procedures;

(5) Sampling quality control;

(6) Laboratory analyses;

(7) Laboratory quality control;

(8) Laboratory data processing;

(9) Laboratory data processing quality control;

(10) Systems auditing (field and laboratory); and

(11) Technical advisory groups, if applicable.]*

*[iii.]***ii.*** A detailed description of field quality control audit procedures to be used, including without limitation, corrective action procedures;

*[iv.]***iii.*** The procedures to be followed to ensure the complete documentation of all field sampling activities; ***and***

[v. A detailed description of laboratory audit procedures to be used, including without limitation, corrective action procedures; and]

*[vi.]***iv.*** A detailed description of the data reporting procedures and format for all analytical data generated by the laboratory, including without limitation, the following:

(1) Laboratory data deliverable format(s);

(2) The laboratory's review and cross-check procedures for the elimination of errors during routine data transfer, in calculations, preparation of data deliverable packages and off-line storage; and

(3) If required by the Department, a description of the laboratory's capability to provide EPA Contract Laboratory Program analytical methodology data on diskette in standard EPA Contract Laboratory Program format utilizing the requirements in the versions of the applicable EPA Contract Laboratory Program Statements of Work documents in effect as of the date on which the laboratory is performing the analysis.

SUBCHAPTER 3. PRELIMINARY ASSESSMENT AND SITE INVESTIGATION

7:26E-3.1 Preliminary assessments

(a) The purpose of a preliminary assessment is to identify the presence of any potentially contaminated areas of concern. If any

potentially contaminated areas of concern are identified, then there is a need for a site investigation pursuant to N.J.A.C. 7:26E-3.3. If no potentially contaminated areas of concern are identified, then no further action is required at the site.

(b) A preliminary assessment is the first step in the process to determine whether or not a site is contaminated.

(c) A preliminary assessment shall be based on diligent inquiry and include an evaluation of the following:

1. Historical information concerning the site history shall be part of the preliminary assessment unless the remediation is directed at either, a specific discharge event, rather than a particular area of *[a site,]* ***concern*** or any underground tank or underground tank system. The site history shall include an evaluation of the following to the extent available from diligent inquiry:

i. Site history information from *[the following]* sources ***including, but not limited to the following***:

(1) Sanborn Fire Insurance Maps;

(2) MacRae's Industrial Directory;

(3) Title and Deed;

(4) Site plans and facility as-built drawings; and

(5) Federal, State, county and local government files;

ii. The industrial/commercial site history from the time the site was naturally vegetated or utilized as farmland, including without limitation:

(1) Names of all owners and operators;

(2) Dates of ownership of each owner;

(3) Dates of operation of each operator; ***and***

[(4) Current addresses of each owner and operator; and]

*[(5)]*****(4)*** Brief descriptions of the past industrial/commercial usage of the site by each owner and operator;

iii. All raw materials, finished products, formulations and hazardous substances, hazardous wastes, hazardous constituents and pollutants which are or were present on the site, including intermediates and by-products;

iv. Present and past production processes, including dates, and their respective water use and shall be identified and evaluated, including ultimate and potential discharge and disposal points and how and where materials are or were received onsite (for example, rail, truck);

v. All former and current containers, container or bulk storage areas, above and below ground tanks, above and below ground waste and product delivery lines, surface impoundments, landfills, septic systems and other structures, vessels, conveyances or units that contain or previously contained hazardous substances, hazardous waste, hazardous constituents and pollutants, including:

(1) Type;

(2) Age;

(3) Dimension of each container;

(4) Location;

(5) Chemical content;

(6) Integrity (for example, tank test reports);

(7) Volume; *[and]*

(8) Construction materials; ***and***

(9) Inventory control records unless a Department-approved leak detection system pursuant to N.J.A.C. 7:1E or 7:14B has always been in place and there is no discharge history;

vi. If the site area exceeds two acres, an interpretation of the aerial photographical history of the site, based on *[all]* available current and historical color, black and white and infrared aerial photographs (scale 1:18,000 or less) of the site and surrounding area ***at a frequency which provides the evaluator with a historical perspective of site activities***. The photographic history shall date back to *[when the site was naturally vegetated or farmland,]* ***1932*** or to the earliest photograph available***. Aerial photographic coverage is available for review at the New Jersey Department of Environmental Protection and Energy, Tidelands Management Program, Aerial Photo Library, 9 Ewing Street, Trenton, New Jersey***;

vii. Any data or information concerning known discharges that have occurred on the site;

viii. Remediation activities previously conducted or currently underway at the site including dates of previous discharges, remedial actions, and all existing sampling data concerning contaminants at the site. If a government agency was involved, the name of the lead government agency, case identification number, and current case status;

ix. All existing ***environmental*** sampling data concerning contaminants at the site;

x. Any known changes in site conditions or new information developed since completion of previous sampling or remediation;

xi. All Federal, State and local environmental permits including permits for all previous and current owners or operators, applied for or received, or both, for the site including:

(1) The name and address of permitting agency;

(2) The reason for the permit;

(3) The permit identification number;

(4) The application date;

(5) The date of approval, denial, or status of application;

(6) The name and current address of all permittees;

(7) The reason for denial, revocation or suspension if applicable; and

(8) The permit expiration date; and

xii. All administrative, civil and criminal enforcement actions for alleged violations of environmental laws concerning the site, including:

(1) The name and address of agency that initiated the enforcement action;

(2) Date of the enforcement action;

(3) The section of statute, rule or permit allegedly violated;

(4) The type of enforcement action;

(5) A description of alleged violations;

(6) The resolution or status of violation and enforcement action; and

(7) A description of any potential environmental impact which may have resulted from the alleged violation.

2. The person *[certifying]* ***conducting*** the preliminary assessment *[pursuant to N.J.A.C. 7:26E-1.5]* shall conduct a site visit to verify the findings in (c)1 above.

7:26E-3.2 Preliminary assessment report

(a) The person responsible for conducting the remediation shall prepare a preliminary assessment report which:

1. Presents and discusses all of the information identified, evaluated or collected pursuant to N.J.A.C. 7:26E-3.1;

2. Is presented in a format that corresponds to the outline of N.J.A.C. 7:26E-3.1(c);

3. Shall also include:

i. Scaled *[historical and current]* site plans *[and facility as-built construction drawings]* detailing lot and block numbers, property and leasehold boundaries, construction or destruction of buildings, areas where fill or cover material has been brought onsite, paved and unpaved areas, vegetated and unvegetated areas, all areas of concern and active and inactive wells; and

ii. Scaled historical site plans and facility as-built construction drawings, if available;

iii. A copy of the United States Geologic Survey (USGS) 7.5 minute topographic quadrangle that includes the site and an area of at least a one mile radius around the site. This map shall be the most recent USGS revision and shall clearly note the facility location and property boundaries. When a portion of the USGS quadrangle is used, the scale, north arrow, contour interval, longitude and latitude, along with the name and date of the USGS quadrangle shall be noted on the map; and

*[ii.]*****iv.*** A summary of the data and information evaluated pursuant to N.J.A.C. 7:26E-3.1(c)1vii, viii and ix shall be presented by area of concern and all phases of work for a particular area of concern shall be integrated into a single discussion of that area;

4. For each area of concern identified at the site, the report shall contain a recommendation that either:

i. The area of concern is potentially contaminated, and thus additional investigation or remediation is required; or

ii. The area of concern is not believed to contain contaminants above the applicable *[cleanup]* ***remediation*** standards, in which

case the preliminary assessment report shall include documentation for this belief*[, pursuant to N.J.A.C. 7:26E-1.6(c)]*.

(b) *[Previous submissions or other previously completed work may satisfy specific items required for the preliminary assessment if approved in advance by the Department (for example, through the MOA process or an ECRA or UST approval).]* The Department will determine the extent to which prior submissions or completions may satisfy the specific items required for the preliminary assessment. If the Department approves any such prior work in writing, then that work may be included as part of the preliminary assessment.

7:26E-3.3 Site investigations

(a) The purpose of a site investigation is to determine if any contaminants are present at the site above any of the applicable *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]* or if no further action is required. If such contaminants are present at the site, then additional remediation is necessary prior to a Department determination that no further action is necessary.

(b) A site investigation shall be *[developed]* ***conducted*** based upon the information collected pursuant to the preliminary assessment requirements in N.J.A.C. 7:26E-3.1 and shall satisfy all of the following requirements:

1. The general sampling requirements in N.J.A.C. 7:26E-3.4;

2. The building interior sampling requirements in N.J.A.C. 7:26E-3.5***, if applicable***;

3. The soil sampling requirements in N.J.A.C. 7:26E-3.6;

4. The ground water sampling requirements in N.J.A.C. 7:26E-3.7***, if applicable***;

5. The surface water*[, wetlands]* and sediment sampling requirements in N.J.A.C. 7:26E-3.8***, if applicable***; and

6. The area specific sampling requirements in N.J.A.C. 7:26E-3.9.

(c) If required pursuant to an oversight document or other applicable rule, the person responsible for conducting the remediation shall submit reports pursuant to N.J.A.C. 7:26E-3.10 in accordance with the schedules contained in the oversight document or other applicable rule.

(d) It is often appropriate to phase the site investigation so that the areas of concern most likely to be contaminated above the applicable *[cleanup]* ***remediation*** standards are sampled first. If at any time during the site investigation, any contamination is found above the applicable *[cleanup]* ***remediation*** standards, then the site investigation may be discontinued and the remediation continued at either the remedial investigation or remedial action phase.

7:26E-3.4 Site investigation—general sampling requirements

(a) Sampling shall be conducted in all ***potentially contaminated*** areas of concern, whether relating to current or former uses of the site to determine whether or not any contaminants are present above the applicable *[cleanup]* ***remediation*** standard.

1. Sampling shall be biased to the suspected location of greatest contamination.

2. Samples shall be biased based on professional judgment, area history, discolored soil, stressed vegetation, drainage patterns, field instrument measurements, odor, or other field indicators.

3. Sampling locations shall comply with requirements listed in N.J.A.C. 7:26E-3.5 through 3.9.

(b) All sampling methods and laboratory analyses shall be conducted pursuant to N.J.A.C. 7:26E-2.1.

(c) Composite sampling shall not be conducted, except as necessary for waste classification pursuant to N.J.A.C. 7:26-8.

[(d) Inventory control records shall be reviewed for all hazardous substances, hazardous wastes, hazardous constituents, and pollutants. Any indications of hazardous substances, hazardous wastes, hazardous constituents, and pollutants loss shall be investigated by sampling at potential leak areas.]

7:26E-3.5 Site investigation—building interiors

(a) The site investigation of building interiors *[shall]* ***may*** be conducted for the purposes of a site investigation pursuant to N.J.A.C. 7:26E-3.3(c) according to the following:

1. The quality assurance and quality control requirements pursuant to N.J.A.C. 7:26E-2.1;

2. If there is reason to believe interior building surfaces are contaminated, wipe or chip sampling shall be conducted;

3. Sampling frequency shall be as follows:

i. One sample for every 900 square feet for each area of concern of 9,000 square feet or less;

ii. For areas of concern greater than 9,000 square feet, one additional sample shall be taken for every additional 9,000 square feet. For example, an area of concern of 9,001 to 18,000 square feet would require a minimum of 11 samples;

[5.] ***4.*** If the person responsible for the site investigation can provide documentation acceptable to the Department in the site investigation report that the contaminant ***in a wipe or chip sample*** present above the applicable *[cleanup]* ***remediation*** standard in the building materials is not the result of a discharge, remediation is not required. This documentation shall include, without limitation, data from at least two samples collected from each building material type being evaluated. Samples shall be collected from a non-production area that has not received any discharges and analyzed for any contaminants present above the applicable *[cleanup]* ***remediation*** standard.

[4.] ***5.*** The presence and extent of asbestos containing material (ACM) in buildings shall be determined. ACM may be present as surfacing material, thermal system insulation, or in miscellaneous material such as ceiling tiles and vinyl asbestos tiles. Asbestos surveys shall be conducted in accordance with 40 CFR 763, Subpart E (The Asbestos Hazard Emergency Response Act Statute and Regulations, "AHERA", 10-30-87); and

7:26E-3.6 Site investigation—soil

(a) The site investigation shall satisfy the following requirements for all soil investigations:

1. A survey for buried drums, tanks or waste using test pits, ground penetrating radar, magnetometry electromagnetics, or other techniques capable of detecting metal containers and other waste to an average depth of 20 feet or deeper shall be conducted if:

i. There have been any reports of buried drums, tanks or waste;

ii. Ground water contamination is detected and no source has been identified; or

iii. Aerial photographic history of the site indicates the presence of drums, tanks or waste in or adjacent to regraded and/or filled areas.

2. Soil borings shall be extended to a depth appropriate for collection of soil samples, and to provide a profile of subsurface conditions. The profile shall meet the following:

i. Logs shall be prepared for all borings to document subsurface conditions including, without limitation, soil types and description of non-soil materials, depth to ground water, if ground water is encountered, soil mottling, field instrument measurements, presence of odor, vapors, soil discoloration, and free product;

ii. Soil shall be classified according to one of the standard systems (for example, Burmeister, Unified, or United States Department of Agriculture);

iii. All borings shall be performed in accordance with the Subsurface and Percolating Waters Act, N.J.S.A. 58:4A-4.1 et seq., which requires, among other things, that a permit be obtained prior to drilling a boring *[to first water or]* greater than 25 feet below grade; and

iv. Soil sample locations may be photo-documented.

3. Initial characterization soil samples (except samples being analyzed for volatile organics) shall be collected at zero to six inches below grade except as required pursuant to N.J.A.C. 7:26E-3.9 (Area Specific).

4. All soil samples collected for volatile organics analysis *[and]* shall comply with the following:

i. *[If]* ***When*** field screening is conducted for volatile organics *[in the surface soil (zero to two feet)]* ***and soil consists of more than 15 percent silt/clay***, a soil core shall be collected beginning at *[a depth of approximately six inches below]* ***the*** ground surface and ending at approximately 24 inches.

(1) The core shall be field-screened with a properly calibrated photoionization detector or flame ionization detector (PID/FID) or other suitable instrument pursuant to N.J.A.C. 7:26E-2.1(b).

(2) An undisturbed sample from the six inch interval registering the highest field measurement shall be sub-sampled from the core and lab-analyzed for volatile organics. ***If all intervals register the same measurement, the sample interval shall be selected based on soil type pursuant to (a)4ii below.***

[(3) If surface soil consists of less than 15 percent silt/clay, the six inch interval above the saturated zone shall be sampled, or a six inch interval within the next lower soil horizon consisting of 15 percent or more silt/clay, or at 9.5 to 10 feet, whichever is encountered first.]

ii. If field screening is not conducted ***or if soil consists of less than 15 percent silt/clay***, *[surface]* volatile organics sample depth shall be based on soil type (soil type may be field-determined). The following guidelines shall apply:

(1) Sample at six to 12 inches if soil consists of 50 percent or more silt/clay.

(2) Sample at 18 to 24 inches if soil consists of 15 to 50 percent silt/clay.

(3) If surface soil consists of less than 15 percent silt/clay, sample the six inch interval above the saturated zone or a six inch interval within the next lower soil horizon consisting of 15 percent or more silt/clay, or at 9.5 to 10 feet, whichever is encountered first.

*[(4)]***iii.*** *[Sampling soil]* ***Soil sampling*** for volatile organics shall be performed using a coring device***, if practicable,*** to minimize contaminant loss during sampling.

5. In all cases, samples shall be collected in discrete six inch increments. If more or less than a six inch increment is sampled because of poor sample recovery or other field logistical problems, an explanation shall be provided in the soil log.

6. Additional sampling of increments below those specified in (a)3 and 4 above shall be completed in cases where the surface has been regraded or if physical evidence in borings indicate the possible presence of contamination.

7. If the designated soil sampling point is within the saturated zone, a sample of the saturated soil shall be collected, when sample recovery is possible, and analyzed.

(b) Soil gas detection methods may be used to bias soil or ground water sample locations.

(c) The site investigation of soil shall be conducted:

1. For the purposes of a site investigation pursuant to N.J.A.C. 7:26-3.3(a); and

2. *[The]* ***According to the*** quality assurance and quality control requirements pursuant to N.J.A.C. 7:26E-2.1.

7:26E-3.7 Site investigation *[of]***—*ground water

(a) Except as provided in (b) below, the site investigation of each area of concern shall include at least one ground water sample if:

1. Any contaminant in the area of concern has a water solubility greater than 100 milligrams per liter as documented by a peer-reviewed reference; and

2. All of the soil between the contaminant and the saturated zone is less than 15 percent silt and clay.

(b) Ground water sampling may not be necessary during a site investigation for a particular area of concern if the person responsible for conducting the remediation documents that ground water contamination from the discharge is unlikely based on the following criteria:

1. The date and duration of the discharge is known;

2. The identity and the volume of the contaminants are known;

3. The date the remediation in response to the single discharge was completed;

4. Post remediation ***soil*** sampling data establish that the remediation meets all applicable *[cleanup]* ***remediation*** standards at the time of the *[site investigation]* ***remedial action workplan approval***; and

5. Any other data or information that is relevant to the determination of the likelihood of ground water contamination.

(c) The site investigation of ground water shall be conducted for the purposes of a site investigation pursuant to N.J.A.C. 7:26E-3.3(a) according to the following:

1. The quality assurance and quality control requirements pursuant to N.J.A.C. 7:26E-2;

2. Ground water samples may be taken pursuant to any generally acceptable sampling method ***pursuant to N.J.A.C. 7:26E-1.6(c)***; any method-specific requirements pursuant to N.J.A.C. 7:26E-4.4(f) shall be conducted, if ground water monitoring wells or peizometers are used; and

3. The ground water sampling points shall be located in:

i. The excavation of *[a]* ***an underground storage*** tank which is the source of contaminants, if possible; or

ii. The expected downgradient flow direction of the area of concern and within 10 feet of the area of concern; ground water flow direction shall be predicted based on topographic controls in the bedrock or soils, location of pumping wells and subsurface conduits at or below the water table.

(d) The minimum number of ground water samples collected shall be as follows:

1. At least one ground water sample for each area of concern which is classified as an Underground Injection Control (UIC) unit including, without limitation, seepage pits, septic systems, dry wells or other injection wells regulated under N.J.A.C. 7:14A-5 ***sampled pursuant to N.J.A.C. 7:26E-3.9(e)3***;

2. At least one ground water sample for sites with leaking underground storage tanks and tank fields containing up to three tanks with a maximum capacity of 10,000 gallons per tank. If a leaking tank is excavated, the ground water sampling point shall be located within the excavation, if possible;

3. Pump islands and associated piping greater than 25 feet from the tank field shall be considered separate areas of concern and shall require a separate ground water sample location; and

4. At least one ground water sample for all other areas of concern unless the area of concern is within 10 feet hydraulically upgradient of a ground water sampling location.

(e) The results of any ground water site investigation analysis shall be evaluated as follows:

1. If the contaminant concentrations found in all ground water samples are below the applicable *[ground water cleanup]* ***remediation*** standard***s*** *[pursuant to N.J.A.C. 7:26D]*, no further remediation is necessary for ground water;

2. If the contaminant concentrations found in any ground water samples exceed the applicable *[ground water cleanup]* ***remediation*** standard***s*** *[pursuant to N.J.A.C. 7:26D]*, the ground water may be resampled to confirm the presence of contamination; this confirmation sampling shall include at least two additional samples taken over a 30 day period, the results of which may be averaged with the original result to determine compliance with the applicable *[ground water cleanup]* ***remediation*** standard***s***; and

3. If ground water contamination is confirmed, a ground water remedial investigation shall be conducted.

7:26E-3.8 Site investigation***—*surface water*[, wetlands]* and sediment

(a) *[The site investigation shall satisfy the following requirements for surface water, wetlands and sediment investigation when all other media at the site have been investigated and no further remediation is necessary for the site to be in compliance with cleanup standards pursuant to N.J.A.C. 7:26D.]* If contamination is found in any *[of the other environmental media]* ***area of concern*** at a site, then *[the]* surface water and sediment *[investigation shall]* ***may*** be investigated as part of the remedial investigation.

(b) The *[site]* investigation of surface water*[, wetlands]* and sediment shall be conducted for the purposes of a site investigation pursuant to N.J.A.C. 7:26E-3.3(a) according to the following:

1. The quality assurance and quality control requirements pursuant to N.J.A.C. 7:26E-2;

2. Surface water samples are required to evaluate standing water bodies, or, for flowing water, upgradient, downgradient, and discharge point water samples are required when there is reason to believe *[site contaminants may have been discharged to]* surface water ***may have been impacted by contamination emanating from the site***. Sampling shall be designed to account for seasonal or short-term flow and water quality fluctuations due to dry versus wet

weather flow, system hydraulics (obtaining flow-proportioned samples where applicable) and potential contaminant characteristics (for example, density, solubility); and

3. Sediments in surface water bodies *[or wetlands]* shall be analyzed when there is reason to believe *[the sediments contain potential contaminants]* ***sediments may have been impacted by contamination emanating from the site***.

i. Sediment sampling for streams and similar water bodies shall be completed in accordance with N.J.A.C. 7:26E-3.9(d)3 (Swales/ Culverts).

ii. Sediment sampling for ponded bodies of water shall be completed in accordance with N.J.A.C. 7:26E-3.9(c) (Surface Impoundments).

iii. In addition to other required analyses, surface water sediments shall also be analyzed for total organic carbon, pH, and particle size. These data are required to develop appropriate *[cleanup numbers pursuant to N.J.A.C. 7:26D]* ***remediation standards***.

7:26E-3.9 Site investigation*—*area specific requirements

(a) The site investigation shall also satisfy the following sampling requirements for bulk storage tanks and appurtenances, including, without limitation, all in-use and out of service storage tanks with a storage capacity greater than 55 gallons, and associated piping and fill points.

1. For above ground tanks over unpaved soil:

i. Sampling around tanks with shell or bottom in direct contact with soil now or in the past shall meet all the following criteria:

(1) Sampling to detect surface contamination shall be conducted around the base of the tank with at least one sample per 100 linear feet, and shall include expected areas of contamination based on soil discoloration/odors, history of repairs/replacement, soil beneath valves, or low areas where spills or leaks from valves may accumulate.

(2) *[To verify tank integrity,]* ***Unless the tank has always been in compliance with N.J.A.C. 7:1E-2 and has no discharge history,*** at least one boring shall be located adjacent to or within two feet of the tank and continuous two foot split spoon sampling performed to the water table (if water table is less than 10 feet). The sample in each boring evidencing the highest apparent contamination based on soil discoloration, odor, field screening result or other field indicator shall be laboratory analyzed. ***If there is no evidence of contamination, samples shall be collected from the zero to six inch interval above the saturated zone.*** At least one boring shall be located in the expected downgradient ground water flow direction from the tank. For tanks in excess of 100 feet in circumference, at least three borings, spaced equidistantly, are required.

(3) In cases where the depth to ground water is greater than 10 feet, sampling shall be conducted to 10 feet as in (a)1i(2) above. ***If there is no evidence of contamination, samples shall be collected at 9.5 to 10 feet.***

ii. Elevated tanks (that is, shell or bottom not in contact with ground) require soil sampling when there is any physical or documentary evidence of discharges, when soil discoloration is observed or when field monitoring or other evidence indicates that a discharge has occurred.

1. At least one soil sample shall be taken below tanks which store or may have stored hazardous substances, hazardous wastes, hazardous constituents or pollutants that do not cause obvious soil discoloration (such as volatile organics), in the area most likely to be contaminated, including without limitation, valve or former leak or rupture areas. If samples cannot be obtained from below the tank because soils are not accessible to sampling equipment, the sample may be located within two feet of the tank.

2. Soil around above ground tanks on paved surfaces shall be sampled pursuant to (b)1 below (Pads) if there are stained soils adjacent to pad or if the potential contaminant would not cause discoloration (volatile organics), or if there is a history of spillage or other evidence that a discharge has occurred.

i. Tanks within a paved containment area shall be sampled at the drainage discharge point, if one exists, pursuant to (d) below (Drainage Areas).

ii. Soil sampling below the pavement shall be conducted only when the pavement has deteriorated so as to allow potential contaminant contact with the soil, or if pavement was not present over the life of the tank or former tanks.

iii. Instead of sampling soil beneath pavement, samples around the pad may be taken pursuant to (b)1 below subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c) specifying why boring through pavement was not considered practical (for example, concrete slabs with berms, synthetic liners).

3. For underground storage tanks:

i. Underground storage tanks and distribution systems containing potential contaminants shall be evaluated to identify any past or present discharges *[or to document the integrity of the tank system]*. No sampling is required for tanks and distribution systems which have always had *[double-walled containment with]* leak detection per N.J.A.C. 7:14B and no discharge history. ***At least four soil borings or test pits around each tank shall be used.*** If tanks will be removed, refer to N.J.A.C. 7:26E-6.3*[(a)]***(b)*** for requirements.

[ii. At least four soil borings or test pits around each tank shall be used to document the integrity of existing or former tank systems in situ. Precision tests pursuant to N.J.A.C. 7:14B-4.3(j) may be used in lieu of soil borings if tanks are beneath buildings or otherwise inaccessible.]

(1) The soil boring or test pit shall be within two feet of the tank with one sampling location located at each end, and additional sampling locations located along the length of the entire tank system, including distribution and fill pipelines;

(2) The total number of required sampling locations, by tank capacity *[(assuming cylindrical tank configurations)]*, are as follows:

Total Capacity (Gallons)	Approximate Length (Feet)	Minimum Number of Sampling Locations
56-2,000	to 10′	4
2,001-10,000	to 30′	6
10,001-25,000	to 40′	8
25,000+	to 40′+	10

(3) Detailed soil logs shall be completed for each sampling location pursuant to N.J.A.C. 7:26E-3.6 (Soil);

(4) Soil samples collected for analysis shall be taken at zero to six inches below the tank bottom unless the tank is within the saturated zone (see (a)3ii(6) below);

(5) In case of any soils or bedding material that is less than 15 percent silt/clay, samples for volatile organics shall be collected at the first less permeable soil horizon encountered below the bottom of the tank, or at zero to six inches above the saturated zone, or at 9.5 to 10 feet below the tank bottom, whichever is encountered first;

(6) If the tank is within the saturated zone, sample zero to six inches above the saturated zone if the potential contaminant's density is less than water, and zero to six inches below tank bottom if the potential contaminant's density is greater than water;

ii. Precision tests pursuant to N.J.A.C. 7:14B-4.3(i) may be used in lieu of soil borings if tanks are beneath buildings or otherwise inaccessible.

iii. To verify tank contents for out of service tanks, one sample shall be taken of any product or residue remaining in the tank and analyzed using ASTM fingerprint method D3328 or other appropriate method.

4. For all above grade piping:

i. Sampling is necessary if there is evidence of a discharge (for example, discolored soil, etc.) or reports of past discharges.

ii. Any sampling conducted shall be pursuant to (e) below (Discharge/Disposal Areas).

5. For all below grade piping:

i. Below grade piping *[associated with underground storage tanks]* shall be *[tested for integrity]* ***evaluated to identify any past or present discharges*** along with the storage tank using soil borings unless the system has always had double-walled containment

with leak detection and no discharge history. Precision tests pursuant to N.J.A.C. 7:26B-4.3(j) may be used if the piping is original and there is no history of discharges or repairs.

ii. For total piping length up to 50 feet, one soil sample shall be collected for each 15 linear feet of piping, including joints and other potential discharge areas. For total piping length in excess of 50 feet, sampling frequency may be reduced subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c) specifying why the reduced number was considered adequate.

6. For all loading and unloading areas:

i. Exposed soils at loading or unloading areas associated with tanks shall be sampled at a minimum rate of one sample per fill connection or valved discharge point;

ii. For loading or unloading points located over impervious cover, sampling shall be conducted pursuant to N.J.A.C. (b)1 below (Pads).

(b) The site investigation shall also satisfy the following requirements for all storage and staging areas, dumpsters and transformers, whether temporary or permanent, including exposed soil areas adjacent to above ground vessels on pads; tank loading/unloading areas on pads; dumpster staging areas; electrical transformers, heat exchanger and other outdoor equipment and drum storage pads.

1. For all pads:

i. Pads shall have a minimum of one sampling location per side adjacent to exposed soil for sides up to 30 feet long; for sides greater than 30 feet long, one additional sample location is required for each additional 30 feet of length;

ii. Each sampling point shall be located immediately adjacent to the pad and biased toward the expected location of greatest *[of]* contamination;

iii. If a pad shows evidence of deterioration that may allow contaminant contact with the soil, or its surface has been modified (repaved), or aerial photographs or site history indicate potential for previous discharges to the soil, soil samples beneath the pad shall be collected pursuant to N.J.A.C. (b)2ii below; and

iv. Bermed pads and pads surrounded by impermeable cover shall be sampled at any drainage discharge point pursuant to (d) below (Drainage Areas).

2. For all storage and staging areas over permeable cover:

i. Storage and staging areas with evidence of discharges which are or were used for storage of hazardous substances, hazardous wastes, hazardous constituents or pollutants shall be sampled pursuant to (e) below (Spills/Disposal Areas).

ii. Sample frequency shall be one per *[400]* ***900*** square feet of surface area to characterize soils below a storage or staging area up to 300 feet in perimeter with a minimum of one sample. Sample frequency may be reduced for larger areas subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c) specifying why sample frequency was considered adequate. Sampling locations shall be biased toward the suspected location of greatest contamination based on low points, drainage patterns, discoloration, stressed vegetation, field instrument measurements or other field indicators.

(c) The site investigation shall satisfy the following requirements for all surface impoundments, including without limitation, lagoons, fire ponds, waste ponds or waste pits, storm water detention basins, excavations, natural depressions or diked areas, which are designed to hold an accumulation of liquid substances or substances containing free liquids. ***Active surface impoundments with impermeable liners which may be damaged as a result of sample collection shall have liner integrity verified by physical inspection and/or evaluation of monitoring well water quality data associated with the surface impoundment, if available.****

1. Sediments within all unlined surface impoundments shall be sampled if the impoundment receives runoff from areas of potential contaminant sources;

2. Sediment sample locations shall be biased towards inflow/outflow areas, and areas where sediments may be expected to accumulate;

3. Core samples shall be taken for contaminant analysis and to fully characterize sediment type, thickness of sediment layers, and vertical extent of sediment.

4. Distinct layers of sediments thicker than six inches, as evidenced by color, particle size, or other physical characteristics, shall be sampled individually.

5. Sediment quantity within the surface impoundment shall be estimated.

[6. Surface impoundments with impermeable liners shall have liner integrity verified by physical inspection and evaluation of monitoring well water quality data, if available.]

(d) The site investigation shall also satisfy the following requirements for all drainage systems.

1. For all building floor drains and collection systems***, if there is reason to believe contaminants were discharged into the floor drain or collection system****:

i. The point of discharge for any floor drain or collection system shall be sampled if the system discharges onsite to soil, ground water or surface water;

ii. If the point of discharge is unknown, tracer tests (for example, dye or smoke) shall be conducted to determine the discharge point(s);

iii. Collection system integrity shall be documented by representative soil sampling at potential leak areas, video inspection, hydrostatic test or pressure test. Other methods may be acceptable, subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c) specifying why the methods were considered effective; and

iv. Sampling soil below floor drains, or collection system laterals, shall be conducted when corrosives (as defined in N.J.A.C. 7:26 or, if plastic piping is or was used, organic solvents are considered corrosive) are or were discharged to floor drains or the collection system or there has been a history of collection system discharges, rupture or repairs. In such cases, representative soil sampling at known or suspected leak areas is required for potential contaminants.

2. Soil at each roof leader discharge point shall be sampled if storage units or process operations using hazardous substances, hazardous wastes, hazardous constituents, or pollutants vent or have vented to the roof;

3. For all swales and culverts:

i. Sampling shall be conducted when the swale/culvert receives or received runoff from other contaminated areas of concern;

ii. Sediment and soil sampling shall be conducted at the points where contamination from runoff/spills enter or have entered the drainage system; and

iii. If flow could have scoured sediments from the receiving structure, sampling shall be conducted at onsite downgradient structures laden with sediments;

4. For all storm sewer and spill containment collection systems:

i. Sampling shall be conducted when the collection system is or was the runoff/spill discharge point from other contaminated areas of concern;

ii. Sediment sampling shall be conducted at the manhole, catchbasin, sump, or other structure where contaminated runoff or discharges enter the drainage system;

iii. Sampling shall be conducted in the soils around catchbasins, manholes, sumps or other structures which contain or may have contained hazardous substances, hazardous wastes, hazardous constituents or pollutants, and are not hydraulically sound (that is, water percolates through the floor and walls), through the use of adjacent soil borings. A single boring located within two feet of the downstream side of the structure shall be sampled at a depth corresponding to the bottom of the structure. If highly permeable soils are encountered and volatile organics sampling is required, sample at the next lower permeability soil horizon or zero to six inches above the saturated zone, or at 9.5 to 10 feet, whichever is encountered first; ***and****

[iv. Additional sampling of sediments within the system shall be conducted to assess the migration of potential contaminants through the drainage network; and]

*[v.]**iv.* Ground water discharging from storm sewer systems which contain dry weather flow (that is, five days following the most recent rainfall) shall be sampled at the discharge point and analyzed for potential contaminants discharged or potentially discharged into the system; and

5. For all boiler and compressor discharges, if there is reason to believe a potential contaminant discharge has occurred, sampling shall be conducted pursuant to (e) below (Discharge/Waste Disposal Areas).

(e) The site investigation shall also satisfy the following requirements for all discharge and waste disposal systems and areas.

1. For any discharge areas and areas of discolored soil or stressed vegetation where specific requirements are not otherwise provided in this section:

i. Each distinct area shall be evaluated independently as an area of concern; and

ii. Initial characterization samples shall be biased based on field indicators such as soil discoloration, stressed vegetation, or field instrument measurements toward those areas of greatest suspected contamination. Sample frequency shall be *[sampled at the rate of]* at least one sample for every *[400]* ***900*** square feet for areas up to 300 feet in perimeter. Sample frequency may be reduced for larger areas, subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c) specifying why the reduced sample frequency was considered adequate.

2. Above ground treatment systems shall be sampled pursuant to the requirements for the functional portions of the system pursuant to (a) above (Tanks). For example, any above ground waste treatment tanks over unpaved soil shall be sampled pursuant to (a)1 above.

3. For below grade wastewater treatment systems:

i. For tanks, septic tanks, separators, and neutralization pits, two samples shall be collected from within the tank, one aqueous and one sludge sample, for analysis unless documentation acceptable to the Department pursuant to N.J.A.C. 7:26E-1.6(c) is provided in the site investigation report (N.J.A.C. 7:26E-3.10) specifying why such sampling was not considered necessary to confirm that only sanitary waste was discharged to the system during the entire life of the system. Documentation shall include, without limitation, an affidavit certifying that only sanitary waste was ever discharged to the system and that no present or former floor drains, sinks, or other units in process areas were ever connected to the system.

ii. For septic disposal fields:

(1) Soil borings shall be completed as specified below for on-site disposal fields unless documentation acceptable to the Department is provided in the site investigation report (N.J.A.C. 7:26E-3.10) specifying why soil boring were not considered necessary to confirm that only sanitary waste was discharged to the system pursuant to (e)3i above.

(2) At least one boring per 500 square feet of *[disposal]* field area shall be completed, with a minimum of four borings per ***disposal*** field.

(3) Borings shall be located within two feet of the *[perimeter laterals]* ***edge of the bed area*** in active ***disposal*** fields***, but shall be angled so that samples are taken below the infiltrative surface as defined in N.J.A.C. 7:9A-2.1****, and directly below laterals within abandoned fields.

(4) Borings shall be located to include the first five feet of *[discharge area]* ***the infiltrative surface as defined in N.J.A.C. 7:9A-2.1**** and shall be spaced so that samples are representative of the entire disposal field.

(5) Soil samples shall be taken at a depth corresponding to ***0.6 inches below*** the bottom of the *[absorption trench]* ***infiltrative surface as defined in N.J.A.C. 7:9A-2.1****.

(6) If *[soils or bedding material with]* ***material to be sampled has**** less than 15 percent silt/clay *[are encountered]* and volatile organics samples are required, volatile organics soil samples shall be taken at the first lower permeability soil horizon or at zero to six inches above the saturated zone, or at 9.5 to 10 feet, whichever is encountered first.

iii. For ***cesspools and**** seepage pits***, as defined in N.J.A.C. 7:9A-2.1**** and dry wells:

(1) One representative sample of sludge/sediments in each pit shall be obtained for analysis ***at zero to six inches below the pit bottom***; ***and***

*[(2) At least one soil boring shall be located within two feet of the outside of the pit wall;

(3) At a minimum soil samples from the boring shall be collected at zero to six inches below the pit bottom; and

(4) If soils or bedding material with less than 15 percent silt/clay are encountered below the pit bottom and volatile organics samples are required, samples for volatile organics shall be collected at the first less permeable soil horizon below the pit or at zero to six inches above the saturated zone or at 9.5 to 10 feet, whichever is encountered first.]*

(2) If material to be sampled has less than 15 percent silt/clay and volatile organics samples are required, samples for volatile organics shall be collected at the first less permeable soil horizon below the pit or at zero to six inches above the saturated zone or at 9.5 to 10 feet, whichever is encountered first.*

iv. Collection lines shall be sampled pursuant to (d)1 above (Floor Drains).

(f) The site investigation shall also satisfy the following requirements for any other ***potentially contaminated**** areas away from process areas not otherwise addressed pursuant to (a) through (e) above:

1. The sample locations shall be biased toward suspected areas of the greatest contamination. If there is no basis for biasing, then random sampling of these areas is required as follows, except as provided in (f)2 below:

i. The area to be sampled shall be gridded and each grid node given an identification number;

ii. The grid nodes chosen for sampling shall be based on the numbers selected from a random number chart;

iii. Areas of less than 10 acres shall be sampled at a rate of at least one sample for every two acres; and

iv. Areas greater than 10 acres may be sampled at a reduced frequency subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c) specifying why a reduced frequency was considered appropriate, but a minimum of five locations shall be sampled.

2. If the person responsible for conducting the remediation documents, pursuant to N.J.A.C. 7:26E-1.6(c), that the area is not and has not been used for any purpose which may have included hazardous substances, hazardous wastes, hazardous constituents, or pollutants, including, without limitation, the activities described in (a) through (e) above, then no samples are required. Such documentation shall be based upon the following:

i. An aerial photographic history pursuant to N.J.A.C. 7:26E-3.1(c)1vi (Preliminary Assessment); and

ii. An affidavit signed by the person certifying the site investigation attesting that, based on diligent inquiry, no potential contaminants were discharged in the area.

7:26E-3.10 Site investigation report

(a) The site investigation report shall present and discuss all of the information identified or collected pursuant to N.J.A.C. 7:26E-3.3 through 3.9.

(b) The site investigation report shall include the following:

1. Historical information pursuant to N.J.A.C. 7:26E-3.2 (preliminary assessment report) unless the remediation is directed at either a specific discharge event, rather than a particular area of a site, or any underground tank or underground tank system;

2. A physical setting section which shall include descriptions of the following unless the remediation is directed at either a specific discharge event, rather than a particular area of *[a site]* ***concern****, or any underground tank or underground tank system:

i. The physical conditions of the site and surroundings, including a general description of soils, geology, hydrogeology, and topography; ***and****

ii. Use of, distance to, flow direction, and names of surface water bodies within one-half mile of the site with emphasis upon water

bodies topographically or hydraulically downgradient of the site that may receive site discharges or runoff*[;

iii. A copy of the United States Geologic Survey (USGS) 7.5 minute topographic quadrangle that includes the site and an area of at least a one mile radius around the site shall be required. This map shall be the most recent USGS revision and shall clearly note the facility location and property boundaries. When a portion of the USGS quadrangle is used, the scale, north arrow, contour interval, longitude and latitude, along with the name and date of the USGS quadrangle shall be noted on the map; and

iv. A wetlands map from the "National Wetlands Inventory" which provides a wetlands map superimposed on a USGS 7.5 minute topographic quadrangle shall be included]*.

3. A technical overview which shall present a general profile of the site investigation execution and results. The following items shall be discussed in the technical overview:

i. Reliability of laboratory analytical data as indicated by compliance with sample holding times, ability to achieve method detection limits and precision and accuracy criteria for the analytical method, and other indicators of data quality;

ii. A summary of the overall nature of contamination on the site, including, without limitation, the numbers of areas of concern requiring further remediation; and

iii. Any significant events or seasonal variation which may have influenced sampling procedures or analytical results; and

4. Findings/recommendations which shall include;

i. A discussion, by area of concern, of the site investigation execution and analytical results. The discussion shall consist of specific findings at the areas of concern;

ii. A discussion of the following items, for each area of concern:

(1) A detailed description of each area of concern including dimensions, suspected and actual comtamination, and suspected source of discharge;

(2) Results and implications of field measurements or area-specific changes in sampling protocol due to field conditions;

(3) Significance of information generated in the library search of tentatively identified compounds/unknown compounds; and

(4) Recommendations for either additional remediation or no further action for each area of concern.

(c) The site investigation report shall also include the following data and information:

1. Results of all analyses, copies of all laboratory data sheets and the required laboratory data deliverables pursuant to N.J.A.C. 7:26E-2.1 (Quality Assurance Requirements). Laboratory data deliverables may be submitted as a separate attachment;

2. A summary table of analytical methods and quality assurance indicators pursuant to N.J.A.C. 7:26E-2.2(a)1v;

3. A table summarizing all sampling results, including sample location, media, sample depth, and field and laboratory identification numbers, analytical results, and comparison to applicable *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]*:

i. All contaminant concentrations exceeding the applicable *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]* shall be identified; *[and]*

ii. Samples with method detection limits (MDLs) (or practical quantitation levels (PQLs) if available) exceeding the applicable *[cleanup]* ***remediation*** standard *[per N.J.A.C. 7:26D]* shall be identified and an explanation provided in the table key; ***and***

iii. Soils/solids sample results shall be reported in milligrams per kilogram on a dry weight basis, and aqueous sample results shall be reported in micrograms per liter;

4. Stratigraphic logs, which include soil/rock physical characteristics and field instrument readings detected during drilling for each soil boring, test pit and monitoring well;

5. Stratigraphic cross sections of the site using information from monitoring wells, test pits and borings***, if available***;

6. All soil boring, piezometer, and monitoring well records, including the State permit numbers and as-built specifications***, if applicable***; ***and***

[7. A summary of the review of inventory control records to identify product loss and any actions taken to investigate potential leak areas; and]

*[8.]***7.*** Any other data and information obtained pursuant to N.J.A.C. 7:26E-3.3 through 3.9.

(d) The site investigation report shall also include the following legible maps and diagrams:

1. Site and area of concern base maps pursuant to N.J.A.C. 7:26E-3.2(a)3i;

2. Sample location map(s), including:

i. All sample locations, sample depth***s*** and contaminant concentration***s*** shall also be plotted on the map***. Where an entire contaminant class is not detected or is less than the applicable remediation standard, contaminants need not be listed individually***;

ii. Map scale and orientation;

iii. Field identification numbers for all samples; and

iv. If more than one map is submitted, maps shall be presented as overlays, keyed to the base map in (d)1 above; sample locations may be superimposed on the site or area of concern map in (d)1 above***. Alternatively, individual maps may be submitted which have a common coordinate system and common scale, provided each map details the features of the base map in (d)1, above;***

3. If applicable, a map of the distribution of surface water, structure and airborne contaminants, including sample location numbers and contaminant concentrations; and

4. Photos may be submitted to document the location of all soil and sediment sample locations.

SUBCHAPTER 4. REMEDIAL INVESTIGATIONS

7:26E-4.1 Remedial investigation requirements

(a) ***A remedial investigation is necessary at each area of concern with contaminants which exceed the applicable remediation standards.*** The purposes of a remedial investigation are to:

1. Delineate the horizontal and vertical extent of contaminants in all media at the site pursuant to (b) below;

2. Determine the general surface and subsurface characteristics of the site, including, without limitation, the depth to ground water;

3. Identify the migration paths and actual or potential receptors of contaminants on or through air, soil, bedrock, sediment, ground water, surface water, and structures at a contaminated site;

4. Collect and evaluate all data necessary to evaluate remedial action alternatives*[,]***. This data may be gathered through studies*** including, without limitation*[:

i. Treatability]***, treatability*** studies, bench scale studies and pilot scale studies (these studies may be conducted pursuant to EPA 540/2-89/058 "Guide for Conducting Treatability Studies Under CERCLA").

i. Any such data collection, *[These studies]* shall be initiated as soon as the general extent of contamination is known, usually after the first delineation phase and, at a minimum, these studies shall be initiated by the end of the second delineation phase; and

ii. A *[feasibility study]* ***remedial alternative analysis*** if required pursuant to N.J.A.C. 7:26E-5.1;

5. Collect and evaluate all data necessary to evaluate the ecological impacts of the contaminants *[pursuant to N.J.A.C. 7:26D-5]*;

6. Collect all data necessary to develop permit limitations for any discharge to an environmental medium which may be required for any remedial action alternative under consideration;

7. Characterize all natural resource damages, including the nature and extent of injury or damage to flora and fauna, caused by the potential contaminants at the site; and

8. Identify containment and/or stabilization activities to prevent contaminant exposure to onsite receptors and to prevent the offsite migration of contaminants while remedial alternatives are being evaluated.

(b) The delineation of the horizontal and vertical limits of contamination for all media shall be conducted as part of the remedial investigation. Delineation samples shall be biased to identify any migration paths of the contaminant. Samples shall be

biased based on professional judgment, area history, discolored soil, stressed vegetation, drainage patterns, field instrument measurements, odor and other field indicators. If soil samples within the saturated zone are required to identify the vertical limit of contamination, a sample of the saturated soil shall be collected, if sample recovery is possible, and analyzed. Delineation shall be accomplished by either:

1. Presentation of sample data that indicates contamination is below the applicable *[cleanup]* ***remediation*** standard *[pursuant to N.J.A.C. 7:26D]*. This may be accomplished after a remedial action has been implemented; or

2. By establishment of a contaminant gradient as follows:

i. Contaminant levels decrease by:

(1) Ten percent or more between the initial characterization sample and each of two sequential delineation samples; or

(2) A factor of five or more between the initial characterization sample and a single delineation sample; and

ii. Once a contaminant gradient has been established, the approximate limits of contamination may be reasonably estimated by extrapolation.

7:26E-4.2 Remedial investigation of building interiors

(a) *[The]* ***If applicable, the*** remedial investigation *[shall]* ***may*** include an investigation of all building interiors which may contain contaminants above the applicable building interior *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]*.

(b) The remedial investigation of each building shall be conducted pursuant to N.J.A.C. 7:26E-4.1 and according to:

1. The quality assurance and quality control requirements pursuant to N.J.A.C. 7:26E-2; and

2. The technical requirements for a building investigation pursuant to N.J.A.C. 7:26E-3.5.

7:26E-4.3 Remedial investigation of soil

(a) The remedial investigation shall include an investigation of all soil which may contain contaminants above the applicable soil *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]*.

(b) The remedial investigation of the soil shall be conducted for the purposes of a remedial investigation pursuant to N.J.A.C. 7:26E-4.1 according to:

1. The quality assurance and quality control requirements pursuant to N.J.A.C. 7:26E-2; and

2. The technical requirements for soil investigation pursuant to N.J.A.C. 7:26E-3.6.

7:26E-4.4 Remedial investigation of ground water

(a) A remedial investigation of ground water for an area of concern shall be conducted if:

1. A ground water sample previously collected from that area of concern contains a contaminant above the applicable ground water *[cleanup]* ***remediation*** standard;

2. A soil sample collected from that area of concern within two feet of the saturated zone or bedrock contains a contaminant above the applicable *[subsurface]* soil *[cleanup]* ***remediation*** standard;

3. A soil sample collected in the area of concern anywhere in the soil column contains a contaminant above the applicable *[subsurface]* soil *[cleanup]* ***remediation*** standard and the contaminant is not going to be actively *[treated]* ***remediated*** or removed; *[or]*

4. Any contaminant in an area of concern has a water solubility greater than 100 milligrams per liter as listed in a peer reviewed reference; and all of the soil between the contaminant and the saturated zone is less than 15 percent silt and clay*[, except as follows:]***.***

*[i.]***5.*** A ground water sample may not be necessary in a remedial investigation for a particular area of concern if the person responsible for conducting the remediation documents that ground water contamination from the discharge is unlikely based on the following criteria:

*[(1)]***i.*** The date and duration of the discharge is known;

*[(2)]***ii.*** The identity and the volume of the contaminants are known;

*[(3)]***iii.*** The date the remediation in response to the single discharge was completed;

*[(4)]***iv.*** Post remediation ***soil*** sampling data establish that the remediation meets all applicable *[cleanup]* ***remediation*** standards *[at the time of]* ***in*** the ***approved*** remedial *[investigation]* ***action workplan or remedial action report***; and

*[(5)]***v.*** Any other data or information that is relevant to the determination of the likelihood of ground water contamination.

(b) The remedial investigation of ground water shall be conducted for the purposes of a remedial investigation pursuant to N.J.A.C. 7:26E-4.1 according to:

1. The quality assurance and quality control requirements pursuant to N.J.A.C. 7:26E-2; and

2. The requirements in (c) through (i) below.

(c) Ground water samples shall be taken pursuant to acceptable professional methods, such as those described in the NJDEPE Field Sampling Procedures Manual in effect as of the date the samples were taken. The person responsible for conducting the investigation may implement an alternate sampling method not described in the Manual, subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c).

(d) All ground water sampling points shall be located in:

1. The excavation of a tank which is the source of the contaminants, if possible; or

2. The expected downgradient flow direction of the area of concern and within 10 feet of the area of concern; ground water flow direction shall be predicted based on topographic relief, the location of surface water bodies, structural controls in the bedrock or soils, location of pumping wells and subsurface conduits at or below the water table.

(e) The minimum number of ground water samples collected shall be as follows:

1. At least one ground water sample for each area of concern*[ed]* which is classified as an Underground Injection Control (UIC) unit including, without limitation, seepage pits, septic systems, dry wells or other injection wells regulated under N.J.A.C. 7:14A-5;

2. At least one ground water sample for sites with leaking underground storage tanks and tank fields containing up to three tanks with a maximum capacity of 10,000 gallons per tank. If a leaking tank is excavated, the ground water sampling point shall be located within the excavation, if possible;

3. Pump islands and associated piping greater than 25 feet from the tank field shall be considered separate areas of concern and shall require a separate ground water sample location; and

4. At least one ground water sample for all other areas of concern unless the area of concern is within 10 feet hydraulically upgradient of a ground water sampling location.

[(f) All ground water samples taken pursuant to (e) above shall be obtained from ground water monitoring wells or piezometers.]

*[(g)]***(f)*** All ground water monitoring wells and piezometers shall:

1. Be constructed pursuant to generally accepted methods, such as those described in the NJDEPE Field Sampling Procedures Manual in effect as of the date the wells or piezometers were constructed. The person responsible for conducting the investigation may implement an alternate sampling method not described in the Manual, subject to the Department's review of documentation pursuant to N.J.A.C. 7:26E-1.6(c). Variations on the well design shall be approved by the Department prior to installation;

2. Be installed after the required well drilling permits are obtained pursuant to N.J.S.A. 58:4A et seq.;

3. Be installed by a licensed New Jersey well driller pursuant to N.J.S.A. 58:4A-4.1 et seq.;

4. Have split spoon samples collected during drilling through unconsolidated or overburden material using American Society of Testing Materials (ASTM) Method D1586-84, incorporated herein by reference, if appropriate. Split spoon samples shall be collected every five feet and at any change in soil lithology and at all zones that show obvious signs of contamination. At least one drilling location per area of concern shall include continuous split spoon

samples to define the subsurface stratigraphy. Drilling logs shall include all data pursuant to N.J.A.C. 7:26E-3.6 (Soil Investigations);

5. Have a sufficient number of rock cores collected during the drilling of bedrock monitoring wells, piezometers and other borings, if appropriate, to obtain a general understanding of the fracture patterns beneath the site *[including strike and dip of bedding planes; orientation of faults, joints and fractures; plunges and trends of folds]*. The corings shall be conducted using ***the ASTM 2113*** Diamond Drilling Method***, as amended and supplemented*** *[ASTM 2113-70]*, incorporated herein by reference. Other methods may be used if documentation acceptable to the Department is provided indicating that the methods were appropriate. The core logs shall include:

i. Lithology;

ii. Fracture frequency;

iii. Degree of weathering;

iv. Fracture fit;

v. Fracture spacing;

vi. Orientation of fractures;

vii. Odors and discoloration in the rock core; *[and]*

viii. Percent recovery; ***and***

ix. Any other information appropriate for the investigation.

6. If appropriate, an evaluation of the bedrock structure at the site including strike and dip of the bedding planes, orientation of faults, joints and fractures; plunges and trends of folds, must be completed through a field evaluation. Published geologic literature may be used if appropriate.

*[6.]***7.*** Be surveyed by a New Jersey licensed surveyor as follows:

i. The inner well casing must be surveyed to the nearest hundredth (0.01) foot *[above mean sea level]* in relation to the *[New Jersey Geodetic Control survey]* ***permanent, on-site*** datum and horizontally to an accuracy of one-tenth of a second latitude and longitude; and

ii. A permanent water level measurement mark shall be etched onto the top of the inner well casing to allow for accurate *[reproducible]***, ***consistent and comparable*** water level measurements over time.

*[7.]***8.*** Be developed to yield a non-turbid discharge, where possible; and

*[8.]***9.*** Be sealed upon completion of the investigation in accordance with N.J.A.C. 7:9-9 unless otherwise approved by the Department.

*[(h)]***(g)*** The results of initial ground water analyses shall be evaluated as follows:

1. If the contaminant concentrations found in all ground water samples are below the applicable ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]*, no further remediation is necessary for ground water;

2. If the contaminant concentrations found in any ground water samples exceed the applicable ***remediation*** standard *[pursuant to N.J.A.C. 7:26D]*, the ground water may be resampled to confirm the presence of contamination. This confirmation sampling shall include at least two additional samples taken over a 30 day period, the results of which may be averaged with the original result to determine compliance with the applicable ***remediation*** standard; and

3. Upon confirmation of ground water contamination, the remedial investigation shall include the collection of ground water samples to:

i. Delineate the vertical and horizontal extent of ground water contamination;

ii. Determine the direction of ground water flow as follows:

(1) A minimum of three ground water monitoring wells or piezometers in each affected aquifer or water bearing zone to determine the ground water flow direction in that zone;

(2) A minimum of two rounds of static water levels shall be obtained at a minimum of 30 days apart to provide a more accurate indication of the ground water flow direction. The water levels may be taken to evaluate seasonal variations in flow direction;

(3) If the site is located in an area that is tidally influenced, *[synoptic static water level measurements shall be completed over two tidal cycles for at least two sampling events each separated by at least two weeks]* ***synotic ground and surface water levels shall be collected during two fair weather sampling events separated by a minimum 30 day period where each event entails collecting hourly water levels from all applicable wells and the surface water for a minimum 71 hour period***; and

(4) Water level measurements and ground water flow determinations shall take into account activities in the area which affect flow direction, such as pumping wells or seasonably used pumping wells; and

iii. If ground water contamination above the applicable *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]* has been confirmed, the person responsible for the remediation shall:

(1) Conduct aquifer tests (pump tests, packer tests, slug tests) ***or other appropriate analysis*** to adequately *[define aquifer characteristics including]* ***characterize the impacted aquifer at the site. At a minimum, this shall include the site water table gradient,*** hydraulic conductivity (K), *[transmissivity (T), storativity (S)]* and ***an estimate of*** the rate of ground water and contaminant flow in the aquifer***. If pumping the aquifer is determined to be a feasible option for possible remediation, then additional aquifer characteristics such as transmissivity (T) and storativity (S) must be determined through the use of a pump test***; and

(2) *[Use]* ***If*** a model to further define characteristics of the ground water flow system *[if]* ***is used,*** documentation acceptable to the Department *[is]* ***shall be*** provided in the remedial investigation report (N.J.A.C. 7:26E-4.9) indicating that the model was appropriate. Specific details on the type of model, input parameters used and referenced, boundaries and limitations of the model shall be submitted to the Department upon request along with a justification as to why the model was selected.

*[(i)]***(h)*** When ground water contamination above *[cleanup]* ***the appropriate remediation*** standards *[pursuant to N.J.A.C. 7:26D]* has been confirmed pursuant to *[(g)3]* ***(g)2*** above, the person responsible for conducting the remediation shall perform the following tasks:

1. A well search of all wells, including:

i. A *[physical, documentary and field]* ***file*** search ***using all available Department, county or local records must be conducted*** for all irrigation, monitoring, and domestic wells within one-half mile of the site and all industrial, public supply wells, and wells with water allocation permits within one mile of the site***. If the contaminated site is located in a ground water use area and contaminated ground water may be emanating from the site, further evaluation, including a door-to-door survey, shall be conducted***;

ii. *[The]* ***If applicable, the*** type of well, the status of the well (active, inactive, properly abandoned pursuant to N.J.A.C. 7:9-9.1) ***. If possible***, total depth, casing length, open bore hole or screened interval, copies of well records and/or well logs on file with the Department's Bureau of Water Allocation, and any additional records available in county or municipal records shall be included; and

iii. A listing of all sources referenced in performing the well search; if a referenced agency was unable to provide the information requested, written documentation as to whom was contacted and when, and that the request for information was either denied or that the information was unavailable.

2. Any ***existing supply*** wells identified pursuant to the well search which are suspected to be contaminated ***by the site in question*** shall be sampled;

3. An evaluation of any surface water body that may be impacted by the contaminated ground water pursuant to N.J.A.C. 7:26E-4.5 (Surface Water Investigations);

4. An evaluation of any subsurface utilities, basements or other structures *[which may pose]* ***that may be impacted from*** a vapor hazard as a result of the ground water contamination; and

5. An evaluation of the current and potential ground water uses based on a 25-year planning horizon utilizing municipality and water purveyor planning data.

*[(j)]**(i)* Soil gas studies shall be conducted to locate sources of ground water contamination when ground water contamination ***by volatile organic compounds*** is identified but no apparent source is identified.

7:26E-4.5 Remedial investigation of surface water, wetlands and sediment

(a) The remedial investigation shall include an investigation of any surface water, wetlands and sediments which may *[contain contaminants above the applicable cleanup standards pursuant to N.J.A.C. 7:26D]* ***have been impacted by contamination emanating from the site***.

(b) The remedial investigation of surface water, wetlands and sediment shall be conducted for the purposes of a remedial investigation pursuant to ***the requirements for the appropriate media in*** N.J.A.C. 7:26E-***3.4 and*** 4.1 according to*[:

1. The]* ***the*** quality assurance and quality control requirements pursuant to N.J.A.C. 7:26E-2*[; and]**.*

[2. The technical requirements for the investigation of surface water, wetlands and sediment pursuant to N.J.A.C. 7:26E-3.8.]

(c) The surface water investigation shall be conducted pursuant to (d) below to evaluate the relationship between contaminated ground water, sediments and surface waters, unless:

1. Documentation acceptable to the Department pursuant to N.J.A.C. 7:26E-1.6(c) is provided with the remedial investigation report (N.J.A.C. 7:26E-4.9) specifying why this migration pathway was not considered significant; or

2. The Department approves a less stringent water quality analysis:

i. Based on site-specific conditions; and

ii. Supported by appropriate supporting documentation.

(d) The surface water investigation shall include:

1. Sampling designed to account for seasonal or short-term flow and water quality fluctuations (dry vs. wet weather), system hydraulics (obtaining flow proportioned samples) and potential contaminant characteristics (density, solubility).

2. A receiving water body analysis on any surface water body to which contaminated ground water is discharging, including the following:

i. A water quality analysis program with sampling stations upstream and downstream of the contaminated site, any existing point source discharges at that site, and any proposed discharge locations;

(1) Procedures in accordance with the methods identified in (d)2i(2) below, including, without limitation:

(A) *[Eight weeks of water]* ***Water*** quality sampling for each *[parameter which has a surface water quality criterion pursuant to N.J.A.C. 7:9-4 or is in Appendix C, incorporated herein by reference, including any contaminant which is discharging to surface water]* ***constituent of concern potentially emanating from a site***;

(B) At least two sample sets must be taken during critical, low flow conditions; and

(C) At least one sediment sample shall be taken and analyzed for the appropriate parameters identified in (d)2i(1)(A) above, during one of the sampling events;

(D) For non-tidal water bodies, samples shall be taken at the area of discharge, and at least one location downstream;

(E) For tidal water bodies, samples shall be taken at the area of discharge at high, low, and slack tides; and

(F) Depending upon site-specific conditions, additional samples may be necessary to define loads from other point sources, tributaries, and other non-point sources; and

(2) All methods shall be consistent with generally accepted professional methods, such as those described in the NJDEPE "Field Procedures Manual For Water Data Acquisition," or the EPA Handbook "Instream Sampling for Waste Load Allocation Applications;" any deviations from these two documents shall be documented pursuant to N.J.A.C. 7:26E-1.6.

ii. A determination of the critical instream waste concentration (IWC), consistent with N.J.A.C. 7:9-4.6, shall also be conducted if a point source discharge to surface water is a potential part of a remedial action at the site. For tidal water bodies, a determination of the critical instream waste concentration may include, but is not limited to, computer plume modelling and dye studies.

7:26E-4.6 Remedial investigation of landfills

(a) The remedial investigation shall include, unless the remedial investigation is being conducted pursuant to ECRA, an investigation of all landfills which may contain contaminants above the applicable *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]*.

(b) The remedial investigation of landfills shall be conducted pursuant to N.J.A.C. 7:26E-4.1 according to the quality assurance and quality control requirements pursuant to N.J.A.C. 7:26E-2.

(c) Landfill investigations shall characterize the contents *[and]* ***of the landfill through a complete file review. In addition,*** the horizontal and vertical extent of fill material and impact on the soil, ground water, air and surface waters ***shall be evaluated***.

(d) The boundaries of the landfill shall be identified through geophysical sensing techniques, or subsurface exploration techniques including test pits or borings, or an aerial photographic history, or local government records. Other methods may be used if documentation acceptable to the Department pursuant to N.J.A.C. 7:26E-1.6(c) is provided in the remedial investigation report (N.J.A.C. 7:26E-4.9) specifying why the methods were considered appropriate.

(e) The person responsible for the investigation shall review all records pertaining to the landfill to determine if any hazardous waste pursuant to N.J.A.C. 7:26 was ever disposed in the landfill.

7:26E-4.7 Remedial investigation of ecological receptors (Reserved)

7:26E-4.8 Remedial investigation workplan

(a) If a remedial investigation workplan is required by the Department in an oversight document or by the ECRA or UST programs, the workplan shall include proposals to complete all requirements pursuant to N.J.A.C. 7:26E-4.1 through 4.7. The remedial investigation workplan shall be presented in a format that corresponds to the outline of this subsection.

(b) The remedial investigation workplan shall include:

1. A detailed schedule for all remedial investigation activities, including timelines and target dates for:

i. Start and completion of all field activities;

ii. Receipt of analytical results required in N.J.A.C. 7:26E-4.1 through 4.7; and

iii. Submission of all reports to the Department;

2. A description of the role of principal personnel who will participate in the remedial investigation:

i. The following information about project personnel including the project manager and, if applicable, a facility contact, legal contact, and contractor and subcontractor contacts shall be provided:

[(1) Telephone numbers;]

*[(2)]**(1)* Responsibilities; *[and]*

*[(3)]**(2)* Authority on the project*[.]**; **and***

(3) The telephone number of the project manager.

ii. If the principal personnel designated on the project change, information for the new personnel shall be submitted to the Department within 10 calendar days of such change;

3. The following historical information unless the remediation is directed at either a specific discharge event, rather than a particular area of a site, or any underground tank or underground tank system:

i. Historical site plans***, if available after completion of a due diligence search,*** and facility as-built construction drawing detailing, at a minimum, all information pursuant to N.J.A.C. 7:26E-3.2(a) and in addition, topography using two foot contours, potential contaminant conduits including all subsurface utilities. Maps depicting the entire site shall be scaled at one inch to 200 feet or less and individual area of concern maps shall be scaled at one inch to 40 feet or less. If more than one map is submitted, maps shall be presented as overlays, keyed to a base map; and

ii. An interpretive aerial history pursuant to N.J.A.C. 7:26E-3.1(c)1vi including all photos. Photos shall be enlarged to *[a]* ***an appropriate*** scale *[of one inch to 200 feet or less]*. Matched pairs shall be provided, if available, to allow for stereo viewing. Photos shall include a north arrow, date and source of photo, and site boundaries. Matte finish reproductions *[shall be provided]* ***are preferred***;

4. Descriptions of the following unless the remediation is directed at either a specific discharge event, rather than a particular area of a site, or any underground tank or underground tank system:

i. The physical conditions of the site and surroundings, including a general description of soils, geology, hydrogeology, and topography.

ii. Usage, distance to, flow direction, and names of surface water bodies within one half mile of the site with emphasis upon water bodies topographically or hydraulically downgradient of the site that may receive site discharges or runoff;

iii. A copy of the United States Geologic Survey (USGS) 7.5 minute topographic quadrangle that includes the site and an area of at least a one mile radius around the site shall be required. This map shall be the most recent USGS revision and shall clearly note the facility location and property boundaries. When a portion of the USGS quadrangle is used, the scale, north arrow, contour interval, longitude and latitude, along with the name and date of the USGS quadrangle shall be noted on the map;

iv. In addition, a wetlands map from the "National Wetlands Inventory" which provides a wetlands map superimposed on a USGS 7.5 minute topographic quadrangle shall be included;

v. Copies of boring logs from on-site construction;

vi. Land use within a 1,000 foot radius of the site including proximity of the site to sensitive human and/or environmental receptors (for example, residences, endangered species habitats, wetlands, hospitals, nursing homes, schools, parks) and

vii. An estimate of the percentage of total land area within a 1,000-foot radius of site covered by structures and other impermeable surface covers shall be required to evaluate ground water recharge potential;

5. A description of each area of concern including dimensions, suspected contaminants, and suspected source of discharge;

6. An area of concern sampling summary table of proposed sampling and analysis shall be presented in the remedial investigation workplan text or on the sample location map specified in (b)7 below, according to the following headings (A suggested format is included in Table 4-1):

i. Location: use the same alpha or numeric designation as shown on the scaled sampling location map;

ii. Matrix: building interior, waste, soil, surface water, ground water, or sediment;

iii. Sample depth:

(1) Soil/sediment—depth of sample increment which will be analyzed;

(2) Ground water—indicate water bearing zone to be sampled (water table, confined, and *[unconfined]* ***semi-confined***) and sample depth;

(3) Surface water—indicate depth of water sample.

iv. Analytical parameters for each sample (for example, priority pollutant metals, full priority pollutant scan); and

v. Sampling method;

TABLE 4-1

SUGGESTED FORMAT
SAMPLING SUMMARY TABLE

LOCATION	MEDIUM	SAMPLE DEPTH	ANALYTICAL PARAMETERS	SAMPLING METHOD
Area T: Seepage Pit				
MWT-1	Ground Water	Water Table (20′)	Priority Pollutants	Bailer
MWT-2	Ground Water	Water Table (20′)	Priority Pollutants	Bailer
MWT-3	Ground Water	Water Table (20′)	Priority Pollutants	Bailer
MWT-4	Ground Water	Confined (50′)	Priority Pollutants	Bailer
Area S: Drum Storage Pad				
S-1	Soil	0-6″	Priority Pollutant Metals and Cyanide	Trowel
S-2	Soil	0-6″	Priority Pollutant Metals and Cyanide	Trowel
		18-24″	Priority Pollutant Volatile Organics	Coring Device
S-3	Soil	0-6″	Priority Pollutant Metals and Cyanide	Trowel

7. Sample location map: proposed sample locations shall be indicated on a sample location map, scaled as in (b)3i above. Sample locations may be superimposed on maps presented pursuant to (b)3i above;

8. Other sampling proposals including any proposals to conduct the following studies:

i. Treatability, bench scale, pilot studies pursuant to N.J.A.C. 7:26E-4.1(a)4i;

ii. Data necessary to develop discharge permit effluent limitations; and

iii. Characterization of natural resource damages pursuant to N.J.A.C. 7:26D-5;

9. Quality assurance project plan including proposed sampling/analytical methods pursuant to N.J.A.C. 7:26E-2.2; and

10. Health and safety plan pursuant to N.J.A.C. 7:26E-1.9.

7:26E-4.9 Remedial investigation report

(a) The remedial investigation report shall comply with all requirements in N.J.A.C. 7:26E-3.10 (site investigation report) and in addition shall present and discuss any additional information collected pursuant to N.J.A.C. 7:26E-4.1 through 4.7 and the approved remedial investigation workplan as outlined in N.J.A.C. 7:26E-4.8, if applicable. The remedial investigation report shall be presented in a format that corresponds to the outline of this subchapter.

(b) The remedial investigation report shall include the following:

1. Historical information pursuant to N.J.A.C. 7:26E-4.8(b)3;

2. Physical setting pursuant to N.J.A.C. 7:26E-4.8(b)4. In addition, if a well search was conducted, it shall be presented pursuant to Appendix B, incorporated herein by reference;

3. Technical overview pursuant to N.J.A.C. 7:26E-3.10(b)3 and, in addition, the following items shall be discussed:

i. A summary of the results of any treatability, bench scale, or pilot studies conducted to support remedy selection;

ii. A summary of the results of any data collected to develop permit limitations for any permits which may be required during potential remedial actions; and

iii. A summary of the results of any ecological assessments conducted *[pursuant to N.J.A.C. 7:26-5]*; and

4. Findings/recommendations pursuant to N.J.A.C. 7:26E-3.10(b)4.

(c) The remedial investigation report shall include the following data and information:

1. Results of all analyses, copies of all laboratory data sheets and the required laboratory data deliverables pursuant to N.J.A.C. 7:26E-2.1 (Quality Assurance Requirements). Laboratory data deliverables may be submitted as a separate attachment;

2. A summary table of analytical methods and quality assurance indicators pursuant to N.J.A.C. 7:26E-2.2 (Quality Assurance Workplan);

3. Sampling Results Summary Table(s) of all analyses, including sample location, media, sample depth, and field and lab identification numbers pursuant to N.J.A.C. 7:26E-3.13(c)3 and, in addition:

i. All summary tables shall be organized by area of concern, and for each area of concern, average concentrations for each contaminant shall be presented along with individual sample results. The average shall be the arithmetic average *[pursuant to N.J.A.C. 7:26D]* and the following shall apply:

(1) All contaminant concentrations exceeding the applicable *[cleanup]* ***remediation*** standard *[pursuant to N.J.A.C. 7:26D]* shall be identified; and

(2) Samples with MDLs (or PQLs if available) exceeding the applicable *[cleanup]* ***remediation*** standard *[pursuant to N.J.A.C. 7:26D]* shall be identified and an explanation provided in the table key; and

***(3) If some contaminants are detected and quantified and some contaminants are "estimated" or non-detectable, for purposes of calculating the average, the person submitting the site investigation report shall substitute one half the reported method detection limit for all contaminants reported as non-detectable, and "estimated" values shall be included in the contaminant average "as is."**

(4) "Non-detectable" values for contaminants in samples which have been diluted shall not be included in the area of concern average for those contaminants. "Detectable" values for contaminants in diluted samples shall be included in the area of concern average for those contaminants.

(5) The average shall be calculated for the contaminated area only, and shall not include clean zone data (data from outside the boundaries of the contaminated area as defined by samples contaminated greater than the applicable remediation standard). For example, if data points within a 50 foot "clean" buffer zone around an area of concern were identified during pre-remedial sampling, this clean zone shall not be included in the average. Samples from different depth intervals shall not be averaged together to determine compliance with applicable remediation standards.*

ii. *[If data for more than 25 samples are presented for an area of concern, the]* ***The*** data in the summary table pursuant to (c)3i. above may be presented using the database format outlined in detail in Tables 4.2 and 4.3.

(1) *[The basic database structure shall contain two database files. The first (Site Definition) shall consist of a single form per site and will be used to locate the site in relation to other sites in the area. A unique Identification Number shall be used for each site. This number shall be the permanent EPA ID Number assigned to the site. If no EPA ID number exists, then the number field can be left blank and added by the Department when the data are received. An absolute (latitude-longitude) coordinate system shall be used to locate each sample. Sample depth shall be included to allow for development of a three dimensional diagram of the site subsurface. This system, whether absolute or relative, shall be defined in the Site Description database and a reference sample point will be equated with the absolute latitude and longitude of the site. In the case of sites less than five acres, the site absolute coordinates shall be measured from the approximate center of the site and any centrally located sample used as a reference point. Both targeted and non-targeted compounds shall be reported on the database. The database structure shall not be duplicated as a hardcopy deliverable.]* ***The Site Sampling Results Database defines the parameters of each site/subsite, sample location, and result of chemical and/or physical analysis of samples collected within a site or subsite. These results are then spatially related to an absolute coordinate system. The database structure shall not be duplicated as a hard copy deliverable. This database shall conform to the following structure and contain, at a minimum, the specified data fields:**

(A) The database will consist of three files: Site Definition, Sample, and Analytical Results.

(I) The Site Definition file contains information specific to the site (Table 4-2). This database shall consist of a single form per site/subsite and is used to locate the site in relation to other sites in the area. This number shall be the permanent number assigned to the site. An absolute (latitude-longitude coordinated system shall be used to locate the site. The key field in this file is the SITEID.

(II) The Sample Database file contains information specific to each sample collected (Table 4-3). This file includes the spatial and physical parameters of each sample collected within a site or subsite. These samples can be defined in an absolute or relative plane (Cartesian) coordinate system. Sample depth shall be included to allow for development of a three dimensional diagram of the site subsurface. This location system (CO SYS), whether absolute or relative, shall be defined in the Site Description data file and a reference sample point (REFNCE) will be equated with the absolute latitude and longitude of the site. In the case of sites/subsites less than five acres, the site absolute coordinators shall be measured from the approximate center of the site and any centrally located sample used as a reference point. The key fields are SITEID and FIELDID.

(III) The Analytical Results Database file contains information specific to each sample collected (Table 4-3a). The key fields are SITEID and FIELDID.*

(2) *[Databases shall be constructed and delivered in any commonly available commercial database product compatible with the IBM type PC running under a DOS operating system and that can be converted into line, or comma quote-delimited ASCII format. The .DBF format, common to dBase, Foxpro, First Choice, Clipper, Alpha 4 and other commercial software, is the preferred format. Alternate formats may be accepted by the Department if simple conversion capabilities exist and if prior approval is provided by the Department. The databases shall be delivered to the Department on a DOS 3.0 or more recent formatted removable media. These are 360k and 1200k 5¼ inch disks and 720k and 1440k 3.5 inch floppy disks. The new 2880k media are currently not accepted by the Department.]* ***Databases shall be constructed and delivered in any commonly available commercial database compatible with the IBM type PC running under a DOS operating system and that can be converted into line, or comma quote-delimited ASCII format. The .DBF format, common to dBase, Foxpro, First Choice, Clipper, Alpha 4 and other commercial software, is the required format. The databases shall be delivered to the Department on a DOS 3.0 or more recent formatted removable media. These are 360k and 1200k 5 1/4 inch disks and 720k and 1440k 3.5 inch floppy disks.**

(3) Shareware and commercial compression programs are available and can be used to efficiently compress the data. The Department currently uses PKZIP version 1.1 and PCTOOLS CPBACKUP version 7.1 software. (PKZIP is shareware and is available from any public bulletin board.) Other compression routines can be used but the contractor must be able to supply the Department with the ability to uncompress the database. Distribution of commercial software will present a licensing problem but most shareware products (for example, ARJ, ZIP and LZH) can be distributed for uncompressing files without incurring a fee.*

TABLE 4-2

SITE DEFINITION DATABASE

Field	Field Name	Variable Type	Field Width	Description
1	SITEID	Character	12	Unique Identification Number (Same as SITEID found in Sample Results Database and *[the same as the CSL ID #]* ***may be assigned by the Department**)
2	LATITUDE	Numeric	*[8]* ***10***	Absolute Latitude (***decimal*** degree***s****[, min, seconds [dd.mm.ssss]]*)
3	LONGITUDE	Numeric	*[8]* ***10***	Absolute Longitude (***decimal*** degree***s****[, min, seconds [dd.mm.ssss]]*)
4	SITENAME	Character	40	Official Site Name
5	ALIASNAME	Character	48	Other Common Names (separate by semicolons)
6	SITESTREET	Character	40	Street Address of Site
7	SITECITY	Character	15	City
8	SITESTATE	Character	2	New Jersey (NJ)
9	SITEZIP	Character	10	Zip Code
10	MUNICIPALI	Character	30	Municipality
11	COUNTY	Character	10	County
12	BLOCKS	Character	12	Block Number
13	LOTS	Character	12	Lot Number
14	ACTIVE	Logical	1	(Y)es or (N)o
15	LAND*_*USE	Character	60	Industrial, residential, recreational
16	SITESIZE	Numeric	15	Area in Acres
17	CO*_*SYS	Character	15	Coordinate system used to locate samples
18	COORUNIT	Character	*[5]* ***8***	Units of coordinate system (ft, meters, yards***, etc.***)
19	XDIRECT	Character	9	Compass direction of X coordinate
20	REFNCE	Character	9	Field ID of sample location that corresponds to absolute reference point (Lat., Log.) ***if absolute reference system is not used***
21	SIC*_*CODE	Character	10	Industrial SIC code for industrial sites

TABLE 4-3

SAMPLE *[RESULTS]* DATABASE

Field	Field Name	Variable Type	Field Width	Description
1	SITEID	Character	12	Unique Site Identification Number (Same as SITEID in Site Definition Database *[and the same as the CSL ID #]*)
2	LABID	Character	10	Identification Number Assigned *[by]* ***to Sample by*** Lab
3	FIELDID	Character	10	Identification Number Assigned ***or Code Assigned*** by Sampler
4	MATRIX	Character	4	*[Air = AIR, Chip = CHIP, Ground Water = GW, Sediment = SED, Soil = SOIL, Surface Water = SW, Wipe = WIPE]* ***([wat]er, [air], [sed]iment, building [wall]s or [f]loors, or [soil])***
***5**	**XCOOR**	**Numeric**	**12**	**Relative or Absolute X-Coordinate**
6	**YCOOR**	**Numeric**	**12**	**Relative or Absolute Y-Coordinate**
7	**DEPTH**	**Numeric**	**4**	**Sample Depth (ft)**
8	**SAMPDATE**	**Date**	**10**	**Date of Sample Collection (mm/dd/yyyy)**
9	**DATELAB**	**Date**	**10**	**Date Sample was Received at Lab (mm/dd/yyyy)**
10	**SAMPNOTE**	**Character**	**256**	**Specific or Non-Standard Information for Sample***

***TABLE 4-3a**

SAMPLE RESULTS DATABASE

Field	**Field Name**	**Variable Type**	**Field Width**	**Description**
1	**SITEID**	**Character**	**12**	**Unique Site Identification Number (Same as SITEID in Site Definition Database)**
2	**FIELD ID**	**Character**	**10**	**Unique Sample ID, same as FIELDID in Sample Database***
*[5]***3*	ANALYTE	Character	*[12]***60*	Chemical or property analyzed
*[6]***4*	CAS	Character	*[14]***10*	CAS Number of analyte, if available
*[7]***5*	CONC	Numeric	*[3]***7*	*[Numeric Concentration Value]* ***Value or concentration of measured analyte or property***
*[8]***6*	CONCUNIT	Character	12	Unit of ***measurement*** or concentration
*[9]***7*	QAQUAL	Character	*[4]***6*	Quality Assurance Qualifier(s) Separate by Semicolons
*[10]***8*	MDL*(3)*	Numeric	7	Minimum Detection Level *[for the Analyte (Express in CONCUNIT)]* ***in CONCUNIT***
*[11	XCOOR	Numeric	12	Relative or Absolute X-Coordinate
12	YCOOR	Numeric	9	Relative or Absolute Y-Coordinate
13	DEPTH	Numeric	4	Depth (ft)
14	SAMPDATE	Date	8	Sampling Date]*
*[15]***9*	FTNOTE	Character	256	Specific or Non-Standard Information for *[Sample]* ***Analytical*** Results
***10**	**DANALYZ**	**Date**	**10**	**Date Analysis was Commenced at Lab (mm/dd/yyyy)***

4. Stratigraphic logs, which include soil/rock physical *[characteristics]* ***descriptions*** and field instrument readings detected during drilling for each soil boring, test pit and monitoring well***, if applicable***;

5. Stratigraphic cross sections of the site using information from monitoring wells, test pits and borings;

6. All soil boring, piezometer, and monitoring well records, including the State permit numbers and as-built specifications***, if applicable***;

7. If applicable, well casing elevations to the nearest hundredth (0.01) foot *[above mean sea level,]* ***relative to a permanent, on-site datum*** taken at the top of casing with locking cap removed;

8. If applicable, ground water elevation, for each monitoring well, to the nearest hundredth (0.01) foot *[above mean sea level,]* ***relative to a permanent, on-site datum*** taken prior to evacuation, from the top of well casing with locking cap removed;

9. A summary of the review of inventory control records to identify product loss and any actions taken to investigate potential discharge areas;

10. Results of any treatability, bench scale, or pilot studies or other data collected to support remedy selection;

11. Any data collected to develop permit limitations;

12. The results of any ecological assessments conducted *[pursuant to N.J.A.C. 7:26D-5]*;

13. For landfills, a summary of any records pertaining to the nature of waste disposed at the landfill. Copies of the records shall be submitted as a separate attachment to the report; and

14. Any other data and information obtained pursuant to N.J.A.C. 7:26E-4.1 through 4.8.

(d) The remedial investigation report shall include the following legible maps and diagrams:

1. Site and area of concern base maps pursuant to N.J.A.C. 7:26E-4.8(b)3i. If more than one map is submitted pursuant to (d)2 below, maps shall be presented as overlays, keyed to the base maps. Sample locations may be superimposed on the base maps;

2. Sample location map(s), including:

i. All ground water, soil*,* sediment**s*** and other sample locations; sample depth and contaminant concentration shall also be plotted on the map;

ii. Map scale and orientation;

iii. Field identification numbers for all samples;

iv. Ground water elevation contour maps with flow direction specified for each set of static water level measurements for each aquifer if monitoring wells were installed for flow direction;

v. Top of bedrock contour map if bedrock was encountered ***in a sufficient number of borings to prepare a map***;

vi. Isopleth maps for ground water contaminant concentrations, including horizontal/vertical extent of any free product zones, for each round of sampling; isopleth maps for soil sample results may also be provided; and

vii. If data for more than 25 samples are presented for an area of concern, soil, ground water and sediment contaminant isopleth maps and cross section diagram(s) showing concentrations of potential contaminants shall be submitted, including:

(1) Horizontal and vertical distribution of contaminants in the soil and sediment, with sample point location numbers and contaminant concentrations; and

(2) Horizontal and vertical distribution of contaminants in the ground water, with sample point location numbers and contaminant concentrations; and

viii. All monitoring well, piezometer, or other ground water sampling point locations including depth of the open borehole interval and/or screened interval;

3. If applicable, map of the distribution of surface water, structure and airborne contaminants, including sample location numbers and contaminant concentrations;

4. The same alpha or numeric labels, if assigned in the remedial investigation workplan, shall be used in the remedial investigation report; and

5. Photos may be submitted to document the location of all soil and sediment sample locations.

SUBCHAPTER 5. *[FEASIBILITY STUDY]* ***REMEDIAL ALTERNATIVE ANALYSIS***

7:26E-5.1 *[Feasibility study]* ***Remedial alternative analysis*** trigger

(a) The purpose of a *[feasibility study]* ***remedial alternative analysis*** is to identify and evaluate remedial action alternatives that are appropriate to the particular characteristics of the area of concern which is undergoing remediation.

(b) The person remediating the site shall select a permanent remedy for the site or area of concern unless otherwise approved by the Department. The Department's preference for remedy selection is, in order of decreasing preference:

1. Onsite permanent remedies;
2. Offsite permanent remedies;
3. Onsite disposal; and
4. Offsite disposal.

(c) The person responsible for conducting the remediation shall conduct a *[feasibility study]* ***remedial alternative analysis*** pursuant to this subchapter unless one of the following remedies is implemented:

1. An onsite permanent remedy; or

2. An offsite permanent remedy when the total volume of contaminated material taken offsite from the entire site, not just the individual area of concern undergoing remediation, is less than 100 cubic yards.

7:26E-5.2 *[Feasibility study]* ***Remedial alternative analysis*** requirements

(a) A *[feasibility study]* ***remedial alternative analysis*** is a multi-step process including:

1. The initial identification of remedial action alternatives which may be appropriate for the site or the area of concern;

2. An initial screening of the remedial action alternatives identified;

3. A detailed analysis of each of the remedial alternatives which remain after the initial screening; and

4. A comparative analysis of the potential performance of each of the remedial action alternatives which remain after the initial screening.

(b) The identification of potential remedial action alternatives, including innovative and emerging treatment technologies, shall be assembled for each area of concern.

(c) The remedial action alternatives which are identified pursuant to (b) above shall undergo an initial screening based on the following:

1. The effectiveness of each remedial action alternative in protecting human health and the environment, including:

i. Its effectiveness in meeting the applicable *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]*. Alternatives that do not meet ***the applicable*** *[cleanup]* ***remediation*** standards shall be eliminated from further consideration; and

ii. The degree to which each alternative reduces toxicity, mobility, or volume of *[potential]* contaminants through treatment, minimizes residual risks and affords long-term protection and minimizes short-term impacts.

2. The implementability of each alternative, including:

i. The technical feasibility and availability of the technologies that each alternative would employ; alternatives that are technically infeasible or that would require equipment, specialists, or facilities that are not available within a reasonable period of time may be eliminated from further consideration; and

ii. If treatability, bench scale, or pilot studies have been conducted pursuant to N.J.A.C. 7:26E-4.1(a)4, these results shall be utilized to determine whether or not an alternative is technically feasible;

3. The timeliness of each alternative including:

i. How quickly each alternative achieves the applicable *[cleanup]* ***remediation*** standard; and

ii. Alternatives where the time needed to achieve the applicable *[cleanup]* ***remediation*** standard is grossly excessive compared to the timeliness of other alternatives may be eliminated from further consideration, however, timeliness shall not be used to select non-treatment over treatment alternatives; and

4. The cost of each alternative including those costs listed below; alternatives where the cost of achieving the applicable *[cleanup]* ***remediation*** standard is grossly excessive compared to the cost of other alternatives may be eliminated from further consideration, however, cost shall not be used to select non-treatment over treatment alternatives:

i. Capital costs (both direct and indirect);

ii. Annual operation, maintenance and monitoring costs; and

iii. Net present value of capital and operation, maintenance and monitoring costs.

(d) Each of the remedial action alternatives which remain after the initial screening shall be analyzed in detail and evaluated according to the following criteria:

1. The ability of the alternative to:

i. Reduce the toxicity, mobility or volume of contaminants through treatment;

ii. Employ reuse, recycling or treatment that reduces toxicity, mobility or volume of *[potential]* contaminants, or results in the reuse or recycling of the contaminants or contaminated media; and

iii. Address the threats to human health and the environment posed by the site;

2. The implementability of the alternative including:

i. The degree of difficulty of implementing the alternatives by considering the technical feasibility, including technical difficulties associated with construction and operation of the alternative;

ii. The reliability of the technology;

iii. The degree to which the alternative may interfere with or restrict other remedial actions taken or to be taken at the site;

iv. The ability to monitor the effectiveness of the alternative;

v. The administrative feasibility including:

(1) The activities needed to coordinate with appropriate offices and agencies; and

(2) The ability and time needed to obtain any necessary approvals and permits from appropriate agencies; and

vi. The availability of services and materials necessary to implement the alternative;

3. The long-term effectiveness and permanence of the alternative, and the degree of certainty that the remedial action will prove successful;

4. The short-term effectiveness of the alternative including:

i. The short-term impacts of alternatives including the risks that might be posed to the community and workers during implementation of the alternative;

ii. The potential environmental impacts of the alternatives and the effectiveness and reliability of measures to mitigate the negative human health or environmental impacts of the alternative during implementation; and

iii. The time required for all applicable *[cleanup]* ***remediation*** standards *[are]* ***to be*** achieved for the area of concern;

5. The cost of the alternative including:

i. The capital costs, both direct and indirect;

ii. The annual operation, maintenance and monitoring costs; and

iii. The net present value of capital, operation, maintenance, and monitoring costs; and

6. Community concerns, *[if applicable,]* including which alternatives interested persons in the community support, have reservations about or oppose.

(e) The final step in a *[feasibility study]* ***remedial alternative analysis*** is a comparative analysis of the alternatives which remain after the initial screening to evaluate the relative performance of the alternatives in relation to each criteria specified in (d) above, including identifying the advantages and disadvantages of each alternative.

1. A narrative discussion shall be included describing the strengths and weaknesses of the alternatives relative to one another with respect to each criterion, and how reasonable variations or uncertainties could change the expectations of their relative performance.

2. The alternative that performs the best overall for each criterion, with other alternatives discussed in the relative order in which they perform, shall be identified.

3. If innovative technologies are being considered, their potential advantages with respect to cost or performance and the degree of uncertainty with respect to expected performance (as compared with more demonstrated technologies) shall also be discussed.

4. The presentation of differences among alternatives shall be measured both qualitatively and quantitatively, and shall identify substantive differences between alternatives (for example, greater short-term effectiveness concerns, greater cost, etc.).

5. Quantitative information that was used to assess the alternatives (for example, specific cost estimates, time until all applicable *[cleanup]* ***remediation*** standards would be achieved, and levels of residual contamination) shall be included in these discussions.

7:26E-5.3 *[Feasibility study]* ***Remedial alternative analysis*** report

(a) The *[feasibility study]* ***remedial alternative analysis*** report shall contain the information included in this section and shall be presented in a format that corresponds directly to the outline of this section and shall provide*[;]***:***

1. A list of the *[cleanup]* ***remediation*** standards applicable to the contamination in the area of concern;

2. A discussion of the initial screening process including a presentation of all remedial action alternatives considered for the site pursuant to N.J.A.C. 7:26E-5.2(c);

3. A list of the remedial action alternatives that remain after initial screening;

4. The evaluation and assessment of each remedial action alternative against the criteria specified in N.J.A.C. 7:26E-5.2(d); and

5. A comparative analysis of the alternatives to evaluate the relative performance of each remedial action alternative in relation to each specific evaluation criterion in N.J.A.C. 7:26E-5.2(d).

(b) The *[feasibility study]* ***remedial alternative analysis*** report shall be based on all data and information obtained pursuant to N.J.A.C. 7:26E-4.1(a)4i including treatability, bench or pilot scale studies.

SUBCHAPTER 6. REMEDIAL ACTION

7:26E-6.1 Remedial action requirements

(a) The person responsible for implementing any remedial action at a contaminated site shall notify the Department pursuant to N.J.A.C. 7:26E-1.4.

(b) Each remedial action implemented at a contaminated site shall:

1. Be approved by the Department prior to implementation, unless the remedial action is a permanent remedy pursuant to N.J.A.C. 7:26E-*[5.1(b)]***5.1(c)***;

2. *[Achieve]* ***Comply with*** all applicable *[cleanup]* ***remediation*** standards *[pursuant to N.J.A.C. 7:26D]*;

3. Comply with all applicable Federal, State, and local laws, regulations, and requirements;

4. Not in itself cause an uncontrolled ***or unpermitted*** discharge or *[merely]* transfer ***of*** contaminants from one media to another; and

5. *[If contaminants remain onsite after remediation in excess of the applicable cleanup standards pursuant to N.J.A.C. 7:26D, be reevaluated at regular intervals, no less frequently than once every five years, to determine whether or not the remediation continues to ensure adequate protection of human health and the environment.]* ***Be reevaluated, as determined as necessary by the Department, if contaminants remain onsite after the remediation in excess of the applicable remediation standards. The reevaluation shall be conducted, at a frequency to be determined by the Department, by the person responsible for the remediation. The reevaluation shall determine, at a minimum, the continued adequacy of the chosen remedy, including the implemented institutional controls.***

(c) Single phase remediations, where the remedial action is conducted concurrently with sampling to delineate the contamination and to confirm contaminant removal, are acceptable.*

7:26E-6.2 Remedial action workplan

(a) If a remedial action workplan is required by the Department in an oversight document or pursuant to the ECRA or UST programs, the workplan shall be submitted in accordance with the schedule contained in that document and shall be presented in a format that corresponds directly to the outline of this section. The workplan shall include:

*[1. A statement that all requirements in N.J.A.C. 7:26E-6.3 and 6.4 (specific remedial action requirements and post-remedial action requirements) will be completed;

2. The remedial investigation report, pursuant to N.J.A.C. 7:26E-4.9, shall be presented as the first section of the remedial action workplan. If the remedial investigation report was previously submitted to the Department, a summary of the report may be submitted;

3. A description of soil and sediment erosion control and monitoring, and dust and odor control and monitoring procedures to be implemented during remedial activities;

4. If any construction activity is planned, the following items shall be included in the workplan:

i. The location of any such construction facilities with additional details describing construction design;

ii. All applicable requirements and standards relating to construction for onsite remedial units including, without limitation:

(1) inspection and professional engineer certification;

(2) measurement and daily logging procedures;

(3) field performance and destructive testing procedures;

(4) as built drawing and construction logs; and

(5) testing criteria for approval or rejection of the work conducted;

5. The identification of all applicable cleanup standards pursuant to N.J.A.C. 7:26D;

6. The identification of all areas where remedial action will be conducted on a scaled site map pursuant to N.J.A.C. 7:26E-4.9 (remedial investigation report). In addition, the map shall specify:

i. The volume of each environmental medium to be remediated;

ii. The vertical and horizontal extent of area to be remediated;

iii. The location, depth and concentration of all contaminants in excess of the cleanup standard; and

iv. Sample locations, depths and parameters for all post-construction samples;

7. A sampling summary table pursuant to N.J.A.C. 7:26E-4.8 (remedial investigation workplan);

8. A quality assurance project plan including proposed sampling and analytical methods pursuant to N.J.A.C. 7:26E-2.2;

9. A detailed description of the remedial action and the remedial technology to be conducted for each area;

10. A detailed description of site restoration plans to comply with N.J.A.C. 7:26E-6.4 (post-remediation action requirements);

11. A detailed description of source and quality of backfill pursuant to N.J.A.C. 7:26E-6.4 (post-remediation action requirements);

12. A description of procedures for dismantling and removal of remedial structures and equipment from the site;

13. A cost estimate of the remedial action pursuant to N.J.A.C. 7:26E-5.2;

14. A schedule is not required if the remedial action will not exceed three months from the proposed start date and the proposed completion date of the remedial action shall be provided;

15. If remedial actions will exceed three months in duration, refer to N.J.A.C. 7:26E-6.5 (remedial action schedule and progress reports) for specific schedule and progress report requirements;

16. A health and safety plan pursuant to N.J.A.C. 7:26E-1.9; and

17. A list of all required permits.]*

***1. The remedial investigation report, pursuant to N.J.A.C. 7:26E-4.9, shall be presented as the first section of the remedial action workplan. If the remedial investigation report was previously submitted to the Department, a summary of the report may be submitted;**

2. A sampling summary table pursuant to N.J.A.C. 7:26E-4.8 (remedial investigation workplan);

3. A proposal to complete all requirements in N.J.A.C. 7:26E-6;

4. The identification of all applicable remediation standards;

5. A detailed description of the remedial action and the remedial technology to be conducted for each area of concern;

6. The identification of all areas where remedial action will be conducted on a scaled site map pursuant to N.J.A.C. 7:26E-4.9 (remedial investigation report). In addition, the map shall specify:

i. The location of remedial treatment units;

ii. The volume of each environmental medium to be remediated;

iii. The vertical and horizontal extent of area to be remediated;

iv. The location, depth and concentration of all contaminants in excess of the remediation standard; and

v. Sample locations, depths and parameters for all post-construction samples;

7. A quality assurance project plan including proposed sampling and analytical methods pursuant to N.J.A.C. 7:26E-2.2;

8. A list of all required permits;

9. If any construction activity is planned, the following items shall be provided in the workplan:

i. The location of any such construction facilities with additional details describing construction design;

ii. All applicable requirements and standards relating to construction for onsite remedial units including inspection and professional engineer certification.

10. A description of soil and sediment erosion control and monitoring, and dust and odor control and monitoring procedures to be implemented during remedial activities, if applicable;

11. A health and safety plan pursuant to N.J.A.C. 7:26E-1.9;

12. A detailed description of site restoration plans to comply with N.J.A.C. 7:26E-6.4 (post-remediation action requirements);

13. A description of procedures for dismantling and removal of remedial structures and equipment from the site, if applicable;

14. A cost estimate of the remedial action pursuant to N.J.A.C. 7:26E-5.2; and

15. If remedial actions will exceed three months in duration, refer to N.J.A.C. 7:26E-6.5 (remedial action schedule and progress reports) for specific schedule and progress report requirements. A schedule is not required if the remedial action will not exceed three months from the proposed start date and the proposed completion date of the remedial action shall be provided.*

7:26E-6.3 Specific remedial action requirements

(a) As a first priority during remedial action, contaminants in all media shall be contained and/or stabilized to prevent contaminant exposure to receptors and to prevent further movement of contaminants through any pathway.

(b) The following requirements shall be followed for the removal of an underground storage tank:

1. The associated piping shall be drained and the tanks pumped out and cleaned thoroughly ***using the American Petroleum Institute's recommended Practice for the Abandonment or Removal of Used Underground Service Tanks, as amended and supplemented. Copies can be obtained from the American Petroleum Institute, 1220 L Street Northwest, Washington, DC 20005***;

2. All of the openings in the tank shall be plugged except for one vent hole;

3. The soil around the tank shall be excavated and the tank shall be removed and secured;

4. After the tank is secured, it shall be examined for holes and the NJDEPE HOTLINE, (609) 292-7172, shall be called if any holes are found ***unless a discharge from the tank was previously reported to the Department***;

5. The tank shall then be prepared for disposal by labeling the tank regarding its site *[or]* ***of*** origin, ultimate destination site and the substance(s) that were stored in it during its use as a storage tank; and

6. The tank shall be removed from the site according to all applicable laws and regulations.

i. During tank removal, the following observations shall be made and documented:

(1) A description of tank condition (with photographic documentation);

(2) *[A description of adjacent soils and]* ***The excavation floor and sidewalls shall be examined for*** any physical evidence of soil contamination;

*[(3)]*** **(A)*** When tanks that contained volatile organics***, including No. 2 fuel oil, diesel fuel, gasoline, kerosene, jet fuel, waste oil,*** are removed, the excavation floor and sidewalls shall be field screened with a properly calibrated flame ionization detector (FID), or photoionization detector (PID) along transects spaced no more than five feet apart.

(B) If the tank did not contain volatile organics (for example, No. 4, No. 6 fuel oil), the excavation shall be examined visually for evidence of a discharge.

(3) *[Post-remediation]* ***If there is no evidence of a discharge,*** soil samples for laboratory analysis shall be taken immediately after tank *[and/or contaminated soil]* removal at a frequency of one per five linear feet along the center line of *[the

excavation. At least]* ***each tank, and*** two *[sample locations shall be biased to the locations of the two highest field measurements]* ***of the excavation sidewalls shall be sampled at the bottom of the sidewalls. If there is evidence of a discharge and remediation will occur, see N.J.A.C. 7:26E-6.4****;

(4) *[A]* ***The*** presence and physical description (for example, odor, sheen) ***of the*** quality of ground water (including any perched water); and

(5) A description of product type and quantity spilled from tank or tank system during excavation.

ii. If documentation acceptable to the Department is provided in the remedial action report *[that the conditions below existed]*, the owner or operator of an underground storage tank system may abandon the system in place only if:

(1) The underground storage tank is located under a permanent structure; or

(2) The owner or operator submits a certification, signed and sealed by a New Jersey professional engineer, stating that removal of the underground storage tank will cause damage to the other structure, or that the tank is difficult to remove from the ground because of inaccessibility or type of tank construction.

iii. If tank systems are abandoned in place, the following requirements shall be met:

(1) The tank system and associated piping shall be drained and the system pumped out and cleaned thoroughly ***using current American Petroleum Institute guidance****;

(2) Decommissioning of the tanks shall then be completed by introducing sand, cement or other material with similar physical/chemical properties into the system through existing openings in the tank or through holes cut in the top of the tank. Because vapors in the tank atmosphere will be displaced during the tank filling operation, particular emphasis shall be placed on health and safety concerns; and

(3) Procedures shall comply with any local ordinances.

[(c) Any asbestos abatement activities shall be in accordance with requirements in N.J.A.C. 5:23-8, Asbestos Hazard Abatement Subcode.]

7:26E-6.4 Post-remedial action requirements

(a) The following sampling shall document the effectiveness of the remedial action:

1. All sampling shall be conducted pursuant to N.J.A.C. 7:26E-3.3 through 3.9 and 4.1 through 4.7.

2. For soils, if excavation is conducted, the minimum post remediation sampling frequency shall be:

i. For excavations less than 20 feet in perimeter, at least one bottom sample and one sidewall sample biased in the direction of surface runoff.

ii. For excavations 20 to 300 feet in perimeter*[,]**:*

(1) For surface spills, one sample from ***the top of*** each sidewall for every 30 linear feet of sidewall and one sample from the excavation bottom for every 900 square feet of bottom area.

(2) For subsurface spills, one sample from the bottom of each sidewall for every 30 linear feet of sidewall and one sample from the excavation bottom for every 900 square feet of bottom area.*

iii. For larger excavations, sampling frequency may be reduced if documentation acceptable to the Department is provided in the remedial action report (N.J.A.C. 7:26E-6.6) specifying why the sample frequency was considered adequate.

iv. For volatile organics bottom samples taken within 24 hours of excavation, samples shall be taken from the zero to six inch interval at the excavation floor. Samples taken after 24 hours shall be taken at six to 12 inches. For excavations open longer than two weeks, volatile organics sample depth for bottom samples shall be in accordance with N.J.A.C. 7:26E-3.9 (site investigation requirements).

v. Each excavation within a larger excavation shall be considered a separate excavation and shall comply with (a)2i through iv above.

vi. For tanks, if contaminated soil is removed, post remediation soil samples for laboratory analysis shall be taken immediately after contaminated soil removal at a frequency of one per five linear feet along the centerline of each tank and at least two of the excavation sidewalls shall be sampled at the bottom of the sidewalls. If the excavation is enlarged horizontally beyond the immediate tank removal area, additional soil samples shall be taken pursuant to (a)2i through iv above.*

3. For soils, if in situ remediation is conducted, the minimum post-remediation sampling frequency shall be one sample per 900 square feet of contaminated area. Where the contaminated zone exceeds two feet in depth, one additional sample per 900 square feet of contaminated area shall be taken or each two feet of depth.

4. For building interiors, post-remediation sample frequency shall be as follows:

i. One sample for every 900 square feet for each area of concern of 9,000 square feet or less.

ii. For areas of concern greater than 9,000 square feet, one additional sample shall be taken for every additional 9,000 square feet. For example, an area of concern of 9,001 to 18,000 square feet would require a minimum of 11 samples.

5. Post-remediation sample locations and depth shall be biased towards the areas and depths of highest contamination identified during previous sampling episodes unless field indicators such as field instrument measurements or visual contamination identified during the remedial action indicate that other locations and depths may be more heavily contaminated. In this case, post-remediation samples shall be biased towards locations and depths of the highest expected contamination.

(b) All areas subject to remediation shall be restored, to the extent practicable, to pre-remediation conditions with respect to topography, hydrology and vegetation***, unless alternate restoration is approved by the Department****.

1. Sites located adjacent to or in wetlands or in or near other critical habitat areas as defined in N.J.A.C. 7:26D-5, may have further requirements under N.J.A.C. 7:7E (Coastal Zone Management) or N.J.A.C. 7:7A (Wetlands Act).

2. Fill material used to restore a site after the remediation has been completed shall be similar in physical properties *[and soil type]* to the material removed unless otherwise approved in advance by the Department. ***Fill used for new building foundations or other construction in remediated areas are exempt from this requirement.****

i. If the excavated material is native soil, the fill shall be of equal or less permeability than the soil removed.

ii. If the excavated material is not native soil, the fill material shall be of equal or less permeability than the native soil in or adjacent to the area of concern ***or, at a minimum, have a permeability equal to or less than that of loam****.

iii. Fill shall be uncontaminated pursuant to *[residential cleanup standards in N.J.A.C. 7:26D]* ***any applicable remediation standard*** and free of extraneous debris or solid waste.

iv. Documentation of the quality of the fill shall be provided by a certification stating that it is virgin material from a commercial or noncommercial source or decontaminated recycled soil.

v. Uncontaminated soil from the site pursuant to *[N.J.A.C. 7:26D]* ***any applicable remediation standard*** may be returned to excavations ***or may be used elsewhere on the site****.

vi. The bills of lading shall be provided to the Department to document the source(s) of fill. The documentation shall include:

(1) The name of the affiant and relationship to the source of the fill;

(2) The location where the fill was obtained, including the street, town, lot and block, county, and state, and a brief history of the site which is the source of the fill; and

3. A statement that to the best of the affiant's knowledge and belief the fill being provided is not contaminated pursuant to *[N.J.A.C. 7:26D]* ***any applicable remediation standards*** and a description of the steps taken to confirm such.

(c) After completion of remediation all monitoring ***and extraction*** wells shall be sealed in accordance with N.J.A.C. 7:9-9 unless otherwise approved by the Department.

7:26E-6.5 Remedial action schedule and progress reports

(a) If the Remedial Action activities at a site are being performed pursuant to N.J.A.C. 7:26C or the ECRA or UST programs, and require more than three months for completion, a schedule for

completion of the remedial action by task and final completion schedule is required in addition to progress reports at a frequency which shall be specified by the Department in the oversight document or by the ECRA or UST program. The remedial action schedule shall contain the following elements:

1. Schedules shall utilize monthly timeframes, when possible, for the initiation or completion of tasks;

2. The remedial action workplan shall not list specific dates as these will be contingent upon Department approval of the remedial action workplan;

3. After remedial action workplan approval is obtained, the schedule shall be revised to identify the projected month/year for each task;

4. All tasks for all areas of concern shall be identified in the schedule;

5. Contractor bidding/review/acceptance process timeframe shall be included in the schedule;

6. The schedule shall consider timeframes for permit applications (municipal, NJDEPE, etc.) and final permit approvals. A critical *[patch]* ***path*** schedule shall be included when any permits are involved because certain tasks cannot proceed without permit approval;

7. When projecting dates for submission of reports to the Department, the schedule shall consider review time of not only the person preparing the report but all other persons who are deemed necessary to finalize the report;

8. The schedule shall identify all anticipated report submittals (month/year) to the Department including, without limitation, progress reports, ground water monitoring reports, post-remediation data reports for individual areas of concern, construction design reports and final remedial action reports. Laboratory analysis time shall be accounted for in projecting report submittal dates;

9. The schedule shall allow for Department review time of submitted reports;

10. The schedule shall include time for obtaining waste classification from the Department for disposal or treatment of waste material generated during remediation;

11. The schedule shall include a timeframe for site restoration (backfill, regrade, pave, etc.) and Department final inspection; and

12. The schedule shall include projected date for full compliance with the Department program overseeing the remediation.

(b) A progress report shall include, at a minimum, the following information:

1. Specification/reporting of all remedial actions accomplished during the reporting period *[and the percent of the total number of all proposed remedial action tasks completed to date]*;

2. Proposal of any deviations from and/or modifications to the approved remedial action workplan. All modifications shall be approved by the Department prior to enactment;

3. Reporting of problems or delays in the implementation of the remedial action workplan. Proposed corrections shall be presented with changes to the approved project schedule and shall be approved by the Department *[prior to the reporting period]*. A revised schedule shall be submitted as part of the progress report. The status of all permit applications shall be included in this schedule;

4. Identification of the remedial actions for the next reporting period;

5. Presentation annually of the actual costs of remediation incurred to date;

6. If required in an oversight document pursuant to N.J.A.C. 7:26C or by ECRA or UST, the following shall be provided:

i. Tabulation of all sample results received during this period with sample date, sample location, laboratory identification, matrix sampled, depth, analyses performed, analytes detected, and concentrations detected and submission of a report summarizing the data and presenting conclusions; and

ii. Tabulation of waste classification and/or characterization samples collected including the physical state of the material (solid, liquid, sludge), the volume of material, number of samples collected, analyses performed and results;

7. A listing of all types and quantities of waste generated ***by the remedial action*** during the reporting period and to date. Include the name of the disposal facilities, and transporters' dates of disposal, and if appropriate, the manifest numbers of each waste load; and

8. Any additional support documentation that is available (e.g. photographs) shall be submitted.

(c) If the Department determines in writing that oversight of some of the remedial activities will occur pursuant to Federal, State or local permits, then the requirements of this subchapter may be waived for those activities. The Department may request a summary of permitted activities.

7:26E-6.6 Remedial action report

(a) Any remedial action report submitted to the Department for approval shall present and discuss all data and information collected in compliance with N.J.A.C. 7:26E-6.3 (specific remedial action requirements) and N.J.A.C. 7:26E-6.4 (specific post-remedial action requirements), if applicable. The report shall be presented in a format that corresponds directly to the outline of this section.

(b) Any remedial action report submitted to the Department for approval shall include the following:

1. All information contained in the remedial investigation report pursuant to N.J.A.C. 7:26E-4.9 ***or a summary of the report***;

2. The remedial investigation report section entitled "Findings/ Recommendations," shall be renamed "Findings/Remedial Action Report" and shall include a description of how each area of concern was addressed;

(c) The Findings/Remedial Action report section shall state for each area of concern either "no remediation was conducted for this area of concern*[.]*" ***or "remedial actions were completed for this area of concern."*** Where remedial actions were completed, the following shall be included:

1. A summary by area of concern of all remedial actions completed;

2. A list of the *[cleanup]* ***remediation*** standards applied to the remedial actions;

3. Tables and figures pursuant to N.J.A.C. 7:26E-*[4.8]*** 4.9*** (remedial investigation report) containing all pre and post remedial data keyed appropriately so that completion of the remedial action is documented. The figures shall clearly indicate the volume of contaminated media which was remediated;

4. A detailed description of site restoration activities pursuant to N.J.A.C. 7:26E-6.4 (Post-Remedial Action Requirements);

5. A detailed description of source and quality of fill pursuant to N.J.A.C. 7:26E-6.4;

6. A detailed report of actual costs pursuant to N.J.A.C. 7:26E-5.2;

7. "As-built" diagrams for any permanent structures including, without limitation, caps, slurry walls, treatment units, or other remedial structures which will remain in place after completion of the remedial action;

8. *[Manifests]* ***Fully executed manifests*** documenting any offsite transport of waste material; and

9. *[Details of any]* ***A filed copy of Department approved*** use restrictions *[pursuant to N.J.A.C. 7:26D]*.

SUBCHAPTER 7. PERMIT IDENTIFICATION AND APPLICATION SCHEDULE

7:26E-7.1 Permit identification

(a) Any person conducting a remedial action shall identify all relevant Federal, State and local permits or permit modifications or certifications needed to implement the selected remedial action including, but not limited to:

1. Soil Erosion and Sediment Control Plan Certification for Land Disturbance Control (N.J.A.C. 2:90);

2. Permit to Construct/Install/Alter Air Quality Control Apparatus/Equipment (N.J.A.C. 7:27-8);

3. Certificate to Operate Air Quality Control Apparatus/ Equipment (N.J.A.C. 7:27-8);

4. Coastal Area Facility Review Act (CAFRA) Permit (N.J.S.A. 13:19-1 et seq.);

5. Waterfront Development/Upland Waterfront Permit (N.J.S.A. 12:5-3);
6. Wetlands Permit (N.J.S.A. 13:9A-1 et seq.);
7. Freshwater Wetlands/Open Water Fill Permit (N.J.S.A. 13:98-1 et seq.);
8. Stream Encroachment Permit (Construction within a Flood Plain) (N.J.S.A. 58:16A-50 et seq.; N.J.A.C. 7:8-3.15);
9. State Water Quality Certificate (N.J.S.A. 58:10A-1 to 13; 33 U.S.C. 1251, §401);
10. Dewatering Permit and/or Water Diversion Permit (N.J.S.A. 23:5-29);
11. U.S. Army Corps of Engineers Dredge and Fill Permit;
12. Delaware River Basin Commission Docket Approval (N.J.S.A. 32:20-1 et seq.);
13. Hackensack Meadowlands Development Commission—Zoning Certificate (N.J.S.A. 13:17-1 et seq.);
14. New Jersey Pinelands—Letter of Approval (N.J.S.A. 13:18A-1 et seq.);
15. Discharge Prevention and Discharge Cleanup and Removal Plans (Pertaining to Storage and Transfer of Petroleum and other Hazardous Substances) (N.J.S.A. 58:10-23.11 et seq.; N.J.A.C. 7:1E);
16. Registration of Underground Storage Tank; UST Installation Permit and Closure Approval (N.J.S.A. 58:10A-21 et seq.);
17. Water Quality Management Plan Consistency Determination (N.J.S.A. 58:11A-1 et seq; N.J.A.C. 7:15);
18. New Jersey Pollutant Discharge Elimination System (NJPDES) (N.J.S.A. 58:10A-1 et seq.; N.J.A.C. 7:14A);
i. NJPDES—Discharge to Surface Water (DSW)—Industrial (N.J.S.A. 58:10A-1 et seq.; N.J.A.C. 7:14A);
ii. NJPDES—Significant Indirect User (SIU) (N.J.S.A. 58:10A-1 et seq.; N.J.A.C. 7:14A); and
iii. NJPDES—Discharge to Ground Water (DGW) (N.J.S.A. 58:10A-1 et seq.; N.J.A.C. 7:14A);
19. Treatment Works Approval (TWA) (N.J.S.A. 58:12A-1 et seq.; N.J.A.C. 7:10-11);
20. Sewer Connection Permit (N.J.S.A. 58:10A-1 et seq.; N.J.A.C. 7:14A);
21. Employer License (Asbestos) (N.J.A.C. 8:60-4), (N.J.A.C. 12:120-4);
22. Asbestos Worker or Asbestos Supervisor Permit Certification of Training Agencies (Asbestos) Asbestos Work Notification Requirements (N.J.A.C. 8:60-6), (N.J.A.C. 12:120-6);
23. National Emission Standards for Hazardous Air Pollutants (NESHAPs) Written Notification Requirements;
24. Landfill Disruption/Closure Approval (N.J.S.A. 13:1E-1 et seq.; N.J.A.C. 7:26-2.7);
25. Hazardous Waste Facility Registration (N.J.S.A. 13:1E-1 et seq.; N.J.A.C. 7:26);
26. Short Term Water Use Report;
27. Well Drilling Permit, and Well Certification Forms A & B; (N.J.S.A. 58:4A-14; N.J.A.C. 7:8-3.11);
28. Well Abandonment Form;
29. Exemption of Waste Flow Rule (Soil Reuse);
30. Hazardous Waste Generator Identification Number (N.J.A.C. 7:26);
31. RCRA TSD Facility Permit, except that hazardous waste treatment, storage, or disposal facility permits pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Hazardous Waste Permitting regulations at N.J.A.C. 7:26, shall not be required for any remediation conducted on site pursuant to *[either]* ***any of the following***:
i. An administrative consent order pursuant to N.J.A.C. 7:26C; or
ii. A memorandum of agreement expressly executed for the implementation of a Department approved remedial action pursuant to a Department approved schedule; provided, however, that if the remedial action is not implemented pursuant to the approved schedule, then this provision does not apply and the otherwise applicable hazardous waste permits shall be required; *[and]*
iii. Approvals under authority of ECRA and UST; or
iv. Approvals under any State publicly funded projects; and*
32. Any other Federal, State or local approvals that may be required.

(b) Any person conducting a remedial action shall apply for and obtain all required permits prior to initiating the remedial action.

(c) Any person conducting a remedial action pursuant to an oversight document or the ECRA or UST programs, shall develop a permit application schedule to identify the timeframes for application and issuance/approval pursuant to N.J.A.C. 7:26E-6.5(a)6.

APPENDIX A
Laboratory Data Deliverables Formats

I. Full Laboratory Data Deliverables—USEPA/CLP Methods

Full laboratory data deliverables for USEPA/CLP analyses may be requested when the following Statements of Work are employed:
"USEPA Contract Laboratory Program Statement of Work for:
A) Organics Analysis, Multi-Media, Multi-Concentration"
B) Inorganics Analysis, Multi-Media, Multi-Concentration"
C) Organics Analysis, Multi-Media, High-Concentration"
D) Inorganics Analysis, Multi-Media, High-Concentration"
E) Low Concentration Water for Organic Analysis"
F) Low Concentration Water for Volatile Organic Analysis"
G) Low Concentration Water for Inorganic Analytes"
H) Polychlorinated Dibenzo-p-dioxins and Polychlorinated Dibenzofurans"

The Full laboratory data deliverables required for USEPA/CLP analyses are listed in the versions of the above noted Statements of Work in effect as of the date of sample analysis by the laboratory. Additionally, mass spectral negative proofs***[1]*** are required where applicable, "clean" soil method blanks***[2]*** for nonaqueous samples are not permitted, and laboratory internal chain of custody documentation is required.

[1]A negative proof is a mass spectrum offered as evidence to support an analyst's decision to negate the presence of a contaminant which has been qualitatively identified and reported by the instrument's data system.

[2]Method blanks for nonaqueous samples shall consist of performing the entire analytical procedure without any actual sample being present. The appropriate amount of sodium sulfate as specified in the current Statements of Work for Organics would be substituted as the "sample" for the semivolatile and pesticide/aroclor fractions.*

II. Full Laboratory Data Deliverables—Non-USEPA/CLP Methods

These deliverables shall be the "Regulatory Format" data deliverables listed in the version of the Professional Laboratory Analytical Services contract issued by the N.J. Department of Treasury, Division of Purchase and Property in effect as of the date of sample analysis by the laboratory.

III. Reduced Laboratory Data Deliverables—USEPA/CLP Methods

Reduced laboratory data deliverables for USEPA/CLP analyses may be required when the "USEPA Contract Laboratory Program Statement of Work for Organic Analyses, Multi-Media, Multi-Concentration"*;* *[and/or]* the "USEPA Contract Laboratory Program Statement of Work for Inorganic Analysis, Multi-Media, Multi-Concentration"*; **"USEPA Contract Laboratory Program Statement of Work for Organics Analysis, Multi-Media, High Concentration"; and/or the "USEPA Contract Laboratory Program Statement of Work for Inorganics Analysis, Multi-Media, High Concentration*** are employed. Data generated via the other above noted Statements of Work may NOT be delivered in the reduced format.

A. Organics

All laboratory data deliverables required for USEPA CLP analyses for organics via the appropriate Statement of Work are the same as those listed above in the **Full Laboratory Data Deliverables—USEPA/CLP** requirements and must be submitted with the following exceptions:

1. Chromatograms of standards (calibrations) are not required.
2. Chromatograms and spectra for matrix spikes and matrix spike duplicates are not required.

B. Inorganics

The Reduced laboratory data deliverables required for USEPA CLP analyses for inorganics are all the Inorganics Data Reporting Forms as specified in the version of the above noted Statement of Work for Inorganics in effect ***as*** of the date of sample analysis by the laboratory.

IV. Reduced Laboratory Data Deliverables—Non-USEPA/CLP Methods

This attachment presents reduced laboratory data deliverables requirements for Non-USEPA/CLP Methods. The deliverable package is divided into six (6) sections:

1. General Requirements
2. GC/MS Requirements
3. GC Requirements
4. Metals Requirements
5. General Chemistry Requirements
6. Petroleum Hydrocarbons Requirements

1. **General Requirements**

A. The data deliverable package shall be bound and paginated with margins, bindings and of reproduction quality such that all pages are legible.

B. **Title/Cover Page**

The format for QA/QC documentation shall be simplified as much as possible for ease of review and reference. The report shall begin with a cover page that includes the laboratory certification number, if applicable, facility name, address and date of report preparation.

The report shall include a summary table that cross-references the field identification number to the laboratory identification number for each sample. This table is needed to locate laboratory information for specific field samples. Sample numbers used in the field are always different than those used in the laboratory and therefore shall be reconciled before submitting the results to Department.

C. **Chain of Custody**

The Chain of Custody (COC) shall ensure the secure and appropriate handling of samples from the site to the laboratory as well as the movement of the sample within the laboratory until analysis is completed. The COC remains with the samples at all times and bears the name of the person assuming responsibility of the samples and the date. The COC is acceptable when there are no lapses in sample custody.

D. **Methodology Review**

The Methodology Review shall list method numbers, with a detailed discussion of any method modification.

E. **Laboratory Chronicle**

The laboratory chronicle shall detail actual sample holding times and specify the sample condition upon receipt at the laboratory (including sample temperature and pH when pH adjustment is required). Holding time begins at the time of sample collection.

F. **Conformance/Non-Conformance Summary**

A non-conformance summary shall be completed and signed by the laboratory. This summary states that the laboratory has reviewed the quality assurance and quality control measures for sample analysis. It identifies any deviations from the accepted practices or results.

2. **GC/MS Requirements**

A. Analytical Results Summary—An analytical results summary form shall be submitted for each sample and for each GC/MS analytical fraction (i.e., volatiles and semi-volatiles). Each form shall contain the following information: date sample received, date sample extracted, date sample analyzed, sample weight/volume, sample moisture content, dilution factor, GC column used, list of analytes, method detection limit ***, practical quantitation level*** and detected analyte concentrations. In addition a separate form for tentatively identified compounds (TICs) shall be submitted for each sample and for each GC/MS analytical fraction. Each TIC shall be identified by compound name or class (if it can be determined) and CAS number along with its retention time and estimated concentration.

B. Tuning Results Summary—Tuning results for all initial and continuing calibrations that are associated with all samples shall be submitted for each GC/MS analytical fraction. Each form shall contain the following information: laboratory file ID, instrument ID, injection date and time, the m/e (mass to ion charge) listing for the key ions, the reported ion relative abundance, the ion abundance criteria and a listing of all standards, blanks, QC samples and field samples (including date and time of analysis) associated with the tune.

C. Method Blank Results Summary—An analytical results form shall be submitted for all method blanks associated with all field samples for all analytical fractions. Each form shall contain the information listed in Section 2A above, as well as a listing of all field and QC samples associated with each method blank. In addition, a separate form for TICs shall be submitted which contains the information listed in Section 2A above.

D. Calibration Summary—A summary of all initial and continuing calibrations that are associated with all samples and blanks shall be submitted for each GC/MS analytical fraction. The following information shall be provided for each initial calibration: instrument ID, calibration date and time, listing of standard concentrations used, laboratory file ID for each calibration standard, listing of all associated field samples, QC samples and blanks, ***retention times for each target analyte and surrogate compound,*** listing of the relative response factor (RRF) for each ***target*** analyte and surrogate compound, ***the average RRF for each target analyte and surrogate compound,*** and percent relative standard deviation for each target analyte and surrogate compound. The following information shall be provided for each continuing calibration: instrument ID, calibration date and time, date and time of the associated initial calibration, the standard concentration used, the laboratory file ID for the calibration standard, listing of all associated field samples, QC samples and blanks, ***retention times for each target analyte and surrogate compound,*** the average RRF for each target analyte and surrogate compound from the associated initial calibration, the RRF for each ***target*** analyte and surrogate compound from the continuing calibration and the percent difference for each target analyte and surrogate compound.

E. Surrogate Compound Recovery Results Summary—If required by the analytical method, a summary form shall be submitted which contains the following information for all field samples, method blanks and QC samples for each GC/MS analytical fraction: sample identification number, sample matrix, surrogate compound names, concentration of surrogate compounds used, surrogate compound recoveries and QC limits for each surrogate compound.

F. Matrix Spike/Matrix Spike Duplicate Results Summary—If required by the analytical method, a summary form shall be submitted for each sample matrix and each GC/MS analytical fraction which contains the following: sample identification number for the sample selected for spiking, list of compounds being spiked, concentration of each spiked compound, matrix spike concentration, matrix spike percent recovery, matrix spike duplicate concentration, matrix spike duplicate percent recovery, relative percent difference and QC limits for percent recovery and relative percent difference.

G. Internal Standard Summary—A summary form shall be submitted which contains the following information for all standards, field samples, method blanks and QC samples for each analytical fraction: sample ID number, ID of laboratory calibration standard, internal standard compound names, concentration of internal standards compounds, retention times of each internal standard, area of each internal standard, and QC criteria (where applicable) for internal standard areas and retention times.

H. Chromatograms—The total ion chromatograms for all field samples and method blanks. All peaks on the chromatograms shall be identified as either an internal standard, surrogate compound, target compound or non-target compound. ***All peaks on a chromatogram shall also be associated with retention times, either directly on the chromatogram or identified and cross-referenced in tabular form.***

3. **GC Requirements**

A. Analytical Results Summary—An analytical results form shall be submitted for each sample. Each form shall contain the information contained in Section 2A above.

B. Method Blank Results Summary—An analytical results form shall be submitted for all method blanks as well as a listing of all field and QC samples associated with each method blank. Each form shall contain the information contained in Section 2A above.

C. Standards Summary—A summary form containing GC standards information for all associated samples shall be submitted for both primary and confirmation (if applicable) analyses. This summary shall contain the following information: instrument ID number, GC column used and notation if primary or confirmation analysis, date and time of standard(s) analysis, listing of all associated field, QC and method blank samples, listing of target compounds, retention time windows of each target compound and calibration factor for each target compound.

D. Surrogate Compound Recovery Results Summary—If required by the analytical method, a summary form shall be submitted which contains the following information for all field samples, method blanks, and QC samples: sample identification number, sample matrix, surrogate compound names, concentration of surrogate compounds used, surrogate compound recoveries and QC limits for each surrogate compound.

E. Matrix Spike/Matrix Spike Duplicate Results Summary—If required by the analytical method, a summary form shall be submitted for each sample matrix which contains the information contained in Section 2F above.

F. Retention Time Shift Summary—If required by the analytical method, a summary form containing retention time shift results shall be submitted for both the primary and confirmation (if applicable) analyses. The form shall contain the following information: instrument ID number, GC column used and notation if primary or confirmation column analysis, name of retention time shift marker compound, list of all field samples, method blanks and QC samples, date and time of analysis of all field samples, method blanks and QC samples, percent difference of the retention time shift and QC limits for the retention time shift.

G. Chromatograms—The primary analysis chromatograms and confirmation analysis chromatogram (when applicable) for all field samples and method blank*s* shall be submitted. All peaks on the chromatogram attributable to target and surrogate compounds shall be identified as such along with the retention time for each peak. The reference standard chromatogram for all multi-peak target compounds (e.g., toxaphene, PCBs) for both the primary and the confirmation analysis (when applicable) shall also be submitted.

4. **Metals Requirements**

A. Analytical Results Summary—An analytical results form shall be submitted for each sample. Each form shall contain the following information: sample identification number (laboratory and/or field ID), *[Sample]* ***sample*** matrix, date sample received, date sample analyzed, sample moisture content, dilution factor (if any), list of target analytes and detected analyte concentrations and method detection limits.

B. Blank Results Summary—A blank results form shall be submitted for all instrument calibration blanks and reagent blanks associated with all field and QC samples. Each form shall contain the following information: list of all target analytes, matrix of the reagent blank, concentration units of the reagent blank, reported concentration of all target analytes found in all calibration and reagent blanks and method detection limits.

C. Calibration Summary—A calibration summary shall be submitted for all initial calibration standards and check standards associated with field samples, blanks and QC samples. Each form shall contain the following information: list of all target analytes, the true concentration for the initial calibration standards, the reported (or found) concentrations for the initial calibration standards and check standards, the percent recovery for each initial calibration standard and check standard and the percent recovery QC limits for each target analyte. In addition, this form shall also list the method detection limit and instrument detection limit for each target analyte.

D. ICP Interference Check Sample Results Summary—If metals analysis is being conducted by ICP methodology, results of the interference check samples analysis shall be reported. The following information shall be reported: list of all target analytes in the interference check sample, the true concentration of analytes in the interference check sample, the reported concentrations of analytes found in the interference check sample for both the initial and final check samples analyses, the percent recovery of the target analytes found in the initial and final check samples analyses and the QC control limits for percent recovery values.

E. Spike Sample Results Summary—A summary of the spike sample analysis shall be submitted. The following information shall be reported: ID number of the sample chosen for spiking, sample matrix, the concentration of each spiked target analyte, the results of the unspiked sample analysis, the results of the spiked sample analysis, the percent recovery for each spiked analyte and the QC limit for percent recovery for each spiked analyte.

F. Duplicate Sample Results Summary—A summary of the duplicate sample analysis shall be submitted. The following information shall be reported: ID number of the original sample and the duplicate samples, sample matrix, results of the original sample analysis, results of the duplicate sample analysis, the relative percent difference of each target analyte for the original duplicate sample analyse*s* and the QC limit for relative percent difference for each target analyte.

G. Laboratory Control Sample Results Summary—When specified by the analytical method, the results of the laboratory control (quality control) sample shall be submitted. The following information shall be reported: control sample matrix, list of all target analyte*s*, the true concentration for each analyte in the control sample, the reported concentration for each target analyte in the control sample, the percent recovery for each target analyte*[s]* and the QC limit for percent recovery for each target analyte.

H. Serial Dilution Summary—If required by the analytical method, a summary of the serial dilution results shall be submitted. The following information shall be reported: ID number of the original sample and the serial dilution samples, sample matrix, results of the original sample analysis, results of the serial dilution sample analysis, the percent difference of each target analyte compared to the original analytes' results and the QC limit for percent difference for each target analyte.

5. **General Chemistry Requirements**

A. Analytical Results Summary—An analytical results form shall be submitted for each sample. Each form shall contain the following information: sample identification number (laboratory and/or field ID), sample matrix, date sample received, date sample analyzed, sample moisture content, dilution factor (if any), list of target analytes and detected analyte concentrations and method *[blank]* detection limits.

B. Blank Results Summary—A blank results form shall be submitted for all method ***blank*** samples associated with all field and QC samples. Each form shall contain the following information: list of all target analytes, matrix of the method blank, concentration units of the method blank, reported concentration of all target analytes found in all method blanks.

C. Spike Sample Results Summary—A summary of the spike sample analysis shall be submitted. The following information shall be reported: ID number of the sample chosen for spiking, sample matrix, the concentration of each spiked target analyte, the results of the unspiked sample analysis, the results of the spiked sample analysis, the percent recovery for each spiked analyte and the QC limit for percent recovery for each spiked analyte.

D. Duplicate Sample Results Summary—A summary of the duplicate sample analysis shall be submitted. The following information shall be reported: ID number of the original sample and the duplicate samples, sample matrix, results of the original sample analysis, results of the duplicate sample analysis, the relative percent difference of each target analyte for the original duplicate sample analyses and the QC limit for relative percent difference for each target analyte.

6. **Petroleum Hydrocarbon Requirements**

A. Analytical Results Summary—An analytical results form shall be submitted for each sample. Each form shall contain the following information: sample identification number (laboratory and/or field ID), sample matrix, date sample received, date sample analyzed, sample moisture content, dilution factor (if any), and detected analyte concentrations and method detection limits.

B. Blank Results Summary—A blank results form shall be submitted for all method blank samples associated with all field and QC samples. Each form shall contain the following information: list of all target analytes, matrix of the method blank, concentration units of the method blank, reported concentration of all target analytes found in all method blanks.

C. Spike Sample Results Summary—A summary of the spike sample analysis shall be submitted. The following information shall be reported: ID number of the sample chosen for spiking, sample matrix, the concentration of each spiked target analyte, the results of the unspiked sample analysis, the results of the spiked sample analysis, the percent recovery for each spiked analyte and the QC limit for percent recovery for each spiked analyte.

D. Duplicate Sample Results Summary—A summary of the duplicate sample analysis shall be submitted. The following information shall be reported: ID number of the original sample and the duplicate samples, sample matrix, results of the original sample analysis, results of the duplicate sample analysis, the relative percent difference of each target analyte for the original duplicate sample analyses and the QC limit for relative percent difference for each target analyte.

E. IR spectra for standards, blanks, samples.

F. If GC fingerprinting was conducted, submit chromatograms for standards, blanks, samples.

APPENDIX B
Well Search Format

Preparer

Name of Site

Case Number

Street Address

Township

County

USGS Quadrangle

Latitude

Longitude

Instructions:

1. All sources of well records/information shall be clearly documented.
2. List all wells and State well permit numbers, including active, inactive and abandoned, within ½ mile of the site boundary. Include all wells, active, inactive and abandoned at the site.
3. Locate all listed wells on a site locus map.
4. Sources that shall be used:

a. Well records search of the Bureau of Water Allocation. There is no cost if this search is performed by the individual. Appointments shall be made to examine well records by contacting the Bureau of Water Allocation at (609) 292-2957. Upon written request, the Bureau will provide the well search for a fee.

b. Contact local or county Health Department or equivalent.

5. Submit any available analyses from wells as an attachment.
6. Complete chart on back.

	WELL OWNER	ADDRESS	TOTAL DEPTH	LENGTH OF CASING	STATIC WATER ELEV.	USE CODE	SOURCE OF INFORMATION
1.							
2.							
3.							
4.							
5.							
6.							

USE CODES

A =
B = Boring
C =
D = Domestic
E = Recovery/Decontamination Pollution Control/Leachate with Pump Capacity
F = Fire
G = Irrigation
H = Heat Pump/Geothermal
I = Industrial
J = Injection/Waste Discharge
K =
L = Livestock
M = Monitoring
N = Public Non-community
O = Oil/Gas Exploration
P = Public Supply
Q = Recharge
S = Sealed
T = Test
U = Non-public
V = Gas Vent
W = Dewatering
X = Cancelled
Y = Cathodic Protection
Z = Piezometer

NEW REPLACEMENT WELL CODES

1 = Domestic
2 = Public Community
3 = Public Non-Community
4 = Industrial
5 = Irrigation
6 = Monitoring
7 = Piezometer
8 = Heat Pump/Geothermal
9 = Recovery
0 = Gas Vent

*[APPENDIX C

SUBSTANCE

Acenaphthylene
Acrolein
Acrylonitrile
Aldrin
Aluminum (Total recoverable)
Ammonia, un-ionized (24-hr average)
Anthracene
Antimony
Arsenic (Total recoverable)
Asbestos
Barium
Benz(a)anthracene
Benzene
Benzidine
3,4 Benzofluoranthene (Benzo(b)fluoranthene)
Benzo(a)pyrene (BaPO)
Benzo(ghi)perylene
Benzo(k)fluoranthene
Beryllium
alpha-BHC (alpha-HCH)
beta-BHC (beta-HCH)
gamma-BHC (gamma-HCH/Lindane)
Bis(2-chloroethyl)ether
Bis(2-chloroisopropyl)
Bis(2-ethylhexyl)phthalate
Bromodichloromethane (Dichlorobromomethane)
Bromoform
Butylbenzyl phthalate
Cadmium (Total recoverable)
Carbon tetrachloride
Chlordane
Chloride
Chlorine Produced Oxidants (CPO)
Chlorobenzene
Chloroform
2-Chlorophenol
Chlorpyrifos
Chromium (Total recoverable)
Chrysene
Copper (Total recoverable)
Cyanide

4,4'-DDD (p,p'TDE)
4,4'-DDE
4,4-DDT
Demeton
Dibenz(a,h)anthracene
Dibromochloromethane (Chlorodibromomethane)
Di-n-butyl phthalate
1,2-Dichlorobenzene
1,3-Dichlorobenzene
1,4'-Dichlorobenzene
3,3'-Dichlorobenzidine
1,2-Dichloroethane
1,1-Dichloroethylene
trans-1,2-Dichloroethylene
2,4-Dichlorohphenol
1,3-Dichloropropene
Dieldrin
Diethyl phthalate
Dimethyl phthalate
4,6-Dinitro-o-cresol
2,4-Dinitrophenol
2,4-Dinitrotolune
1,2-Diphenylhydrazine
Endosulfans (alpha and beta)
Endosulfan sulfate
Endrin
Endrin aldehyde
Ethylbenzene
Fluoranthene
Fluorene
Guthion
Heptachlor
Heptachlor epoxide
Hexachlorobenzene
Hexachlorobutadiene
Hexachlorocyclopentadiene
Hexachloroethane
Indeno(1,2,3-cd)pyrene
Iron
Isophorone
Lead (Total recoverable)
Malathion
Manganese
Mercury (Total recoverable)
Methoxychlor
Methyl bromide (Bromomethane)
Methyl chloride (Chloromethane)
Methylene chloride
Mirex
Nickel (Total recoverable)
Nitrate (as N)
Nitrobenzene
N-Nitrosodi-n-butylamine
N-Nitrosodiethylamine
N-Nitrosodimethylamine
N-Nitrosodipheylamine
N-Nitrosopyrrolidine
Parathion
Pentachlorobenzene
Pentachlorophenol
Penanthrene
Phenol
Phosphorous (yellow)
Polychlorinated biphenyls (PCBs-1242, 1254, 1221, 1232, 1248, 1260, and 1016)
Pyrene
Selenium (Total recoverable)
Silver (Total recoverable)
Sulfide-hydrogen sulfide (undissociated)
1,2,4,5-Tetrachlorobenzene
2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD)
1,1,2,2-Tetrachloroethane
Tetrachloroethylene
Thallium
Toluene
Toxaphene
1,2,4-Trichlorobenzene
1,1,1-Trichloroethane
1,1,2-Trichloroethane
Trichloroethylene
2,4,5-Trichlorophenol
2,4,6-Trichlorophenol
Vinyl chloride
Zinc (Total recoverable)]*

(a)

GREEN ACRES PROGRAM
Nonprofit Acquisition Program
Adopted New Rules: N.J.A.C. 7:36-9

Proposed: July 6, 1992 at 24 N.J.R. 2405(a).
Adopted: May 6, 1993 by Scott A. Weiner, Commissioner, Department of Environmental Protection and Energy.
Filed: May 11, 1993 as R.1993 d.265, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: P.L. 1989, c.183 (Open Space Preservation Bond Act of 1989); P.L. 1992, c.88 (Green Acres, Clean Water, Farmland and Historic Preservation Bond Act of 1992); N.J.S.A. 13:1B-1 et seq., 13:1D-1 et seq. and 13:8B-1 et seq.

DEPE Docket Number: 25-92-06.
Effective Date: June 7, 1993.
Expiration Date: November 21, 1993.

Summary of Public Comments and Agency Responses:

Comments were received from the Utility and Transportation Contractors Association (UTCA) and the New Jersey Conservation Foundation (NJCF):

1. COMMENT: UTCA requested that the definition of "conservation restriction" be amended to allow for the placement of rights-of-way through land acquired under this program.

RESPONSE: The Department has not made the suggested change. Pursuant to the Open Space Preservation Bond Act of 1989, P.L. 1989, c.183 ("Act"), land acquired under this program can be used only for recreation and conservation purposes, as defined. The conservation restriction, which the nonprofit must give to the State, prohibits the use of the land for other than recreation and conservation purposes. The Department may allow the granting of an easement on the land if the Department determines, on a case by case basis, that the easement directly supports, and is consistent with, the recreation and conservation purposes of the site. Any use of the land which is contrary to the definition of "recreation and conservation purposes," and thus prohibited by the conservation restriction, is considered a diversion and requires the prior approval of the Commissioner and the State House Commission.

2. COMMENT: NJCF recommended that the list of documents required for grant payments be separated to differentiate between what is needed for payments in advance of the time of closing as opposed to reimbursement after the nonprofit has taken title to the land.

RESPONSE: The Department requires the same documentation for both types of payment. N.J.A.C. 7:36-9.12(a) is revised upon adoption to clarify that the document requirements of that subsection apply to both payment in advance of closing and reimbursement after closing.

3. COMMENT: NJCF recommends minor alterations to the Regulatory Flexibility Analysis to reflect its understanding that (a) although Green Acres provides funding for the acquisition, some costs, such as legal fees and title search and title insurance costs, are ineligible for 50 percent reimbursement under this program and (b) some of the documentation and administrative overhead for a grant application is not produced for unassisted acquisitions.

RESPONSE: The Department agrees that some costs associated with an acquisition are not 50 percent reimbursable. However, 50 percent of the cost of acquisition as defined at N.J.A.C. 7:36-9.1 is reimbursable. Further, the Department acknowledges that a grant application may

require some administrative costs and documentation not required for an unassisted acquisition, but believes such additional burden is minor relative to the advantages of the grant.

4. COMMENT: NJCF requested that the definition of "cost of acquisition" be changed to include the cost of title insurance so that it would be eligible for 50 percent reimbursement under this program.

RESPONSE: The Department did not make the suggested change. In order to be able to fund the maximum number of acquisition projects, Green Acres can only participate in the cost of land acquisition, surveys, and appraisals.

5. COMMENT: NJCF requested amending the definition of the Historic Preservation Restriction which nonprofits must donate to the State, if appropriate to the project being funded. NJCF has suggested that, if appropriate, a facade easement alone should suffice.

RESPONSE: The Department did not make the suggested change. The definition of this restriction is taken directly from the Act and does not necessarily require more than a facade easement.

6. COMMENT: NJCF recommended the addition of a definition for "Professional Services."

RESPONSE: The Department has not made the suggested change because this term is not used in the rules.

7. COMMENT: NJCF suggested altering the definition of "project site" to accommodate those situations in which the nonprofit is unable to acquire every parcel included in the approved application.

RESPONSE: The Department understands that the situations like those which prompted the comment may arise and has changed the definition and added N.J.A.C. 7:36-9.3(h) to accommodate such situations in which the entire project site cannot be acquired.

8. COMMENT: NJCF stated that nonprofits may wish to acquire an interest in a project site which does not allow for public access and that, if such an interest is acquired, the nonprofit will be unable to "agree to make and keep the lands accessible to the public ..." pursuant to N.J.A.C. 7:36-9.2(a)3. Further, NJCF stated acquisition of such interest should be eligible for funding if the project site is contiguous to buffers, and enhances land to which public access is provided.

RESPONSE: The Department did not make the suggested change. The Department appreciates NJCF's position and would encourage nonprofits' acquisition of such interests. However, the requirement of public access is specifically imposed by the Act, subject to the exception already articulated in N.J.A.C. 7:36-9.2(a)3. Nonetheless, the Department may participate in the acquisition of an interest in a portion of the project site to which public access is not provided if public access is provided to an adjacent portion of the project site and if the acquisition of the nonaccessible portion supports or enhances the public's use of the adjacent accessible portion.

9. COMMENT: NJCF requested that nonprofits be allowed to donate, execute, and record the conservation restriction to the State upon receipt of grant funds, as opposed to doing so at the time of closing.

RESPONSE: The Department agrees with the gist of the comment and has changed N.J.A.C. 7:36-9.2(a)5.

10. COMMENT: NJCF requested that a nonprofit be able to use as part of its matching share the value of land which is part of an anticipated project site or eligible to be incorporated as part of such a site and which it acquires prior to final approval of the project. NJCF states that nonprofits must have the flexibility to accept donations of land when landowners are willing to donate their property.

RESPONSE: The Department has changed N.J.A.C. 7:36-9.3(e) in response to this comment. The Department acknowledges that circumstances may exist where the nonprofit must acquire land within an anticipated project site in advance of the established Green Acres time schedule. N.J.A.C. 7:36-9.3(e) now states that, if the nonprofit wishes to use the value of such land as part of its matching share, the nonprofit must obtain written approval from Green Acres prior to the acquisition.

11. COMMENT: The rules state that one of the items which will be included in the Project Agreement between the nonprofit and the State is the "grant amount" approved for the project. NJCF recommended adding the word "estimated" because the final amount of grant funds paid to the nonprofit may differ from what was approved.

RESPONSE: The Department has made the suggested change.

12. COMMENT: NJCF stated that the appraisal and value determination processes, described at N.J.A.C. 7:36-9.8(a)6 and 9.9(b), respectively, imply that the nonprofit may not bring to Green Acres' attention any information the nonprofit may have concerning the value of the project site until after Green Acres establishes the fair market value.

RESPONSE: The Department has altered the rules to specifically state that the nonprofit should submit to Green Acres, in writing and as soon as possible, any information it has regarding land value.

13. COMMENT: The rules include guidelines which Green Acres uses to determine if the nonprofit has made "significant progress" and is therefore eligible for supplemental funds. One such guideline is that the nonprofit has entered into a purchase agreement with the landowner within 150 days after Green Acres has established the fair market value. NJCF states that 150 days may not be sufficient because the lengthy appraisal, fair market value determination, and negotiation processes must occur before the nonprofit can enter into a purchase agreement with the property owner.

RESPONSE: The Department did not make the suggested change. The Department does not begin counting the 150 days until after the appraisals have been completed and the nonprofit has received the Fair Market Value Certificate. The Department believes that entering into a purchase contract within 150 days is reasonable and does constitute significant progress.

14. COMMENT: NJCF stated that it is unreasonable for Green Acres to require nonprofits to wait to negotiate with landowners until after Green Acres has established the fair market value for the land.

RESPONSE: The Department has changed N.J.A.C. 7:36-9.11(a). The Department acknowledges that nonprofits may need to negotiate early to be reasonably sure a project can be successfully completed. The rules no longer prohibit early negotiations, but still strongly suggest that the nonprofit follow the established time schedule. Negotiating prior to the issuance of the fair market value may not be in the best interest of the nonprofit and is, therefore, done at the nonprofit's risk.

15. COMMENT: NJCF suggested that language be added to N.J.A.C. 7:36-9.12(a)9iv which addresses the State's right as beneficiary to the casualty insurance policy for structures within the project site. NJCF recommended that the rule state that the Department's interest is limited to its participation in the acquisition of the insured structure.

RESPONSE: The Department has made the suggested change, in effect, by amending N.J.A.C. 7:36-9.12(a)9iv, adding subsection N.J.A.C. 7:36-9.15(d), and adding a definition to address this issue.

16. COMMENT: NJCF suggested altering the Retention and Use provisions (N.J.A.C. 7:36-9.15(b) and (c)) to be consistent with the requirements of the Internal Revenue Service.

RESPONSE: The Department has not made the suggested change. The current language accurately reflects the Department's policies regarding diversion of land acquired with Green Acres funds. These policies are intended to protect such lands for recreation and conservation purposes which is the object of all Green Acres laws.

Summary of Agency-Initiated Technical Changes:

In proposed N.J.A.C. 7:36-9, subchapter heading, the spelling of the word "ACQUISITION" has been corrected.

In proposed N.J.A.C. 7:36-9.1, in the definition of "project," the word "the" has been added so that it will read "... acquisition from the time of ..."

The Department has corrected the codification of the second-to-last and last subsections at proposed N.J.A.C. 7:36-9.3, to read (e) and (f), respectively.

In proposed N.J.A.C. 7:36-9.10(a)3, the word "project" has been changed to "purchase."

In proposed N.J.A.C. 7:36-9.12(b), the word "of" has been changed to "or" so that it will read "... amount or 50 percent ..."

In proposed N.J.A.C. 7:36-9.14, the word "acquisitions" has been changed to "acquisition."

In proposed N.J.A.C. 7:36-9.15(b) and (c), the rule cross-references have been corrected to N.J.A.C. 7:36-9.2(a)4."

Summary of Changes Upon Adoption:

The Department, in response to the public comment, has changed the definition of "project site" and has added N.J.A.C. 7:36-9.3(h). A concern was expressed that the State may require the nonprofit to acquire every parcel of land included in the approved application even if it becomes impractical for the nonprofit to complete such acquisiton. This subsection now allows for the acquisition of less than the entire approved project site if the lesser acquisition has been approved by the Department.

The Department, on its own initiative, has added a definition of "State" in N.J.A.C. 7:36-9.1 in order to make it known that each such use of that word refers to the State of New Jersey.

The Department, in response to public comment, has added a definition of "State's proportionate share" in N.J.A.C. 7:36-9.1 in order to

make clear the extent of Green Acres funding used in a project.

The Department, on its own initiative, has added the Federal government to N.J.A.C. 7:36-9.2(a)4i which lists the entities authorized to accept title to the project site from the nonprofit. This added provision was in the "Green Acres, Clean Water, Farmland and Historic Preservation Bond Act of 1992."

The Department, in response to public comment, has changed N.J.A.C. 7:36-9.2(a)5. This paragraph now allows the nonprofit to donate to the State the conservation restriction or historic preservation restriction, as the case may be, either at the time of deed recordation or upon receipt of grant funds. The revised paragraph requires the nonprofit to provide to Green Acres a title insurance policy, updated to the date of reimbursement, if there is a delay between the date the nonprofit acquires the land and the date of reimbursement from the State.

The Department, in response to public comment, has changed N.J.A.C. 7:36-9.3(e). The nonprofit asked that it be allowed to accept donations or acquire land, in an anticipated project site, prior to project approval by the Department. This subsection now states that lands the nonprofit acquires prior to project approval cannot be used as part of its matching share unless the nonprofit has obtained written approval from Green Acres prior to such approval.

The Department, on its own initiative, has added N.J.A.C. 7:36-9.3(g) to clarify the type of interest in real property which is eligible for acquisition under this program. The requirement of perpetual availability for recreation and conservation purposes is implicit in Section 2 of the Act and explicit in the Summary published with the proposal of these rules.

The Department, in response to public comment, has amended N.J.A.C. 7:36-9.4(d)1. Subsection (d) lists some of the items which are included in the project agreement between the nonprofit and the State. The Department has changed paragraph (d)1 from "grant amount" to "estimated grant amount" to accommodate those situations where the amount approved for a project is different from the amount finally paid to the nonprofit.

The Department, on its own initiative, has added N.J.A.C. 7:36-9.4(h) to notify applicants that the State will advertise and conduct one public hearing on all applications received to give the public an opportunity to give input which may assist the Department in its review of the proposed acquisitions. The Department plans to hold this hearing as a matter of policy and merely wants this procedural requirement to be included in the rules as adopted. This requirement was inadvertently left out of the rules as proposed. However, the nonprofits which participated in the first and only (1991) funding round were aware of this requirement as it is included in the application package provided by the Department. Therefore, this is not a new requirement and, although a representative of the nonprofit may need to attend the hearing, it places no additional financial burden on the nonprofit.

The Department, on its own initiative, has added N.J.A.C. 7:36-9.4(i). This is not an additional requirement. Title insurance is requested under N.J.A.C. 7:36-9.12(a)4. Green Acres is merely asking the nonprofit to obtain and submit the title search earlier in the acquisition process so that it can be provided to the appraisers. Early detection of any existing title problems may save the nonprofit unnecessary work and expense.

The Department, in response to public comment, has changed N.J.A.C. 7:36-9.8(a)6 and 9.9(b). It is important that Green Acres has as much information as possible regarding the value of land within a project site prior to its review of the appraisals and subsequent establishment of the fair market value for that site. N.J.A.C. 7:36-9.9(b) included a request that the nonprofit submit to Green Acres, as soon as possible, any useful land value information it may have. The Department has moved that request from N.J.A.C. 7:36-9.9(b) to 9.8(a)6 to clarify that all related information should be as early as possible in Green Acres' land valuation review process.

The Department, in response to public comment, has changed N.J.A.C. 7:36-9.11(a). This subsection discusses when the nonprofit is permitted to negotiate with the owner(s) of land in a project site. The Department had prohibited negotiations prior to the establishment of the fair market value. Instead of prohibiting early negotiations, this subsection now strongly suggests that nonprofits follow the established time schedule for negotiations and states that the nonprofit is proceeding at its own risk if it negotiates ahead of such schedule.

The Department, in response to public comment, has changed N.J.A.C. 7:36-9.12(a) to more clearly and consistently indicate that the Department can make grant payments to the nonprofit in advance of the time of closing or as reimbursement after closing.

The Department, on its own initiative, has changed N.J.A.C. 7:36-9.12(a)2. This paragraph establishes the requirements for the survey which is submitted to Green Acres as part of a request for payment. The Department has revised this provision upon adoption to make explicit the requirement that the survey satisfy the regulatory requirements established by the State Board of Professional Engineers and Land Surveyors, and to list some of the items which those regulations require to be shown.

The Department, on its own initiative, has changed N.J.A.C. 7:36-9.12(a)3. This paragraph establishes the requirements for the metes and bounds description which is submitted to Green Acres as part of a request for payment. The Department has revised this provision upon adoption to explain that the metes and bounds description, which must correspond to the survey required under N.J.A.C. 7:36-9.12(a)2, will become part of the deed of conveyance, the conservation restriction or historic preservation restriction, as the case may be, and the agreement between the State and the nonprofit.

The Department, on its own initiative, has changed N.J.A.C. 7:36-9.12(a)4. This paragraph sets forth the requirements regarding proof of title insurance which the nonproift must provide to Green Acres as part of a request for payment. The Department has revised this provision upon adoption to state more clearly that the nonprofit must submit a title binder which includes all easements, restrictions, and instruments of record. After the nonprofit acquires the property, a title policy in an amount at least equal to the fair market value must be submitted which names the State as co-insured, endorses the survey required under N.J.A.C. 7:36-9.12(a)2, and notes that the property will be subject to Green Acres rules and regulations and a conservation restriction or historic preservation restriction which the nonprofit must give to the State. This change was made because the Department realized the language used in the proposal, though intended to protect fully the State's interest, was neither sufficiently specific nor explicit.

The Department, on its own initiative, has changed N.J.A.C. 7:36-9.12(a)5. This paragraph sets forth the requirements regarding the deed which must be submitted as part of a request for payment. The Department has revised this provision upon adoption to clarify that the deed must use the metes and bounds description required under N.J.A.C. 7:36-9.12(a)3, and must include a clause stating that the property is subject to Green Acres rules and regulations.

The Department, in response to public comment, has changed N.J.A.C. 7:36-9.12(a)9iv. This subsection now explains that the extent of the State's rights as beneficiary in any casualty insurance policy obtained for the project site.

The Department, in response to public comment, has added N.J.A.C. 7:36-9.15(d). This subsection more fully and clearly explains the State's interest in a project site and the extent to which the State may control the remediaiton of, or any proceeds derived from, any damage to the project site.

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 9. BASIS FOR ASSISTANCE TO, AND ELIGIBILITY REQUIREMENTS FOR, TAX EXEMPT NONPROFIT ORGANIZATIONS FOR THE *[ACQUISTION]* ***ACQUISITION*** OF LAND FOR RECREATION AND CONSERVATION PURPOSES

7:36-9.1 Definitions

The terms used in this subchapter shall have the following meanings:

"The Act" means the Open Space Bond Act of 1989, P.L. 1989, c.183.

"Commissioner" means the Commissioner of the New Jersey Department of Environmental Protection and Energy.

"Conservation restriction" means an interest in land less than fee simple absolute, stated in the form of a right, restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural, scenic, open or wooded condition, or for conservation of

soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife, to forbid or limit any or all:

1. Construction or placing of buildings, roads, signs, billboards or other advertising, or other structures on or above the ground;
2. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste, or unsightly or offensive materials;
3. Removal or destruction of trees, shrubs, or other vegetation;
4. Excavation, dredging or removal of loam, peat, gravel, soil, rock, or other mineral substance;
5. Surface use except for purposes permitting the land or water area to remain predominantly in its natural condition;
6. Activities detrimental to drainage, flood control, water conservation, erosion control, or soil conservation, or fish and wildlife habitat preservation; and
7. Other acts or uses detrimental to the retention of land or water areas.

"Cost of acquisition" means the fair market value or negotiated purchase price, including the value of any lands to be acquired by donation specifically to be incorporated as part of the project site, whichever is less, of all lands to be acquired by the nonprofit with the assistance of a grant pursuant to this subchapter. If funds are available, any reasonable survey and appraisal costs incurred in connection with such acquisition are also included.

"Department" means the New Jersey Department of Environmental Protection and Energy.

"Diversion" means the use of land acquired using Green Acres funds in a manner prohibited by any applicable conservation restriction or historic preservation restriction or by this subchapter.

"Estimated land value" means the value of the project site based on any reasonable method determined by Green Acres to be reliable, such as discussions with real estate or appraisal professionals.

"Fair market value" means the land value certified by Green Acres, based on one appraisal for properties with an estimated land value of $250,000 or less, or on two independent appraisals for properties with an estimated land value of more than $250,000.

"Green Acres" means the New Jersey Green Acres Program, created pursuant to N.J.S.A. 13:8A-1 et seq., or its successor.

"Historic preservation restriction" means an interest in land less than fee simple absolute, stated in the form of a right, restriction, easement, convenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to preserving a structure or site which is historically significant for its architecture, archaeology or associations, to forbid or limit any or all:

1. Alteration in exterior or interior features of such structure;
2. Changes in appearance or condition of such site;
3. Uses of such structure or site which are not historically appropriate; and
4. Other acts or uses detrimental to the appropriate preservation of such structure or site.

"Land" or "lands" means real property, including improvements thereof or thereon, rights-of-way, water, riparian, and other rights, easements, privileges, and all other rights or interests of any kind or description in, relating to, or connected with real property.

"Local government unit" means a municipality, county or other political subdivision of the State of New Jersey authorized to administer, protect, develop, and maintain lands for recreation and conservation purposes, or any agency thereof, the primary purpose of which is to administer, protect, develop, and maintain lands for recreation and conservation purposes.

"Nonprofit" means a corporation or trust whose purposes include the acquisition and preservation of land or water areas or of a particular land or water area, or either thereof, in a natural, scenic or open condition, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and which has received tax exemption under section 501(c) of the 1954 Internal Revenue Code.

"Project" means the acquisition of the project site and all activities in furtherance of that acquisition from ***the*** time of the Department's approval of the nonprofit's application until the closing of title and conveyance to the State, by the nonprofit, of a conservation restriction or historic preservation restriction, as the case may be.

"Project site" means *[that land]* ***all those parcels*** which constitute*[s]* a contiguous or unified recreation or conservation open space area and ***in*** which the nonprofit *[will]* ***intends to*** acquire ***a real property interest*** as described in the approved grant application, regardless of how acquired.

"Recreation and conservation purposes" means the use of lands for parks, natural areas, ecological and biological study, historic areas, forests, camping, fishing, water reserves, wildlife preserves, hunting, boating, winter sports and similar uses for either public outdoor recreation or conservation of natural resources, or both.

"State" means the State of New Jersey.

"State House Commission" means that entity created by N.J.S.A. 52:20-1 et seq.

"State's proportionate share" means the total grant amount for the acquisition of the project site divided by the total cost of acquisition.

"Tidelands" or "riparian lands" means lands now or formerly flowed by the mean high tide. These lands are owned by the State of New Jersey unless the State has conveyed its ownership through a riparian grant.

7:36-9.2 Eligible applicants

(a) To qualify to receive a grant, the board of directors or governing body of the applying nonprofit shall:

1. Demonstrate to the Commissioner that it qualifies as a nonprofit;
2. Demonstrate that it has the resources to match the grant requested;
3. Agree to make and keep the lands accessible to the public, unless the Commissioner determines that public accessibility would be detrimental to the lands or any natural resources associated therewith;
4. Agree not to sell, lease, exchange, or donate the lands unless:

i. The transferee is the State, a local government unit, *[or]* another nonprofit***, or the Federal government if permitted by the applicable bond act***;

ii. The lands will continue to be held for recreation and conservation purposes; and

iii. The Commissioner approves the transfer in writing prior to the nonprofit's offering, for sale or conveyance, of any of its interest in the project site; and

5. Agree to execute and donate to the State at no charge a ***perpetual*** conservation restriction *[or]**,* historic preservation restriction, ***or both,*** as the case may be, ***which are approved by the State*** and to record such restriction ***either:***

i. *[immediately]* ***Immediately*** upon, and simultaneously with, the recordation of the deed for the project site ***or***

ii. Immediately upon the receipt of grant funds from the State for the acquisition of each parcel in the project site if such reimbursement occurs at a later date. Prior to any such later reimbursement, the nonprofit must submit the title insurance policy required by N.J.A.C. 7:36-9.12(a)4, updated as of the date of reimbursement and showing no encumbrances or exceptions other than those revealed by the title search required by N.J.A.C. 7:36-9.4(i) and accepted by the Department pursuant to N.J.A.C. 7:36-9.3(g).

7:36-9.3 Grants to nonprofits

(a) The State shall make a grant to a nonprofit for acquisition of lands for recreation and conservation purposes in the amount of 50 percent of the cost of acquisition or $500,000, whichever is less, depending on the availability of funds. In exceptional circumstances as described in (d) below, the Department will consider a grant in excess of $500,000 for a project.

(b) In the case where the value of lands acquired by donation exceeds 50 percent of the cost of acquisition, Green Acres participation will be reduced by the amount exceeding 50 percent of the cost of acquisition.

(c) The Commissioner shall establish initial acquisition funding limits at the time funding is offered. Such limits shall be based on

the estimated land value, as well as estimated survey and appraisal costs. The Department's participation may be limited to the initial grant offering.

(d) Provided that funds are available, the Commissioner may modify the funding limit set forth above based on considerations including, but not limited to:

1. Competition for funds/number and quality of applications; and
2. Recreational, historic, or ecological uniqueness of the project site.

*[(d)]**(e)* In no case will the value of lands *[already]* owned by the nonprofit be accepted as all or part of the nonprofit's matching share of the cost of acquisition ***unless the nonprofit has received written approval from Green Acres prior to acquisition of such land*. *Approval shall be granted if such land is part of the project site.***

*[(e)]**(f)* In no case will funds used for acquisition of land pursuant to the Green Acres acts, N.J.S.A. 13:8A-1 through 13:8A-55, or such other sums as may be appropriated from time to time for like purposes, be accepted as all or part of the nonprofit's matching share of the cost of acquisition.

(g) In no case shall funds be used to acquire land if the title search required by N.J.A.C. 7:36-9.4(i), or the title insurance policy required by N.J.A.C. 7:36-9.2(a)5 or N.J.A.C. 7:36-9.12(a)4, reveals that the acquisition would not assure the perpetual dedication of the project site to recreation and conservation purposes.

(h) In no case may funds be used to acquire less than the entire project site unless the Department agrees to such lesser acquisition because of unanticipated costs, owners unwilling to convey, clouds on title, or other circumstances making acquisition of the entire project site impracticable.

7:36-9.4 Application procedures

(a) If funds are available, the Department will accept applications annually, within 90 days after the date of publication of a notice of the availability of grant funds in the New Jersey Register.

(b) The nonprofit shall submit a written application package for each project site and shall meet with Green Acres concerning the specifics of the particular grant application.

(c) The nonprofit shall submit an application on a form provided by the Department which shall include, but not be limited to, documentation supporting the applicant's qualification as a nonprofit, a description of the project site, a discussion of the proposed use of the project site, and a narrative explaining how the project site satisfies the general program criteria set forth in N.J.A.C. 7:36-9.5(b) below.

(d) After approval of the application, the State and the nonprofit shall enter into an agreement which shall include the following:

1. The ***estimated*** grant amount;
2. The time period for acquisition;
3. The acreage, location, tax map block and lot listing, and metes and bounds description of the project site;
4. The administrative requirements for record keeping and project management; and
5. The specific conservation restriction and/or historic preservation restriction, as the case may be.

(e) The conservation or historic preservation restriction, as the case may be, shall include:

1. The conditions governing the use, future development, and maintenance of the project site, governing the public access to the project site, and governing the conveyance of any interest in the project site;
2. The State's right to enforce the conditions of the restriction; and
3. The remedies available to the State in the event nonprofit does not comply with the conditions of the restriction.

(f) The Department shall send a notice of receipt of applications to appropriate State, county, and municipal officials. This notice shall include the location, tax map block and lot listing, and proposed use of the project site, and the grant amount requested. The notice will be sent within 60 days after the application deadline and will invite written comments on the proposed project. Green Acres will review all comments received and will consider them in determining whether to make, and the amount of, a grant.

(g) The Department will notify each nonprofit of the funding decision made on that nonprofit's grant application.

(h) Within 60 days after the last day on which Green Acres accepts applications, the Department will hold one public hearing to receive comment on all such applications. The Department will publish a notice announcing the time and location of the public hearing in no less than three official advertising newspapers in the State and in the New Jersey Register.

(i) Within 60 days after funds have been appropriated for the nonprofit's project, the nonprofit shall obtain, and provide to Green Acres a copy of, a title search of the project site, with copies of all easements, restrictions, and other instruments of record attached.*

7:36-9.5 General program criteria

(a) When a nonprofit submits more than one eligible funding request, the Department reserves the right to limit funding to fewer than all applications submitted by the nonprofit or less than the total amount for which the nonprofit applies, or both.

(b) Decisions on whether or not an application is approved will be based on the following factors: open space needs; degree of environmental, historic, and/or cultural resource protection; amount of public participation, support, and planning; the quality of the project site; and other factors indicating the extent to which the project serves the purposes of the Act.

7:36-9.6 Eligible acquisitions

(a) An acquisition may include the purchase of title, development rights, life estate, remainder interest, easement, or other interest in real property suitable for recreation and conservation purposes.

(b) An area of historic significance (a site which meets the criteria for inclusion in the New Jersey or National Register of Historic Places) may be acquired.

(c) A site with existing buildings or structures which will be utilized or renovated for the support of recreation or conservation purposes is eligible.

(d) A site with existing buildings or structures which will be demolished to provide an open space area is eligible.

(e) A waterfront acquisition shall include, if at all possible, all private tidelands interests and continue to where the public interest begins.

7:36-9.7 Ineligible acquisitions

(a) Any site which will remain predominantly (more than 50 percent) covered by buildings or structures is ineligible.

(b) Any current or former landfill site, a site which is known or suspected to be contaminated with hazardous substances or hazardous waste, and any property which is adjacent to, or which may be adversely affected by, any such site is ineligible.

(c) Any site that has unmarketable or uninsurable title or that is, or is intended to be, used as a public road right-of-way is ineligible.

(d) The acquisition of State-owned tidelands or riparian lands is ineligible for reimbursement. However, in those cases where the State previously conveyed its ownership of certain tidelands, the acquisition of such privately held tidelands is eligible.

7:36-9.8 Appraisal process

(a) The nonprofit shall follow the following appraisal procedures:

1. The nonprofit shall meet with Green Acres who will instruct the nonprofit on the selection and hiring of the appraiser(s) and will discuss the appraisal assignment;
2. Green Acres will provide a list of pre-qualified appraisers from which the nonprofit may hire. This list is determined by Green Acres, based on a review and acceptance of each appraiser's work experience, professional qualifications, and sample work product. A nonprofit may hire an appraiser not included on the above referenced list only with the prior approval of Green Acres, which will be based on the review and acceptance of the items listed above;
3. The nonprofit shall submit for Green Acres' approval, draft appraisal contract(s) prior to contract execution;
4. The nonprofit shall contract the appraisal services;

5. The nonprofit shall schedule a meeting with Green Acres staff and the appraiser(s) to discuss the appraisal assignment and to visit the project site, prior to the commencement of the appraisal(s); and

6. The nonprofit shall submit to Green Acres three copies of each completed appraisal report. ***If the nonprofit has any information which could affect the land value finding, it should immediately submit it in writing to Green Acres.***

7:36-9.9 Value determination

(a) Green Acres shall certify the fair market value of the project site based upon a review of the appraisal report(s), an inspection of the project site, an examination of the comparable sales used by the appraiser(s), and a review of all available applicable data that is pertinent to the fair market value estimated by the appraiser(s).

(b) Green Acres will send to the nonprofit a copy of the fair market value certification and appraisal(s) for review. *[If the nonprofit has any information which could subsequently affect the value finding, it should immediately bring it to Green Acres' attention.]*

(c) In the case where the survey of the project site, submitted as part of the payment materials described at N.J.A.C. 7:36-9.12(a)2, shows a different acreage total than the acreage total shown in the fair market value certification, Green Acres will advise the appraiser(s), request an adjusted value, if needed, and revise the fair market value to reflect the actual acreage of the project site.

(d) Within 60 days after the nonprofit receives the fair market value certification, the nonprofit shall submit to Green Acres the following documents to indicate acceptance of Green Acres' certification of the fair market value of the project site:

1. A certified copy of an adopted resolution of the nonprofit, on a form provided by Green Acres, containing the following:

i. A statement that the nonprofit has reviewed and accepts the fair market value of the project site, as certified by Green Acres;

ii. A statement that the nonprofit has the ability and intention to finance its share of the cost of the project;

iii. The name of an officer of the nonprofit, and a statement that the officer is authorized to communicate with Green Acres on behalf of the respondent, and to provide additional information to Green Acres and furnish additional documents regarding the project;

iv. An estimate of the annual operating expenses of the project; and

v. A waiver of the nonprofit's right to hold the State or its agencies, instrumentalities, employees and representatives liable for damages arising directly or indirectly from the project; and

2. A completed Nonprofit Acquisition Master Sheet information form, on a form provided by Green Acres and containing the following information:

i. Information identifying the project and its sponsor; and

ii. For each parcel of land included in the project site, an identification of the parcel, its owner, the amount of acreage it contains, and the fair market value of the land and any improvements thereon.

(e) Green Acres receipt of the items listed at (d) above constitutes the nonprofit's acceptance of the fair market value.

7:36-9.10 Supplemental funding

(a) In the event that the certified fair market value exceeds the approved grant amount, Green Acres may increase the grant to equal the fair market value, provided that:

1. Funds are available;

2. The fair market value does not exceed the funding limit established at N.J.A.C. 7:36-9.3(a); and

3. The nonprofit has entered into a *[project]* ***purchase*** agreement within 150 days of its acceptance of the fair market value.

(b) The Department reserves the right to refuse all supplemental funding requests.

7:36-9.11 Acquisition procedures

(a) The nonprofit *[may]* ***should not*** initiate negotiations with the property owner *[only]* ***until*** after Green Acres acknowledges the receipt of the items listed at N.J.A.C. 7:36-9.9(d). ***Any adverse consequences resulting from negotiations before such time shall be the sole responsibility of the nonprofit alone.*** *[Negotiations]* ***All negotiations*** are the responsibility of the nonprofit. The nonprofit should make every reasonable effort to acquire the project site expeditiously.

(b) The nonprofit has the sole responsibility for closings and all real estate acquisition procedures related to the project site.

7:36-9.12 Grant payments

(a) Green Acres grant payments will be made *[when the nonprofit has taken title to the project site or at]* ***in advance of the time of closing or as reimbursement after*** the time of closing. Advance payment requests must be initiated at least 60 days before the established date of closing to permit a review by Green Acres. To initiate this review, and for all payment requests, the following must be submitted for each parcel of land to be acquired as part of the project site for which payment is being requested:

1. A cancelled check or, in the case of advance payment requests, a copy of the purchase contract indicating date, time, and place of the scheduled closing;

2. Two copies of a ***land*** survey ***plan*** which must *[contain]* ***comply with N.J.A.C. 13:40-5.1 regarding preparation of land surveys and must show*** acreage, *[ownership,]* current tax map ***references*** (block *[and lot]* ***, lot, and listed owner***) *[references]*, all easements of record, ***fences, improvements,*** encroachments, ***water courses, wetlands,*** and pertinent natural features. *[Area]* ***The area*** of Green Acres participation must be clearly stated and labeled; *[The survey must correspond to the legal description described at (a)3 below;]*

3. Two copies of a *[legal (]*metes and bounds*[)]* description *[either developed from a survey or extracted from existing deeds and plotted, confirmed, signed, and sealed by a New Jersey licensed land surveyor]* ***, on the surveyor's letterhead, corresponding to the survey in (a)2 above and signed and sealed by a land surveyor licensed by the State***. This legal description ***is to be used in the deed of conveyance and*** will become part of the agreement between the State and the nonprofit, and part of the conservation restriction or historic preservation restriction, as the case may be, which the nonprofit gives to the State;

4. Title insurance *[policy or title binder as proof that title to the property is insurable until a copy of the actual policy is available for examination after title is in the name of the nonprofit.]* ***binder with copies of all easements, restrictions, and other instruments of record attached. After title is in the name of the nonprofit, a copy of the title insurance policy must be submitted which names the State as an additional insured and endorses the survey plan submitted under (a)2 above. The policy amount must be at least equal to the fair market value.*** Schedule B, Section II (Exceptions) must note that the parcel will become subject to Green Acres rules and regulations, whether proposed or promulgated, and a conservation restriction or historic preservation restriction, as the case may be;

5. A certified copy of the recorded deed *[after closing as proof of the purchase]* ***which has used the surveyor's metes and bounds description, including area, and contains a clause indicating that the parcel is subject to Green Acres rules and regulations, whether proposed or promulgated***. For advance payment requests, a copy of the most recent deed to the project site should be submitted;

6. Copies of cancelled checks, vouchers, or invoices for survey and appraisal costs;

7. A completed project payment form/requisition, on a form provided by Green Acres and containing the following information:

i. The name, address, title and telephone number of the chief executive officer of the nonprofit, and of the person designated in the resolution submitted under N.J.A.C. 7:36-9.9(d)1 as the nonprofit's authorized correspondent;

ii. Information identifying the project;

iii. A description of prior payments made for the project;

iv. A survey and a metes and bounds description of each parcel;

v. If the nonprofit is making the payment request after acquiring the project site, a copy of the title insurance policy for each parcel, or the policy number if the title insurance policy has previously been submitted;

vi. If the nonprofit is making the payment request before acquiring the project site, a copy of the title insurance binder for each parcel, or the binder number if the binder has previously been submitted;

vii. A certification, signed by the chief executive officer of the nonprofit, confirming the accuracy of the information contained on the form, and stating that no bonus has been given or received in connection with any bill for which the nonprofit seeks reimbursement; and

viii. Any other information reasonably required to verify that the nonprofit has incurred the costs for which reimbursement is sought;

8. A completed Parcel Acquisition Payment Information Sheet, on a form provided by Green Acres and signed by the person authorized pursuant to N.J.A.C. 7:36-9.9(d)1, containing the following information:

i. Information identifying the nonprofit and the project site;

ii. An itemized statement of the direct cost of acquiring the project site, and of the survey costs and appraisal costs incurred in connection with the acquisition;

iii. A justification of any difference between the direct cost of acquiring the project site and the fair market value of the project site as certified by Green Acres; and

iv. A justification of any difference between the project site as described in the grant application, and the project site as acquired; and

9. If the project site includes buildings or other improvements which are not to be demolished, a completed Post-Acquisition Insurance Certification on a form provided by Green Acres and signed by the person authorized pursuant to N.J.A.C. 7:36-9.9(d)1. In the certification, the nonprofit shall state the following:

i. That a standard casualty insurance policy covering the improvements is in effect, in an amount equal the full replacement cost of the improvements;

ii. That the policy or a certificate thereof is attached to the certification;

iii. The dates on which coverage begins and ends under the policy;

iv. That the policy names the Department as loss payee ***to the extent of the State's proportionate share of all insurance proceeds***; and

v. That the policy provides that the insurer will not terminate or fail to renew the policy without at least 30 days prior written notice to the Department.

(b) After Green Acres reviews and approves the payment materials listed at (a) above, Green Acres will prepare and forward to the nonprofit a payment invoice reflecting the approved grant amount *[of]* ***or*** 50 percent of the cost of acquisition, whichever is less. The nonprofit must verify, sign, and return the invoice to Green Acres for approval and processing.

(c) Grant payments will be mailed directly to the nonprofit. Green Acres grant checks cannot be signed over to the property owner, but must be deposited into the nonprofit's account.

7:36-9.13 Signs

The nonprofit shall erect, maintain, and replace on the project site, one or more permanent signs provided, or approved, by the Department.

7:36-9.14 General provisions

The nonprofit shall comply with all laws, rules, regulations, policies, and procedures applicable to the project site or its acquisition*[s]*.

7:36-9.15 Retention and use

(a) Any change in approved use, public access, maintenance, or any development contrary to the approved use of the lands acquired utilizing the grant requires the prior written approval of Green Acres.

(b) Lands which the nonprofit acquires pursuant to this subchapter shall not be disposed of, except pursuant to N.J.A.C. 7:36-9.2*[(d)]****(a)4***, or diverted to a use for other than recreation and conservation purposes without the prior approval of the Commissioner and the State House Commission and following a public hearing at least one month prior to any such approvals. A diversion includes, but is not limited to, a permanent easement, right-of-way, lease, or sale of such land granted or made for other than recreation or conservation purposes.

(c) Fifty percent of all proceeds received by the nonprofit as a result of the conveyance of any rights in the project site in conformance with N.J.A.C. 7:36-9.2*[(d)]****(a)4*** shall be paid to the Department for deposit in the bond fund used to assist the project. This reimbursement requirement will be included in the conservation restriction or historic preservation restriction, as the case may be.

(d) The State's proportionate share of all proceeds received by the nonprofit as a result of any casualty, other damage, or event causing a reduction in the value of the project site shall be paid to the Department for deposit in the bond fund used to assist the project unless the Department agrees in writing to a different disposition for the repair of the damage. This requirement will be included in the conservation restriction or historic preservation restriction, as the case may be.

7:36-9.16 Temporary use

Lands, buildings, or structures that have been acquired under this program for recreation and conservation purposes may be used or leased for non-recreation uses on a temporary basis only with the prior written approval of Green Acres.

7:36-9.17 Remedies

(a) If the nonprofit refuses or fails to comply with this subchapter, the grant agreement with the Department, the conservation restriction or historic preservation restriction, as the case may be, or any other applicable law, the Department may, after notices and reasonable opportunity to cure, institute a suit to enjoin such violation by temporary and/or permanent injunction and may take any other legal action as may be necessary to insure compliance.

(b) The nonprofit will pay whatever costs the Department incurs in enforcing the nonprofit's obligations pursuant to this subchapter, the grant agreement with the Department, the conservation restriction or historic preservation restriction, as the case may be, or any other applicable law. Such costs shall include, but not be limited to, personnel costs, attorneys' fees, and court costs.

7:36-9.18 Savings provision

If any provision in this subchapter shall be held ineffective or invalid by any court of competent jurisdiction, that provision shall be severed and all remaining provisions shall continue in full force and effect.

INSURANCE

(a)

DIVISION OF PROPERTY AND CASUALTY

Personal Private Passenger Automobile Insurance: Provision of Coverage to All Applicants that Qualify as Eligible Persons

Adopted Concurrent Amendments: N.J.A.C. 11:3-2.8, 33.2 and 34.4, and 11:17A-1.2 and 1.7

Adopted Concurrent New Rules: N.J.A.C. 11:3-44

Proposed: March 15, 1993 at 25 N.J.R. 1290(a).
Adopted: April 30, 1993 by Samuel F. Fortunato, Commissioner, Department of Insurance.
Filed: April 30, 1993 as R.1993, d.238, **with substantive and technical changes** not requiring additional public comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 17:1C-6(e), 17:29A-7 and 17:33B-15.

Effective Date: April 30, 1993, Readoption of Concurrent New Rules and Amendments;
June 7, 1993, Changes upon Adoption
Expiration Date: January 4, 1996, N.J.A.C. 11:3;
January 2, 1995, N.J.A.C. 11:17A.

These rules, amendments and reproposed amendments were adopted on an emergency basis and concurrently reproposed on March 15, 1993 pursuant to N.J.S.A. 52:14B-4(c). This present adoption of the concurrent reproposed new rules, amendments and reproposed amendments is effective upon acceptance for filing by the Office of Administrative Law (see N.J.A.C. 1:30-4.4(e)) except for changes upon adoption, which are effective on June 7, 1993, the date of publication of this notice.

Summary of Public Comments and Agency Responses:

The adopted emergency new rules and amendments were published on March 15, 1993 at 25 N.J.R. 1290(a). During the comment period which closed on April 14, 1993, 10 comments were submitted from insurance companies (Allstate Insurance Company, First Trenton Indemnity Company, New Jersey Manufacturers Insurance Company, the Prudential Property and Casualty Insurance Company of New Jersey, Selective Insurance Company of America and State Farm Insurance Companies), insurance trade associations (Alliance of American Insurers and American Insurance Association) and producer trade associations (All Agents in the Public Interest, and Professional Insurance Agents). These comments and the Department's responses are summarized below:

COMMENT: One company recommended that the Department revise its definition of "completed written application" set forth at N.J.A.C. 11:3-44.3(a) to conform with the definitions at N.J.A.C. 11:17A-1.2 and 11:3-33.2 by including references to a completed coverage selection form as provided at N.J.A.C. 11:3-15.6, a copy of the applicant's driver's license, a copy of the motor vehicle registration for the principal vehicle to be insured, one additional proof of New Jersey residency, and an inspection acknowledgment form where physical damage is requested. The commenter also suggested that rather than including an acknowledgment of requirement for insurance inspection form where physical damage is requested, that instead, an actual vehicle inspection form, or a bill of sale, window sticker or dealer invoice for insurance on a new automobile should be included as part of a "completed written application."

RESPONSE: The Department agrees in part with the commenter and has amended N.J.A.C. 11:3-44.3(a) to include a reference to the coverage selection form. The Department notes that this rule is a list of the minimum information necessary from which to determine whether an applicant is an eligible person and to rate and underwrite the policy. Where an applicant provides the information enumerated at N.J.A.C. 11:3-44.3(a) and an insurer determines that the applicant is an eligible person, coverage must be bound. An insurer is not precluded from thereafter requesting additional rating or underwriting information which the insurer has traditionally sought during the application process.

Insurers are permitted to request the information listed in the definition of "completed written application" at N.J.A.C. 11:3-44.3(a) prior to binding coverage. That definition does **not** include that an insurer is permitted to obtain a copy of the applicant's driver's license, a copy of the motor vehicle registration of the principal vehicle to be insured, additional proof of New Jersey residency or an acknowledgment of requirement for insurance inspection form where physical damage is requested. Because these items have not been included as the minimum necessary information upon which a determination of eligibility can be made and to rate and underwrite a policy, they are not listed in that rule.

With regard to an acknowledgment of requirement for insurance inspection form, such document is required at the time an insurance application is completed pursuant to N.J.A.C. 11:3-36.5(c)1 when a vehicle inspection is deferred in accordance with those rules. The document is not required when an inspection is waived pursuant to N.J.A.C. 11:3-36.4. If an inspection is waived, the document would not have been requested as provided in the rule.

COMMENT: A number of commenters objected to the amended definition of "declination" set forth at N.J.A.C. 11:3-33.2 and 11:17A-1.2. The definition as amended provides that a failure by an insurer to act upon a written application for insurance within five business days from receipt of a completed written application is a declination of insurance. One commenter suggested that the rule lacked statutory support, was arbitrary and capricious and disregarded the Department's own study of insurer practices. A number of commenters complained that five days was an unreasonably short period of time in which to make well-founded and rational underwriting determinations, to verify and document information on an application and to minimize claim or rate fraud and that either 10 or 15 days was a more reasonable period of time in which to act on an application.

RESPONSE: The Department notes that the amendment to the term "declination" is authorized under the Fair Automobile Insurance Reform Act ("FAIR Act"). The amendment to the definition in the rules merely interprets the definition of declination as set forth in the FAIR Act at N.J.S.A. 17:33B-13. A declination is defined therein to include a refusal by an insurer to issue an automobile insurance policy to an eligible person upon receipt of an application. N.J.S.A. 17:33B-13. N.J.S.A. 17:33B-15 prohibits insurers from refusing to insure eligible persons. In light of these statutory provisions, the amendment to the definition of declination merely recognizes that an insurer's failure to promptly respond to an application for insurance is an implicit denial of coverage. The amendment is, therefore, authorized by the FAIR Act and was necessitated by practices instituted by insurers in an apparent attempt to avoid their obligations to provide insurance to all eligible applicants.

The Department notes that with the ongoing depopulation of the New Jersey Market Transition Facility ("MTF"), the marketplace has had to absorb approximately 60,000 to 70,000 insureds per month seeking coverage in the voluntary market. The emergency rules have been adopted in an attempt to stabilize the market during this depopulation. By October 1993, all MTF policies will have expired and many of the emergency rules will, therefore, no longer be necessary. The rules which have been promulgated to ameliorate the effects of the MTF depopulation will, therefore, only be operative until October 15, 1993. This includes the requirement that insurers make a binding decision within five business days.

The study which was undertaken by the Department in 1992 to review insurer practices established, among other things, that for insurers which did not immediately bind coverage seven to 20 calendar days was the average range of time used in the industry to either bind or decline coverage. Some insurers bound coverage in a shorter period of time.

In recognition of the results of the above survey, together with the fact that many insurers immediately bind coverage, the Department determined that five business days is a reasonable time in which to act upon an application for insurance once a completed written application is received.

The Department notes that five business days is equivalent to seven calendar days. The Department further notes that the amendment to the term declination will only remain operative until October 15, 1993 and was only necessitated by actions taken by insurers which were viewed by the Department as attempts to channel away eligible applicants. Once the depopulation of the MTF has occurred insurers may establish their own standards, consistent with their methods of operation and their duty to provide coverage to eligible persons.

The Department further notes that once a policy is bound, if an insurer discovers additional or more accurate information, the insurer may rerate the policy. Where an insurer determines that an applicant is not an "eligible person" or as otherwise authorized, an insurer may cancel a policy pursuant to N.J.S.A. 17:29C-7.

COMMENT: A number of commenters raised concerns with regard to the transmission of applications to insurers. One commenter suggested that where a producer has authority to bind coverage, the five days within which to transmit an application to an insurer pursuant to N.J.A.C. 11:17A-1.7(a)3.1 is an excessive amount of time. A producer should send an appliction to the insurer within 24 hours. Another commenter suggested that once coverage is bound by a producer, a temporary identification card is issued to the insured and there is no urgency to transmit the application. Nevertheless, the time in which an application should be transmitted is a "matter of agreement" between the producer and the insurer and should, therefore, not be subject to regulation by the Department.

One commenter also suggested that N.J.A.C. 11:17A-1.7(a)3ii, which requires a producer to promptly transmit an application where the producer does not have binding authority, should define the term "promptly" and that one business day is a reasonable time for transmission of such an application. Another commenter suggested that the requirement of a producer without immediate binding authority to promptly transmit an application in light of the fact that regular mail may take up to three days would leave insurers with fewer than five business days to take action on an application for insurance.

RESPONSE: The Department recognizes that, by agreement, an insurer may properly require its producers to forward "bound applications" in fewer than five business days. Five business days, however, is a reasonable upper limit because: (1) it provides a producer with sufficient time in which to obtain any and all necessary information and documents which should accompany the application; and (2) insurers are provided sufficient time to complete any further underwriting review within the 60 days permitted by N.J.S.A. 17:29C-7.

With regard to applications submitted to insurers by producers without binding authority, the Department notes that N.J.A.C. 11:3-44.3(b) provides insurers with five business days from receipt of a "completed written application" to either bind or decline coverage. Thus, under no circumstances would an insurer have fewer than five days to make a determination on an application.

The Department has chosen not to define the term "promptly" because the Department anticipates that producers will comply with the spirit of these rules and will transmit applications in a timely fashion. Insurers should monitor the actions of their producers. Where a producer does not comply with his or her responsibilities, he or she can be held accountable by the insurer.

If appropriate, the Department will take further action to enforce the letter and spirit of these rules and the FAIR Act mandates.

COMMENT: One commenter suggested that only producers who forward "unbound" applications to insurers for underwriting review need to retain proof of the date of transmission to the insurer. The commenter, therefore, suggested that N.J.A.C. 11:17A-1.7(a)3iii be amended to read:

Producers that transmit **non-binding** applications to insurers for underwriting review....

RESPONSE: Because producers are required to transmit to insurers bound applications within five business days, they must also retain proof of the date of such transmission. This will provide insurers with sufficient time to conduct further underwriting review and it will also protect the interests of the producers if the date of transmission comes into question.

COMMENT: One commenter objected to the change in the definition of "eligible person" at N.J.A.C. 11:3-34.4(b) which has been amended to include persons domiciled in this State, but temporarily residing out-of-State either while attending school as a full-time student or who are in the military and stationed out-of-State. The commenter claims that the FAIR Act definition of eligible person does not authorize the Department to create such a category. The commenter claims that the change represents faulty public policy and will add to everyone's costs. The commenter suggests that these individuals should pay the rate applicable to the exposure of that driver and car to risks in the other state.

Another commenter supports the amendment to "eligible person", but only if the vehicle remains registered in New Jersey.

RESPONSE: The FAIR Act broadly defines "eligible person" as "a person who is an owner or registrant of an automobile registered in this State **or** who holds a valid New Jersey driver's license to operate an automobile . . ." N.J.S.A. 17:33B-13. (emphasis supplied) When N.J.A.C. 11:3-34 was first adopted, the Department included the requirement that a registered automobile be principally garaged in New Jersey or that a licensed driver be resident in New Jersey, to reduce rate fraud. At that time, New Jersey insurers routinely included on New Jersey household policies automobiles and drivers temporarily garaged or residing out-of-State under the circumstances described in this amendment. The Department has discovered that some insurers have apparently changed this practice, and the rule is intended to address the change. Clarifying language has been added upon adoption to more accurately express this intent; that is, that the New Jersey driver's license or registration remains a necessary component of the definition of "eligible person." The amendment to the definition of N.J.A.C. 11:3-34.4(b) is therefore consistent with the FAIR Act definition and only applies to New Jersey domiciliaries. The FAIR Act does not require that an eligible person's vehicle be registered in New Jersey if the person is a New Jersey licensed driver.

While N.J.A.C. 11:3-34.4(b) addresses eligibility only, nothing in the rule precludes an insurer from rating a vehicle on its garage location. Traditionally, however, insurers have rated such vehicles using New Jersey rates.

COMMENT: A number of comments were submitted in connection with N.J.A.C. 11:3-44.3(a), the minimum information needed for a completed written application. One commenter suggested that insurers should be permitted to require the submission of copies of drivers' licenses and registration cards of all drivers and vehicles in the household.

Several commenters suggested that insurers should be permitted to require motor vehicle abstracts from this State as well as other states or foreign countries where the applicant previously resided.

One commenter suggested that motor vehicle abstracts should be provided by applicants, but only with applications which will be bound immediately.

Other documents which insurers suggested should be included in N.J.A.C. 11:3-44.3(a) in order to prevent fraud and to facilitate rating and underwriting include: personal data for all drivers in the household; police accident reports and renewal declaration pages from the immediately preceding insurer.

RESPONSE: Except for requesting a motor vehicle abstract directly from the applicant, the new rules do not prohibit insurers from requesting any and all of the above noted information and documents. However, the information is not required for determining whether an applicant is eligible, nor can an insurer refuse to bind an eligible person applicant where the information is not provided. With regard to driver's records, application forms generally elicit such information from the applicant. However, many insurers obtain a motor vehicle abstract to verify that information. Therefore, the Department has not changed this provision and the ultimate burden remains with the insurer.

An insurer must bind coverage for an eligible person applicant when the information set forth at N.J.A.C. 11:3-44.3(a) is provided. An insurer may, however, cancel an application pursuant to N.J.S..A 17:29C-7 where it is determined that the applicant is not an eligible person. Additionally, an insurer may re-rate a policy based on information which it obtains after the policy has been bound.

COMMENT: One commenter suggested that N.J.A.C. 11:3-44.3(c)2 should be amended. This rule provides that if the eligibility of an applicant cannot be determined because of deficiencies in the application, the applicant is advised that he or she has 15 days to cure the deficiencies and if "the applicant is determined to be an eligible person, coverage shall be provided either immediately or as of the originally requested effective date...." The commenter recommends that the rule should state that coverage shall be provided "at the later of" immediately or the originally requested effective date in order to deter applicants from driving without insurance on the assumption that they will later be determined to be eligible persons qualified for coverage.

RESPONSE: The Department agrees with this comment and amends this provision to read "coverage shall be bound either immediately or as of the originally requested effective date **if later.** . . . " Using the later date as the effective date may also encourage applicants to submit requested information in a timely manner.

COMMENT: One commenter suggested that N.J.A.C. 11:3-44.3(c) should be amended so that retroactive coverage is not provided on applications which were deficient when submitted. The commenter proposed that the rule should read that coverage shall be provided "upon receipt of a completed application verifying the applicant's eligibility."

RESPONSE: It is not clear what type of "verification" this commenter desires. The Department notes, however, that an insurer need only provide coverage to "eligible persons." Such a determination can only be made upon receipt of a completed written application pursuant to N.J.A.C. 11:3-44.3(a). The information contained therein is sufficient to

determine eligibility. Subsequently, if an insurer deems it necessary, it may "verify" the accuracy of the information provided by the applicant through other sources such as a motor vehicle abstract.

Insurers which receive unbound applications from their producers should require their producers to obtain all information necessary to comprise a completed written application pursuant to N.J.A.C. 11:3-44.3(a).

COMMENT: Another commenter was concerned that some applicants do not need or want insurance within five days of the submission of a completed written application, but merely want price information to comparison shop. In those instances it would be inappropriate to bind coverage within five days or to charge an applicant for unwanted coverage.

RESPONSE: Nothing in the rules compels an insurer to provide coverage at an effective date prior to the date requested by the applicant. To provide insurance before such date may compel an applicant to pay for duplicate, unnecessary insurance coverage. The rules merely set an outside time limit in which to respond to an application when coverage is requested immediately. Moreover, a person is still entitled to obtain a quote for insurance coverage without completing an application.

COMMENT: One commenter claimed that the Department does not have authority to dictate the time in which an applicant's coverage must be provided or declined; nor can the department mandate that insurers using MTF rates must provide producers with immediate binding authority.

RESPONSE: Where an insurer fails to respond within five business days to an application for insurance, the Department deems the insurer's inaction to be a declination. The FAIR Act requires an insurer to provide insurance to eligible person applicants and prohibits insurers from taking actions to discourage eligible applicants. N.J.S.A. 17:33B-15. As explained in response to another comment above, the Department believes it is, therefore, authorized to establish the point at which an application is deemed declined based on an insurer's inaction.

The Department has the authority to require insurers which utilize MTF rates to provide their producers with immediate binding authority in connection with the Department's approval of MTF rates. Previous Department approvals to utilize MTF rates were premised upon an insurer utilizing the entire MTF rating system. Current MTF rules on file with the Department provide producers with immediate binding authority.

COMMENT: A number of insurers which utilize MTF rates are opposed to providing immediate binding authority to producers in accordance with the provisions of N.J.A.C. 11:3-44.4(a)

RESPONSE: The MTF rating system provides for immediate binding authority, a level of service to which most insureds have become accustomed and rely upon. Most insurers provided immediate binding authority at the time their MTF rates were approved. Some insurers have since revoked such authority. It is appropriate for insurers to comply with N.J.A.C. 11:3-44.4(a) for the remaining few months of the MTF depopulation to avoid market disruption and to reduce the number of uninsured motorists. Insurers, however, are free to utilize their voluntary rating systems and to cease using MTF rates and the entire MTF rating system.

COMMENT: One commenter requested clarification of whether a deposit payment is an acceptable requirement with an application for insurance.

RESPONSE: Insurers are permitted to request payment in accordance with their filed rating systems and usual procedures. Nothing in the emergency rules compels insurers to provide coverage without obtaining payment for same.

COMMENT: One commenter suggested that the Department did not have the authority to require insurers to bind coverage immediately pursuant to N.J.A.C. 11:3-44.5 for insureds whom they covered in another state that moved to New Jersey.

RESPONSE: There is no logical reason for an insurer which provided coverage to an insured in another state to require a period of time and perhaps a lapse in coverage, when the insured moves to New Jersey and applies for a New Jersey policy, in order to determine whether the insured is an eligible person. Because insurers or their affiliates have ready access to the information necessary to determine eligibility, there is no reason to delay binding coverage or to allow a lapse in coverage for such applicants. Coverage should be continued without lapse and the policy rated and issued in accordance with the insurer's filed New Jersey rating system. If such an applicant is not an eligible person pursuant to New Jersey standards, coverage may be declined.

COMMENT: One commenter claimed that the provisions of N.J.A.C. 11:3-44.3(a) manifest imprudent public policy by prohibiting thorough underwriting and anti-fraud measures. The rules strain to simplify the application process at the risk of encouraging misrepresentation, rate evasion and dishonesty. Insurers should be permitted to request and obtain sufficient information to ensure their receipt of a premium commensurate with the insurance risk assumed.

RESPONSE: The Department has determined that the information required by N.J.A.C. 11:3-44.3(a) supplies sufficient information to determine eligibility and rate the policy. In recognition that, over time, a shorter period for initial underwriting could provide greater opportunity for the dangers described by the commenter, the Department has provided that these emergency rules are limited in their duration and expire in conjunction with the depopulation of the MTF. Regrettably, these rules are required in the current market and have been necessitated by the efforts of some insurers to avoid their obligations during the depopulation of the MTF.

Nothing in these rules should be construed to prohibit insurers from obtaining and verifying information to properly rate policies and to detect fraud or dishonesty.

COMMENT: One insurer seeks a clarification of N.J.A.C. 11:3-44.3(c) so that if coverage is provided in spite of deficiencies in an application, the insurer may request the missing information and follow New Jersey cancellation requirements if the applicant does not cure the deficiencies.

RESPONSE: Insurers are permitted to request information for the purpose of determining eligibility and to rate and underwrite a policy. If an insurer determines that an applicant is not an eligible person, the insurer may cancel the policy. An insurer may also re-rate a policy based on new or more accurate information obtained. The Department interprets N.J.S.A. 17:33B-15 to prohibit insurers from cancelling policies of eligible persons based on their failure to respond to requests for unusual, complex or extraordinary information.

COMMENT: One commenter inquired whether rates can be increased where applicants refuse to provide additional rating information requested by the insurer.

RESPONSE: If an applicant fails to provide rating information, an insurer may charge a higher rate in accordance with its approved rating system pending the receipt of the additional rating information. The insurer must, however, notify the insured that it has "up-rated" the policy because of the applicant's failure to provide the information and upon receipt of the rating information, re-rate the policy correctly.

Any extraordinary, complex or unreasonable information sought by an insurer may be considered a violation of N.J.S.A. 17:33B-15.

COMMENT: One commenter objected to the requirement that a motor vehicle record be submitted as part of a completed application. It asserted that requiring this information to be submitted as part of a completed written application has imposed an additional financial burden on producers. Because insurers are precluded from charging policyholders for the expense of such information the costs of retrieving the motor vehicle records are placed on the producers. The commenter, therefore, suggested that the applicant should provide the document or the costs associated therewith.

RESPONSE: The Department stresses that a motor vehicle record is not required by these rules. An applicant, therefore, cannot be required to supply such a document and should not be requested to do so by either the insurer or the producer. By agreement, an insurer can require its producer to supply such information. In cases where an insurer requests such information coverage must, nevertheless, be bound or declined within five business days of receipt of a completed written application. The fact that an insurer may require its producer to obtain a motor vehicle record **does not** extend the five business day period in which to make a determination on an application.

COMMENT: One commenter requested an interpretation of N.J.A.C. 11:17A-1.7(a)3ii which indicates that nothing in this section "shall be construed to permit an insurer to rescind any binding authority previously granted to its producers." The commenter also inquired as to whether insurers who rescinded the binding authority of their agents before the effective date of the adoption acted improperly and whether insurers were prohibited from using the emergency adoption as a means to avoid any contractual notice obligations in rescinding immediate binding authority.

RESPONSE: The language in this rule was intended to emphasize that an insurer is not released from its contractual obligations with regard to the binding authority of its producers. This language was deemed necessary due to the erroneous interpretation of Order 92-171 which

required insurers that did not transact business through producers with immediate binding authority to bind or decline coverage within 15 days. Some insurers used the Order as an excuse to improperly terminate their producers' immediate binding authority. The Department seeks to avoid a similar situation here and notes that insurers should continue to operate pursuant to the terms of their agreements with producers.

Any breach of an agreement between an insurer and its producer must be resolved between the two. Whether previous actions taken by insurers in rescinding their producers' immediate binding authority violated any statutes or rules is beyond the scope of these rules.

COMMENT: One commenter noted that the assessment of two eligibility points for violations which occurred out-of-State gives insureds which have incurred such eligibility points a distinct advantage.

Another commenter noted that certain enumerated practices by a particular insurer appear to violate various provisions of the emergency rules and amendments.

RESPONSE: The first comment is beyond the scope of this proposal which does not address the eligibility points schedule. The second comment raises questions which are best handled by the Department's Enforcement Division and the comments have been forwarded for further evaluation.

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. NEW JERSEY PERSONAL AUTOMOBILE INSURANCE PLAN

...

11:3-2.8 Eligibility

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

(c) "Qualified applicant" shall also include a member of the United States military forces, if otherwise eligible for insurance coverage insured by the PAIP, with respect to an automobile if, at the time application is made, the applicant is a nonresident who is stationed in this State, whose automobile is registered in another State and garaged in this State.

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

SUBCHAPTER 33. APPEALS FROM DENIAL OF AUTOMOBILE INSURANCE

...

11:3-33.2 Definitions

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

...

"Completed written application" means a signed application that contains the minimum information necessary as set forth at N.J.A.C. 11:3-44.3(a) to determine whether the applicant is an eligible person, to rate and underwrite the policy, is accompanied by a completed coverage selection form as provided at N.J.A.C. 11:3-15.6 and, if requested, a copy of the applicant's driver's license, a copy of the motor vehicle registration of the principal vehicle to be insured, one additional proof of New Jersey residency and an acknowledgment of requirement for insurance inspection form where physical damage is requested.

"Declination," "denied" or "denial" means:

1.-3. (No change.)

4. The refusal by an insurer or agent to provide, upon the request of an applicant, an application form or other means of making an application or request for automobile insurance coverage;

5. The refusal by an insurer to renew a policy of automobile insurance based on eligible person status, unless either a member of the insured's household is not an eligible person and that person accounts for 10 percent or more of the use of the subject vehicle pursuant to N.J.A.C. 11:3-8.4(a)2 or that the eligible person is nonrenewed pursuant to the provisions of N.J.A.C. 11:3-8.5;

6. The cancellation of an automobile insurance policy by the insurer pursuant to N.J.S.A. 17:29C-7 for any reason other than nonpayment of premium; or

7. Failure of an insurer to either bind coverage or issue a written denial of coverage to an applicant within five business days of the date a completed written application is received that includes the information in N.J.A.C. 11:3-44.3(a). This provision shall not be operative after October 15, 1993.

SUBCHAPTER 34. ELIGIBLE PERSONS QUALIFICATIONS AND AUTOMOBILE INSURANCE ELIGIBILITY POINTS SCHEDULE

...

11:3-34.4 Eligible person qualifications

(a) (No change)

(b) An "eligible person" includes a person ***who is an owner or registrant of an automobile registered in this State or who holds a valid New Jersey driver's license to operate an automobile and is*** domiciled in this State who is temporarily residing out-of-State and whose car may be principally garaged in another state while the person either is a full time student or is in the military service and is stationed out-of-State.

SUBCHAPTER 44. SPECIAL RULES FOR EFFECTING COVERAGE FOR PRIVATE PASSENGER AUTOMOBILE INSURANCE

11:3-44.1 Purpose and scope

(a) This subchapter implements the provisions of N.J.S.A. 17:33B-15 and 18 which prohibit insurers, both individually and through their agents, from attempting to channel away eligible persons, with the effect of avoiding an insurer's obligation to provide private passenger automobile insurance coverage to eligible persons.

(b) This subchapter applies to all persons that are licensed and authorized to transact the business of personal private passenger automobile insurance in this State and all producers.

11:3-44.2 Definitions

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

"Affiliate" means an insurer that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common ownership and management with, another insurer.

"Business days" means all days other than weekends and official New Jersey State and Federal holidays.

"Commissioner" means the Commissioner of the Department of Insurance.

"Completed written application" means a signed application that contains the minimum information necessary as set forth at N.J.A.C. 11:3-44.3(a) to determine whether the applicant is an eligible person, to rate and underwrite the policy, is accompanied by a completed coverage selection form as provided at N.J.A.C. 11:3-15.6 and, if requested, a copy of the applicant's driver's license, a copy of the motor vehicle registration of the principal vehicle to be insured, one additional proof of New Jersey residency and an acknowledgment of requirement for insurance inspection form where physical damage is requested.

"Days" means calendar days.

"Eligible person" means a person as defined at N.J.S.A. 17:33B-13 and N.J.A.C. 11:3-34.4.

"Insurer" means a person authorized to transact the business of personal private passenger automobile insurance in this State including insurers organized pursuant to N.J.S.A. 17:50-1 et seq.

"Market Transition Facility" or "MTF" means the New Jersey Market Transition Facility established pursuant to N.J.S.A. 17:33B-11.

"Personal private passenger automobile insurance" means a policy of automobile insurance principally used to provide primary insurance on private passenger automobiles which are owned individually, or jointly by individuals who are residents of the same household, and used for personal, family, or household needs.

"Transmit" means to mail or deliver by any means including, but not limited to, third class mail, certified mail, overnight delivery or

express delivery, hand delivery and any transmission by wire, including, but not limited to, facsimile transmission or computer modem.

11:3-44.3 Duty to provide coverage upon receipt of a completed written application

(a) The minimum information necessary to determine whether an applicant is an eligible person and to rate and underwrite the policy is as follows:

1. The desired effective date of policy;

2. Personal information, including the name, address, home telephone number, date of birth, sex and marital status of the applicant and principal driver of each automobile to be insured under the policy;

3. The number of vehicles to be insured and a description of each such vehicle including:

i. The model year;

ii. The cost of the vehicle, if new;

iii. The trade name;

iv. The model;

v. The body type;

vi. The vehicle identification number;

vii. An approximate odometer reading if the insurer rates by mileage;

viii. The estimated annual mileage if the insurer rates by mileage;

ix. The intended use of vehicle (for pleasure, for or to work, to school or to public transportation);

4. Where the vehicle is garaged, if different from residence;

5. The month and year licensed for all drivers licensed less than three years;

6. Information regarding each resident licensed driver who is to be a named insurer under the policy, or who is the principal driver of a vehicle insured under the policy, or who is not otherwise a named insured under a separate policy of automobile insurance including:

i. The percentage use of each licensed driver;

ii. The motor vehicle record for the previous three years including:

(1) Convictions for traffic violations that result in the assessment of insurance eligibility points pursuant to N.J.A.C. 11:3-34.5;

(2) Motor vehicle accidents; and

(3) Drivers' license and registration suspensions and revocations;

iii. An insurer shall not require the applicant to submit a motor vehicle abstract;

iv. Automobile insurance claims history if needed to determine placement into a preferred company in a group of insurers;

v. Insurance fraud and other violations or crimes enumerated at N.J.S.A. 17:33B-13 or set forth at N.J.A.C. 11:3-34.4(a)1, 2 or 4; and

vi. Criminal convictions for offenses in the course of which a motor vehicle was used pursuant to N.J.S.A. 2C:43-2b(7);

7. The drivers' license number of the applicant;

8. Information relating to types of coverage, limits of liability and driver discounts; *[and]*

9. A coverage selection form; and

*[9.]***10.*** No information shall be requested based on whether the insured is impaired by physical or mental disabilities except those disabilities that impair the ability to operate an automobile safely.

(b) An insurer, by itself or through its producers with binding authority, shall provide coverage to an eligible person applicant who submits a completed written application that includes the information in (a) above.

1. Insurers shall have five business days from the date of receipt of a completed written application to either provide or decline insurance. An insurer shall obtain and retain documentation of the date of receipt of such application.

2. Any document which an insurer requires to be submitted in connection with an application or renewal shall be prominently requested in the application or renewal form.

3. If physical damage coverages are requested by eligible person applicants, insurers shall bind liability coverages in accordance with these rules and may bind physical damage coverages subject to compliance with N.J.A.C. 11:3-36.

(c) If upon receipt of an application from a producer without immediate binding authority or directly from an applicant, an insurer finds that the application is incomplete and the insurer is unable to determine whether the applicant is an eligible person, the insurer shall, within five business days of the date the application was received by it, issue a notice which:

1. Clearly and specifically identifies the deficiencies;

2. Advises the applicant that if the deficiencies are cured within 15 days and the applicant is determined to be an eligible person, coverage shall be provided either immediately or as of the originally requested effective date ***if later***; and

3. Advises the applicant that if the deficiencies are not cured within 15 days, the application shall be deemed to have been declined.

(d) This rule shall not be operative after October 15, 1993.

11:3-44.4 Immediate binding authority for insurers with MTF rates

(a) Insurers which are approved by the Commissioner to use MTF rates in accordance with N.J.S.A. 17:33B-11c shall provide their producers with authority to immediately bind coverage on behalf of the insurer for all applicants to be charged MTF rates. Insurers shall amend their approved rating system, if necessary, either to incorporate MTF Manual Rule 5 which shall be deemed approved by the Commissioner; or to extend immediate binding authority to their producers in accordance with their own immediate binding procedures. This requirement shall not apply to insurers which transact personal private passenger automobile insurance directly with the public.

(b) This rule shall not be operative after October 15, 1993.

11:3-44.5 New applicants previously insured in another state by the insurer or an affiliate

(a) An insurer shall immediately provide coverage, without lapse, to any eligible person applicant that:

1. Has moved to New Jersey from another state;

2. Submits a completed written application within 60 days of establishing residency in New Jersey; and

3. Applies to either the same insurer under which the applicant is currently insured or an affiliate of that insurer.

11:3-44.6 Underwriting rules

These new rules shall supersede any existing, conflicting underwriting rules previously filed and approved by the Department pursuant to N.J.A.C. 11:3-35.

11:3-44.7 Penalties

Any insurer that violates any provision of this subchapter shall be subject to the penalties provided by law, including but not limited to the suspension, revocation or termination of a certificate of authority and a civil penalty in an amount of up to $2,000 for the first violation and up to $5,000 for the second and each subsequent violation in accordance with N.J.S.A. 17:33B-15 and 17:33B-21.

SUBCHAPTER 1. ACTIVITIES FOR WHICH A PERSON MUST BE LICENSED AS AN INSURANCE PRODUCER OR REGISTERED AS A LIMITED INSURANCE REPRESENTATIVE

...

11:17A-1.2 Definitions

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

...

"Completed written application" means a signed application that contains the minimum information necessary as set forth at N.J.A.C. 11:3-44.3(a) to determine whether the applicant is an eligible person, to rate and underwrite the policy, is accompanied by a completed coverage selection form as provided at N.J.A.C. 11:3-15.6 and, if requested, a copy of the applicant's driver's license, a copy of the motor vehicle registration for the principal vehicle to be insured, one additional proof of New Jersey residency and an acknowledgment of requirement for insurance inspection form where physical damage is requested.

"Declination," "denied" or "denial" means:

1.-4. (No change)

5. The refusal by an insurer to renew a policy of automobile insurance based on the eligible person status, unless either a member of the insured's household is not an eligible person and that person accounts for 10 percent or more of the use of the subject vehicle pursuant to N.J.A.C. 11:3-8.4(a)2 or that the eligible person is nonrenewed pursuant to the provisions of N.J.A.C. 11:3-8.5;

6. The cancellation of an automobile insurance policy by the insurer pursuant to N.J.S.A. 17:29C-7 for any reason other than nonpayment of premium; or

7. Failure of an insurer to either bind coverage or issue a written denial of coverage to an applicant within five business days of the date a completed written application is received that includes the information in N.J.A.C. 11:3-44.3(a). This provision shall not be operative after October 15, 1993.

...

"Transmission" means any form of mailing including, but not limited to, third class mail, certified mail, any overnight delivery or express delivery, hand delivery and any wire transmission including, but not limited to, facsimile transmission or computer modem.

11:17A-1.7 Personal private passenger automobile insuance solicitation

(a) An insurance agent, or an insurance broker who has a brokerage relationship with an insurer, when soliciting personal private passenger automobile insurance, shall:

1.-2. (No change.)

3. Upon request, submit an application of an eligible person for automobile insurance to the insurer selected by the applicant.

i. Where a producer who, pursuant to the authority granted by an insurer, has the authority to immediately bind an application for private passenger automobile insurance, determines that the applicant is an eligible person, the producer shall bind the coverage and shall transmit the application to the insurer within five business days of receipt of the completed written application. Nothing in this section shall be construed to compel an insurer to provide a producer with the authority to bind coverage immediately except as provided at N.J.A.C. 11:3-44.4. This provision shall not be operative after October 15, 1993.

ii. Where a producer who, pursuant to his or her agreement with an insurer, does not have authority to bind coverage immediately, receives a completed written application, the producer shall promptly transmit the application to the insurer. Nothing in this section shall be construed to permit an insurer to rescind any binding authority previously granted to its producers.

iii. Producers that transmit applications to insurers for underwriting review shall retain proof of such transmissions in order to memorialize the date upon which transmission occurred. Such proof may be in the form of:

(1) An official receipt of mailing which includes the applicant's name thereon;

(2) A copy of a facsimile transmission which contains the applicant's name and the date of transmission; or

(3) Any other manner from which proof and date of mailing can be verified;

4.-6. (No change.)

(b) (No change.)

COMMERCE AND ECONOMIC DEVELOPMENT

(a)

DIVISION OF DEVELOPMENT FOR SMALL BUSINESSES AND WOMEN AND MINORITY BUSINESSES

Certification of Women-Owned and Minority-Owned Businesses

Readoption: N.J.A.C. 12A:11

Proposed: March 15, 1993 at 25 N.J.R. 1056(a).
Adopted: April 30, 1993 by Barbara McConnell, Commissioner, Department of Commerce and Economic Development.
Filed: April 30, 1993 as R.1993 d.237, **without change as to the readoption but with the proposed amendments still pending.**

Authority: N.J.S.A. 52:27H-21.24.

Effective Date: April 30, 1993.
Expiration Date: April 30, 1998.

Summary of Public Comments and Agency Responses:

The Department of Commerce and Economic Development ("DCED") has received substantive comments on the proposed amendments to N.J.A.C. 12A:11, which the Department needs to consider fully. Public comments were received only on the amendments, and, to prevent the chapter from expiring, the Department is adopting current rules found at N.J.A.C. 12A:11.

By notice elsewhere in this issue of the New Jersey Register, the comment period on the proposed amendments found at N.J.R. 1056(a) are extended until August 30, 1993.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 12A:11.

(b)

NEW JERSEY DEVELOPMENT AUTHORITY FOR SMALL BUSINESSES, MINORITIES' AND WOMEN'S ENTERPRISES

Direct Loan Program

Adopted Amendment: N.J.A.C. 12A:31-1.4

Proposed: March 1, 1993 at 25 N.J.R. 891(a).
Adopted: April 14, 1993 by the New Jersey Development Authority for Small Businesses, Minorities' and Women's Enterprises, Mark L. Quinn, Secretary.
Filed: May 3, 1993 as R.1993 d.243, **without change.**

Authority: N.J.S.A. 34:1B et seq., specifically 34:1B-50(t).

Effective Date: June 7, 1993.
Operative Date: July 1, 1993.
Expiration Date: July 16, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

12A:31-1.4 Allocation of direct loan assistance

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

(e) The interest rate on direct loans shall be equal to 100 basis points above two-thirds of the value of Moody's "A" Rated Utility Index at the time of the loan closing, with a minimum of five percent.

LAW AND PUBLIC SAFETY

(a)

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Fees and Terms

Minor's Employment Permit, Rehabilitation Employment Permit, Transportation License Insignia, Limited Transportation Permit, Limited Transportation Permit Insignia

Adopted Amendments: N.J.A.C. 13:2-14.2, 14.7, 20.6 and 21.4

Proposed: April 5, 1993 at 25 N.J.R. 1340(a).
Adopted: May 11, 1993 by John G. Holl, Acting Director, Division of Alcoholic Beverage Control.
Filed: May 14, 1993 as R.1993 d.288, **without change.**

Authority: N.J.S.A. 33:1-1(x) and (y), 2, 3, 10, 11, 13, 14, 23, 25, 26, 28, 28.1, 28(a), 31, 35, 39, 50, 55, 66, and 74.

Effective Date: June 7, 1993.
Expiration Date: July 24, 1995.

Summary of Public Comments and Agency Responses:
No public comment was received regarding the proposed rule amendments.

Full text of the adoption follows.

13:2-14.2 Minor's employment permit; fees
(a) (No change.)
(b) The fee for an individual permit is $10.00 per annum, or any part thereof.

13:2-14.7 Rehabilitation employment permit; duration; types; fees
(a)-(b) (No change.)
(c) The fee for either type of rehabilitation employment permit shall be $100.00 per annum, payable on the date of application.

13:2-20.6 Applications; fees
(a)-(b) (No change.)
(c) Application for transportation license insignia shall be filed with the Director upon a prescribed form and shall be issued at a cost of $20.00 for each insignia, in cash, money order or certified check payable to the order of the Division of Alcoholic Beverage Control.
1. (No change.)

13:2-21.4 Limited transportation permit
(a) (No change.)
(b) Application for a limited transportation permit shall be made to the Division on a form prescribed by the Director, in duplicate, accompanied by a fee of $400.00.
(c) A limited transportation permit has a term of one year terminating on September 30, unless sooner cancelled by the Director.
1. Those limited transportation permits and the corresponding limited transportation permit insignia which have been issued with an expiration date of June 30, 1993 shall be and are extended until September 30, 1993.
(d) (No change.)
(e) Limited transportation permit insignia are obtainable from the Division in the same manner, with the same eligibility requirements, transfer restrictions and insignia location as a transit insignia as set forth in N.J.A.C. 13:2-20. The cost for this limited transportation permit insignia is $40.00 per vehicle.

(b)

DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF COSMETOLOGY AND HAIRSTYLING

Board of Cosmetology and Hairstyling Rules

Readoption with Amendments: N.J.A.C. 13:28

Proposed: March 1, 1993 at 25 N.J.R. 893(b).
Adopted: April 28, 1993 by the Board of Cosmetology and Hairstyling, Bridget Damiano, President.
Filed: May 14, 1993 as R.1993 d.287, **with a technical change** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 45:5B-6.

Effective Date: May 14, 1993, Readoption;
June 7, 1993, Amendments.
Expiration Date: May 14, 1998.

Summary of Public Comments and Agency Responses:
No comments were received.

Summary of Agency-Initated Changes:
A proposed amendment to N.J.A.C. 13:28-6.29, consistent with proposed amendments to 6.28, was inadvertently omitted from the proposed rule text although the amendment was referred to in the proposal summary and impact statements. Accordingly, the amendment to N.J.A.C. 13:28-6.29 has been included upon adoption.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 13:28.

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

13:28-1.2 Examination and reexaminations
(a) Applicants shall be subject to testing in all areas of cosmetology and hairstyling appropriate for the license sought, and such examination shall be in two parts: practical and written.
(b) (No change.)
(c) An applicant who fails one part of the examination shall be reexamined only on the part failed; provided, however, that an applicant for a cosmetology and hairstyling license by endorsement pursuant to N.J.S.A. 45:5B-29 and 30 who fails one part of the examination shall retake the complete examination.
(d) (No change.)

13:28-1.6 Notification of change of address
(a) Licensees shall notify the Board in writing of any change from the address currently registered with the Board and shown on the most recently issued certificate. Such notice shall be sent to the Board no later than 30 days following the change of address.
(b) Failure to notify the Board of any change of address pursuant to (a) above may result in disciplinary action in accordance with N.J.S.A. 45:1-21(h).
(c) Service of an administrative complaint or other Board-initiated process at a licensee's address currently on file with the Board shall be deemed adequate notice for the purposes of N.J.A.C. 1:1-7.1 and the commencement of any disciplinary proceedings.

13:28-2.6 Shops within residential premises
(a)-(b) (No change.)
(c) Cosmetology and hairstyling services shall not be rendered or offered to be rendered upon residential premises which are not licensed pursuant to N.J.S.A. 45:5B-9.

13:28-2.9 Ancillary services
(a)-(c) (No change.)
(d) Permanent cosmetic application such as, but not limited to, tattooing and permanent make-up, is prohibited on any licensed premises.

13:28-2.10 Posting of licenses and required notices

(a) All shops shall display the following in a location clearly visible to all patrons:

1.-3. (No change.)

4. The following notice:

NOTICE

This shop and the operators herein are licensed to engage in the practice of cosmetology and hairstyling by the State Board of Cosmetology and Hairstyling, an agency of the New Jersey Division of Consumer Affairs. Any member of the consuming public having a complaint concerning the manner in which this practice is conducted may notify the State Board of Cosmetology and Hairstyling at 124 Halsey Street, Newark, New Jersey 07102, or the New Jersey Division of Consumer Affairs, Post Office Box 45003, Newark, New Jersey 07101.

13:28-3.1 Premises

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

(e) (No change in text.)

(f) All tools, implements and electrical appliances used within a licensed shop shall be maintained in a sanitary and safe manner. Tools and utensils applied directly to patrons shall be thoroughly cleaned and sanitized after each and every use in accordance with the provisions of N.J.A.C. 13:28-3.2.

13:28-3.2 Sanitizing implements and tools

(a) A licensee shall sanitize all implements and tools by:

1. Cleaning all instruments thoroughly with a mild alkaline detergent to remove any soil, blood or any other foreign material;

2. Rinsing all instruments with tap water after cleaning;

3. Processing all instruments with a chemical disinfectant registered by the Environmental Protection Agency as being tuberculocidal when used at a recommended dilution;

4. Following a manufacturer's instructions when using chemical disinfectant; and

5. Storing clean instruments in a dry sanitizer.

(b) A licensee shall discard after each use all emery boards that cannot be sanitized.

13:28-3.3 Personnel

(a) (No change.)

(b) All practitioners shall be attired in clean outer garments.

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

13:28-6.2 Application procedure for school licenses

(a) (No change.)

(b) Upon receipt of a completed application the School Committee shall review the application. A complete application shall include: a school bond; school bulletin; a certificate of incorporation or partnership agreement where applicable; personnel data form(s); floor plan; employment contract (one year minimum) with the supervising teacher; hour by hour breakdown of the course; a sample enrollment agreement (contract); sample certificate of completion; sample advertisements; certified-audited financial data; and the required licensing fee as set forth in N.J.A.C. 13:28-5.1.

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

13:28-6.8 Student registration cards

(a) (No change.)

(b) A student registration card is valid from the date of issue until the particular student's education is completed in the course in which the student is enrolled, as long as the student is not absent from school for a period of more than three months.

1. In instances where absences exceed three months, the student shall be dropped for the school's time sheets and must obtain a new registration card, pursuant to N.J.A.C. 13:28-6.21(n), in order to resume training.

(c) (No change.)

13:28-6.10 Commencement of classes

School classes shall commence on the first Monday of each month, provided, however, that if a holiday falls on the first Monday, school classes shall commence on the first working day following the holiday. The Board may, at its discretion, approve a date for the commencement of school classes other than the first Monday of each month provided the licensed school obtains Board approval at least 30 days prior to the commencement of classes.

13:28-6.16 Other trades; demonstrations

(a) (No change.)

(b) A school shall not rent space for demonstrations to outside companies, individuals, corporations, associations, partnerships or other entities unless such space is in excess of the required minimum footage for school premises pursuant to N.J.A.C. 13:28-6.7. Demonstrations shall not conflict with the regular school operation.

13:28-6.20 Equipment

(a) (No change.)

(b) The minimum equipment required for schools shall be as follows:

1.-2. (No change.)

Recodify existing 4.-12. as 3.-11. (No change in text.)

Recodify existing 14. and 15. as 12. and 13. (No change in text.)

14. One teachers' lavatory for schools having three or more teachers.

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

(f) Each school shall have separate classrooms for junior and senior students.

(g)-(i) (No change.)

13:28-6.21 Student standards and requirements

(a)-(n) (No change.)

(o) Examinations shall be administered by the school to the student prior to completion of his or her course in accordance with the standard procedures followed by public educational institutions in the State in all courses of instruction. The examination shall be written and practical.

(p) All students shall complete a course of study in conformance with the curricula adopted by the Board.

(q) (No change.)

13:28-6.22 Application submission by schools

The school shall submit applications for each student for examination within 30 days after the student's completion of the course of study. Each application must be accompanied by two recent photographs, a copy of a high school or equivalency diploma and the appropriate fees pursuant to N.J.A.C. 13:28-5.1.

13:28-6.29 Curriculum for 1200 hour cosmetology and hairstyling course

TIME DISTRIBUTION FOR INSTRUCTIONAL UNITS AND CLINICAL PRACTICE

	Hours of Class and Subject Related Instruction	Hours of Practical Instruction	Total
...			
Hair & Basic layer & *[Cap]* ***Clipper*** cut—Razor, Scissors, Thinning shears, Tapering	40	130	170
...			

13:28-6.31 Curriculum for 500 hour course for student teachers

TIME DISTRIBUTION FOR INSTRUCTIONAL UNITS AND CLINICAL PRACTICE

	Hours of Class and Subject Related Instruction	Hours of Practical Instruction	Total
...			
Hair & Basic layer & Clipper cut—Razor, Scissors, Thinning shears, Tapering	20	30	50
...			

(a)

DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS
Fees
Adopted Amendment: N.J.A.C. 13:35-6.13
Adopted New Rule: N.J.A.C. 13:35-10.9

Proposed: March 15, 1993 at 25 N.J.R. 1058(a).
Adopted: April 20, 1993 by the Board of Medical Examiners, Sanford M. Lewis, President.
Filed: May 10, 1993 as R.1993 d.260, **without change**.

Authority: N.J.S.A. 45:9-2 and 45:1-3.2.

Effective Date: June 7, 1993.
Expiration Date: September 21, 1994.

The Board of Medical Examiners afforded all interested parties an opportunity to comment on the proposed amendments to its fee schedule, N.J.A.C. 13:35-6.13 and 10.9, as proposed in the New Jersey Register on March 15, 1993 at 25 N.J.R. 1058(a). The official comment period ended on April 14, 1993. Announcements of the opportunity to respond to the Board were also forwarded to the Star Ledger, the Trenton Times, the New Jersey Hospital Association, the Department of Health and to other interested parties.

A full record of this opportunity to be heard can be inspected by contacting the State Board of Medical Examiners, 28 West State Street, Trenton, New Jersey 08608.

Summary of Public Comments and Agency Responses:

During the 30-day comment period, the Board received four written responses to the proposal. A summary of the comments received together with the Board's responses follows.

COMMENT: Eli B. Halpern, M.D. suggested that the classification of active physicians be divided into part time and full time for purposes of assessing biennial renewal fees. The commenter stated that this would be equitable and fair to the State and to semi-retired physicians.

RESPONSE: To assess licensing fees based on the number of hours worked by each physician would be impractical since the Board would be unable to ensure compliance on a case-by-case basis.

COMMENT: William T. Anderson, M.D. and Ronald A. Reiss, M.D. objected to the fee increases. These commenters believe that the increases outpace the rate of inflation and represent an insensitivity to medical practice operating costs at a time when the Federal government is considering a cutback on physician incomes, physicians are being charged higher fees to continue in practice, and payors are cutting reimbursement rates.

RESPONSE: While the Board recognizes the impact of rising fees upon practitioners, unfortunately it is necessary to increase fees to meet Board expenses. Pursuant to N.J.S.A. 45:1-3.2, each professional board within the jurisdiction of subchapter 1 of Title 45 is required to be self-funded; that is, all Board operating costs must be met through licensing and other fees. The statute also requires the agency to assess fees which are estimated not to exceed the amount required. After receiving and evaluating fiscal information regarding proposed expenditures during the next licensing period, the Board is confident that the estimate of fees required in order to continue its operations complies with these statutory requirements.

COMMENT: Ronald A. Reiss, M.D. stated that, in light of the number of frivolous lawsuits and complaints filed against physicians, the Board's investigative costs should be paid by consumers (the general public) who request investigations.

RESPONSE: As stated above, pursuant to N.J.S.A. 45:1-3.2, the regulated community is required to pay for its regulation. The Board notes that it attempts to rule out frivolous complaints and to expend resources only on those complaints which appear to have merit. The Board believes the profession should support such investigation and enforcement to ensure that all—physicians and patients alike—are equally protected.

COMMENT: Bernard Robins, M.D., Secretary of the Medical Society of New Jersey, requested documentation, including the budget and the revenue and expense statement, that justifies the proposed increases.

RESPONSE: Division staff is currently assembling a budgetary analysis for the fiscal years 1992 through 1995 which it believes will be responsive to the commenter's request. This analysis, which requires substantial work, will be sent to the Society as soon as it is available.

Full text of the adoption follows.

13:35-6.13 Fee schedule

(a) The following fees shall be charged by the Board of Medical Examiners:

1. Medicine and Surgery (M.D. or D.O. license)	
i. Initial application fee	$325.00
Application for re-examination	175.00
ii. Examination—	
Both Components	500.00
Component I	300.00
Component II	325.00
iii. Initial registration fee	
(1) If paid during the first year of a biennial renewal period	250.00
(2) If paid during the second year of a biennial renewal period	125.00
iv.-vi. (No change.)	
vii. Biennial registration	250.00
viii. Biennial registration for licensee over 65 without health care facility or HMO affiliation	125.00
2. Podiatry (license)	
i. Application fee	125.00
ii. Examination	150.00
iii. Initial registration fee	
(1) If paid during the first year of a biennial renewal period	170.00
(2) If paid during the second year of a biennial renewal period	85.00
iv. Endorsement	150.00
v. Biennial registration	170.00
vi. Biennial registration for licensee over 65 without health care facility or HMO affiliation	85.00
3. Bio-analytical laboratory directorship, plenary license	
i. Application fee	125.00
ii. Examination (plenary license)	350.00
iii. Examination (plenary license)	150.00
iv. Initial registration fee	
(1) If paid during the first year of a biennial renewal period	170.00
(2) If paid during the second year of a biennial renewal period	85.00
v. Biennial registration	170.00
4. Bio-analytical laboratory directorship, specialty license	
i. Application fee	125.00
ii. Examination (specialty license)	350.00
iii. Exemption (specialty license)	150.00
iv. Initial registration fee	
(1) If paid during the first year of a biennial renewal period	170.00
(2) If paid during the second year of a biennial renewal period	85.00
v. Biennial registration	170.00
5. Midwifery (license)	
i. Application fee	125.00
ii. Examination (lay midwife license)	50.00
iii. Endorsement (lay midwife license)	50.00
iv. Initial registration fee	
(1) If paid during the first year of a biennial renewal period	170.00
(2) If paid during the second year of a biennial renewal period	85.00
v. Biennial registration	170.00
6. Certified Nurse Midwifery (registration)	
i. Application fee	125.00
ii. Examination, C.N.M.	50.00
iii. Endorsement (C.N.M.)	50.00
iv. Initial registration fee	
(1) If paid during the first year of a biennial renewal period	170.00

(2) If paid during the second year of a biennial renewal period 85.00
v. Biennial registration, C.N.M. 170.00
7. Orthoptist (registration)
i. Application fee 125.00
ii. Registration by credentialing 25.00
iii. Initial registration fee
(1) If paid during the first year of a biennial renewal period 170.00
(2) If paid during the second year of a biennial renewal period 85.00
iv. Biennial registration 170.00
Recodify existing 9. and 10. as 8. and 9. (No change in text.)
10. General
i. Recording of name change and issuance of replacement license 50.00
ii. Replacement of lost engrossed copy/certified true copy/biennial registration certificate 50.00
iii. Preparation of certification papers for applicants to other states 50.00
iv. Late renewal fee 100.00

13:35-10.9 Fees
(a) The following fees shall be charged by the Board for athletic trainer registration:
1. Temporary registration or authorized registration without examination 60.00
2. Examination (reserved)
3. Initial registration fee
i. If paid during the first year of a biennial renewal period 60.00
ii. If paid during the second year of a biennial renewal period 30.00
4. Biennial registration 60.00
5. Endorsement 60.00
6. Late renewal fee 50.00

(a)

NEW JERSEY RACING COMMISSION

Thoroughbred Rules

Possession of Drugs or Drug Instruments

Adopted Amendment: N.J.A.C. 13:70-14A.8

Proposed: March 15, 1993 at 25 N.J.R. 1060(a).
Adopted: April 27, 1993 by the New Jersey Racing Commission, Frank Zanzuccki, Executive Director.
Filed: May 10, 1993 as R.1993 d.262, **without change.**

Authority: N.J.S.A. 5:5-30.

Effective Date: June 7, 1993.
Expiration Date: January 25, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

13:70-14A.8 Possession of drugs or drug instruments
(a) No person aside from licensed veterinarians shall have in his possession anywhere within the grounds of any association conducting a race meeting, or anywhere within the confines of a racetrack enclosure, or anywhere within the grounds of any licensed off-track stabling facility, any drugs not possessed in accordance with the laws of the State of New Jersey, nor any contraband drug or unauthorized prescription legend drugs, nor any hypodermic syringes or needles, or any other instrument which may be used for injection, unless the injectable device is possessed for self-administration, and further provided that the individual possessing such device promptly notify the State Steward:
1. That he is in possession of such device; and
2. Of the chemical substance to be administered.

(b)

NEW JERSEY RACING COMMISSION

Harness Rules

Possession of Drugs or Drug Instruments

Adopted Amendment: N.J.A.C. 13:71-23.9

Proposed: March 15, 1993 at 25 N.J.R. 1061(a).
Adopted: April 27, 1993 by the New Jersey Racing Commission, Frank Zanzuccki, Executive Director.
Filed: May 10, 1993 as R.1993 d.261, **without change.**

Authority: N.J.S.A. 5:5-30.

Effective Date: June 7, 1993.
Expiration Date: January 25, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

13:71-23.9 Possession of drugs or drug instruments
(a) No person aside from licensed veterinarians shall have in his possession anywhere within the grounds of any association conducting a race meeting, or anywhere within the confines of a racetrack enclosure, or anywhere within the grounds of any licensed off-track stabling facility, any drugs not possessed in accordance with the laws of the State of New Jersey, nor any contraband drug or unauthorized prescription legend drugs, nor any hypodermic syringes or needles, or any other instrument which may be used for injection, unless the injectable device is possessed for self-administration, and further provided that the individual possessing such device promptly notify the State Steward:
1. That he is in possession of such device; and
2. Of the chemical substance to be administered.

(c)

VIOLENT CRIMES COMPENSATION BOARD

Compensable Damages

Adopted Amendment: N.J.A.C. 13:75-1.7

Proposed: February 16, 1993 at 25 N.J.R. 674(a).
Adopted: May 3, 1993 by the Violent Crimes Compensation Board, Jacob C. Toporek, Chairman.
Filed: May 6, 1993 as R.1993 d.250, **with a technical change** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 52:4B-9.

Effective Date: June 7, 1993.
Expiration Date: June 5, 1994.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows (addition to proposal indicated in boldface with asterisks ***thus***; deletion from proposal indicated in brackets with asterisks *[thus]*):

13:75-1.7 Compensable damages
(a)-(d) (No change.)
(e) In claims involving the death of a victim, the maximum reimbursement for funeral expenses shall be as follows:
1. For incidents occurring before January 10, 1980, $750.00;
2. For incidents occurring on or after January 10, 1980, $2,000; and
3. For incidents occurring on or after *[(the effective date of this amendment)]* ***June 7, 1993***, $3,000.

(a)

VIOLENT CRIMES COMPENSATION BOARD

Attorney's Fees
Affidavit of Service
Adopted Amendment: N.J.A.C. 13:75-1.12

Proposed: February 16, 1993 at 25 N.J.R. 674(b).
Adopted: May 3, 1993 by the Violent Crimes Compensation Board, Jacob C. Toporek, Chairman.
Filed: May 6, 1993 as R.1993 d.251, **without change.**

Authority: N.J.S.A. 52:4B-9.

Effective Date: June 7, 1993.
Expiration Date: June 5, 1994.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

13:75-1.12 Attorney's fees
(a)-(b) (No change.)
(c) For all claim applications filed prior to July 1, 1990, attorney's fees shall be computed on an hourly basis and shall not exceed a maximum of $50.00 per hour.
1. (No change.)
2. The Board shall require an affidavit of service where attorney's fees exceed $1,500. Said affidavit must include an hourly accounting of work completed by the attorney in direct relation to the claim before the Board.
(d) (No change.)

PUBLIC UTILITIES

(b)

BOARD OF REGULATORY COMMISSIONERS

Public Records
Adopted Amendments: N.J.A.C. 14:3-6.5

Proposed: June 1, 1992 at 24 N.J.R. 1966(a).
Adopted: May 12, 1993 by the Board of Regulatory Commissioners, Dr. Edward H. Salmon, Chairman, and Jeremiah F. O'Connor and Carmen J. Armenti, Commissioners.
Filed: May 13, 1993 as R.1993 d.273, **with substantive changes** not requiring additional public notice or comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 48:2-13 and 47:1A-1 et seq.
BRC Docket Number: AX92030352.

Effective Date: June 7, 1993.
Expiration Date: May 6, 1996.

Summary of Public Comments and Agency Responses:
The Board received written comments from the following individuals:
Edward K. DeHope, Esq., on behalf of AT&T Communications of New Jersey, Inc.
Roger P. Frye, Esq., on behalf of New Jersey-American Water Company, Inc.
Daniel V. Gulino, Esq., Jersey Central Power & Light Company.

COMMENT: AT&T Communications of New Jersey, Inc. (AT&T) recommends that the Board incorporate additional language in its proposal in order to make it clear that records which are filed with the Board and are accorded confidential treatment pursuant to either Board rule or protective order shall be disclosed only to the extent and in the manner provided therein, and shall not be deemed public records within the meaning of N.J.S.A. 47:1A-1 et seq. This recommendation is joined by New Jersey-American Water Company (NJ-American).

RESPONSE: In proposing this rule amendment, the Board never intended that it be implied that records which are either, by rule, accorded confidential treatment or are the subject of a protective order be accessible beyond the scope and manner provided for by the Board. The Board would further note that it is presently drafting a proposal regarding protective orders which is consistent with the comments of AT&T. Accordingly, N.J.A.C. 14:3-6.5(a) has been changed upon adoption for the sole purpose of clarifying the Board's initial intent.

COMMENT: NJ-American recommends that procedural safeguards be afforded to utilities in the form of notice to the affected utility of a request to review its records in question and an opportunity for the utility to be heard should the utility wish to take the position that the disclosure sought is inimical to the public interest.

RESPONSE: The Board agrees that a utility should have the opportunity to request that certain information that would constitute a public record under N.J.S.A. 47:1A-1 et seq. be given privileged or confidential treatment. The Board, however, is of the opinion that such a request should be made at the time the information is submitted to the Board or at the time circumstances have sufficiently changed as to necessitate different treatment for the documents. Any claim of privilege or confidentiality pertaining to a document required by law to be filed with and maintained by the Board should not lie dormant until a request is made for access thereto.

COMMENT: Jersey Central Power & Light Company (JCP&L) argues that the proposed amendment will, *inter alia*, "... defeat the purpose behind the submission of such records (accident reports)" and "... on its face, conflict[s] with N.J.A.C. 14:11-5.7." JCP&L further argues that N.J.A.C. 14:3-6.5 and N.J.A.C. 14:11-5.7 clearly indicate a determination by the Board that the admission of complete and accurate accident reports for the Board's review is an important device for insuring and maintaining adequate safety and reliability of service.

JCP&L is concerned that the proposed amendment will substantially increase the number of persons who could request access to the information and, therefore, increase the danger that utilities will be disinclined to suggest to the Board ways in which certain types of accidents may be avoided in the future. JCP&L is also concerned that an initial accident report, that may eventually be amended after further investigation, could be used to the prejudice of the utility. JCP&L states its opinion that the Board's existing rules are consistent with current statutory and case law.

RESPONSE: As indicated in its summary to the proposal which was published at 24 N.J.R. 1966(a), "[t]he Board has authorized the proposed amendment to N.J.A.C. 14:3-6.5 in order to bring this rule within the parameters of existing New Jersey statutory and case law. New Jersey Right to Know Law, N.J.S.A. 47:1A-1 et seq. . . .; *Irval Realty v. Board of Public Utility Commissioners*, 61 N.J. 366 (1972)." While agreeing that on a limited basis it may exclude records from the public domain, the Board is of the opinion that N.J.A.C. 14:3-6.5 and 14:11-5.7 cannot stand in the face of the *Irval* decision and the Right to Know Law. This opinion is consistent with advice that the Board has received from the Office of the Attorney General through the Division of Law, Department of Law and Public Safety. Indeed, in adopting N.J.A.C. 14:11 as a new rule which became effective on March 3, 1993, at 25 N.J.R. 999(a), the Board, pursuant to the advice of the Attorney General, amended N.J.A.C. 14:11-5.7 to read:

Accident reports may be used by the Board in determining what safety practices should be recommended. In a proceeding before the Board, accident reports shall be evidential only at the discretion of the Board.

Prior thereto, the rule provided that accident reports were solely for the use of the Board in determining what safety practice, if any, should be recommended and that such reports were not available as evidence in any collateral civil proceeding. The Board is aware of the concerns raised by JCP&L and the other commenting utilities. It is the opinion of the Board, however, that the proposed amendments are necessary in order that the Board's rules may be brought into compliance with statutory and case law, and that the ability of the affected utilities to request that certain required information be afforded confidential or protected status adequately protects their interests.

Summary of Agency-Initiated Change:
As there are presently no safety inspections that are required by law to be made, maintained or kept by and for the Board, and there are no plans to require same in the future, the Board will make the rule consistent with current policy by eliminating the reference to safety inspections set out in N.J.A.C. 14:3-6.5(b).

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

14:3-6.5 Public records

(a) All records, except those records set forth in (b) below ***or which by rule are accorded confidential treatment by the Board or are the subject of a protective order of the Board***, which specifically are required by law to be made, maintained or kept by and for the Board of Regulatory Commissioners shall be public records within the meaning of N.J.S.A. 47:1A-1 et seq. ***Records which by rule are accorded confidential treatment by the Board or which are the subject of a protective order of the Board shall be disclosed only to the extent and in the manner provided therein, and shall not be deemed public records within the meaning of N.J.S.A. 47:1A-1 et seq.***

(b) All records which specifically are required by law to be made, maintained or kept by and for the Board which relate to accidents and investigation of accidents concerning public utilities and to *[safety inspections and]* surveys of property and equipment of public utilities shall be deemed public records, copies of which may be purchased or reproduced under the provisions of N.J.S.A. 47:1A-1 et seq., unless it is determined by the Board that the inspection, copying or publication of such records shall be inimical to the public interest.

(c) All other records of the Board shall not be subject to the provisions of N.J.S.A. 47:1A-1 et seq., and shall be available for inspection and examination only to the extent and for such purposes as may be expressly authorized by the Board.

(d) The fee for copies of records, instruments and documents of the Board shall be the fee established by law.

(a)

BOARD OF REGULATORY COMMISSIONERS

Inspection and Operation of Master Meter Systems

Adopted New Rules: N.J.A.C. 14:6-5

Proposed: December 21, 1992 at 24 N.J.R. 4494(a).

Adopted: April 30, 1993 by the Board of Regulatory Commissioners, Dr. Edward H. Salmon, Chairman, Jeremiah F. O'Connor and Carmen J. Armenti, Commissioners.

Filed: May 5, 1993 as R.1993 d.247, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: Part 192 of Title 49 of the Code of Federal Regulations (49 CFR 192); N.J.S.A. 48:2-13 and 48:2-23.

BRC Docket Number: GX92040458.

Effective Date: June 7, 1993.

Expiration Date: September 3, 1996.

Summary of Public Comments and Agency Responses:

In response to this proposal, comments were received from Richard Fryling, Jr., Esq., General Solicitor, Public Service Electric and Gas Company (PSE&G), on behalf of PSE&G, Elizabethtown Gas Company, New Jersey Natural Gas Company and South Jersey Natural Gas Company (hereinafter referred to collectively as "the Companies").

COMMENT: The Companies have expressed two areas of concern. The first pertains to the last sentence of N.J.A.C. 14:6-5.4(a) which states:

> Alternatively, the owner or operator of the master meter system may make arrangements with the servicing utility to provide the required inspection and certification.

In opposing this language, the Companies have argued that they have no knowledge of the type of system that was installed by the owner or operator of the master meter system, its location, the qualifications of the installer, or to the manner of installation and facility testing utilized by the owner or operator. In addition, they argue that there would also be no knowledge of any renovations or relocations that may have been installed by prior owners or operators or the materials that may have been used.

It is the opinion of the Companies that the risks inherent in making a certification should be borne by a professional engineer and that there are sufficient numbers of consulting and professional engineers available in New Jersey to eliminate any need for the utilities to undertake this responsibility. The Companies also suggest that the rule define the scope of the required inspection and certification with a checklist for the professional engineer, or utility if the Board so directs, and specify the standards and criteria to be utilized in granting or denying certification to preclude charges of abuse of discretion. The Companies are of the further opinion that if a utility is required to be involved in the certification process, it should be authorized to charge for the inspection and certification on a market basis in recognition of potential liability and that utilities would be taking potential business from the State's professional engineers. It has also been noted that some utilities utilize outside contractors and do not have a sufficient number of employees that would be needed under the proposed rule.

The second area of concern raised by the Companies is the requirement of N.J.A.C. 14:6-5.4(c) that would require a utility to attempt to arrange with the owner or operator to take over the master meter system and make corrections to bring the system into compliance with all applicable safety standards. For the reasons stated above, the Companies have voiced their opposition to taking over customer-owned piping systems. The Companies recommend that the proposed rule be modified to require the owner or operator to make arrangements with the utility and to either eliminate the system or bring it into compliance with the Federal Code. It is further recommended that, in order to eliminate confusion, reference to the BOCA requirements be deleted as the intent of the proposed rule is to assure compliance with the Federal Code. The Companies further suggest a clarification to recognize that it is the Board, and not the utilities, who has the authority in New Jersey to implement and assure compliance with the Federal Code.

RESPONSE: The Board would note that it is customary in situations where there are service problems connected with facilities which are owned by a customer, that the servicing utility will assist the customer in order that the extent of the problem may be determined and a reasonable and effective remedy implemented. In doing so, the utility will direct the customer to those experts who are qualified to do the necessary work. It was with this customary meaning in mind that the Board proposed that the owner or operator of a master meter system could seek out the services of a licensed professional engineer or, in the alternative, could make arrangements with the servicing utility to provide inspection and certification. That is, the owner or operator could eliminate an independent attempt to locate a qualified engineer by going directly to the utility and receiving the names of engineers known by the utility to be competent to do such work. Of course, the owner or operator could elect to follow both approaches and select the option that was most cost effective.

The reluctance of the affected gas utilities to become directly involved in the inspection and certification process, in any manner, pertaining to facilities which they do not own is understandable. The Board, however, is of the opinion that if the owner or operator of the facilities can demonstrate that despite the assistance of the utility, the services of an independent licensed professional engineer cannot be retained, the utility, as the last available expert, must be able to perform the inspection and certification in order to insure that the safety of the master meter system is not compromised. The Board is of the further opinion that the pertinent amendments to N.J.A.C. 14:6-5.4(a) do not place any additional burdens on the owners or operators of the systems. Rather, it clarifies the accepted practices of utilities and allows the owner or operator to secure any needed assistance in an expeditious manner.

With regard to the potential for charges of abuse of discretion by an independent licensed professional engineer or by the utility with regard to the grant or denial of any aspect of the certification, the Board has further included language that the reporting of the annual certification that the system complies with all applicable safety requirements, including the Federal Code, shall be submitted on a standard form, to be supplied by the Board, which merely reflects and is consistent with the Federal Code specifications.

It is the intent of the Board that all inspections and needed improvements to the master meter system, whether performed by an independent licensed professional engineer or by the utility, should be at the expense of the system's owner or operator. In order to clarify this intent, the Board has added language to the end of N.J.A.C. 14:6-5.4(a) to the effect that all work associated with the inspection and certification will be at the expense of the owner or operator. Because it would be impossible for the Board to calculate the market price at any particular point in time, the use of the language "...at the expense of the owner or operator" in N.J.A.C. 14:6-5.4(c) reflects the Board's standard position that work performed by the utility should be at the utility's cost for labor and materials. The Board is of the further opinion that because of the

relatively small number of existing master meter systems in New Jersey and the quantity of pipe associated therewith, any work that would ultimately be required to be done by a gas utility should not impose any large burden on either its employees or equipment.

The Board believes that the proposed rule clearly indicates its intent that it is the owner or operator, rather than the utility, who is responsible for the inspection, certification and, if necessary, repair of the master meter system. Therefore, in order to maintain consistency with the rest of the proposed rule, the Board will amend N.J.A.C. 14:6-5.4(c) to make clear that it is the owner or operator who has the obligation to contact the utility in order to attempt to arrange for the repair or replacement of the master meter system.

In the summary to the proposed rule set forth at 24 N.J.R. 4495, the Board stated that the proposal was consistent with its statutory authority to require utilities under its jurisdiction to provide safe, adequate and proper service. The Board further stated:

> Building codes administered by local subcode officials, such as the BOCA Code (Building Officials and Code Administrators, Inc.), address only the initial installation of piping downstream of the gas meter. Federal regulations, however, mandate that these facilities be inspected, operated and maintained in compliance with all applicable Federal requirements. The adoption of State rules governing the inspection, operation and maintenance of master meter systems would, therefore, enable the Board's Bureau of Pipeline Safety to assure compliance with the Federal requirements.

Accordingly, the Board concurs with the comment that reference to any code other than the Federal Code is unnecessary, and potentially confusing. Therefore, all references to the BOCA Code shall be eliminated.

Summary of Agency-Initiated Changes:

In reviewing the proposed rules, the Board determined that reference should be made therein to a discovered condition in the master meter system that constitutes an immediate safety hazard. Accordingly, the Board will amend N.J.A.C. 14:6-5.4(b) by including language to the effect that until repairs can be made to the system that will either eliminate or sufficiently abate the hazardous condition, service to the system could be subject to discontinuance pursuant to N.J.A.C. 14:3-3.6(a)3x. As this existing rule gives a utility the general authority to discontinue service in any situation in which there is a hazard to life or property, this amendment does not constitute any change of present Board policy.

In addition, to provide adequate lead time for master meter systems that are presently in the development or construction stage, and to allow the owners or operators of existing master meter systems sufficient time in which to have their respective systems initially inspected and certified, the Board has modified N.J.A.C. 14:6-5.3 and 5.4(a) by replacing the specific date of January 1, 1994, which is fast approaching, with a time frame of one year to commence with the effective date of the rules. June 7, 1994, therefore, would be the date certain.

The Board has also modified N.J.A.C. 14:6-5.4(a) and (b), respectively, to clarify its intent that the certification to be submitted to the Board as well as the notice of compliance after necessary corrections to the system have been completed, will be the responsibility of the owner or operator.

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

SUBCHAPTER 5. MASTER METER SYSTEMS

14:6-5.1 Scope

Unless otherwise ordered or permitted by the Board of Regulatory Commissioners of the State of New Jersey, the following rules shall apply to the inspection and operation of all master meter systems.

14:6-5.2 Definitions

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

"Board" means the Board of Regulatory Commissioners.

["BOCA" means the Building Officials and Code Administrators, Inc.]

"Federal Code" means the Federal Pipeline Safety Code, 49 CFR 192.

"Master meter system" means any underground gas pipeline system operated by a residential or commercial customer of a New Jersey gas utility which is utilized for the distribution of gas to ultimate consumers within, but not limited to, a definable area, such as a mobile home park, a housing project or an apartment complex, where the operator purchases metered gas from a public utility for resale through the operator's distribution system which is beyond the control of the utility. The ultimate consumers served by the operator's distribution system will subsequently purchase the gas directly through a meter or by other means, such as through rents.

14:6-5.3 Service to master meter systems

After *[January 1,]* ***June 7,*** 1994, no gas utility in this State shall provide gas service to any newly developed master meter system as defined in N.J.A.C. 14:6-5.2.

14:6-5.4 Inspection and compliance

(a) Except as provided in (b) and (c) below, *[after January 1, 1994]* ***after June 7, 1994***, no gas utility in this State shall continue to provide gas service to any residential or commercial master meter system unless the utility is provided by the owner or operator of the master meter system with an annual certification***, on a form, supplied by the Board, reflecting Federal Code specifications,*** from a licensed professional engineer, that the system has been inspected within the last six months and that it complies with all applicable safety requirements*[, including the requirements of both BOCA and the Federal Code]*. ***The owner or operator may request from the servicing utility a list of those licensed professional engineers known to the utility who are qualified to perform such services.*** A copy of such certification shall be submitted to the Board ***by the owner or operator. In the event that the owner or operator can demonstrate that the services of a licensed professional engineer could not be obtained after utilization of the list provided by the utility, then,*** *[Alternatively]* ***alternatively***, the owner or operator of the master meter system may make arrangements with the servicing utility to provide the required inspection and certification ***at the expense of the owner or operator***.

(b) If the results of the inspection reveal that the master meter system does not satisfy the requirements of the Federal Code, *[but meets all other applicable safety standards,]* the owner or operator of the system shall furnish the utility***, in the event that the utility did not perform the inspection,*** and the Board with a copy of the inspection report and shall submit a detailed plan of action to bring the system into compliance with the requirements of the Federal Code within 12 months. The owner or operator shall submit to the utility proof of compliance with the requirements of the Federal Code within the 12 month period. A copy of such compliance shall be forwarded to the Board ***by the owner or operator. Should the inspection uncover a condition that constitutes an immediate safety hazard, the owner or operator shall immediately notify the servicing utility. Until repairs can be made to the system that will either sufficiently abate or eliminate the hazardous condition, service to the system may be subject to discontinuance as provided in N.J.A.C. 14:3-3.6a3x****.

(c) If the owner or operator of the master meter system does not comply with (a) and (b) above, the *[utility]* ***owner or operator*** shall attempt to arrange with the *[owner or operator]* ***utility*** to take over the master meter system and make corrections to bring the system into compliance with all applicable safety standards*[, including BOCA and the Federal Code,]* at the expense of the owner or operator. If such an arrangement cannot be effected within one year, the utility shall promptly petition the Board for permission, upon notice and hearing, to discontinue service to the master meter system.

(a)

BOARD OF REGULATORY COMMISSIONERS

Regulation of Competitive Telecommunications Services

Adopted New Rules: N.J.A.C. 14:10-5

Proposed: May 18, 1992 at 24 N.J.R. 1868(a).
Adopted: April 30, 1993 by the Board of Regulatory Commissioners, Dr. Edward H. Salmon, Chairman, and Jeremiah F. O'Connor and Carmen J. Armenti, Commissioners.
Filed: May 5, 1993 as R.1993 d.248, **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. 48:2-13.

BRC Docket Number: TX92020201.
Effective Date: June 7, 1993.
Expiration Date: September 6, 1996.

Summary of Public Comments and Agency Responses:

On January 17, 1992, Title 48 of the New Jersey Revised Statutes was amended by the adoption of the Telecommunications Act of 1992, P.L.1991, Ch.428, N.J.S.A. 48:2-21.16 et seq. (Act). The Act significantly alters the regulatory mechanism for telecommunication carriers operating in the State of New Jersey. Section 4(a) of the Act precludes the Board of Regulatory Commissioners (Board) from regulating the rates, rate structures, terms and conditions of service, rate base, rate of return and cost of service, for competitive telecommunications services. The Act, however, does not remove carriers providing such services from the Board's regulatory authority. On February 27, 1992, the Board issued an Order in Docket No. TX92020201, adopting interim procedures to be followed by carriers offering competitive services. The Board stated that it believed it was appropriate to initiate a rulemaking proceeding to revise the regulatory structure for all carriers to conform with the Act, but that it was also necessary to institute interim procedures until final rules are adopted.

The proposal was published in the New Jersey Register on May 18, 1992 at 24 N.J.R.1868(a) and a public hearing was held before the Commissioners on June 15, 1992. Oral comments were presented by Joan Campion, Senior Attorney on behalf of MCI Telecommunications Corporation (MCI); Robert Mulvey, Esq., on behalf of New Jersey Bell Telephone Company (NJ Bell); Veronica Curvey, Esq., on behalf of the Department of the Public Advocate, Division of Rate Counsel and Vincent Sharkey, Esq., and Mary Murphy, District Manager, representing AT&T Communications of New Jersey, Inc. (AT&T). Written comments were received from Vincent Sharkey on behalf of AT&T; Philip Schaefer, Esq., on behalf of NJ Bell; James Laskey, Esq., on behalf of MCI; Keith Townsend, Esq., on behalf of Sprint Communications Company L.P. (Sprint) and Martin Rothfelder, Esq., on behalf of Teleport Communications (Teleport).

1. COMMENT: The Interexchange Carriers (IXCs) suggest that separate rules should apply to IXCs and local exchange carriers (LECs) because LECs offer a combination of monopoly and competitive services and the potential for cross-subsidies, which are prohibited by the Act, are at issue. The Act treats LECs and IXCs differently and the Board should as well. Also, the Board should promulgate rules for LECs as part of the NJ Bell alternative regulation proceeding.

RESPONSE: The Board believes the commenters rationale to create additional rules for LECs with safeguards to prevent cross-subsidies is reasonable and in keeping with the Act. The cross-subsidization provision and other provisions of the Act, such as allowing for a determination of the competitiveness of individual LEC services after hearing and notice, require more stringent regulation of LEC services. The Board is not convinced however, that completely separate rules are appropriate. The rules contained herein, as modified, are appropriately applicable to all providers of competitive telecommunications services as that term is defined herein. We believe promulgation of additional requirements to apply to LECs is consistent with the Act. The Board will formulate and propose additional rules to be included in this Subchapter applicable to proposed "New Competitive Telecommunications Service Offerings for Local Exchange Carriers." We will thus reserve N.J.A.C. 14:10-5.7 for these rules. Until such time as these new rules are proposed and adopted, no LEC proposed new competitive service shall become effective unless approved by the Board after notice and hearing, pursuant to N.J.S.A. 48:2-21.19(b).

2. COMMENT: The IXCs argue that the proposed reporting requirements at N.J.A.C. 14:10-5.8 are more detailed than current requirements and, therefore, are contrary to the intent of the Act.

RESPONSE: The Board disagrees. In proposing the rules the Board indicated that the rules would require competitive service providers to incur record keeping and administrative costs and the Board would be required to check and monitor the reports filed and the information contained in those reports. 24 N.J.R.1869. However, the Board anticipated that these costs would be more than offset by corresponding reductions in costs from the relaxation of the necessity of filing and obtaining prior Board approval for revisions to existing competitive services and the introduction of new competitive services. The commenters have not disputed this assumption.

The Act has given IXCs pricing flexibility in addition to relief from traditional regulation. However, at the same time, the Act has necessitated that the Board's function shift from regulation to oversight of IXCs. It is therefore essential that the Board monitor the competitiveness of services to ensure that effective competition exists and that the marketplace determines reasonable rates without traditional regulation. The reporting requirements of the rule serve this function and are essential for the Board to monitor the competitiveness of telecommunications services.

3. COMMENT: Several parties suggest that the requirement at N.J.A.C. 14:10-5.8(a) to file quarterly reports is burdensome and that reporting on an annual basis is sufficient.

RESPONSE: The Board does not agree and the quarterly reporting requirement will remain. This data is necessary for the Board to not only monitor the marketplace and individual services, but also to fulfill its mandate to report to the Governor and the Legislature as to the success of the deregulation of competitive services. Quarterly reports are necessary so that the Board can monitor competitive markets on an ongoing basis and collect sufficient information to form the basis for comparisons.

4. COMMENT: MCI states that the information to be filed with new service offerings at N.J.A.C. 14:10-5.6(c) is burdensome and may require Board approval. It contends that the requirement that IXCs submit competitive alternatives presumes that the carrier must prove the new service is competitive. Further, MCI states that tariff pages and a description of the new service is sufficient.

RESPONSE: The Board does not view the supplemental information required by the rule as burdensome; this information is necessary for the Board to fulfill its Legislative mandates. It will be used for informational purposes by the Board, not to determine whether or not a new IXC service is competitive. The language of the proposal has been modified to clarify that Board approval is not required for new competitive service offerings by IXCs and to allow flexibility in the filing of alternative or substitute services in the situation where an IXC is the first to introduce a new competitive service thereby having no competitive alternative until another carrier responds with a service of its own. The Board has therefore modified N.J.A.C. 14:10-5.6(c) by requiring the supplemental information on substitute services to be supplied "if applicable."

5. COMMENT: MCI and NJ Bell argue that the requirement at N.J.A.C. 14:10-5.8(a)5, for data on customer complaints should not be required. AT&T contends that information on individual complaints is not necessary.

RESPONSE: The Board does not agree with the suggestion that no information be collected on customer complaints. The Board maintains its authority to address customer complaints as well as service quality standards. Information concerning complaints is necessary to fulfill these mandates of the Act. However, we concur with AT&T's suggestion and the proposal has been modified so that only summaries of complaints need be reported to the Board.

6. COMMENT: AT&T argues that notice periods contained at N.J.A.C. 14:10-5.4, 5.5, and 5.6 (14 days for increases, one day for decrease and 7 days for new services) and notice to customers, Rate Counsel and competitors, are inappropriate. Notice requirements should be eliminated for existing services. New services should become effective upon one day's notice. According to AT&T, the Act deregulated IXC services and the market should determine rate changes and new services, not the Board.

RESPONSE: The two primary reasons for including notice requirements in the proposed rules are to protect and alert customers of rate increases and to give the Board the opportunity to review new service offerings to determine that they do not violate the Board's ban on intraLATA competition.

The Board's understanding of general industry practice is that subscriber bills are issued on a monthly basis. The prior notification requirement of rate increases not only alerts the customer to a pending rate increase, but also gives the customer the opportunity to react, i.e., change carriers or consumption habits. Therefore, prior notification is important. However, given the carriers concerns, we will reduce the time for notice and revise the proposed rules concerning rate increases from 14 days to five business days notice. While IXCs have been deregulated because of competition in the marketplace, customer notice is still important. An IXC customer would not have the ability to make appropriate choices if rates are increased without notification. While the Act deregulates the rates charged by IXCs, the Board's responsibility to consumers remains.

The Board recognizes that customers will have less notice of a change in rates; however, the Board does not believe this change will be substantial. The difference between 14 calendar days notice and five business days notice will normally be one week and in time periods involving holidays will be less than one week. Further, standard industry practices permits a customer to change IXC carriers in less than five business days, and in fact, such changes may normally be accomplished in one business day. We believe this appropriately balances the needs of the carriers for flexibility with competitive services and the needs of consumers for appropriate notice.

The Board has also reduced the IXC new service notice requirements from seven days to five business days to be consistent with the rate increase requirements. However, the Board does not agree that any filings should go into effect upon filing and will not revise the one day requirement for rate decreases. The Board believes some minimal advance notice of rate changes is required to respond to customer questions. Nothing in the comments suggest that such a minimal one day notice requirement for rate decreases would have any adverse impact on a carrier's operations. Finally, the Board agrees with AT&T's suggestion that notice to competitors of rate changes is not necessary and is burdensome. Therefore, the proposal is being revised upon adoption to require additional notice only to Rate Counsel.

7. COMMENT: MCI argues that the Board has authority to require tariffs but may not impose notice period restrictions on tariff changes as contained at N.J.A.C. 14:10-5.4 and 5.5. It further argues that the rules are burdensome because, for example, an increase of one tenth of one cent on a single rate element as part of an overall rate decrease would require 14 days notice to the Board and customers. MCI suggests that "increased charges" should include only tariff changes that increase overall revenue to the carrier.

RESPONSE: The Board believes that it has authority to impose notice requirements. The Act specifically permits the Board to require tariffs and the structure and content of such tariffs would also be within our jurisdiction. Additionally, the notice requirements perform an important customer protection function. With respect to MCI's other argument, IXCs have flexibility in filing and could easily separate rate increases and rate decreases to avoid additional customer notice for rate decreases. Additionally, for any particular customer or class, the important aspect is the impact on their rates, not overall carrier revenues.

8. COMMENT: Commenters suggest that existing language at N.J.A.C. 14:10-5.3(a) regarding tariffing of all competitive services is too broad and, as written, could include services not currently tariffed.

RESPONSE: The Board agrees that the proposed language may be overly broad. Therefore the proposal has been changed upon adoption to clarify that only competitive telecommunications services require tariffs and not services the Board deems need not be tariffed.

9. COMMENT: MCI and AT&T oppose certain tariff requirements at N.J.A.C. 14:10-5.3(b) concerning cross-referencing of other tariffs. MCI objects to the requirement that state specific rates be included in the tariff. AT&T agrees that cross-references should be included, but, as proposed, the language is overly restrictive.

RESPONSE: The Board disagrees and the tariff requirements will remain unchanged. In order for the tariff requirements to be meaningful, state specific rates, that is, rates that apply to intrastate usage, and a description of the service must be included. IXCs can mirror federal tariff rates. However, the price for intrastate usage must be contained in the intrastate tariff. Changes to the tariff may be accomplished fairly rapidly pursuant to these rules as adopted and the inclusion of specific rates is not unduly burdensome. With respect to cross-references to FCC tariffs, the rules allow such references with two exceptions—for intrastate rates and service descriptions. These are minimum requirements for a tariff to be of any use. Therefore, the rules shall continue to require the minimum language and intrastate rates as proposed.

10. COMMENT: Several parties provided comments on the proposal concerning the confidentiality provisions of proposed requirements at N.J.A.C. 14:10-5.6(c)3 and 5.8(d). As proposed, these requirements would permit carriers to seek a protective order from the Board in order to protect information that the carriers deem to be proprietary and not appropriate for public disclosure. The information required by these sections include supplemental information to be filed with new service offerings, pursuant to N.J.A.C. 14:10-5.6(c)3, and quarterly and annual information concerning the services offered by the carriers, pursuant to N.J.A.C. 14:10-5.8(a) and (b). The commenters argue that there should be no need for a carrier to seek a protective order; rather the rule should provide that any information marked as proprietary by a carrier be protected from public disclosure. AT&T proposes that a section be added to the rule which would provide that in the event the Board receives a request for disclosure of information marked proprietary, the Board would notify the party supplying said information and that party would be given the opportunity to file a motion for a protective order. The commenters argue that it is an undue burden on both the carriers and the Board to require that a motion for a protective order be filed each time the relevant information is submitted to the Board.

RESPONSE: The Board does not agree that it is an undue burden on carriers to file a motion for a protective order to maintain the confidentiality of information the carrier believes is sensitive. Further, it is not clear that all of the information requested by N.J.A.C. 14:10-5.6(c)3 and 5.8(a) and (b) would necessarily merit protection. Therefore, it is not appropriate to seal all of this information by operation of the text of the rule without reviewing such information. The approach suggested by AT&T wherein a protective order need only be sought in the event a third party seeks access to materials marked proprietary addresses this concern somewhat. However, such a practice requires that the Board or its staff initiate a procedure to inform the requesting party that the information sought has been marked proprietary and further notify the carrier which has submitted the material that such information has been requested. In the Board's view, since the information is filed pursuant to these rules, carriers should only be permitted to seal from public disclosure that information for which it can substantiate a need for protection. Additionally, the courts require that all interests be weighed in determining whether information should be sealed from public disclosure. See, e.g., *South Jersey Pub.* v. *N.J. Expressway,* 124 *N.J.* 478 (1991); *N.J. Newspapers* v. *Passaic County,* 127 *N.J.* 9 (1992). If after reviewing the information and any motions for protective orders filed with the Board, it becomes apparent that some or all of the information is of a nature to routinely merit protection, the Board may revise the rule in the future to protect such information without the requirement for a protective order.

11. COMMENT: AT&T states that IXC services have been deemed competitive by the Act and it is unnecessary for the Board to make such a determination. References to such determinations should therefore be deleted.

RESPONSE: The Board disagrees. The Board is specifically authorized by the Act to reclassify any competitive telecommunications service if sufficient competition is no longer present. These provisions do not require a Board finding that new IXC services are competitive—only that they remain competitive. As stated above, additional rules in accordance with the Act will be promulgated for LEC services.

12. COMMENT: IXCs should be permitted to discontinue any service upon notice to customers and the Board without requiring Board approval. Therefore, N.J.A.C. 14:10-5.10(b) should be deleted.

RESPONSE: The Board agrees with commenters' suggestion that if a service is viable in a competitive environment, there should be more than one carrier. However, the Board is concerned with the abandonment of service by carriers and the continued ability of customers to purchase services. Therefore, the Board will not delete this provision but will amend the language so that the Board reserves the right to fully examine the impact of the discontinuance of service provided by a single carrier on customers or classes of customers and, if necessary, delay the implementation of the withdrawal of a particular service on a case-by-case basis upon notice to the carrier.

13. COMMENT: Teleport suggests that N.J.A.C. 14:10-5.6(c)4 should be revised to state that once an intraLATA service has been deemed competitive, compensation to the LEC and/or blocking will not be necessary.

RESPONSE: The current language requires compensation "where appropriate". Should the Board's policy with respect to blocking and/or compensation for intraLATA call completion be revised in the future, this rule has the flexibility to accommodate any change in policy. Therefore, clarification of this language is not necessary.

14. COMMENT: Sprint suggests the proposed rules exceed the scope of the Board's authority to regulate IXCs under the Act. It contends that the Act only allows the Board: (1) to require LECs and IXCs to file and maintain tariffs; (2) to determine whether a service is competitive; (3) to designate what reports are necessary to monitor the competitiveness of any service; (4) to reclassify services; and (5) to set service quality standards and resolve customer complaints.

RESPONSE: The Board disagrees and is satisfied that the rules do not exceed its authority. The comment identifies certain specific authority granted to the Board by the Act. However, our authority is not so narrowly defined. In fact, the rules address each of the five items cited and the provisions of the adopted rules are necessary for the Board to meet these specific criteria.

15. COMMENT: The term "letter petition" at N.J.A.C. 14:10-5.6(c) is confusing and suggests prior Board approval is necessary.

RESPONSE: While the Board does not agree that the term "letter petition" implies a need for Board approval in the context of the rules, we have amended the rule to delete the word "petition" so that there will be no ambiguity.

16. COMMENT: The term "service category" as used at N.J.A.C. 14:10-5.8(a) is unclear and the rules also use the term "service offering."

RESPONSE: The Board disagrees and will not revise the rules. Service category is a term used in the context of these rules for the purpose of collecting data to monitor the continued competitiveness of services. With the rapid change and continually increasing number of services being offered by carriers, a specific definition in the rule is overly rigid and may be rendered obsolete in a short period of time. Additionally, the items included in a service category will depend on a carrier's tariff structure. Such categories as "inbound" and "outbound" as suggested by one commenter are appropriate and may be utilized.

17. COMMENT: Language should be added at N.J.A.C. 14:10-5.6(c) to clarify that LEC's will meet all other requirements of the Act.

RESPONSE: As stated previously, the Board will formulate and propose additional rules to be included in this Subchapter applicable to LEC competitive services. In the interim, LEC proposed new competitive services may not become effective unless authorized by the Board, after hearing and notice.

18. COMMENT: According to NJ Bell, N.J.A.C. 14:10-5.9(a) is too limited for the Board's process of evaluating the continued competitiveness of services. It suggests that the language focuses on certain measures of market share while omitting, for example, such information as identifying firms that actively do, or that readily could, supply the products and services in the relevant market.

RESPONSE: The Board disagrees and no change will be made to the rules. The Board has been given a legislative mandate to monitor the competitiveness of telecommunications services and the authority to formulate reporting requirements necessary to meet this mandate. The proposed language requires service specific data which will be utilized by the Board to monitor the competitiveness of each service category. The adopted rule gives the Board the necessary flexibility to utilize any appropriate economic indicator to determine the competitiveness of individual services and is satisfactory to comply with the legislative mandate contained in the Act.

19. COMMENT: As proposed, N.J.A.C. 14:10-5.9(b) fails to recognize that reclassification of competitive services requires notice and hearing and also would permit reclassification based upon one single competitive factor rather than all relevant factors as required by the Act.

RESPONSE: The Board agrees that the rule should be modified to include a reference to notice and hearing. However, the Board does not agree that all criteria identified in the Act or the adopted rule must be absent to reclassify a competitive service. Any of the five criteria may be utilized, singularly or collectively, in determining whether a service should be reclassified from competitive to noncompetitive.

20. COMMENT: All definitions should be deleted because the rules should apply to IXCs only and sufficient definitions are already contained in the Act. If the definitions remain, "local telecommunication service" is inappropriate because it encompasses all intraLATA services, including toll. According to AT&T, this definition would inappropriately include IXCs who provide intraLATA services subject to compensation.

RESPONSE: The Board disagrees that all definitions should be deleted because the rules are applicable to both LECs and IXCs. It is reasonable to define what constitutes a competitive telecommunications service within the context of these rules so as to identify which services are subject to the proposal. In addition, it will be necessary to define interexchange carrier as well as local exchange carrier because additional regulations may apply to new proposed competitive services of local exchange carriers after proposed and adopted rules are promulgated.

The Board does agree that the proposed definition of "local telecommunications services" could potentially and unintentionally be interpreted to include IXCs which provide services within the LATA subject to compensation. The term "local telecommunications service" is utilized as part of the definition of local exchange carrier and no other portion of the adopted rule. Therefore it is being deleted upon adoption.

21. COMMENT: The reference at N.J.A.C. 14:10-5.6(c)4, requiring "evidence" that intraLATA minutes will be reported and paid is not appropriate because a carrier will not have such evidence at the time a new service is introduced. A statement by a representative of the IXC should be sufficient.

RESPONSE: The Board agrees and the term "evidence" will be changed. The language with respect to the supplementary data required to be filed will be revised so that IXCs certify through a statement from a company representative that intraLATA calls will be blocked or compensation will be paid where required. If a dispute with respect to blocking and/or compensation arises, the affected LEC has the ability to petition the Board for relief.

22. COMMENT: AT&T recommends that the Board delete N.J.A.C. 14:10-5.6(d). This section allows the Board to investigate and suspend a provision of a competitive service if such service violates a Board rule or is otherwise not in conformance with law. AT&T contends that this section is too broad and that it is inconsistent with the provisions of the Act prohibiting the Board from regulating the rates or terms and conditions of IXC services.

RESPONSE: The Board disagrees with AT&T's interpretation. Nothing in the proposed language can be read to give the Board authority over the lawful rates, terms and conditions of competitive services, in a manner contrary to the Act. The section allows the Board to conduct an investigation to ensure a carrier is providing a service in accordance with law, and to suspend any aspect of a competitive service in violation of law.

23. COMMENT: N.J.A.C. 14:10-5.8(b) should be deleted because the Board does not regulate IXC rates.

RESPONSE: The Board disagrees and this provision will remain. The Board is mandated by law to evaluate the success of deregulation. If prices begin to rise rapidly, there may be evidence that competition may not exist. This is intended to be used as a monitoring tool to fulfill the Board's legislative mandate.

24. COMMENT: Financial reports submitted prior to the Act, as required at N.J.A.C. 14:10-5.8(e), are no longer appropriate.

RESPONSE: The Board disagrees and this provision will remain. This information is required by statute, N.J.S.A. 48:2-16, and is not affected by deregulation of competitive services. Requiring IXCs to file annual reports consistent with the Act, as suggested, is meaningless because no reports are required by the Act.

25. COMMENT: N.J.A.C. 14:10-5.9(a) should be deleted because IXC services have been deemed competitive by the Act and it is unnecessary for the Board to make such determination. The Board should monitor the competitiveness of the marketplace.

RESPONSE: The Board disagrees and will not delete this provision. The Act clearly empowers the Board to determine what reports are necessary to monitor the competitiveness of any telecommunications service. Whether or not the Act declares the IXC marketplace competitive, it specifically authorizes the Board to monitor individual services. Therefore, this section is applicable to IXCs and LECs equally and will remain unchanged. The Board will, however, revise the language by deleting the word "determining" and replacing it with "monitoring" as suggested by AT&T.

26. COMMENT: N.J.A.C. 14:10-5.9(b) should be deleted because IXC services are already deemed competitive by the Act, and the section regarding reclassification refers to services that are deemed competitive by the Board.

RESPONSE: The Board disagrees and this section will continue to apply to IXCs and LECs. The Act empowers the Board to reclassify competitive services if sufficient competition is no longer present. IXCs have argued that a strict reading of the Act precludes the Board from reclassifying IXC services because the Legislature, not the Board, deemed their services to be competitive. This interpretation would render the safeguards in sections 4c and 4d meaningless and would be inconsistent with the mandate to monitor **all** competitive services for continued effective competition. Further, the Act does not differentiate between LEC and IXC services for purposes of reclassification. Therefore, this provision will remain unchanged with the exception of clarifying that the Board would reclassify a competitive service only after hearing and notice.

Summary of Agency-Initiated Changes Upon Adoption:

In N.J.A.C. 14:10-5.3(a), 5.4(a), 5.5(a), 5.6(a), and 5.6(c) the Board has modified the text in each subsection to be consistent with the definition section to clarify each reference to "competitive services" as "competitive telecommunications services".

In N.J.A.C. 14:10-5.6(c)2 and 5.6(d) the Board made minor text changes to be grammatically correct.

The Board has determined that it will promulgate additional requirements applicable to LECs and has reserved N.J.A.C. 14:10-5.7 for this purpose. Each subsequent section has been recodified to reflect this change.

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

SUBCHAPTER 5. REGULATION OF COMPETITIVE TELECOMMUNICATIONS SERVICES

14:10-5.1 Scope

The rules in this subchapter govern the provision of competitive telecommunications services, as defined below, subject to the jurisdiction of the New Jersey Board of Regulatory Commissioners. The rules will apply to all local exchange carriers and intrastate interexchange carriers offering competitive services.

14:10-5.2 Definitions

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

"Competitive telecommunications services" means any telecommunications service determined to be competitive by the Board and/or pursuant to P.L. 1991, c.428.

"Interexchange carrier" means a carrier, other than a local exchange telecommunications company authorized by the Board to provide long-distance telecommunications services.

"Local exchange carrier" means a carrier authorized by the Board to provide local telecommunications services.

["Local telecommunications services" means telecommunications services provided solely within a local access and transport area, that is, intraLATA calls.]

14:10-5.3 Informational tariff filings

(a) *[Tariffs]* ***Unless the Board determines otherwise, tariffs*** shall be filed for all competitive ***telecommunications*** services. Such tariffs shall:

1. Contain specific intrastate usage rates;
2. Contain every intrastate service offered;
3. Clearly and sufficiently provide descriptions and terms and conditions for each intrastate service;
4. Be consistent with all provisions of this subchapter; and
5. Be considered public records.

(b) Cross-references to Federal Communications Commission interstate tariffs are permitted for volume discounts, optional features and other provisions not specifically required to be included in intrastate tariffs pursuant to (a) above.

14:10-5.4 Requirements for tariff revisions to existing services which create increased charges to any customer

(a) Tariff revisions to existing competitive ***telecommunications*** services which create increased charges to any customer shall become effective *[14]* ***five business*** days after notice of the proposed revision as described in (b) below, without the requirement of prior Board approval.

(b) The notice requirement for a tariff revision, as described in (a) above, shall be by direct mail to all affected customers or by publication in newspapers of general circulation throughout the affected service area, within 24 hours of the filing of revised tariff pages with the Board.

(c) Proposed revisions as decribed in (a) above shall be served on the Division of Rate Counsel *[and all other tariffed carriers offering competitive services, including local exchange carriers and interexchange carriers,]* within 24 hours of filing with the Board.

14:10-5.5 Requirements for tariff revisions to existing services which do not create increased charges to any customer

(a) Tariff revisions to existing ***competitive telecommunications*** services which do not create increased charges to any customer shall become effective one day after the filing of revised tariff pages with the Board, without the requirement of prior Board approval.

(b) Proposed revisions as described in (a) above shall be served on the Division of Rate Counsel *[and all other tariffed carriers offering competitive services, including local exchange carriers and interexchange carriers,]* within 24 hours of filing with the Board.

14:10-5.6 Requirements for new ***competitive telecommunications*** service offerings for existing ***interexchange*** carriers

(a) New competitive ***telecommunications*** service offerings ***of existing interexchange carriers*** shall become effective *[seven]* ***five business*** days after filing with the Board, without the requirement of prior Board approval.

(b) Proposed revisions as described in (a) above shall be served on the Division of Rate Counsel within 24 hours of filing with the Board. *[In addition, copies of the proposed tariffs must be submitted to all other tariffed carriers offering competitive services, including local exchange carriers and interexchange carriers, on or before the effective date of the new service.]*

(c) The filing requirements for new competitive ***telecommunications*** services ***of existing interexchange carriers*** are:

1. *[All competitive service providers]* ***Interexchange carriers*** shall submit a letter *[petition]* containing:
   i. A description of the new service; and
   ii. Tariff pages with all terms and conditions.
2. The letter *[petition]* must be supplemented by a written schedule, providing, *[as]* ***at*** a minimum, the following additional information:
   i. The prospective customer base; and
   ii. An indication of other services that are similarly competitive, through the use of tables or charts describing competitive services and/or alternatives***, if applicable***.
3. If the supplemental written schedule contains sensitive information that would qualify under law for protective treatment as proprietary information, such schedule may be provided to the Board as a proprietary document bearing suitable markings, if accompanied by a motion as described at N.J.A.C. 14:10-*[5.8(d)]* ***5.9(d)***. Until the Board rules on the motion, the supplemental schedule shall not be disclosed to the public.
4. In addition to the requirements contained in (c), 1, 2 and 3 above, interexchange carriers shall:
   i. Submit documentation related to intraLATA call completion capability and an agreement by the interexchange carrier to block such calls or *[evidence]* ***submit a statement*** that intraLATA minutes of use will be reported and compensation will be paid to the affected local exchange carrier where appropriate; and
   ii. Submit copies of proposed tariffs to the local exchange carrier to be compensated, inclusive of adequate descriptions of services that complete intraLATA calling, if applicable, within 24 hours of filing with the Board.

(d) The Board shall retain its authority to investigate and suspend, if necessary, all aspects of any competitive service if the filing violates any Board rule or *[are]* ***is not*** otherwise *[not]* in conformance with law.

14:10-5.7 Requirements for new competitive telecommunications service offerings for local exchange carriers* *(Reserved)

14:10-*[5.7]***5.8*** Requirements for interexchange carriers initial tariff filings

Initial tariffs of interexchange carriers that have not previously been authorized by the Board to provide intrastate service in New Jersey, shall go into effect on not less than 30 days notice but in no case prior to Board approval. In addition to all filing requirements contained in N.J.A.C. 14:1-5.11, the petition must include the information required in N.J.A.C. 14:10-5.6(c), as well as financial information necessary for the Board to determine the financial stability of the petitioner and whether it is capable of providing safe, proper and adequate service.

14:10-*[5.8]***5.9*** Reporting requirements

(a) Every local exchange carrier and interexchange carrier providing competitive intrastate telecommunications services shall provide to the Board information on a quarterly basis which shall include:

1. Total number of customers by service category;
2. Total minutes of use by service category;
3. Total number of calls by service category;
4. A description of each service offering;
5. A *[description]* ***summary*** of *[each]* complaint***s*** by service category; and
6. Any further information deemed necessary by the Board to fulfill the mandates of P.L. 1991, c.428.

(b) In addition to the quarterly information required in (a) above, every local exchange carrier and interexchange carrier providing competitive intrastate telecommunications services shall provide to the Board, on an annual basis, the total change in individual prices for each service category for the preceding 12 month period.

(c) All background and supporting documentation used to develop the information required by (a) above shall be maintained during the pendency of these rules and shall be available for inspection by the Board, its staff or its designees, upon request.

(d) Any carrier is permitted to file with the Board a motion for a protective order to protect any and/or all of the information required by (a) or (b) above from public disclosure. Any such motion shall be supported by affidavit which shall delineate the specific basis for the request for the protective order.

1. In the event the Board issues a protective order, the Board's staff shall take appropriate measures to maintain the confidentiality of the records and access to such records shall be limited to agents, employees, and attorneys of the Board, and, in the discretion of the Board, to any other appropriate governmental agency. All such governmental agencies shall be subject to the confidentiality requirements contained in this subsection. In addition, the Director of the Division of Rate Counsel shall be permitted to receive copies of such reports provided that the Director treats the information contained in the reports in a proprietary and confidential manner.

(e) The annual financial reporting requirement shall remain in full force and effect. Such annual reports shall be filed on or before March 31.

14:10-*[5.9]***5.10*** Standards for monitoring the competitiveness of services

(a) In *[determining]* ***monitoring*** the competitiveness of services, the Board may:

1. Use information collected pursuant to N.J.A.C. 14:10-*[5.8]* ***5.9*** to conduct an analysis as to whether services are becoming more or less competitive; specifically, monitor the market shares of carriers as measured by number of calls, minutes of use, number of customers and customer complaints;
2. Consider using an economic measure of concentration or any other appropriate economic indicator to measure market share and the competitiveness of individual services; or
3. Consider using a customer survey to solicit information related to the perception of the level of competition by actual telecommunications users.

(b) The Board may reclassify a service that had previously been found to be competitive, if***, after notice and hearing,*** the Board finds:

1. That the market concentration for an individual carrier results in a service no longer being sufficiently competitive;
2. That significant barriers to market entry exist;
3. That there is a lack of significant presence of competitors;
4. That there is a lack of like or substitute services in the relevant geographic area; or
5. That a carrier is not providing safe, adequate or proper service.

14:10-*[5.10]***5.11*** Discontinuance of service offerings

(a) Any carrier providing competitive services may, upon 30 days notice to the Board and its customers, discontinue any competitive service offering.

(b) Service offerings provided solely by a single carrier, may be discontinued *[only upon the approval of the Board.]****, unless the Board notifies the carrier that it will postpone the discontinuance of the service pending Board review and approval.***

TRANSPORTATION

(a)

DIVISION OF ROADWAY DESIGN
BUREAU OF LANDSCAPE ARCHITECTURE

Soil Erosion and Sediment Control Standards Vegetative and Engineering Standards

Adopted Readoption: N.J.A.C. 16:25A

Proposed: April 5, 1993 at 25 N.J.R. 1479(a).
Adopted: May 12, 1993 by William D. Ankner, Director, Division of Policy and Capital Programming.
Filed: May 13, 1993 as R.1993 d.276, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6 and 6:1-29.

Effective Date: May 13, 1993.
Expiration Date: May 13, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 16:25A.

(b)

DIVISION OF TRAFFIC ENGINEERING AND LOCAL AID
BUREAU OF TRAFFIC ENGINEERING AND SAFETY PROGRAMS

Speed Limits for State Highways; Restricted Parking and Stopping; No Parking Zones; Miscellaneous Traffic Rules; Turns; Prohibited Right Turns on Red

Adopted Readoptions: N.J.A.C. 16:28, 16:28A, 16:29, 16:31 and 16:31A

Adopted Readoption with Amendments: N.J.A.C. 16:30

Proposed: April 5, 1993 at 25 N.J.R. 1479(b).
Adopted: May 7, 1993 by Richard C. Dube, Director, Division of Traffic Engineering and Local Aid.
Filed: May 7, 1993 as R.1993 d.257, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 27:7-21, 39:4-98, 39:4-138, 39:4-139, 39:4-198, 39:4-199, 39:4-201.1, 39:4-85.1, 39:4-140, 39:4-183.6, 39:4-88, 39:4-208, 39:4-91 and 39:4-183.27.

Effective Date: May 7, 1993, Readoptions;
June 7, 1993, Amendments.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoptions can be found in the New Jersey Administrative Code at N.J.A.C. 16:28 through 16:31.

Full text of the adopted amendments follows.

16:30-5.2 DOT headquarters

(a) Except as hereinafter provided, the operator of a vehicle shall not park the vehicle in any parking area constructed, owned and maintained at the Headquarters of the N.J.D.O.T. unless such vehicle is registered with a parking permit issued by the Division of Support Services.

(b) (No change.)

(c) Parking permits shall be serially numbered and shall indicate Parking Area. The permit will be designed for pasting and shall be pasted upon the inside of the rear window.

(d) No person shall counterfeit a parking permit or make a substitute or temporary permit, or use such a permit.

(e) To be valid, the parking permit must be on the car at all times while parked in designated parking areas.

(f) Records of all permits issued will be kept on file at the issuing agent's office.

(g) Vehicles parked in restricted areas may be towed away at owner's expense.

(h) Reserved parking spaces and handicapped spaces may be established within the various parking areas including areas for customer/visitor parking and will be properly marked by signs or markings and the operator of any vehicle using such areas will obey all reserved signs or markings.

(i) On special or emergency occasions any parking area may be designated as a closed area to permit holders. On such occasions proper notice will be given to permit holders as soon as possible and such notice will designate, providing there is space, another area available to them during such time.

(j) The operator of a vehicle shall not stop or stand the vehicle in the driveways or roadways marked with signs or any of the parking areas so as to interfere with the free and orderly movement of vehicles entering or leaving the areas.

(k) The operator of a vehicle will park said vehicle in a proper manner in the spaces marked and they shall not park the vehicle in any other space not so marked.

(l) The operator of a vehicle upon entering, remaining in or leaving the various parking areas will obey all traffic control devices and all Department designated officers that may be on duty at the time.

(m) The Department designated officer on duty in any of the parking areas may control the traffic and parking. All drivers of vehicles shall obey his orders and directions, notwithstanding anything contained in these Rules.

(n) Parking permits may be revoked by the issuing agent at any time.

(o) Department employees in violation of these rules may be subject to Departmental disciplinary action as provided for in Departmental Policies and Procedures.

(p) As prescribed by Title 39:4-209 of the Revised Statutes, "Any person who shall violate any of the said regulations may be subject to a fine of not less than $1.00 nor more than $15.00."

16:30-6.1 (Reserved)

16:30-6.4 (Reserved)

16:30-7.3 (Reserved)

(a)

DIVISION OF TRANSPORTATION ASSISTANCE BUREAU OF FREIGHT SERVICES

Transportation of Hazardous Materials

Adopted Amendments: N.J.A.C. 16:49-1.3, 1.5, 2.1 and Appendix

Proposed: March 15, 1993 at 25 N.J.R. 1065(a).
Adopted: April 20, 1993 by Kathy A. Stanwick, Deputy Commissioner, Department of Transportation.
Filed: April 27, 1993 as R.1993 d.235, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6 and 39:5B-25 et seq.

Effective Date: June 7, 1993.
Expiration Date: February 8, 1995.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

(**Note:** An ellipsis (. . .) is used to indicate Appendix paragraphs, not affected by the adopted amendments, which are not reproduced herein.)

16:49-1.3 General requirements

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

(h) This chapter establishes minimum standards which must be complied with in conjunction with the transportation of hazardous materials. Therefore, in the event of a conflict between this chapter and any other State regulation, the stricter, more stringent standard shall apply and govern. This chapter is intended to complement, and not to limit, those related statutory and regulatory provisions of the New Jersey Department of Environmental Protection and Energy regarding hazardous wastes, radioactive materials, spill compensation and control.

(i) This chapter may be amended from time to time by the New Jersey Department of Transportation. The Federal "Hazardous Materials Regulations" referenced herein, are adopted as revised as of October 1, 1992. The "Federal Motor Carrier Safety Regulations" as referenced in 49 CFR 177.804 are adopted as revised as of October 1, 1992. The New Jersey Department of Transportation intends to amend these rules as new Federal publications become available.

(j)-(k) (No change.)

16:49-1.5 Document availability

(a) Copies of the Federal "Hazardous Materials Regulations," Title 49, Code of Federal Regulations, Parts 171, 172, 173, 174, 177, 178, 179, and 180 revised as of October 1, 1992, and referenced herein, may be purchased from the places listed below. The "Federal Motor Carrier Safety Regulations," Title 49, Code of Federal Regulations, Parts 390 through 397 revised as of October 1, 1992, and adopted by reference in Section 177.804 of the Appendix to the Regulations Regarding the Transportation of Hazardous Materials, may also be purchased at the places listed below.

1.-3. (No change.)

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

16:49-2.1 Parts adopted by reference

(a) The New Jersey Department of Transportation, pursuant to N.J.S.A. 39:5B-25 et seq., hereby incorporates by reference the following portions of Title 49—Transportation, Code of Federal Regulations, revised as of October 1, 1992. The parts adopted by reference are found in Chapter 1, referred to as "Research and Special Programs Administration, Department of Transportation." These parts are detailed in the APPENDIX TO THE REGULATIONS REGARDING THE TRANSPORTATION OF HAZARDOUS MATERIALS. The portions adopted are summarized below.

1. Part 171—General Information, Regulations, and Definitions. (Sections 171.1, 171.4, 171.5, 171.6 and 171.20 are omitted from adoption herein; modifications are made to Sections 171.15 and 171.16).
2. Part 172—Hazardous Materials Table, Special Provisions, Hazardous Materials Communications, Emergency Response Information, and Training Requirements. (Modifications are made to Section 172.3.)
3. Part 173—Shippers—General Requirements for Shipments and Packagings (Section 173.32a is excluded from adoption herein).
4. Part 174—Carriage by Rail.
5. Part 177—Carriage by Public Highway.
6. Part 178—Specifications for Packagings.
7. Part 179—Specifications for Tank Cars. (Sections 179.3, 179.4, and 179.5 are excluded from adoption herein.)
8. Part 180—Continuing Qualification and Maintenance of Packagings.

APPENDIX TO THE REGULATIONS REGARDING THE TRANSPORTATION OF HAZARDOUS MATERIALS

This Appendix to the Regulations Regarding the Transportation of Hazardous Materials details the adopted portions of Title 49, C.F.R., by section. All sections are listed by number and title to identify content for the reader. Detailed modifications are stated within the appropriate section.

CHAPTER I

RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION

(Subchapter B is not being incorporated upon adoption.)

SUBCHAPTER C—HAZARDOUS MATERIALS REGULATIONS

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

Section 171.2 General requirements.
Section 171.3 Hazardous waste.
Section 171.7 Reference material.

These materials incorporated by reference are technical documents referred to, on occasion, in Title 49, Code of Federal Regulations. Specific technical document names, associations, and addresses where they may be found are contained in Section 171.7 of Title 49, Code of Federal Regulations.

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Section 171.10 Units of measure.

...

Section 171.14 Transitional provisions for implementing requirements based on the UN Recommendations.
Section 171.15 Immediate notice of certain hazardous materials incidents. (New Jersey revisions as noted below.)

Section 171.15 is revised to state the following. (Note: Paragraph (a) has been changed and paragraph (d) has been added.)

(a) At the earliest practicable moment, each carrier who transports hazardous materials (including hazardous wastes) shall give notice in accordance with paragraph (b) or paragraph (d) of this section after each incident that occurs during the course of transportation (including loading, unloading and temporary storage) in which

1. As a direct result of hazardous materials:

i.-iii. (No change.)

iv. An evacuation of the general public occurs lasting one or more hours; or

v.-vi. (No change.)

2. Fire, breakage, spillage, or suspected radioactive contamination occurs involving shipment of radioactive material (see also §§174.45, 175.45, 176.48, and 177.807 of this subchapter or in Title 49, Code of Federal Regulations, as appropriate); or

3. (No change.)

4. A situation exists of such a nature (e.g., a continuing danger to life exists at the scene of the incident) that, in the judgment of the carrier, it should be reported in accordance with (b) and (d) of this section.

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

(d) If a New Jersey Police Accident Report has been filed with the New Jersey Division of Motor Vehicles, or if a Spill Report has been filed with the New Jersey Department of Environmental Protection and Energy, then reports requested above in paragraphs (b) and (c) are not required of intrastate carriers who are not under the jurisdiction of U.S.D.O.T. All other carriers are subject to the U.S.D.O.T. reporting requirements as usual.

Section 171.16 Detailed hazardous materials incident reports. (New Jersey revision as noted below.)

Section 171.16 is revised to state the following: (Note: Paragraphs (a) and (b) have been changed and paragraph (e) has been added.)

(a) Each carrier who transports hazardous materials shall report in writing in duplicate on DOT Form 5800.1 (Rev. 6/89) to the U.S. Department of Transportation within 30 days of the date of discovery, unless the requirements of paragraph (e) in this section are met, each incident that occurs during the course of transportation (including loading, unloading, or temporary storage) in which any of the circumstances set forth in Section 171.15(a) occurs or there has been an unintentional release of hazardous materials from a package (including a tank) or any quantity of hazardous waste has been discharged during transportation. If a report pertains to a hazardous waste discharge—

1. A copy of the hazardous waste manifest for the waste must be attached to the report; and

2. (No change.)

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

(e) If a New Jersey Police Accident Report has been filed with the New Jersey Division of Motor Vehicles or if a Spill Report has been filed with the New Jersey Department of Environmental Protection and Energy, then other reports requested in this section are not required of intrastate carriers who are not under the jurisdiction of U.S.D.O.T. All other carriers are subject to the U.S.D.O.T. reporting requirements as usual.

...

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

...

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

Subpart B—Table of Hazardous Materials, Their Description, Proper Shipping Name, Class, Label, Packaging, and Other Requirements

Section 172.101 Purpose and use of Hazardous Materials Table, including the Hazardous Materials Table, the CERCLA List, and the List of Hazardous Substances and Reportable Quantities.
Section 172.102 Special provisions.

Index—Identification Number Cross Reference to Proper Shipping Names in Section 172.101.

Subpart C—(No change.)

Subpart D—Marking.

...

Section 172.301 General marking requirements for non-bulk packagings.
Section 172.302 General marking requirements for bulk packaging.
Section 172.303 Prohibited marking.

...

Section 172.312 Liquid hazardous materials in non-bulk packagings.
Section 172.313 Poisonous hazardous materials.
Section 172.316 Packagings containing materials classed as ORM-D.
Section 172.320 Explosive hazardous materials.
Section 172.324 Hazardous substances in non-bulk packagings.
Section 172.325 Elevated temperature materials.
...
Section 172.336 Identification numbers; special provisions.
...

Subpart E—Labeling.

...
Section 172.400a Exceptions from labeling.
...
Section 172.411 EXPLOSIVE 1.1, 1.2, 1.3, 1.4, 1.5, and 1.6 labels, and EXPLOSIVE Subsidiary label.
...
Section 172.431 KEEP AWAY FROM FOOD label.
Section 172.432 INFECTIOUS SUBSTANCE label.
...
Section 172.446 CLASS 9 label.
...

Subpart F—Placarding

...
Section 172.502 Prohibited and permissive placarding.
...
Section 172.505 Placarding for subsidiary hazards.
...
Section 172.514 Bulk packagings other than tank cars.
...
Section 172.522 EXPLOSIVES 1.1, EXPLOSIVES 1.2 and EXPLOSIVES 1.3 placards.
Section 172.523 EXPLOSIVES 1.4 placard.
Section 172.524 EXPLOSIVES 1.5 placard.
Section 172.525 EXPLOSIVES 1.6 placard.
Section 172.526 Standard requirements for the RESIDUE placard.
...
Section 172.542 FLAMMABLE placard.
Section 172.544 COMBUSTIBLE placard.
...
Section 172.547 SPONTANEOUSLY COMBUSTIBLE placard.
Section 172.548 DANGEROUS WHEN WET placard.
...
Section 172.553 KEEP AWAY FROM FOOD placard.
...
Section 172.560 CLASS 9 placard.

Subpart G—(No change.)

Subpart H—Training
Section 172.700 Purpose and scope.
Section 172.701 Federal-State relationship.
Section 172.702 Applicability and responsibility for training and testing.
Section 172.704 Training requirements.
...

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

Subpart A—General

...
Section 173.2 Hazardous materials classes and index to hazard class definitions.
Section 173.2A Classification of a material having more than one hazard.
...
Section 173.9 Cars, truck bodies, freight containers or trailers containing lading which has been fumigated or treated with Class 3, Division 2.1, 2.3, or 6.1 materials.
...

Subpart B—Preparation of Hazardous Materials for Transportation.

...
Section 173.22a Use of packagings authorized under exemptions.
...
Section 173.24 General requirements for packagings and packages.
Section 173.24a Additional general requirements for non-bulk packagings and packages.
Section 173.24b Additional general requirements for bulk packagings.
...
Section 173.26 Quantity limitations.
Section 173.27 General requirements for transportation by aircraft.
Section 173.28 Reuse, reconditioning and remanufacture of packagings.
...
Section 173.32 Qualification, maintenance and use of portable tanks.
Section 173.32a Approval of Specification IM portable tanks.
...
Section 173.40 General packaging requirements for poisonous materials required to be packaged in cylinders.

Subpart C—Definitions, Classification and Packaging for Class 1
Section 173.50 Class 1—definitions.
Section 173.51 Authorization to offer and transport explosives.
Section 173.52 Classification codes and compatibility groups of explosives.
Section 173.53 Provisions for using old classifications of explosives.
Section 173.54 Forbidden explosives.
Section 173.56 New explosives—definition and procedures for classification and approval.
Section 173.57 Acceptance criteria for new explosives.
Section 173.58 Assignment of class and division for new explosives.
Section 173.59 Description of terms for explosives.
Section 173.60 General packaging requirements for explosives.
Section 173.61 Mixed packaging requirements.
Section 173.62 Specific packaging requirements.
Section 173.63 Packaging exceptions.

Subpart D—Definitions, Classification, Packing Group Assignments and Exceptions for Hazardous Materials Other Than Class 1 and Class 7
Section 173.115 Class 2, Divisions 2.1, 2.2, and 2.3—Definitions.
Section 173.116 Class 2—Assignment of hazard zone.
Section 173.120 Class 3—Definitions.
Section 173.121 Class 3—Assignment of packing group.
Section 173.124 Class 4, Divisions 4.1, 4.2, and 4.3—Definitions.
Section 173.125 Class 4—Assignment of packing group.
Section 173.127 Class 5, Division 5.1—Definition and assignment of packing groups.
Section 173.128 Class 5, Division 5.2—Definitions and types.
Section 173.129 Class 5, Division 5.2—Assignment of packing group.
Section 173.132 Class 6, Division 6.1—Definitions.
Section 173.133 Division 6.1—Assignment of packing group and hazard zones.
Section 173.134 Class 6, Division 6.2—Definitions.
Section 173.136 Class 8—Definitions.
Section 173.137 Class 8—Assignment of packing group.
Section 173.140 Class 9—Definitions.
Section 173.141 Class 9—Assignment of packing group.

Section 173.144 Other Regulated Materials (ORM)—Definitions.
Section 173.145 Other Regulated Materials—Assignment of packing group.
Section 173.150 Exceptions for Class 3 (flammable and combustible liquids).
Section 173.151 Exceptions for Division 4.1 (flammable solids).
Section 173.152 Exceptions for Division 5.1 (oxidizers) and Division 5.2 (organic peroxides).
Section 173.153 Exceptions for Division 6.1 (poisonous materials).
Section 173.154 Exceptions for Class 8 (corrosive materials).
Section 173.155 Exceptions for Class 9 (miscellaneous hazardous materials).
Section 173.156 Exceptions for ORM materials.

Subpart E—Non-bulk Packaging for Hazardous Materials Other Than Class I and Class 7

Section 173.158 Nitric acid.
Section 173.159 Batteries, wet.
Section 173.160 Bombs, smoke, non-explosive (corrosive).
Section 173.161 Chemical kits.
Section 173.162 Gallium.
Section 173.163 Hydrogen fluoride.
Section 173.164 Mercury (metallic and articles containing mercury).
Section 173.171 Smokeless powder for small arms.
Section 173.172 Aircraft hydraulic power unit fuel tank.
Section 173.173 Paint, paint-related material, adhesives and ink.
Section 173.174 Refrigerating machines.
Section 173.181 Pyrophoric materials (liquid).
Section 173.182 Barium azide—50 percent or more water wet.
Section 173.183 Nitrocellulose base film.
Section 173.184 Highway or rail fusee.
Section 173.185 Lithium batteries and cells.
Section 173.186 Matches.
Section 173.187 Pyrophoric solids, metals or alloys, n.o.s.
Section 173.188 White or yellow phosphorous.
Section 173.192 Packaging for certain Packing Group I poisonous materials.
Section 173.193 Bromoacetone, methyl bromide, chloropicrin and methyl bromide or methyl chloride mixtures, etc.
Section 173.194 Gas identification sets.
Section 173.195 Hydrogen cyanide, anhydrous, stabilized (hydrocyanic acid, aqueous solution.)
Section 173.196 Infectious substances (etiologic agents).
Section 173.197 Regulated medical waste.
Section 173.198 Nickel carbonyl.
Section 173.201 Non-bulk packagings for liquid hazardous materials in Packing Group I.
Section 173.202 Non-bulk packagings for liquid hazardous materials in Packing Group II.
Section 173.203 Non-bulk packagings for liquid hazardous materials in Packing Group III.
Section 173.204 Non-bulk, non-specification packagings for certain hazardous materials.
Section 173.205 Specification cylinders for liquid hazardous materials.
Section 173.211 Non-bulk packagings for solid hazardous materials in Packing Group I.
Section 173.212 Non-bulk packagings for solid hazardous materials in Packing Group II.
Section 173.213 Non-bulk packagings for solid hazardous materials in Packing Group III.
Section 173.214 Packagings which require approval by the Associate Administrator for Hazardous Materials Safety.
Section 173.216 Asbestos, blue, brown, or white.
Section 173.217 Carbon dioxide, solid (dry ice).
Section 173.218 Fish meal or fish scrap.
Section 173.219 Life-saving appliances.
Section 173.220 Internal combustion engines, self-propelled vehicles, and mechanical equipment containing internal combustion engines or wet batteries.
Section 173.221 Polystyrene beads, expandable.
Section 173.222 Wheelchairs equipped with wet electric storage batteries.
Section 173.224 Packaging and control and emergency temperatures for self-reactive materials.
Section 173.225 Packaging requirements and other provisions for organic peroxides.
Section 173.226 Materials poisonous by inhalation, Division 6.1, Packing Group I, Hazard Zone A.
Section 173.227 Materials poisonous by inhalation, Division 6.1, Packing Group I, Hazard Zone B.
Section 173.228 Bromine pentafluoride or bromine trifluoride.
Section 173.229 Chloric acid solution or Chlorine dioxide hydrate, frozen.
Section 173.230 Non-bulk packagings for ORM-D materials.

Subpart F—Bulk Packaging for Hazardous Materials Other Than Class 1 and Class 7

Section 173.240 Bulk packaging for certain low hazard solid materials.
Section 173.241 Bulk packaging for certain low hazard liquid and solid materials.
Section 173.242 Bulk packagings for certain medium hazard liquids and solids, including solids with dual hazards.
Section 173.243 Bulk packaging for certain high hazard liquids and dual hazard liquids which pose a moderate hazard.
Section 173.244 Bulk packaging for certain pyrophoric liquids (Division 4.2) and poison liquids with inhalation hazards (Division 6.1).
Section 173.245 Bulk packaging for extremely hazardous materials such as poisonous gases (Division 2.3).
Section 173.247 Elevated temperature material.
Section 173.249 Bromine.

Subpart G—Gases; Preparation and Packaging.

...
Section 173.314 Requirements for compressed gases in tank car tanks.
...
Section 173.321 Ethylamine.
Section 173.322 Ethyl chloride.
Section 173.323 Ethylene oxide.
Section 173.324 Ethyl methyl ether.

Subpart H—(Reserved)

...
Section 173.335 Gas generator assemblies.
...
Section 173.338 Tungsten hexafluoride.
Section 173.340 Tear gas devices.

Subpart I—Radioactive Materials.

...
Section 173.421-1 Additional requirements for excepted packages containing Class 7 (radioactive) materials.
...

Appendix A to Part 173—Method of Testing Corrosion to Skin.
Appendix B to Part 173—Procedure for Testing Chemical Compatibility and Rate of Permeation in Plastic Packaging and Receptacles.
Appendix C to Part 173—Procedure for Base-level Vibration Testing.
Appendix D to Part 173—Test Methods for Dynamite (Explosive, Blasting, Type A).

Appendix E to Part 173—Guidelines for the Classification and Packing Group Assignment of Class 4 Materials.
Appendix F to Part 173—Guidelines for the Classification and Packing Group Assignment of Division 5.1 Materials.
Appendix G to Part 173—Definition of Regulated Medical Waste.

Part 174—CARRIAGE BY RAIL

Subpart A—General Requirements

...

Subpart B—(No change.)

Subpart C—General Handling and Loading Requirements

...

Section 174.81 Segregation of hazardous materials.

Subpart D—Handling of Placarded Rail Cars, Transport Vehicles and Freight Containers.

Section 174.82 General requirements for the handling of placarded rail cars, transport vehicles, freight containers, and bulk packages.
Section 174.83 Switching placarded rail cars, transport vehicles, freight containers, and bulk packagings.
Section 174.84 Position in train of loaded placarded rail cars, transport vehicles, freight containers or bulk packagings when accompanied by guards or technical escorts.
Section 174.85 Position in train of placarded cars, transport vehicles, freight containers, and bulk packagings.
Section 174.86 Maximum allowable operating speed.

Subpart E—Class I (Explosive) Materials

Section 174.100 Forbidden Class I (explosive) Materials.
Section 174.101 Loading Class 1 (explosive) materials.

...

Section 174.104 Division 1.1 or 1.2 (Class A explosive) materials; car selection, preparation, inspection, and certification.
Section 174.105 Routing shipments, Division 1.1 or 1.2 (Class A explosive) materials.
Section 174.106 "Order-Notify" or "C.O.D." shipments, Division 1.1 or 1.2 (Class A explosive) materials.
Section 174.107 Shipping days for Division 1.1 or 1.2 (Class A explosive) materials.

...

Section 174.112 Loading Division 1.3 (Class B explosive) materials (Also see Section 174.102).
Section 174.114 Record to be made of change of seals on "Cars loaded with Division 1.1 or 1.2 (explosive) materials" laden cars.
Section 174.115 Loading Division 1.4 (Class C explosive) materials.

Subpart F—Detailed Requirements for Class 2 (Gases) Materials

...

Section 174.201 Class 2 (gases) material cylinders.

...

Section 174.280 Division 2.3 (poisonous gas) materials with foodstuffs.
Section 174.290 Materials extremely poisonous by inhalation shipped by, for, or to the Department of Defense.

Subpart G—Detailed Requirements for Class 3 (Flammable Liquid) Materials

...

Section 174.304 Class 3 (flammable liquid) materials in tank cars.
Section 174.380 Class 3 (flammable liquid) materials, with a subsidiary hazard of Division 6.1 (poisonous) materials, with foodstuffs.

Subpart H—Detailed Requirements for Class 4 (Flammable Solid) Materials

...

Section 174.430 Special handling requirements for Division 4.2 (pyrophoric liquid) materials.

...

Section 174.480 Class 4 (flammable solid) materials, with a subsidiary hazard of Division 6.1 (poisonous) materials, with foodstuffs.

Subpart I—Detailed Requirements for Division 5.1 (Oxidizing) Materials

...

Section 174.580 Division 5.1 (oxidizer) materials, with a subsidiary hazard of Division 6.1 (poisonous materials), with foodstuffs.

Subpart J—Detailed Requirements for Division 6.1 (Poisonous) Materials

Section 174.600 Special handling requirements for materials extremely poisonous by inhalation.

...

Section 174.680 Division 6.1 (poisonous) materials with foodstuffs.

Subpart K—Detailed Requirements for Class 7 (Radioactive) Materials

Section 174.700 Special handling requirements for Class 7 (radioactive) materials.

...

Subpart L—Detailed Requirements for Class 8 (Corrosive) Materials

Section 174.800 Special handling requirements for class 8 (corrosive) materials.

...

Subpart M—Detailed Requirements for Class 9 (Miscellaneous Hazardous) Materials

...

PART 177—CARRIAGE BY PUBLIC HIGHWAY

Subpart A—General Information and Regulations

...

Motor carriers and other persons subject to this part shall comply with 49 CFR Parts 390 through 397 (excluding Section 391.69, 393.81, and 397.3) revised as of October 1, 1992, to the extent those rules apply. Carriers transporting hazardous materials, substances, or wastes as defined herein must comply with these parts as listed below.

(See N.J.A.C. 16:49-1.3(1) herein).

MOTOR CARRIER SAFETY REGULATIONS

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS: GENERAL

Subpart A (No change.)

Subpart B—General Requirements and Information

Section 390.9 State and local laws, effect on.

...

Section 390.23 Relief from regulations.
Section 390.25 Extension of relief from regulations—emergencies.

...

PART 391—QUALIFICATION OF DRIVERS

Subpart A–Subpart F (No change.)

Subpart G—Limited Exemptions

...

Section 391.71 Intrastate drivers of vehicles transporting combustible liquids. (Section 391.71(a) and (b) are revised to state the following:)

(a) The provisions of Section 391.11(b) (relating to minimum age), Section 391.21 (relating to application for employment), Section 391.23 (relating to investigations and inquiries), Section 391.31 (relating to road test), and Section 391.35 (relating to written examination) do not apply to a driver who is otherwise qualified and was a regularly employed driver (as defined in Section 390.5 of this subchapter) as of January 1, 1991, and continues to be a regularly employed driver of that motor carrier and who drives a motor vehicle that:

1. Is transporting combustible liquids (as defined in Section 173.120(b) of this title), and

2. Is being operated in intrastate commerce.

(b) In addition to the exemptions provided in paragraph (a) of this section, a person who has been a regularly employed driver as defined in Section 390.5 as of January 1, 1991, but who is not physically qualified to drive under Section 391.41(b) and who is otherwise qualified under N.J.S.A. 39:3-10 to drive a motor vehicle, may continue to drive a motor vehicle provided that person is in possession of a valid New Jersey driver license issued prior to January 1, 1991, and continues to be a regularly employed driver of that motor carrier and drives a vehicle that:

1.-2. (No change.)

3. Is transporting combustible liquids (as defined in Section 173.120(b) of this title), and

4. (No change.)

Subpart H—Controlled Substances Testing

...

Section 391.89 Access to individual test results or test findings.

...

Section 391.117 Disqualification

...

PART 392-PART 394 (No change.)

PART 395—HOURS OF SERVICE OF DRIVERS

Section 395.1 Scope of rules in this part.

...

PART 396—INSPECTION, REPAIR, AND MAINTENANCE

...

Section 396.15 Driveaway-towaway operations and inspections.

...

Section 396.25 Qualifications of brake inspectors.

Appendix G to Subchapter B—Minimum Periodic Inspection Standards

PART 397—TRANSPORTATION OF HAZARDOUS MATERIALS; DRIVING AND PARKING RULES

...

Subpart D—Routing of Class 7 (Radioactive) Materials

Section 397.101 Requirements for motor carriers and drivers.
Section 397.103 Requirements for State routing designations.

Subpart E—Preemption Procedures

Section 397.201 Purpose and scope of the procedures.
Section 397.203 Standards for determining preemption.
Section 397.205 Preemption application.
Section 397.207 Preemption notice.
Section 397.209 Preemption processing.
Section 397.211 Preemption determination.
Section 397.213 Waiver of preemption application.
Section 397.215 Waiver notice.
Section 397.217 Waiver processing.
Section 397.219 Waiver determination and order.
Section 397.221 Timeliness.
Section 397.223 Petition for reconsideration.
Section 397.225 Judicial review.

PART 177—CARRIAGE BY PUBLIC HIGHWAY (CONTINUED)

...

Section 177.818 Special instructions; Division 2.1 (flammable gas) materials that are cryogenic liquids.

...

Section 177.825 Routing and training requirements for Class 7 (radioactive) materials.
Section 177.826 Carrier's registration statement; Division 2.1 (flammable gas) materials that are cryogenic liquids.

Subpart B—Loading and Unloading

...

Section 177.835 Class 1 (explosive) materials.

...

Section 177.838 Class 4 (flammable solid) materials, Class 5 (oxidizing) materials, and Division 4.2 (pyrophoric liquid) materials.
Section 177.839 Class 8 (corrosive) materials.
Section 177.840 Class 2 (gases) materials.
Section 177.841 Division 6.1 (poisonous) and Division 2.3 (poisonous gas) materials.
Section 177.842 Class 7 (radioactive) material.

...

Subpart C—Segregation and Separation Chart of Hazardous Materials

Section 177.848 Segregation of hazardous materials.

Subpart D—Vehicles and Shipments in Transit; Accidents

...

Section 177.855 Accidents; Class 1 (explosive) materials.
Section 177.856 Accidents; Class 3 (flammable liquid) materials.
Section 177.857 Accidents; Class 4 (flammable solid) or Class 5 (oxidizing) materials.
Section 177.858 Accidents; Class 8 (corrosive) materials.
Section 177.859 Accidents; Class 2 (gases) materials.
Section 177.860 Accidents or leakage; Division 6.1 (poisonous) or Division 2.3 (poisonous gas) materials.
Section 177.861 Accidents; Class 7 (radioactive) materials.

Subpart E—Regulations Applying to Hazardous Material on Motor Vehicles Carrying Passengers for Hire

Section 177.870 Regulations for passenger carrying vehicles.

PART 178—SPECIFICATIONS FOR PACKAGINGS

...

Section 178.2 Applicability and manufacturers' responsibility.
Section 178.3 Marking of packagings.

Subpart B—Specifications for Inside Containers, and Linings

Section 178.33 Specification 2P; inner nonrefillable metal receptacles.
Section 178.33a Specification 2Q; inner nonrefillable metal receptacles.

Subpart C—Specifications for Cylinders

...

Section 178.60 Specification 8AL; steel cylinders with approved porous filling for acetylene.
Section 178.61 Specification 4BW; welded steel cylinders made of definitely prescribed steel with electric-arc welded longitudinal seam.
Section 178.65 Specification 39; non-reusable (non-refillable) cylinder.

...

Subpart H (No change.)

Subpart J—Specifications for Containers for Motor Vehicle Transportation

...

Section 178.320 General requirements applicable to all DOT specification cargo tank motor vehicles.

Section 178.337 Specification MC 331; cargo tank motor vehicle primarily for transportation of compressed gases as defined in Subpart G of Part 173 of this subchapter.

...

Section 178.345 General design and construction requirements applicable to Specifications DOT 406 (Section 178.346), DOT 407 (Section 178.347), and DOT 412 (Section 178.348) cargo tank motor vehicles.

...

Subpart K—Specifications for Packagings for Class 7 (Radioactive) Materials.

...

Section 178.352 Specification 6L; metal packaging.
Section 178.354 Specification 6M; metal packaging.
Section 178.356 Specification 20PF phenolic-foam insulated, metal overpack.
Section 178.358 Specification 21PF fire and shock resistant, phenolic-foam insulated, metal overpack.
Section 178.360 Specification 2R; inside containment vessel.
Section 178.362 Specification 20WC wooden protective jacket.
Section 178.364 Specification 21WC wooden-steel protective overpack.

Subpart L—Non-bulk Performance-oriented Packaging Standards

Section 178.500 Purpose, scope and definitions.
Section 178.502 Identification codes for packagings.
Section 178.503 Marking of packagings.
Section 178.504 Standards for steel drums.
Section 178.505 Standards for aluminum drums.
Section 178.506 Standards for metal drums other than steel or aluminum.
Section 178.507 Standards for plywood drums.
Section 178.508 Standards for fiber drums.
Section 178.509 Standards for plastic drums and jerricans.
Section 178.510 Standards for wooden barrels.
Section 178.511 Standards for steel jerricans.
Section 178.512 Standards for steel or aluminum boxes.
Section 178.513 Standards for boxes of natural wood.
Section 178.514 Standards for plywood boxes.
Section 178.515 Standards for reconstituted wood boxes.
Section 178.516 Standards for fiberboard boxes.
Section 178.517 Standards for plastic boxes.
Section 178.518 Standards for woven plastic bags.
Section 178.519 Standards for plastic film bags.
Section 178.520 Standards for textile bags.
Section 178.521 Standards for paper bags.
Section 178.522 Standards for composite packagings with inner plastic receptacles.
Section 178.523 Standards for composite packagings with inner glass, porcelain, or stoneware receptacles.

Subpart M—Testing of Non-bulk Packagings and Packages

Section 178.600 Purpose and scope.
Section 178.601 General requirements.
Section 178.602 Preparation of packagings and packages for testing.
Section 178.603 Drop test.
Section 178.604 Leakproofness test.
Section 178.605 Hydrostatic pressure test.
Section 178.606 Stacking test.
Section 178.607 Cooperage test for bung-type wooden barrels.
Section 178.608 Vibration standard.
Section 178.609 Test requirements for packagings for infectious substances (etiologic agents).

Appendix A—Specifications for Steel

Appendix B—Alternative Leakproofness Test Methods

PART 179—SPECIFICATIONS FOR TANK CARS

Subpart A—Introduction, Approvals, and Reports

...

Subpart B (No change.)

Subpart C—Specifications for Pressure Tank Car Tanks (Classes DOT—105, 109, 112 and 114)

...

Section 179.104 Special requirements for spec. 105-A200-F tank car tanks.
Section 179.105 Special requirements for Specification 105S, 105J, 111J, 112S, 112J, 112T, 114S, 114J and 114T tank cars.

Subpart D—Specifications for Non-Pressure Tank Car Tanks (Classes DOT—103, 104, 111AF, 111AW, and 115AW)

...

Section 179.203 Special requirements for specification 111 tank cars.

...

Subpart E—Specifications for Multi-Unit Tank Car Tanks (Classes DOT—106A and 110AW)

Section 179.300 General specifications applicable to multi-unit tank car tanks designed to be removed from car structure for filling and emptying (Classes DOT—106A and 110AW).

...

Subpart F to Part 180, Subpart E (No change.)

(a)

DIVISION OF TRANSPORTATION ASSISTANCE
BUREAU OF FREIGHT SERVICES
Rail Freight Program
Adopted Readoption with Amendments: N.J.A.C. 16:53C
Adopted Repeal: N.J.A.C. 16:53C-6.2

Proposed: April 5, 1993 at 25 N.J.R. 1481(a).
Adopted: May 12, 1993 by William D. Ankner, Director, Division of Policy and Capital Programming.
Filed: May 13, 1993 as R.1993 d.277, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-5.1 and 27:1A-6.

Effective Date: May 13, 1993, Readoption;
June 7, 1993, Amendments and Repeal.
Expiration Date: May 13, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 16:53C.

Full text of the adopted amendments follows.

16:53C-1.1 Definitions

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

"Acquisition assistance" means funds the Rail Freight Assistance Program uses to cover the cost of acquiring, by purchase, or in such other manner the Department considers appropriate, a railroad line or other rail property for existing or future rail freight service.

...

"Rail facility construction assistance" means funds provided to cover the cost of constructing rail related facilities for the purpose of improving the quality and efficiency of existing rail freight service, or providing the benefits of rail service to industries not located on existing rail lines. This includes new connections between two or more existing lines, relocation of lines or sidings, modernization of existing facilities, construction of rail related freight facilities (for example, team track, intermodal transfer, etc.), and construction of minor sections of new track (for example, passing tracks, crossovers, etc.).

. . .

"Substitute service assistance" means funds to cover the cost of reducing the transportation impacts of abandoned rail service in a manner less expensive than the continuation of the rail service and includes, but is not limited to, the acquisition, construction or improvement of substitute freight transportation facilities, for example, team track.

16:53C-2.1 General provisions

(a) Scope of the program includes:

1.-3. (No change.)

4. Substitute service assistance.

16:53C-2.2 Form of financial assistance

Financial assistance may be in the form of a grant to the owner of the rail properties, the operator of Rail Freight Service on the properties, or responsible public agency/authority. The Commissioner shall determine all financial terms and conditions of the grant.

16:53C-2.3 Duration of assistance

Financial assistance is limited in duration to a period not to exceed three years from the date of project approval. Should circumstances dictate that a project extend beyond three years, the sponsor shall request such an extension of the Department in writing, including a detailed justification for the request. Circumstances to be considered eligible for an extension shall include, but not be limited to: unanticipated additional work directly associated with the project; inability to accomplish the project within the specified time-frame due to circumstances beyond the sponsor's control; forced staging of financing over a period greater than three years; or a project scope which is physically impossible to accomplish within three years.

16:53C-3.2 Acquisition assistance

(a) The rail freight properties which are eligible for acquisition assistance are those properties in the State identified as part of a core rail freight system which will be defined by the Department. In no case will the State acquire rail properties where continued rail operations can be maintained through ownership within the private sector. These properties may include inactive rail lines which have value for future use as rail freight facilities or as components of an intermodal system.

(b) (No change.)

16:53C-3.3 Rehabilitation or improvement assistance

(a) The rail freight properties eligible for rehabilitation assistance are those properties (as defined by the Department), for which a one-time investment of capital assistance will seek to insure the continuation or creation of safe, adequate and efficient rail freight services for a period of not less than five years.

1. For a State-owned line, the operator of the freight service or other appropriate party is eligible to receive a grant of up to 100 percent of the total project cost to rehabilitate a rail line to Federal Railroad Administration (FRA) safety standards allowing rail operations at speeds appropriate for this line. On these properties trackage rights fees, or lease payments may be assessed in an amount sufficient to recoup acquisition and/or rehabilitation investments.

2. An operator or other responsible party, providing rail freight services on a rail line not owned by the State which is part of the core rail freight system, is eligible to receive a grant not to exceed 70 percent of the total cost of rehabilitating the rail line to FRA safety standards allowing rail operations at speeds appropriate for this line.

3. The operator or other responsible party, providing rail freight service on a rail line which is not an element of the core system, is eligible to receive a grant not to exceed 50 percent of the cost of rehabilitating the line to FRA safety standards allowing rail operations at speeds appropriate for this line.

4. Funding assistance available under this program shall not be available for maintenance as defined in N.J.A.C. 16:53C-1.

16:53C-3.5 Substitute rail service assistance

For industries located on rail segments where the continuation of rail service through acquisition, rehabilitation or rail facility construction assistance is not warranted, a grant not to exceed 50 percent of the total cost of project construction may be made available in order to provide alternative nonrail transportation facilities necessitated by the loss of rail service.

16:53C-5.1 General provisions

(a) The State Rail Plan shall be based on a comprehensive, coordinated and continuing planning process. It shall be developed with an opportunity for participation by all interested parties. The Department shall schedule a public meeting upon revising the State Rail Plan. Public notice shall be given in accordance with applicable State law and practice.

(b) (No change.)

16:53C-6.1 General contents of applications

(a) Each application shall include:

1.-2. (No change.)

3. Budget estimates for the total amount of assistance required; and

4. Applicant's intention to furnish the local share of total project costs, including copies of any executed third party agreements to provide the required local share, or a portion thereof.

(b) Applications for assistance may be addressed to: Manager, Bureau of Freight Services, New Jersey Department of Transportation, 1035 Parkway Avenue, Trenton, New Jersey 08625.

16:53C-6.2 (Reserved)

16:53C-6.3 Rehabilitation or improvement assistance and rail facility construction assistance

(a) In addition to meeting the requirements of N.J.A.C. 16:53C-6.1, each application for rehabilitation or improvement assistance, and/or fail facilities construction assistance shall include:

1.-2. (No change.)

3. A description of the arrangements made for the operation of rail service over the property, including copies of the proposed operating agreements or leases, and the proposed method of financing the operation of such service.

16:53C-7.1 Requirements for application for assistance

Applications for assistance under the program shall conform to the requirements for environmental assessments under State and Federal regulations, laws, directives, or policies concerning existing or new facility construction.

16:53C-8.1 Grant agreement

(a) Upon the approval of an application meeting the requirements of N.J.A.C. 16:53C-1 through 7, an agreement for the State share of the approved amount of the estimated project costs will be executed by the applicant and the Commissioner or his designated representative.

(b) The agreement will:

1. Identify the amount of the grantee's share of the program costs to be furnished in cash or through approved in-lieu-of-cash contributions as defined in N.J.A.C. 16:53C-4. The applicant shall expend a pro-rata share of its contributions at the same time payments of the State share are made available;

2. Provide assurances that the applicant will comply with applicable State laws, policies, directives, and regulations dealing with discrimination in employment and prevailing wage rate requirements on public contracts; and

3. Provide assurances by the applicant that a contingent interest shall be retained by the State for a period equal to the service life

of the project. Further, that during any time within this period, the State's share shall be repaid, upon the sale, disposition or abandonment of the rail line receiving assistance.

16:53C-8.3 Final settlement

Final settlement under the agreement will be made on the basis of a State audit which has determined the allowable costs over the entire term of the agreement. If the State audit determined that the allowable costs under the agreement are less than the amount of the agreement, the difference shall be refunded to the program at the end of the fiscal year in which the audit was performed.

(a)

DIVISION OF TRANSPORTATION ASSISTANCE
OFFICE OF AVIATION
Licensing of Aeronautical Activities
Adopted Readoption: N.J.A.C. 16:55

Proposed: April 5, 1993 at 25 N.J.R. 1483(a).
Adopted: May 12, 1993 by William D. Ankner, Director, Division of Policy and Capital Programming.
Filed: May 13, 1993 as R.1993 d.278, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 6:1-29 and 6:1-44.

Effective Date: May 13, 1993.
Expiration Date: May 13, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 16:55.

(b)

DIVISION OF TRANSPORTATION ASSISTANCE
OFFICE OF AVIATION
Issuance of Summons and Designation of Enforcement Officer
Adopted Readoption with Amendments: N.J.A.C. 16:60

Proposed: April 5, 1993 at 25 N.J.R. 1484(a).
Adopted: May 12, 1993 by William D. Ankner, Director, Division of Policy and Capital Programming.
Filed: May 13, 1993 as R.1993 d.279, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6 and 6:1-29.

Effective Date: May 13, 1993, Readoptions;
June 7, 1993, Amendments.
Expiration Date: May 13, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 16:60.

Full text of the adopted amendments follows.

16:60-1.1 Scope

This chapter sets forth procedures for the issuance of summons and complaints and empowers specific additional employees of the Division of Aeronautics with the authority of function as law enforcement officers in compliance with the provisions of Title 6 of the New Jersey Statutes Annotated.

16:60-1.2 Issuance of summons

Designated law enforcement officers of the Division of Aeronautics are hereby vested with the authority to issue a complaint and summons for noncompliance with the provisions of N.J.S.A. Title 6 (Aviation) or noncompliance with any of the provisions contained in this chapter. All proceedings shall be brought before a Magistrate having jurisdiction in the municipality in which it is alleged that the violation occurred. Designated law enforcement officers shall file the complaint and issue a summons for any violation of N.J.S.A. Title 6 (Aviation). The special form of complaint and summons prescribed by the Administrative Director of the Courts pursuant to Rule 4:70-3 and Part VII, Rules Governing Practice in the Municipal Court.

16:60-1.3 Designation action

(a) In addition to the personnel specifically designed as law enforcement officers by N.J.S.A. 6:1-29, the members and employees of the Division of Aeronautics assigned to the following authorized positions are hereby designated as law enforcement officers:

1.-4. (No change.)

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

(c)

DIVISION OF TRANSPORTATION ASSISTANCE
OFFICE OF AVIATION
Aircraft Accidents
Adopted Readoption: N.J.A.C. 16:61

Proposed: April 5, 1993 at 25 N.J.R. 1485(a).
Adopted: May 12, 1993 by William D. Ankner, Director, Division of Policy and Capital Programming.
Filed: May 13, 1993 as R.1993 d.280, **without change.**

Authority: N.J.S.A. 27:1A-5, 27:1A-6, 6:1-29 and 6:1-44.

Effective Date: May 13, 1993.
Expiration Date: May 13, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 16:61.

TREASURY-GENERAL

(d)

DIVISION OF PENSIONS AND BENEFITS
State Health Benefits Commission
Local Employer Reentry
Adopted Amendment: N.J.A.C. 17:9-1.5

Proposed: February 1, 1993 at 25 N.J.R. 460(a).
Adopted: May 7, 1993 by the State Health Benefits Commission, Patricia Chiacchio, Acting Secretary.
Filed: May 12, 1993 as R.1993 d.269, **without change.**

Authority: N.J.S.A. 52:14-17.27.

Effective Date: June 7, 1993.
Expiration Date: October 3, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

17:9-1.5 Voluntary termination of employer; notice

(a) (No change.)

(b) For purposes of local coverage, when a participating employer voluntarily terminates coverage, the coverage for the employer's active and retired employees shall terminate as of the first of the month following a 60-day period beginning with the receipt of the resolution by the Health Benefits Commission. The Commission may, from time to time, establish a re-entry application period not

to exceed 30 days for those employers who have terminated coverage. During this period, an employer who has terminated coverage only once may submit a resolution for automatic re-entry. The re-entry shall be effective upon a date set by the Commission which date shall be not less than 60 days nor more than 365 days following the receipt of the resolution for re-entry. Automatic re-entry into the program will be permitted only once.

1. An employer who has terminated coverage more than once may submit a resolution for re-entry during the re-entry application period. The Commission shall consider the relevant facts accompanying the resolution, including any hardship or emergency, the impact of re-entry on the program and individual members, and whether re-entry is consistent with statutory law or judicial determinations. The Commission shall approve or disapprove the resolution for re-entry and shall so notify the employer within 30 days following receipt of the resolution. If the Commission approves the re-entry, the re-entry shall be effective upon a date determined by the Commission, which date shall be not less than 60 days nor more than 365 days following the Commission's approval. The re-entry shall be contingent upon the employer's reimbursement to the Commission of administrative expenses reasonably based upon the approximate cost to the Commission of re-enrolling the employer.

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

(a)

DIVISION OF PENSIONS AND BENEFITS

State Health Benefits Commission
Annual Enrollment Periods
Adopted Amendment: N.J.A.C. 17:9-2.3

Proposed: November 2, 1992 at 24 N.J.R. 4025(b).
Adopted: May 6, 1993 by the State Health Benefits Commission, Patricia Chiacchio, Acting Secretary.
Filed: May 10, 1993 as R.1993 d.259, **without change.**

Authority: N.J.S.A. 52:14-17.27.

Effective Date: June 7, 1993.
Expiration Date: October 3, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

17:9-2.3 Annual enrollment period

(a) Any employee who shall elect not to enroll for coverage for himself or herself or for his or her dependent at the time such employee or dependent first becomes eligible for coverage shall subsequently be permitted to enroll himself or herself and his or her dependents only during the annual enrollment period, which is the month of April of each year with coverage effective for the first coverage period in July in the case of State coverage and the month of March with coverage effective July 1 in the case of local coverage.

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

(b)

DIVISION OF PENSIONS AND BENEFITS

State Health Benefits Commission
Coverage Changes; Exemptions
Adopted Amendment: N.J.A.C. 17:9-2.4

Proposed: November 2, 1992 at 24 N.J.R. 4025(c).
Adopted: April 29, 1993 by the State Health Benefits Commission, Patricia Chiacchio, Acting Secretary.
Filed: May 5, 1993 as R.1993 d.249, **without change.**

Authority: N.J.S.A. 52:14-17.27.

Effective Date: June 7, 1993.
Expiration Date: October 3, 1993.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the adoption follows.

17:9-2.4 Coverage changes; exceptions

(a) An employee may change his or her enrollment and the enrollment of his or her dependents to any type of coverage at any time if such changes result from a change in family, dependency or employment status of the employee or his or her dependents. Such changes will be permitted under the following conditions:

1.-7. (No change.)

8. Retirement or COBRA enrollment: When an employee enrolls in the retiree or COBRA group, he or she may, within 60 days of the qualifying event, select a plan other than the plan which covered the employee as an active employee.

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

OTHER AGENCIES

(c)

CASINO CONTROL COMMISSION

Applications
Fees
Adopted Amendments: N.J.A.C. 19:41-9.1 and 9.4

Proposed: March 15, 1993 at 25 N.J.R. 1080(a).
Adopted: May 5, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: May 7, 1993 as R.1993 d.253, **without change.**

Authority: N.J.S.A. 5:12-69(a) and 70(e).

Effective Date: June 7, 1993.
Operative Date: July 1, 1993.
Expiration Date: April 15, 1995.

Summary of Public Comments and Agency Responses:

Comments were received from the Sands Hotel & Casino ("the Sands"); TropWorld Casino and Entertainment Resort ("TropWorld"); Caesar's Atlantic City ("Caesar's"); Trump Taj Mahal Associates ("Taj Mahal"); and Harrah's Casino Hotel ("Harrah's").

COMMENT: Both the Sands and Harrah's stated their support of the proposal. The Sands commented that the proposal would make the distribution of uncollected expenditures more equitable.

RESPONSE: The Commission agrees, as evidenced by this adoption.

COMMENT: TropWorld and Caesar's suggest that it would be more equitable to utilize a two-tier system where properties with casino and casino simulcasting facility square footage of 60,000 or less pay an amount equal to 90 percent of the amount paid by those properties with facilities of over 60,000 square feet.

RESPONSE: The commenters' suggestion reflects agreement with the Commission's determination that smaller casino facilities should not be held accountable for the same share of the year-end assessment as larger casinos. However, the commenters have not demonstrated any rational basis for the suggested 90 percent figure, nor is any such basis apparent. The Commission thus does not agree that the suggested formula would provide an equitable basis for allocation.

COMMENT: Taj Mahal objects to the use of casino square footage to allocate the year-end assessment, arguing that it discriminates against properties with larger casino floors such as its own. Taj Mahal states that, during 1992, it averaged 15 percent of the total casino space but 13.8 percent of table game units and 15.8 percent of table game revenue, and 12.8 percent of slot machine units and 11.7 percent of slot revenue. Taj Mahal asserts that "square footage is not an accurate indicator of market share" since all gaming space cannot always be utilized. It instead suggests allocation based upon revenue producing units, "which is more indicative of market share potential and ability to generate revenues." Alternatively, Taj Mahal suggests allocation based upon revenue, as is the gross revenue tax.

RESPONSE: As noted in the proposal notice, larger casino facilities are likely to require a greater number of employees in order to operate efficiently. A larger amount of authorized gaming area may correspond

to a greater number of gaming-related casino service industry enterprises utilized by a casino. A substantial portion of the year-end assessment is attributable to the investigation and processing of gaming-related casino service industries. Thus, the Commission has determined that each casino licensee's share of the year-end assessment shall be based upon its approved casino room and simulcasting facility square footage.

Full text of the adoption follows.

19:41-9.1 General description of fees and policy

(a) Under the Act, the Commission and Division are required to be financed exclusively from fees charged each fiscal year to applicants, licensees and registrants. Generally, the Act divides fees into two broad categories: those pertaining to casino licenses and those pertaining to all other forms of licensure or approval. Section 139 of the Act requires the Commission to establish, by regulation, fees for the issuance and renewal of casino licenses. The statutory basis for the casino license issuance fee is the cost of investigation and consideration of the application. The statutory basis for the casino license renewal fee is the cost of maintaining the control and regulatory activities of the Commission and the Division. In contrast, section 141 of the Act requires the Commission to establish, by regulation, issuance and renewal fees for all non-casino licenses, but indicates no cost basis for establishing such fees.

(b) (No change.)

(c) To the extent fairly possible, each applicant or licensee should pay the investigatory or regulatory costs attributable to that applicant or licensee. However, since individual employees and casino service industry enterprises cannot always be expected to cover the full amount expended, there will be an amount of the annual combined budgets of the agencies which will not be recoverable through specified fees for particular services. This amount cannot be predicted with precision because of the necessarily variable allocation of Commission and Division efforts.

(d) Given the mandate of the Act to recover the cost of maintaining control and regulatory activities from casino license renewal fees and given the fact that all such activities are undertaken for the direct or indirect benefit or protection of casino operations, the obligation to supply additional funds necessary to recover the otherwise uncollected expenditures of the agencies should be allocated among the licensed casino facilities.

(e) (No change.)

19:41-9.4 Casino license fees

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

(f) A licensed casino facility shall be required to pay, as a component of the renewal fee for any casino license necessary to casino or casino simulcasting operations therein and as a condition of any such casino license renewal, a share of the amount of any liability of the Casino Control Fund existing as of the close of business on June 30 of each fiscal year. The share for each licensed casino facility shall be the amount which bears the same proportion to the total liability of all licensees as the proportion which that licensed casino facility's average daily authorized casino room and casino simulcasting facility square footage bears to the total average daily authorized casino room and casino simulcasting facility square footage for all licensed casino facilities. For purposes of this calculation any part of a calendar day shall be considered a full day. Any days during which a necessary casino license or operation certificate for a licensed casino facility has been suspended shall also be counted in determining the share of such facility. Further, the operation of the facility by a conservator or trustee shall be deemed continued operation by the casino operator for these purposes. The obligation to pay the assessed share of a licensed casino facility shall be that of the casino operator; provided, however, that if a change of casino operators occurs during the fiscal year, each such operator shall be liable for an amount of the share apportioned according to the time during which each operator functioned. Any share calculated in accordance with this section shall be paid in full by December 31 of the year following the fiscal year. The Commission, through its Division of Financial Evaluation, may estimate from time to time during the fiscal year the share for each licensed casino facility incurred to that time and require payment of such estimated share on a monthly or other periodic basis during the fiscal year.

(a)

CASINO CONTROL COMMISSION

Notice of Administrative Corrections

Gaming Schools; Minimum Hours

Internal Controls; Personnel Assigned to the Operation and Conduct of Gaming and Slot Machines

Gaming Equipment; Approval of Gaming and Simulcast Wagering Equipment; Retention by Commission or Division; Evidence of Tampering

N.J.A.C. 19:44-8.3, 19:45-1.12 and 19:46-1.20

Take notice that the Office of Administrative Law has discovered errors in the text of N.J.A.C. 19:44-8.3, 19:45-1.12 and 19:46-1.20.

At N.J.A.C. 19:44-8.3(a)1, subparagraph (a)1vi, "180 hours to deal pai gow poker," proposed and adopted at 24 N.J.R. 569(a) and 3742(a), respectively, was omitted from the 10-19-92 update to the New Jersey Administrative Code.

At N.J.A.C. 19:45-1.12(b)2, "pai gow poker" was proposed and adopted for addition to the list of games at 24 N.J.R. 569(a) and 3742(a), respectively, but was omitted from the 10-19-92 update to the New Jersey Administrative Code.

At N.J.A.C. 19:46-1.20(a) and (c), references to pokette wheels, pai gow shakers and pai gow tiles which were proposed and adopted at 24 N.J.R. 558(a) and 2140(a), and 24 N.J.R. 3753(a) and 4279(b), respectively, were incorporated into the New Jersey Administrative Code through the 10-19-92 and 11-16-92 updates, but have subsequently been inadvertently deleted as further rule amendments were made.

This notice of administrative correction is published pursuant to N.J.A.C. 1:30-2.7.

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

19:44-8.3 Minimum hours

(a) Any training or instruction designed to prepare a student for employment as a dealer shall satisfy the following minimum requirements:

1. For a student being trained to deal a first game the following minimum hours of training and instruction shall be required:

i.-ii. (No change.)

iii. 200 hours to deal roulette; [and]

iv. 240 hours to deal craps;

v. 270 hours to deal pai gow[.]; **and**

vi. 180 hours to deal pai gow poker.

2.-3. (No change.)

(b) (No change.)

19:45-1.12 Personnel assigned to the operation and conduct of gaming and slot machines

(a) (No change.)

(b) The following personnel shall be used to operate the table games in an establishment:

1. (No change.)

2. Dealers shall be the persons assigned to each craps, baccarat, blackjack, roulette, minibaccarat, red dog, sic bo, big six, [and] pai gow **and pai gow poker** table to directly operate and conduct the game.

3.-8. (No change.)

(c)-(i) (No change.)

19:46-1.20 Approval of gaming and simulcast wagering equipment; retention by Commission or Division; evidence of tampering

(a) The Commission shall have the discretion to review and approve all gaming and simulcast wagering equipment and other de-

vices used in a casino, casino simulcasting facility or hub facility as to quality, design, integrity, fairness, honesty and suitability including without limitation gaming tables, layouts, roulette wheels, **pokette wheels,** roulette balls, drop boxes, big six wheels, sic bo shakers, sic bo electrical devices, **pai gow shakers,** chip holders, racks and containers, scales, counting devices, trolleys, slip dispensers, dealing shoes, dice, cards, **pai gow tiles,** locking devices, card reader devices, data processing equipment, pari-mutuel machines, self-service pari-mutuel machines and totalisators.

(b) The Commission shall have the discretion to require a prototype or sample of any model of gaming and simulcast wagering equipment or of other device used in a casino, casino simulcasting facility or hub facility to be placed in its custody and retained by it or the Division as a control for comparison purposes.

(c) Any evidence that gaming equipment or other devices used in a casino, casino simulcasting facility or hub facility including, without limitation, gaming tables, layouts, roulette wheels, **pokette wheels,** roulette balls, drop boxes, big six wheels, sic bo shakers, sic bo electrical devices, **pai gow shakers,** gaming chips, plaques, chip holders, racks and containers, scales, counting devices, trolleys, slip dispensers, dealing shoes, locking devices, card reader devices, data processing equipment, tokens, slot machines, pari-mutuel machines, self-service pari-mutuel machines and totalisators have been tampered with or altered in any way which would affect the integrity, fairness, honesty or suitability of the gaming equipment or other devices for use in a casino, casino simulcasting facility or hub facility shall be immediately reported to an agent of the Commission and the Division. A member of the casino licensee's **casino** security department shall be required to insure that the gaming equipment or other device and any evidence required to be reported pursuant to this subsection is maintained in a secure manner until the arrival of an agent of the Division. Rules concerning evidence of tampering with dice [and], cards **and pai gow tiles** may be found at N.J.A.C. 19:46-1.16(g) and 19:46-1.18(n), respectively.

(a)

CASINO CONTROL COMMISSION

Gaming Equipment

Gaming Chips, Tokens and Plaques; Storage and Security

Casino Vaults

Adopted Amendment: N.J.A.C. 19:46-1.6

Proposed: March 15, 1993 at 25 N.J.R. 1083(a).
Adopted: May 5, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: May 7, 1993 as R.1993 d.254, **with substantive and technical changes** not requiring additional public notice or comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 5:12-63(c), 63(d), 63(e), 69(a), 70(i), 70(l), 70(m), 99(a)4, 6, 9 and 10, and 100(c).

Effective Date: June 7, 1993.
Expiration Date: April 15, 1998.

Summary of Public Comments and Agency Responses:

Comments on the proposal were received from the Division of Gaming Enforcement (Division) and from the Sands Hotel and Casino (Sands).

COMMENT: The Division objected to the proposed amendment because, in its view, the proposed amendments would authorize the Commission to permit gaming chips to be stored in areas where the security over the chips was not comparable to that of the cashiers' cage or an approved casino vault.

RESPONSE: The proposed amendment states that gaming chips may be stored in approved casino vaults, in cashiers' cages, or in secure areas approved by the Commission. Consequently, the Commission agrees with the Division that the area in which gaming chips are stored must be secure as stated in the proposal.

To underscore the original intent of the proposed amendment, the Commission is making changes to the proposed amendment which do not require additional public notice or comment. Specifically, the amendment as adopted will permit gaming chips to be stored in a secure area, comparable to a casino vault or cashiers' cage, provided that the area is approved by the Commission after consultation with the Division.

COMMENT: The Sands supports the adoption of the proposed amendments.

RESPONSE: Accepted.

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

19:46-1.6 Receipt of gaming chips, tokens or plaques from manufacturer or distributor; inventory, security, storage and destruction of chips, tokens and plaques

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

(c) If any of the gaming chips or plaques received from such manufacturer or distributor are to be held in reserve and not utilized for active gaming either at the gaming tables or in the cashiers' cage, they shall be recorded in the chip inventory ledger as reserve chips or plaques and shall be stored in separate locked compartments in:

1. An approved casino vault;
2. The cashiers' cage; or
3. A ***comparable*** secure area, approved by the Commission ***after consultation with the Division***, which is adjacent to and accessible exclusively from the casino.

(d) Any gaming chips received from such manufacturer or distributor that are part of the secondary set of chips shall be recorded in the chip inventory ledger as such and shall be stored separately from the value and non-value reserve chips in locked compartments in:

1. An approved casino vault;
2. The cashiers' cage; or
3. A ***comparable*** secure area, approved by the Commission ***after consultation with the Division***, which is adjacent to and accessible exclusively from the casino.

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

(h) A casino licensee shall ensure that ***at*** all times there is adequate security, as approved by the Commission, for all gaming chips and plaques in its possession.

(i) (No change.)

(b)

CASINO CONTROL COMMISSION

Rules of the Games

Permissible Additional Wager

Adopted Amendment: N.J.A.C. 19:47-2.17

Proposed: March 15, 1993 at 25 N.J.R. 1084(a).
Adopted: May 5, 1993 by the Casino Control Commission, Steven P. Perskie, Chairman.
Filed: May 7, 1993 as R.1993 d.255, **without change.**

Authority: N.J.S.A. 5:12-69(a) and (c), 99(a) and 100 (e).

Effective Date: June 7, 1993.
Expiration Date: April 15, 1996.

Summary of Public Comments and Agency Responses:

COMMENT: The Division of Gaming Enforcement and TropWorld Casino and Entertainment Resort support the amendments as proposed.

RESPONSE: Accepted.

Full text of the adoption follows.

19:47-2.17 Permissible additional wagers

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

(g) Any additional wager made pursuant to this section shall not exceed the lesser of:

1. The amount of the blackjack wager made by the player pursuant to N.J.A.C. 19:47-2.3(a) and (d); or
2. A maximum limit established by the casino licensee.

(h) A casino licensee shall post the maximum limit of the additional wager, as established in (g) above, in accordance with N.J.A.C. 19:47-8.3.

(i) An additional wager shall have no bearing on any other wager made by the player at the game of blackjack.

PERSONNEL
(a)

MERIT SYSTEM BOARD
Selection and Appointment
Readoption with Amendments: N.J.A.C. 4A:4

Proposed: March 15, 1993 at 25 N.J.R. 1085(b).

Adopted: May 11, 1993 by the Merit System Board, Anthony J. Cimino, Commissioner, Department of Personnel.

Filed: May 12, 1993 as R.1993 d.270, **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:4-1 et seq., 11A:7-13, 40A:9-1.3 through 1.10, 40A:14-10.1a, 40A:14-12, 40A:14-45, 40A:14-123.1a, 40A:14-127, 40A:14-127.1, 38:23A-2, L.1992, c.197 and Executive Order No. 10(1982).

Effective Date: May 12, 1993, Readoption;
June 7, 1993, Amendments.

Expiration Date: May 12, 1998.

Summary of Hearing Officer Recommendations and Agency Responses:

A public hearing on the proposed readoption with amendments was held on March 31, 1993. Henry Maurer served as hearing officer. Two persons presented comments at that time. In addition, seven persons submitted written comments. Mr. Maurer recommended that the rules be readopted with the amendments proposed, with two changes as described in the Summary below. The record of the public hearing may be reviewed by contacting Janet Share Zatz, Director of Appellate Practices and Labor Relations, Department of Personnel, CN 312, Trenton, NJ 08625.

Summary of Public Comments and Agency Responses:

COMMENT: D. Craig Stevens, Director of Personnel at the Department of Environmental Protection and Energy (DEPE), proposed the addition of a new paragraph 3 for N.J.A.C. 4A:4-1.1(c) which would state that, in addition to allowing the promotion of employees from the noncompetitive division to the competitive division to the titles described in the rule, they could also be promoted to "other non-related titles as appropriate."

RESPONSE: The Merit System Board notes that the longstanding policy of the Department of Personnel has been to limit promotions from noncompetitive titles, in view of the fact that individuals did not attain these titles through competitive testing. Therefore, the Board believes that it would not be appropriate to broaden this rule to provide for promotion from noncompetitive titles to non-related competitive titles.

COMMENT: Mr. Stevens also commented that N.J.A.C. 4A:4-1.4(c) should be amended to state: "Once the appointment is changed to regular appointment, the employee shall begin to serve a working test period. At the conclusion of the working test period, the employee shall be granted retroactive status to the original date of the conditional appointment."

RESPONSE: The Board does not agree that such an amendment to N.J.A.C. 4A:4-1.4(c) is necessary. It must be emphasized that these appointments are equivalent to regular appointments, except for the contingency of displacement if a higher ranking eligible succeeds upon appeal. The Board believes that it is more appropriate to begin the working test period on the date of conditional regular appointment. Further, the current rule already provides in subsection (c) that the original date of conditional appointment will be utilized if the final determination of appointment rights causes no change in the selection process.

COMMENT: Mr. Stevens further suggested that N.J.A.C. 4A:4-1.5(b) be amended to begin by stating: "Once a certification list is issued, and there are three or more eligibles interested in permanent appointment, any employee serving provisionally and does not file for and take the examination shall be separated." Mr. Stevens stated that this amendment would ensure that the provisional is not separated unless there is a replacement.

RESPONSE: The Board observes that subsection (b) was promulgated five years ago to ensure that provisional appointees could not circumvent merit selection procedures even if a complete list is not issued. Adopting Mr. Stevens' suggestion would undercut this effort.

COMMENT: Mr. Stevens next proposed a new N.J.A.C. 4A:4-1.4(c) which would specify that provisionals may be terminated at any time, but receive 14 calendar days of notice, either written or verbal, although verbal notice is to be confirmed in writing.

RESPONSE: The Board notes that current rules already provide that only permanent and probationary appointees have the right to appeal termination to the Merit System Board in N.J.A.C. 4A:2-2.1(a). However, the Board is aware that procedures concerning notice have been established for some appointing authorities, in some cases through collective negotiations. Thus, setting these procedures through regulation is not recommended.

COMMENT: Kenneth L. Frazee, Director, Human Resources Management, Office of the Attorney General, asked whether N.J.A.C. 4A:4-1.5, the rule on provisional appointments, will be enforced.

RESPONSE: The Board understands that the Department of Personnel intends to enforce the provisions on provisional appointments to the extent that the Department's limited resources allow.

COMMENT: Gregory B. Vida, Director of Human Resources at the Department of Community Affairs (DCA), suggested that the proposed new N.J.A.C. 4A:4-1.6(a) be changed by replacing the word "shall" with "may".

RESPONSE: The meaning of "shall" in this rule section is that if an appointment is made in the situations listed, then that appointment must be an interim appointment. Therefore, the Board does not agree that any change is necessary to N.J.A.C. 4A:4-1.6(a).

COMMENT: J.S. Wiedemann, Director of Human Resources at the Department of the Treasury supported the use of interim appointments, as provided in the proposed new N.J.A.C. 4A:4-1.6(a), to fill a position held by a permanent employee on indefinite suspension or who is appealing a removal. However, he suggested that the timeframe of six months for a leave of absence be deleted, since original leave requests are often granted for short periods and then extended beyond six months; also, some positions are "critical in nature" and cannot be vacant even for short periods. Mr. Stevens and Charles R. Myers, Director of Human Resources, Department of Human Services (DHS), also opposed the six-month limitation.

RESPONSE: Mr. Myers, Mr. Wiedemann and Mr. Stevens point out the practical problems associated with limiting interim appointments to situations where a leave of absence is greater than six months. The current rule does not contain this restriction, and there is no indication that such a restriction is necessary. Therefore, the Board agrees that the phrase "for more than six months" should be deleted from (a)1.

COMMENT: Mr. Frazee, commented that N.J.A.C. 4A:4-1.6, as amended, would curtail the appointing of authority's choice in whom to appoint for an interim appointment and using certification procedures to do this, as provided in a new subsection (e), would be time consuming and unnecessary. Mr. Stevens also commented that N.J.A.C. 4A:4-1.6(e) should not require use of the certification process for the filling of interim appointments unless the appointing authority does not have a viable candidate for the position on a short-term basis.

RESPONSE: Comments by Mr. Frazee and Mr. Stevens present valid concerns on the proposed new language in subsection (e). Under current practice, an interim appointment must be made from a list if a complete eligible list exists for that title. However, anyone on that list who is interested in an interim appointment may be selected. The Board agrees that it would be unduly cumbersome to require certification procedures be followed each time an interim appointment is to be made. Therefore, the Board has decided that the proposed additional language in subsection (e) should be deleted.

COMMENT: Mr. Stevens commented that a new subsection (i) should be added to N.J.A.C. 4A:4-1.6 which would state that interim appointees may be terminated at any time, with 14 calendar days written or verbal notice which, if verbal, would be confirmed in writing. Mr. Stevens also suggested stating that the 14 day period could be shortened if the

permanent employee must be returned to the position at issue in a shorter period of time by court order or final administrative action of the Merit System Board.

RESPONSE: As the Board notes above, current rules already provide that only permanent and probationary appointees have the right to appeal terminations to the Merit System Board. See N.J.A.C. 4A:2-2.1(a). However, interim appointees have the right to return to their permanent title. Under these circumstances, further language need not be added to the rule on termination of interim appointees.

COMMENT: Mr. Stevens commented that N.J.A.C. 4A:4-1.6(c)1 should be amended to state that an interim appointee shall receive a provisional appointment to the title held on an interim basis, as an alternative to returning to his or her permanent title.

RESPONSE: As stated, interim appointees are entitled to return to their permanent title. Therefore, the Board believes that further entitlements are not necessary.

COMMENT: Richard A. Dann, President, CWA Local 1085, stated that N.J.A.C. 4A:4-1.7(a), proposed for readoption, does not address a problem in the day-to-day interpretation of the time limit placed on temporary appointments.

Although the rule section's language limits a temporary appointment to an aggregate period of not more than six months in a 12-month period and not more than 12 months if the position is established as a result of a short-term grant, the Department of Personnel aggregates employee work assignments by adding their hours and converting them to months of full-time work. By way of example, Mr. Dann stated that employees working 15 hours a week, less than half-time, will always be viewed as working less than six months in a 12-month period. Consequently, these positions will always be temporary. He argued further that such a result subverts the purpose of the Civil Service Act, which is to safeguard against political favoritism by granting permanent status to employees.

He suggests that the confusion lies in the use of the term "established" in N.J.S.A. 11A:4-13(c), which refers to the period of time the position is in existence, not how many hours an employee in the position works. He further stated that the use of the term "aggregating" addresses the common situation in which temporary positions recur so that the months are to be totalled over the course of a 12-month period. He also commented that legislative history of Title 11A supports the view he espouses.

To remedy the situation, he proposed the following additional language: "Any calendar month during which a temporary position is filled or authorized to be filled by the appointing authority will be counted as a full month for purposes of aggregating the term of the job assignment."

RESPONSE: The Board notes that the Department of Personnel does not consider part-time positions that continue throughout the year to be temporary positions. Although such positions may have been considered temporary in local service at one time, the current policy of the Department, in both State and local service, is that permanent part-time positions are not "temporary" even if the hours of work are less than half-time. Therefore, the Board believes that the amendment suggested by Mr. Dann is unnecessary.

COMMENT: Mr. Frazee asked whether the prohibition against consecutive temporary appointments would be enforced through the Personnel Management Information System (PMIS) or the State centralized payroll system.

RESPONSE: The PMIS system, and other methods, will be used to enforce this prohibition in State service.

COMMENT: Mr. Wiedemann, Director of Human Resources at Treasury, proposed that N.J.A.C. 4A:4-1.7 be changed to delete the maximum duration for temporary positions. Mr. Myers also expressed opposition to this restriction.

RESPONSE: The Merit System Board notes that the six-month limit on temporary positions is set by statute, at N.J.S.A. 11A:4-13(c), and it is not at liberty to change this requirement.

COMMENT: Mr. Stevens proposed that N.J.A.C. 4A:4-1.7(d) be amended to state that consecutive temporary appointments in excess of the periods indicated in subsection (a) to the same title within a 12-month period are prohibited. Otherwise, Mr. Stevens stated, subsection (d) should be deleted.

RESPONSE: The Board believes that permitting consecutive temporary appointments to different titles would allow for circumvention of the six-month limit on temporary appointments.

COMMENT: Mr. Stevens commented that N.J.A.C. 4A:4-1.9(a) be amended to state that an employee with permanent status returning to a title in one of the situations specified: "will have rights to a position in the permanent title in the unit scope where the individual was promoted. If as a result of a reorganization, the unit scope no longer exists, the employee shall be returned to his/her permanent title in another unit scope within the organization."

RESPONSE: The current rule provides for a right to return to the same organizational unit. In State service, an organizational unit is an appointing authority. Therefore, the Board believes that it would unduly limit the flexibility of appointing authorities to amend subsection (a) as suggested by Mr. Stevens to require that an employee be returned to the same unit scope.

COMMENT: Mr. Frazee asked whether the proposed changes to N.J.A.C. 4A:4-1.10, which would provide for the review and approval by the Department of Personnel of all initial and subsequent appointments, promotions and related personnel actions, constitutes a substantive change in policy.

RESPONSE: The change in wording clarifies current policy that the Department of Personnel's authority to review all appointments is not limited to open competitive and promotional appointments.

COMMENT: Mr. Stevens commented that a new subsection (a) should be added to N.J.A.C. 4A:4-1.11(a) to state the following: "Appointing authorities in State service shall establish procedures to determine the need to retain positions vacated by retirement. Such procedures will determine whether a position is filled at its current level and in consent with the Department of the Treasury's Office of Management and Budget in its present organizational unit. If the position is reassigned to accommodate other needs of the appointing authority, or the account number is changed; and if the appointing authority is filled at a lower level, the position is kept vacant, or if the position is abolished, the position is exempt from the vacancy review process."

He further suggested that N.J.A.C. 4A:4-1.11(a)4 be amended to state that the Vacancy Review Board may determine that the position at issue be abolished only if funds lapse to the State Treasury. Gregory B. Vida, Director of Human Resources at the DCA, commented that N.J.A.C. 4A:4-1.11(a) should state that the Vacancy Review Board "shall have the power to . . ." rather than "shall review all positions. . ."

RESPONSE: The Board notes that the operations of the Vacancy Review Board are currently under review. For this reason, substantive changes to N.J.A.C. 4A:4-1.11 are not advisable until completion of this review.

COMMENT: Mr. Stevens commented that N.J.A.C. 4A:4-2.1(d) should be changed to permit, rather than require a promotional examination to be reannounced if the test has not been held within one year of the closing date. He also stated that the rule's current language does not appear to comport with actual practice.

RESPONSE: This subsection was added to the rules a few years ago, in response to an individual petition to address the infrequent situation where a promotional test is not held within one year of the closing date. In such situations, the Board believes that an equitable solution is to reannounce the examination so that additional individuals can compete for promotion. The Board does not believe that this policy should be changed at this time.

COMMENT: Mr. Stevens further commented that N.J.A.C. 4A:4-2.5(a)1 should be amended to allow substitution of college credits in the required area of specialization for the degree itself if, within 18 months of appointment, the individual completes the remaining courses required for the full degree.

RESPONSE: The Board notes that educational requirements are set for each title on an individual basis. Modification of such requirements should also be considered on a title-by-title basis, not through a blanket change in the rules. Therefore, the Board does not agree that N.J.A.C. 4A:4-2.5(a)1 should be changed in this manner.

COMMENT: Mr. Stevens also proposed that a new N.J.A.C. 4A:4-2.5(a)4 be added to state the following: "It is the responsibility of the applicant to have all documentation of degree(s) and/or credit(s), as required in the examination posting, at the time of the certification interview. Failure to present the required documentation will result in the individual being denied appointment from the certification list in question. Notices of certifications will state this requirement." Mr. Stevens stated that this proposal would help expedite the certification process.

RESPONSE: The Board agrees that it is the responsibility of the applicant to bring all documentation of educational requirements to the

interview. However, such interviews are scheduled and arranged by the appointing authority. Therefore, the Board believes that appointing authorities are in the best position to notify applicants concerning documentation they must bring to the interview.

COMMENT: Mr. Stevens suggested that N.J.A.C. 4A:4-2.5(b) include a new subparagraph to permit promotions to be open to noncompetitive titles deemed appropriate by the appointing authority and the Department of Personnel.

RESPONSE: The Board does not believe that it is necessary to allow for a further broadening of promotional eligibility from the noncompetitive (NC) to the competitive divisions. The proposed language is designed to further merit selection principles.

COMMENT: Sherryl Gordon, Executive Director of the American Federation of State, County and Municipal Employees (AFSCME), Administrative Council 1, commented that the Merit System Board should clarify the purpose for the proposed change to N.J.A.C. 4A:4-2.5(d), concerning promotions from the noncompetitive division to the competitive division.

RESPONSE: The Board believes that the purpose of these amendments is to conform the rules to current practice concerning promotion from the NC to the competitive division. First, the rule recognizes that the NC division includes titles that are above entry level, so promotion to related, above entry level competitive titles is appropriate. The rule also recognizes that competitive division employees should also be allowed to compete when the promotional title is in a higher class code.

COMMENT: Mr. Stevens commented that the word "related" should be deleted from N.J.A.C. 4A:4-2.5(d). Mr. Stevens also commented that the language "and possessing the complete open competitive requirements" should be deleted from N.J.A.C. 4A:4-2.5(d)1 and (d)2. He stated that, if the purpose of the amendment is to expand the promotional rights of noncompetitive employees, the requirements for these employees should be the same as those in the competitive division. Mr. Stevens further asked why the lateral movement of an employee from the noncompetitive to the competitive division should be considered a promotion, as provided in N.J.A.C. 4A:4-2.5(e).

RESPONSE: The Board does not believe that the distinctions between the competitive and NC divisions should be eliminated entirely. Individuals in the NC division did not attain their positions through competitive examination. Thus, while it is appropriate to provide opportunity for promotion to the competitive division, it would undermine merit system principles to allow promotion on exactly the same basis as competitive division employees.

COMMENT: Gregory B. Vida, Director of Human Resources at the DCA, commented that N.J.A.C. 4A:4-2.6(a)3 should require that an employee receive only one PAR rating of a 4 or a 5 to be disqualified from taking a promotional examination, rather than two such consecutive ratings. He stated that an employee who has received one such final rating has been counselled every three months and has had an unsatisfactory interim rating and improvement plan.

RESPONSE: The rule linking PAR ratings and promotional eligibility was adopted in its present form very recently (January 19, 1993). The Board prefers to wait until some experience has been gained under the new rule before considering any changes.

COMMENT: Mr. Stevens proposed that N.J.A.C. 4A:4-2.6(c) be amended to allow the consideration of out-of-title work in a promotional situation because of the "operational necessity of the appointing authority to assign duties prior to the date of actual appointment, due to reorganization or temporary freezes on personnel actions."

RESPONSE: The Board notes that the current rule does not limit the situations where good cause may be found for crediting out-of-title work. Thus, the situation cited in Mr. Stevens' proposed amendment may be covered by the current rule, depending upon the particular situation.

COMMENT: Sherryl Gordon, Executive Director of AFSCME, Administrative Council 1, expressed concern that proposed changes to N.J.A.C. 4A:4-2.9(a)2 and (b)1, which provide for an examination candidate's submission of a doctor's certification to support the need for a makeup examination. Ms. Gordon stated that the doctor's certification could reveal a disability which could be used against the candidate, even inadvertently, in violation of the Americans with Disabilities Act (ADA). The rule should be amended, she further commented, to provide for the confidentiality of any such certification which would be used by the Office of Selection and Placement for examination purposes only.

RESPONSE: The Board believes that confidentiality of a doctor's note supporting a request for a make-up examination is already provided under N.J.A.C. 4A:4-2.16.

COMMENT: Mr. Stevens proposed that N.J.A.C. 4A:4-2.10 include a new subsection to state that, "in expanded education and experience questionnaires, the eligibles will be required to assemble and to receive instructions from a Department of Personnel monitor as to the completion of the questionnaire prior to taking the unsupervised possession of the questionnaire." Mr. Stevens stated that this amendment would ensure that all candidates receive the same instructions and promote the validity of the testing process.

RESPONSE: Unassembled examinations are designed to be conducted without arranging a test site, scheduling candidates, and assigning a monitor. The Board believes that the proposed amendment would add substantially to the cost of test administration.

COMMENT: Mr. Stevens also commented that a new subsection (f) should be added to N.J.A.C. 4A:4-2.17 to provide for the following exceptions to the nonrefundability of the examination application fee: 1. Where service of the affected title changes after the announcement and prior to the list promulgation; 2. Where the appointing authority can no longer make the appointment because of a hiring freeze in State service of the abolition of a title; 3. When the provisional appointee retires and the position is abolished, the work location has changed or has been reclassified based on Vacancy Review Board or appointing authority action; 4. Other sufficient causes as deemed by the Commissioner of Personnel.

RESPONSE: The Board notes that the fee is intended to defray the costs associated with processing applications and conducting examinations. These costs would be incurred by the Department of Personnel in all of the situations described in Mr. Stevens' proposed amendment. Further, if a list is not used for one title, it may be found appropriate for another title under N.J.A.C. 4A:4-4.3.

COMMENT: Mr. Stevens also commented that N.J.A.C. 4A:4-3.1(a)5 should be amended to provide for a special reemployment list to include former and current permanent employees who were laid off, laterally displaced "to a new work location" or demoted in lieu of layoff. Mr. Stevens stated that, without a new work location, the laterally displaced employee should not have reemployment rights.

RESPONSE: Special reemployment rights for laterally displaced employees are set forth in another rule, N.J.A.C. 4A:8-2.3. According to the latter rule, special reemployment rights are available to those displaced by title as well as work location. Therefore, it would be inconsistent with N.J.A.C. 4A:8-2.3 to make the change suggested by Mr. Stevens. However, the Board would be interested in examining this issue when N.J.A.C. 4A:8 is under review for readoption.

COMMENT: Mr. Stevens also suggested that a new subsection (b) be added to N.J.A.C. 4A:4-3.5 to note that the consolidation of eligible lists under subsection (a) would not reduce the opportunity for appointment by a provisional employee serving at the time of consolidation.

RESPONSE: The Board notes that it has never been the policy of the Department of Personnel to give provisional appointees an advantage in the selection process. Therefore, the Board does not believe that the amendment proposed by Mr. Stevens should be adopted.

COMMENT: Abby Demel-Brown, President of CWA Local 1031, commented at the hearing that she was opposed to a proposed amendment, N.J.A.C. 4A:4-3.7(c). She stated that this proposed section is inconsistent with State college autonomy law which was not intended to change the terms and conditions of employment for State college employees when it was enacted in 1986. She commented that assurances were forthcoming from the then Commissioner of Personnel, the then Chancellor of Higher Education and certain legislators that affected employees would continue to have the same rights as other State employees. She recounted that, commencing in 1991, State colleges interpreted their autonomous status to mean that layoff rights were limited to each college, as opposed to being the entire Department of Higher Education. She stated that the proposal would codify this interpretation. She urged the Merit System Board not to adopt the proposed rule section. To illustrate her position, she submitted a copy of a brief filed on behalf of the union in *In the Matter of the Department of Higher Education—Layoff Rights for Career Service Personnel,* Docket No. A-6412-91T3, an Appellate Division matter.

Denice Hunt, a Shop Steward for CWA Local 1031, commented at the hearing that employees were not given layoff rights to the State colleges from where they worked in the Department of Higher Education, and therefore sustained large salary losses.

RESPONSE: The proposed amendments to N.J.A.C. 4A:4-3.7 are intended to conform the rule to current practice, whereby an autonomous agency is equivalent to a department for purposes of priority of special

reemployment lists. New subsection (c) would provide a definition of "autonomous agency" which is consistent with existing rules on layoffs. See N.J.A.C. 4A:8-1.5(a) and 4A:8-2.1(c)1i. Based on Attorney General advice, the Department of Personnel considers each State college as an autonomous agency for layoff purposes. Therefore, the Board believes that the amendments to N.J.A.C. 4A:4-3.7 would simply make this rule consistent with existing rules and practice governing layoffs.

COMMENT: Mr. Stevens commented that N.J.A.C. 4A:4-4.1(b) should state that a certification should only be issued against provisionals and conditional appointees.

RESPONSE: The current language of N.J.A.C. 4A:4-4.1(b) is deliberately broad to allow the Department of Personnel flexibility in determining whether to issue a certification. Therefore, the Board does not believe that the limiting language proposed by Mr. Stevens should be adopted.

COMMENT: Mr. Stevens also commented that N.J.A.C. 4A:4-4.6(b) should be clarified to state that an eligible returning from military duty who completes the working test will have the regular appointment date originally designated.

RESPONSE: The Board believes that Mr. Stevens' suggestion for clarification of N.J.A.C. 4A:4-4.6(b), concerning eligibles on military leave, is valid. However, this would be considered a substantive change requiring additional public notice and opportunity for comment. Therefore, this proposal should be reviewed further by the Department of Personnel before the Board considers it.

COMMENT: Mr. Stevens further commented that N.J.A.C. 4A:4-4.7(a) be amended to provide for the removal of an eligible's name from a list if an eligible for a law enforcement position or other position requiring drug screening results in a confirmed, positive drug test.

RESPONSE: Current rules on removal of names from an eligible list and examination disqualification already provide support for the removal of an eligible's name from a law enforcement list due to results of drug testing. See N.J.A.C. 4A:4-4.7(a)1 and (a)11, 4A:4-6.1(a)3 and (a)9. *In the Matter of Rochelle D. Harris, Correction Officer Recruit.* 2:3 MSR 5 (Merit System Board, decided November 1, 1989). Thus, the Board believes that the amendments to these rules proposed by Mr. Stevens are unnecessary. Further, the suggested amendments refer to positions other than law enforcement requiring drug testing, but do not specify which positions are involved.

COMMENT: Mr. Frazee expressed support for the proposed new N.J.A.C. 4A:4-5.3(d), which will enable appointing authorities to keep working test period paperwork on file rather than forward it to the Department of Personnel.

RESPONSE: The Board appreciates Mr. Frazee's favorable response to this proposal, which it intends to adopt.

COMMENT: Sherryl Gordon, Executive Director, AFSCME, Administrative Council 1, expressed opposition to the proposed new N.J.A.C. 4A:4-5.3(d)3, stating that an appointing authority does not need to retain working test period progress reports and related material for seven years following an employee's separation from State service, because the appointing authority could use that information in response to an inquiry from a prospective employer.

RESPONSE: The Board understands that record retention schedules of the State Records Commission require that former State employees' records be maintained for six years after separation. This requirement applies to records maintained by the appointing authority as well as those maintained by the Department of Personnel. The Department has revised the rule upon adoption to reflect the scheduled retention. Confidentiality requirements with respect to such records are governed by N.J.A.C. 4A:1-2.2.

COMMENT: Mr. Stevens commented that N.J.A.C. 4A:4-6.1(a) should provide that a candidate for a law enforcement position or any other position requiring drug screening may be denied eligibility or appointment because of a confirmed, positive drug test. Mr. Stevens also suggested that a candidate also be disqualified for failure to follow other application procedures.

RESPONSE: As noted above, current rules on removal of names from an eligible list and examination disqualification already provide support for the disqualification about which Mr. Stevens is concerned. The Board regards Mr. Stevens' suggestion, therefore, as unnecessary.

COMMENT: Mr. Frazee asked concerning the proposed amendments to N.J.A.C. 4A:4-7.5(b) whether the supervisor in the old or new appointing authority would be evaluating the employee's working test period performance.

RESPONSE: The supervisor in the former organizational unit would be responsible for the progress report if the employee has served in that unit for at least two months, in the case of a 12 month working test period. See N.J.A.C. 4A:4-5.3. The supervisor in the new unit would be responsible for the final report.

COMMENT: Mr. Stevens expressed opposition to the proposed amendment to N.J.A.C. 4A:4-7.6(a)3. He stated that the class code governs promotions rather than the competitive or noncompetitive division.

RESPONSE: The Board believes that this provision is consistent with longstanding rule and policy that movement from the noncompetitive to the competitive division is always considered a promotion for examination purposes, even if the titles have the same class code in State service. Therefore, the Board does not agree that this provision be deleted, as suggested by Mr. Stevens.

COMMENT: Sherryl Gordon, Executive Director, AFSCME, Administrative Council 1, suggested that the proposed N.J.A.C. 4A:4-7.8(b)1 should be amended to state that permanent continuous service in all previously held titles should be aggregated for seniority purposes.

RESPONSE: The rule as proposed would make seniority rights with respect to voluntary demotions consistent with those applicable to demotions in lieu of layoff. The Board believes that enlarging seniority rights as suggested by Ms. Gordon would give an undue advantage to voluntary demotions.

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

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

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.

4A:4-1.6 Interim appointments

(a) When an appointing authority makes an appointment to a specific position in State service or a specific title in local service, an interim appointment shall be made where the position/title is held by a permanent employee who:

1. Is on a leave of absence *[for more than six months]*;
2. Is on indefinite suspension; or
3. Has been removed or demoted for disciplinary reasons and is awaiting final administrative action by the Merit System Board on appeal.

(b) When an appointing authority does not make an appointment in the situations listed in (a) above, the appointing authority shall reserve a position/title for the absent employee as a vacant position/title.

(c) Any interim appointment shall remain in effect only during the period of time that the permanent employee is on an approved leave of absence, on indefinite suspension or awaiting final administrative action of the Merit System Board on the appeal of a disciplinary demotion or removal.

1. At the end of the interim appointment, the appointee shall return to his or her permanent title.

(d) An interim appointee shall possess the minimum qualifications for the title.

(e) If a complete eligible list exists for the title, the interim appointment shall be made from that list *[through applicable certification procedures. It is the responsibility of the appointing authority to request the appropriate type of certification]*. An interim appointee's name shall remain on the eligible list for consideration for permanent employment.

(f) An interim appointee shall continue to accrue seniority in his or her permanent title.

(g) The layoff rights of an interim appointee shall be determined from his or her permanent title. See N.J.A.C. 4A:8-2.

(h) The appointing authority shall advise interim appointees of their rights under an interim appointment. See N.J.A.C. 4A:4-4.7 for effect on permanent appointment rights.

4A:4-1.7 Temporary appointments

(a) The Commissioner may approve temporary positions 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 established as a result of a short-term grant.

(b) A temporary appointee shall meet the minimum qualifications for the title.

(c) See N.J.A.C. 4A:4-4.7 for effect on permanent appointment rights.

(d) Consecutive temporary appointments in excess of the periods set forth in (a) above are prohibited.

4A:4-1.10 Approval of appointments by Department of Personnel

(a) All initial and subsequent appointments, promotions, and related personnel actions are subject to the review and 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)-(h) (No change.)

(i) See N.J.A.C. 4A:4-2.17 for application processing fee procedures.

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 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.

(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.

(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 in any competitive title; or

2. Serving in all related noncompetitive titles or in any competitive title.

(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, with or without a clause to substitute experience for education;

2. Para-professional, which requires at least 60 general college credits or 12 or more specific college credits (but less than a full degree), with or without a clause to substitute experience for education; 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 as listed in (a) above, the examination, with or without all or part of the open competitive requirements, as appropriate, shall be open to permanent competitive division employees serving in 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. The next lower in-series title, if one exists, and all other competitive division titles at specified class code levels below the promotional title. See N.J.A.C. 4A:1-1.3 for definition of class code.

3. The next lower in-series title, if one exists, and all other permanent competitive division employees who meet the complete open competitive requirements.

4. To related titles, pursuant to an established plan approved by the Commissioner.

5. In extraordinary circumstances, the Commissioner may set another appropriate title scope.

(c) When a promotion is between categories as listed in (a) above, the examination shall be open to permanent competitive division employees currently serving in the announced unit scope and who meet one of the following criteria:

1. All applicants who meet the complete open competitive requirements;

2. All applicants who are permanent in a bridge title or titles approved by the Commissioner and who meet the complete open competitive requirements. A bridge title is one which is recognized by the Department of Personnel as related to a higher category title in terms of work performed and knowledge, skills and abilities required;

3. All titles that are in the same category as the announced title and that are in specified class codes below the announced title, including the next lower in-series title if one exists, with or without all or part of the open competitive requirements, as appropriate, and all applicants as described in (c)2 above; or

4. In extraordinary circumstances, the Commissioner may set another appropriate title scope.

(d) When a promotion is to be made from the noncompetitive division to a related title in the competitive division, the examination shall be open to all permanent employees who meet one of the following:

1. Serving in the next lower or next two lower in-series noncompetitive titles and possessing the complete open competitive requirements;

2. Serving in all related noncompetitive titles and possessing the complete open competitive requirements;

3. All competitive division titles at specified class code levels below the announced title, with or without all or part of the open competitive requirements, and all titles as described in (d)1 or 2 above;

4. Competitive division employees who meet complete open competitive requirements and all titles as described in (d)1 or 2 above; or

5. In extraordinary circumstances, the Commissioner may set another appropriate title scope.

(e) The movement of a permanent employee in the noncompetitive division to a related title in the same category and with the same class code in the competitive division shall be considered a promotion for purposes of this subchapter. The title scope of the examination shall be established as set forth in (d) above.

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. Have one year of continuous permanent service for an aggregate of one year immediately preceding the closing date in a title or titles to which the examination is open. Aggregate service shall be calculated in the same manner as seniority as set forth in N.J.A.C. 4A:4-2.15.

2. Be currently serving in the announced unit scope in a title to which the examination is open and meet all other requirements contained in the announcement. If an examination announcement is amended, all requirements must be met by the announced closing date whether or not the application filing date is changed;

3. Have not received a Performance Assessment Review (PAR) final rating of a Four, Marginally Below Standards, or Five, Significantly Below Standards (or equivalent in an approved local service evaluation program) in each of the two rating periods immediately preceding the announced closing date; and

4. 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.

(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.

(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 separated or displaced as a result of layoff and who subsequently return to a title and unit scope 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 reason 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 a factor.

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. Unless the examination notice states otherwise, 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 15 minutes after the designated time.

2. 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, except for police and fire promotional examinations under (b) below, 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) For police and fire promotional examinations, make-up examinations may be authorized only in cases of:

1. Debilitating injury or illness requiring an extended convalescent period, provided the candidate submits a doctor's certification containing a diagnosis and a statement clearly showing that the candidate's physical condition precluded his or her participation in the examination;

2. Death in the candidate's immediate family as evidenced by a copy of the death certificate; or

3. A candidate's wedding which cannot be reasonably changed as evidenced by relevant documentation.

(c) 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.

(d) 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.

(e) Make-up examinations will be administered to the extent possible under the same conditions as the original examination.

(f) 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.

(g) All candidates taking make-up examinations, except physical performance examinations, 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.

(h) In extraordinary circumstances, such as an examination that 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. In such cases, candidates will be so notified at least 45 days prior to the date of the examination. The only exception will be documented error on the part of the Department of Personnel or appointing authority, in which case a make-up may be granted if practicable.

4A:4-2.10 Conduct and security of examinations

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

(d) See N.J.A.C. 4A:4-2.6 on confidentiality of examination records.

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 set by the announced closing date for the examination.

1. When an appointing authority requires residency as of the date of appointment, residency must be continuously maintained from the closing date up to and including the date of appointment. See N.J.A.C. 4A:4-4.7(a)7.

(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:4-2.14 Accommodation and waiver of examinations for disabled persons

(a) Otherwise qualified applicants who have a disability 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 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.

(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) Candidates for State service promotional examinations shall receive credit for the final Performance Assessment Review (PAR) rating on file in the candidate's personnel office as of the announced closing date for the rating period immediately preceding the announced closing date.

1. Credit shall be awarded as follows:

i. Three points for Significantly Above Standards;

ii. Two points for Exceeds Standards; or

iii. One point for Meets Standards.

2. When there is no final rating on file for a candidate as of the announced closing date, the rating for that period shall be deemed Meets Standards and credit shall be given for that rating.

3. Performance ratings shall not be used as a scoring factor in promotions when the supervisor who completes a performance rating for a subordinate or acts as a reviewer for a subordinate's rating competes in the same promotional examination as the subordinate.

(d) In calculating seniority for promotional examinations, the following types of leaves shall not be deducted from seniority:

1. All leaves with pay including sick leave injury (SLI):

2. Military, educational, gubernatorial appointment, personal sick, disability, family and voluntary alternative to layoff leaves of absence without pay; and

3. In local service, leave without pay to fill elective office.

(e) Suspensions, other leaves of absence without pay not identified in (d) above, and any period an employee is laid off shall be deducted when calculating seniority.

1. In local service police and fire examinations, credit for record of service will be reduced by disciplinary suspensions received during the five year period immediately preceding the announced closing date.

(f) Employees reappointed from a special reemployment list shall be considered as having continuous service for seniority purposes. However, the elapsed time between the layoff or demotion in lieu of layoff and reappointment shall be deducted from the employee's seniority.

(g) When a municipality has a volunteer fire company and paid positions are created, any volunteer firefighter who has actively served for at least two years is entitled to service credits in addition to his or her earned examination score. The highest possible score for examination performance shall be 90 percent to which the service credit shall be added. Service credits shall be not less than three nor more than 10, and shall be added only to a passing score. The service credit shall be calculated by adding one point to the number of years of service: for example, add three points for two years of service, four points for three years of service, and so on. Any service time in excess of nine years shall be awarded the 10 point maximum.

(h) Ties in final earned ratings shall not be broken.

4A:4-2.17 Application processing fees

(a) A $5.00 processing fee shall be charged for each open competitive and promotional examination application.

(b) The fee shall be paid by check or money order, made payable to NJDOP, which shall be submitted with the application.

(c) Applications received without a fee shall not be processed unless the applicant submits, within the time required by written notice from the Department of Personnel, the required fee or, for open competitive applications, proof of exemption as described in (d) below.

(d) An applicant for an open competitive examination will be granted a waiver of the fee if the applicant provides documentation showing that, as of the closing date, he or she is receiving General Assistance benefits, Aid to Families with Dependent Children, or Supplemental Security Income. Proof must consist of one of the following:

1. General Assistance—a copy of the applicant's benefits identification card (if one was issued) or a letter from the applicant's local municipal welfare director.

2. Aid to Families with Dependent Children—a copy of the applicant's identification card which shows the case number.

3. Supplemental Security Income—a copy of the applicant's latest annual award letter or proof of the applicant's Medicaid identification number for S.S.I. benefits.

(e) The fee is for processing purposes only and does not guarantee admittance to an examination or appointment to a position. The fee shall not be refunded for any reason except untimely filing of the application or cancellation of the examination.

1. The fee shall not be refunded when the cancellation is due to the lack of eligible applicants ("no admits") or when no eligible applicant appears for testing ("no show").

2. When an examination is cancelled at the request of the appointing authority, the appointing authority shall reimburse the Department of Personnel for fees refunded to applicants.

4A:4-3.2 Order of names on eligible lists

(a) The order of names on an open competitive list shall be as follows:

1. When an announcement is open to more than one local jurisdiction, the resulting list of eligibles shall be separated into sub-lists by the residency requirements as provided by applicable law and ordinance.

2. Within each sub-list as provided in (a)1 above, the order of names shall be:

i. Eligibles entitled to disabled veterans preference in order of their scores;

ii. Eligibles entitled to veterans preference in order of their scores; and

iii. Non-veteran eligibles in order of their scores.

3. Eligibles who receive the same score shall have the same rank. See N.J.A.C. 4A:4-4.2(c).

4. 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:4-3.7 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 or autonomous agency 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 or autonomous agency 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.

(b) Reinstatement of a permanent employee following disability retirement shall have priority over appointment from any eligible list, except a special reemployment list. See N.J.A.C. 4A:4-7.12.

(c) For purposes of this section, an autonomous agency in local service is one which, by statute, is a body corporate and has the powers of an appointing authority. In State service, an autonomous agency is one which, by law, is in but not under the supervision of a principal department.

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, except when the eligible has accepted a temporary or interim appointment in another unit scope. An employee who subsequently returns to the 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.

(f) Acceptance or refusal of a temporary or interim appointment shall not be cause for removal from an eligible list.

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.-2. (No change.)

3. Appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, provided that:

i.-ii. (No change.)

iii. See N.J.A.C. 4A:4-2.15(h) for tie scores.

(b)-(e) (No change.)

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 should be submitted to the Department of Personnel at least five working days before the end of the four month period. The appointing authority shall notify the employee of the extension in writing on or before the last day of the four month period.

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. 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. However, major disciplinary procedures applicable to employees serving in a working test period (see N.J.A.C. 4A:2-2) shall also be applicable to such officers from the date of appointment until completion of police training. Upon successful completion of the working test period, the date of appointment from the eligible list shall be recorded as the date of regular appointment.

i. Law enforcement officers who have successfully completed the police training course prior to appointment shall begin their working test on the date of regular appointment.

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.

1. A paid leave of absence for a correction officer or juvenile detention officer for the purpose of training required by N.J.S.A. 52:17B-68.1 shall not extend the length of the working test period unless the course in which the appointee is enrolled is scheduled to end after the one year period.

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.

(d) In State service, the appointing authority shall:

1. Retain all reports for an employee in his or her individual personnel file;

2. When an employee is being separated or returned to his or her permanent title due to unsatisfactory performance, submit to the Department of Personnel, within five days following the last day of the working test period, copies of all progress reports and the final report and the written notice of separation or return to his or her permanent title;

3. Retain all progress reports and related material for the length of an employee's service and for *[seven]* ***six*** years following his or her separation from State service, if applicable; and

4. Retain for auditing any other records so identified by the Department of Personnel.

(e) In local service, the appointing authority shall furnish working test period progress reports to the Department of Personnel upon request.

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 unifit 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;

8. Has failed to pay the required application processing fee in a timely manner, or for open competitive examination, has failed to provide documentation of exemption from the application processing fee in a timely manner; or

9. 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:4-6.5 Medical and/or psychological disqualification appeals

(a) An appointing authority may request that an eligible's name be removed from an eligible list due to disqualification for medical or psychological reasons which would preclude the eligible from effectively performing the duties of the title.

1. (No change.)

2. The appointing authority submission shall include a finding that the eligible is not qualified due to medical or psychological reasons for the title. A removal request may be denied where such professional report and recommendation is not provided. See (f) below for report requirements.

3. (No change.)

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

(e) The appellant may submit to the Merit System Board a report from a New Jersey licensed physician, psychologist or psychiatrist of his or her own choosing. The appellant shall furnish the appointing authority with copies of all submissions to the Merit System Board. See (f) below for report requirements.

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

4A:4-7.3 Relocation assistance: State service

(a) Subject to available appropriations, the Commissioner may allow relocations assistance for permanent employees who are transferred or reassigned on a permanent basis to a new work location due to a relocation of an office or unit, or 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 requested, 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:4-7.5 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, or the exercise of lateral displacement rights in the course of layoff procedures.

(b) An employee who is permanently transferred during the working test period due to a combining of functions or operations or the exercise of lateral displacement rights shall be permitted to complete 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 title to an equivalent 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.

3. In State service, a lateral title change from the noncompetitive to the competitive division is considered a promotion. See N.J.A.C. 4A:4-2.5(e).

(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 for 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, if the new title is in the competitive division, 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 furhter employment.

1. Examination procedures shall be waived, permanent status retained, and aggregate seniority granted, if the employee has previously held the title on a permanent basis during current continuous service. See N.J.A.C. 4A:8-2.4(e).

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 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 Personnel except when the title change results from changes in the Department of Personnel Classification Plan, reclassification of the employee's position, or a pre-layoff action agreed to by affected negotiations representatives and approved by the Commissioner.

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 a lower related title. See N.J.A.C. 4A:8-2.1(b) for criteria on determining related titles.

1. When the demotion is to any title previously held on a permanent basis during current continuous service, permanent status shall

be retained. All permanent continuous service in the previously held title shall be aggregated for seniority purposes.

(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 during or upon successful completion 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. 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.

(c) The new appointing authority shall inform the employee of his or her effective resignation of permanent status prior to the employee's new appointment.

COMMUNITY AFFAIRS

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Notice of Administrative Correction
Uniform Fire Code
General Precautions Against Fire
N.J.A.C. 5:18-3.3

Take notice that the Department of Community Affairs has discovered an error in the publication of the adopted amendments to N.J.A.C 5:18-3.3(w) appearing in the May 3, 1993 New Jersey Register at 25 N.J.R. 1868(a). As explained in response to first comment in the notice of adoption, and as depicted in the original notice of adoption filed with OAL for publication, R.1993 d.197, the phrase "and portable heat producing" in subparagraph (w)1i should have been deleted upon adoption. That deletion is effected by this notice of administrative correction, published pursuant to N.J.A.C. 1:30-2.7.

Full text of the corrected rule follows (deletion indicated in brackets [thus]):

5:18-3.3 General precautions against fire

(a)-(v) (No change.)

(w) The following apply to rooming and boarding houses:

1. Every rooming and boarding house shall have rules prohibiting the activities listed in (w)1i and ii below, which shall be accepted in writing by every resident as a condition of residency.

i. The use of cooking and food warming [and portable heat producing] devices, other than microwave ovens, is prohibited in rooming units.

ii. Smoking is prohibited in rooming units.

(b)

DIVISION OF HOUSING AND DEVELOPMENT

Uniform Construction Code
Asbestos Hazard Abatement Subcode
Adopted Amendments: N.J.A.C. 5:23-2.17, 8.1 and 8.2
Adopted Recodification with Amendments: N.J.A.C. 5:23-8.3 through 8.11, 8.13 through 8.20, and 8.22 through 8.24
Adopted New Rule: N.J.A.C. 5:23-8.19
Adopted Repeals: N.J.A.C. 5:23-8.12 and 8.21

Proposed:April 20, 1992 at 24 N.J.R. 1422(a).

Adopted: April 12, 1993, by Stephanie R. Bush, Commissioner, Department of Community Affairs.

Filed: April 12, 1993 as R.1993 d.198, **with substantive and technical changes** not requiring additional public notice and comment.

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

Effective Date: June 17, 1993.

Expiration Date: February 3, 1998.

Summary of Public Comments and Agency Responses:

Comments were received from: Asbestos Safety Control Monitors Association, Atlantic Environmental Incorporated, Dennis E. Bowes, CCE, Cynosure Consultants, Inc., Environmental Concepts, Environmental Mediation and Management, G.A. Environmental Services, Joe Miller, Newark Housing Authority, New Jersey Association of Designated Persons, New Jersey Catholic Conference, New Jersey Department of Health, New Jersey Health Officers Association, Northeastern Analytical, Oil, Chemical and Atomic Workers International Union, PKM, Inc., P T & L Environmental Consultants, Powell Environmental Services, Inc., Steve Powell, Princeton University Counsel, Resilient Floor Covering Institute, and the White Lung Association of New Jersey.

Summary of Hearing Officer Recommendations and Agency Responses:

A public hearing on the proposed amendments to subchapter 8 was held on May 11, 1992 at the Department of Community Affairs, 101 South Broad Street, Trenton, New Jersey. Charles Decker, Assistant Director, Division of Codes and Standards, Department of Community Affairs presided at the hearing. The hearing officer received testimony. He did not make comment and makes no recommendations. For a review of the transcript of the public hearing, contact Michael L. Ticktin, Department of Community Affairs, CN 802, Trenton, NJ 08625.

General Comments

The Department has amended the references to fees to reflect the fee increases adopted at 24 N.J.R. 3521(b) effective October 5, 1992. See N.J.A.C. 5:23-8.4(c) (from former 8.6(a)1i, 8.10(c)); (from former 8.19(i); and 8.11(h)1 and 3); (from former 8.18(h)1 and 2).

COMMENT: Although the use of spray poly should be allowed, it may lead to increased indoor air quality complaints (per N.J.A.C. 5:23-11). Therefore, off-gassing should be required before work begins.

RESPONSE: To ensure the safe and correct use of materials, subchapter 11 requires that manufacturer's instructions be followed.

COMMENT: Local officials do not know that they can grant variances. They need to be better informed about subchapter 8.

RESPONSE: Construction officials cannot grant variances from subchapter 8 except upon the recommendation of the ASCM firm which is responsible for technical evaluations. The Department offers a course in subchapter 8 as a part of its continuing education requirement. In addition, Department staff is available to construction officials for technical assistance.

COMMENT: There is a basic lack of fire protection requirements.

RESPONSE: The construction official is responsible for ensuring egress and fire retardant enclosures in occupied buildings. Egress in unoccupied buildings is not part of this proposal. The Department will look into this further and welcomes comments. Worker safety is to be provided in conformance with OSHA regulations. The Department has clarified the issue of combustibility in this adoption at N.J.A.C.

5:23-8.15(e)4 and 8.19(c)1 by adding a reference to the Building Subcode requirements for fire-rated materials which apply to these projects.

Conflict of Interest

COMMENT: This proposal contains the appearance of a confict of interest. One of the Ad Hoc Committee members holds a patent concerning pressure differential.

RESPONSE: The Department made it clear in the Summary statement of the proposal that the rules do not require the use of any particular patented system. The Uniform Construction Code (UCC) currently requires specified pressure differentials in smoke evacuation systems, stairwells, laboratories, and other building spaces in which public safety is provided by controlling the flow of air from one area to another. This approach is now being applied to asbestos hazard abatement to prevent the flow of contaminated air from the enclosed asbestos abatement work area to the remainder of the building.

Demolition—N.J.A.C. 5:23-2.17

COMMENT: The proposal requires that an asbestos hazard be abated prior to demolition to conform to NESHAP requirements. This requirement should include renovation work where the potential exposure is greater.

RESPONSE: This is a reasonable suggestion. An amendment will be made to include friable asbestos encountered in renovation work. This will appear as a proposal shortly.

Pressure Differential

COMMENT: Limit the pressure differential to 0.02 inches w.c. Buildings are not built to withstand negative pressure. At specified levels, walls and ceilings collapse. The decrease in pressure in basements, sub-basements, floors below grade, and pipe tunnels will increase the likelihood of water seeping through the walls. Additional equipment may be required in these areas to measure the presence of oxygen. Most abatement contractors are not geared for this.

COMMENT: The 0.05 in. w.c. may be too high to ensure the integrity of the poly. The NY standard of 0.02 in. w.c. is safe and effective. 0.10 in. w.c. is difficult to maintain and jeopardizes the integrity of the poly. Another commenter stated that 0.02 in. w.c. is the maximum that should be required.

COMMENT: Pressure differentials may be difficult to maintain. The Department should make a technical evaluation.

COMMENT: Testwell Craig performed tests on the integrity of barriers (primary and secondary). They concluded that greater than 0.04 in. w.c. adversely affects barrier integrity. Therefore, DCA should probably require 0.04 in. w.c. If the Department adopts the proposed standard, it should require an evaluation by a professional engineer of the capability of the structure to withstand increased negative air pressure differential.

COMMENT: There is a lack of published information demonstrating that 0.10 in. w.c. is any more protective than values 40 percent less. Pressure varies by ± 0.02 in. w.c. within the work area. Therefore, 0.06 in. w.c. should be used for pre-commencement and 0.04 in. w.c. should be used during abatement to provide protection by preventing fiber migration at much less cost.

RESPONSE: Because all of these comments address pressure differential levels, the Department will make one summary statement explaining the determinations that were made and the reasons for them.

This proposal is reasonable, necessary, and consistent with guidelines issued by the National Institute of Building Sciences (NIBS). Traditional asbestos hazard abatement projects assume that, with exhaust, a pressure differential of approximately 0.02 in. w.c. is maintained. This is not an absolute requirement because the pressure differential changes naturally with air flow within a building. The normal air flow is not harmful when an abatement project takes place when the building is empty because the workers wear protective equipment, the air is monitored, and the building is thoroughly cleaned before it is re-occupied. However, it is very important when an abatement project takes place in an occupied building because, then, as the air flows through the building, asbestos could travel with it and people could breathe it in. A positive control is required to prevent this from happening. The containment required by this regulation creates, in effect, a building within a building. The sealed space is larger than the work area, the make-up air must come from space other than occupied space, and the movement of air is always inward. The effect of a negatively pressurized work space is that air is prevented from moving from the negatively pressurized containment to the positively pressurized adjacent space. The work area is isolated from the area from which the make-up air is drawn and both these areas are isolated from the occupied areas of the building.

In a building of more than four stories, there are normal swings of air pressure that make it impossible to maintain one pressure differential level within the building. Therefore, it is necessary to isolate the work space and maintain the pressure differential within it, so that the project will not be adversely affected by the normal building swings. A pressure differential of 0.05 in. w.c. is the standard pressure differential. The load created by this pressure differential is miniscule in comparison with the loads that the building is designed and constructed to withstand. A pressure differential of 0.05 in. w.c. creates a pressure of .259 psf (pounds per square foot).

Air Exchanges

COMMENT: Air exchanges must be retained. They are the essential worker protection. They are the requirement on which OHSA regulations are based; without air exchanges, the respirator becomes the primary worker protection. DCA must be trying to accommodate ASCM firms. DCA should not soil its integrity by implying that clean air in the workplace is obsolete. If someone does not want to pay the GPAC patent fee, they should challenge the patent.

COMMENT: Air exchanges are not redundant. Pressure differential is a different concept. It is possible to have a high pressure differential and poor air flow. Smoke testing is inadequate and does not substitute for establishing the appropriate pressure differential.

COMMENT: The pressure differential requirement is more effective than four air exchanges per hour. The pressure differentials listed are more than sufficient. The four air exchanges per hour should be deleted.

COMMENT: Keep air exchanges.

RESPONSE: The Federal government has pre-empted the regulation of worker safety through its OSHA regulations. DCA has no authority to promulgate rules on worker safety. The Department retains the air exchanges in order to minimize problems that might occur in the event that containment fails.

Economic Impact Statement

COMMENT: The proposed regulations will increase the cost of asbestos abatement by a minimum of 40 percent due to the additional duties placed on the AST, the additional engineering controls required, and the requirement for TEM clearance.

RESPONSE: This proposal does not add duties for the AST. The AST section in the proposal is a combination of two existing sections which were combined for clarity. The proposal does not require a generic change to TEM clearance. Although this proposal seems to be adding engineering controls for abatement in occupied buildings, in fact this is simply a codification of existing state-of-the-art abatement procedures in an occupied building. These requirements were part of the variation process; now they are part of the subchapter itself. In addition, the AST's duties that have been part of an abatement project in an occupied building are now codified.

COMMENT: This statement does not consider the effect of the changes on schools. The cost of projects will increase significantly. The reversal of the 25 square/10 linear feet to 10 square/25 linear feet means that the abatement of more than 10 square feet of ceiling tile becomes a project; it used to be 25 square feet. This will impact cost.

RESPONSE: The Department has decided to retain the current requirement of 25 square/10 linear feet in order to maintain consistency with the regulations promulgated by the Department of Labor.

COMMENT: The deletion of minor/small/large abatement projects will require plans and specs for regular maintenance work. This will increase cost 25 percent to 30 percent.

RESPONSE: This proposal does not include new requirements for minor/small/large abatement projects. In the proposal, existing sections were re-named and those for which procedures existed but no permit was required were deleted.

COMMENT: The cost of containment will not be five percent of the job; it could be as high as 75 percent of job.

RESPONSE: The Department believes this is incorrect. The Department believes that the most significant cost associated with an abatement project is labor.

COMMENT: This is a public health code. Certain classes of individuals are protected under this code; others are not. This is not true of the rest of the UCC.

RESPONSE: This is not a public health code. DCA has no jurisdiction to promulgate a public health code. DCA does have the jurisdiction to

promulgate construction standards and to ensure building safety. This subchapter regulates asbestos hazard abatement in buildings, occupied and unoccupied.

N.J.A.C. 5:23-8.1 Title; scope; intent

COMMENT: In paragraph (c)2, reference is made to "public entity," but "public entity" is not defined.

RESPONSE: Words and terms that have a common understanding do not need definition in regulations. This is such a term.

COMMENT: The Department of Health does not have copies of the regulations. Regulations must be obtained from the Department of Labor. The Department of Health requests that its address be deleted from subchapter 8.

RESPONSE: The reference to the Department of Health and its address have been deleted from N.J.A.C. 5:23-8.1(a)1i.

COMMENT: The scope should be expanded to include private sector. All buildings should be covered, not just public buildings and schools.

RESPONSE: The Department agrees that the scope of the subchapter should be expanded. However, that expansion was not part of this proposal.

N.J.A.C. 5:23-8.2 Definitions

COMMENT: The definition of "operations and maintenance activity" should include a time limit as it did previously. Another commenter asked that the one year provision for "asbestos hazard abatement project" be retained.

RESPONSE: Upon reflection, the Department agrees that the time limit of one year is appropriate and has retained it.

COMMENT: "Authorized personnel" should read "having jurisdiction over," not "related to," the project.

RESPONSE: Language has been added that states that only contracted workers and regulators shall have access to the abatement project.

COMMENT: Authorized personnel should be required to have picture IDs from their agency.

RESPONSE: It is not within DCA's jurisdiction to establish requirements for workers. That is the Department of Labor's jurisdiction. DCA provides the AST's with picture ID's.

COMMENT: Clarify the definition of "enforcing agency."

RESPONSE: This is defined at N.J.A.C. 5:23-1.4 in the UCC and does not need to be repeated here.

COMMENT: Asbestos hazard abatement project should include "disturbance" as well as "removal, enclosure, encapsulation" of asbestos containing material (acm). This will conform with N.J.A.C. 5:23-8.6—"the following information shall be certified by architect or engineer: whether asbestos will be disturbed . . ."

RESPONSE: This is being addressed in the renovation section of the UCC (N.J.A.C. 5:23-2) which will be proposed for amendment.

COMMENT: NIOSH is "National Institute of Occupational Safety and Health."

RESPONSE: The correction has been made.

COMMENT: With flame resistant poly sheeting, six mil is more nominal than actual. Add the word "nominal." Also add "nominal" to the "polyethylene sheeting" definition.

RESPONSE: The word "nominal" has been added to each definition.

COMMENT: Add "permitted" employee to distinguish from the building owners' employees (N.J.A.C. 5:23-8.13).

RESPONSE: The distinction is clear in the context of the rules.

COMMENT: "Occupied building" should be clarified to prevent work when building is occupiable but empty (that is, nights and weekends).

RESPONSE: This does not need clarification. The Department has no objection to work taking place at night or on the weekends, as long as the clearances are met and building safety is ensured. This is included in the scope of work and the specifications for a particular job.

COMMENT: Clarify "operations and maintenance" to prevent dividing a large project into smaller projects. One commenter suggested the definition from N.J.A.C. 12:60; another commenter suggested using the definition from AHERA.

RESPONSE: The Department retained the one year provision to prevent dividing a large project into smaller projects. AHERA does not define operations and maintenance in terms of amounts of material. The rules for the Department of Health are N.J.A.C. 8:60; those for the Department of Labor are N.J.A.C. 12:120. They do not include a definition of operations and maintenance.

COMMENT: Strippable coating does not adhere "gently."

RESPONSE: "Gently" has been deleted.

COMMENT: Ten square feet/25 linear feet do not conform to NESHAP which sets 160 square feet and 260 linear feet as minimum regulatory limits.

COMMENT: Why were 10 square/25 linear feet changed from 10 linear/25 square?

RESPONSE: The Department had intended to conform to the proportions in the NESHAP requirements, but has decided to maintain consistency with the New Jersey Department of Labor rules.

COMMENT: The definition of separation barrier should include specifications.

RESPONSE: Specifications are not part of the definition; they are part of the regulation.

COMMENT: AHERA (Asbestos Hazard Emergency Relief Act) requires abatement for more than three square/three linear feet. The other projects should not violate this standard.

RESPONSE: The AHERA regulations identify the three square/three linear feet as a fiber release episode. It is not a project threshold and it would be inaccurate to apply it as such in this subchapter. Other projects, which are covered by subchapter 8, are not subject to the AHERA regulations through a decision of the U.S. Congress.

COMMENT: One commenter states that asbestos containing material (acm) outside of containment in glove bag area should be cleaned.

RESPONSE: The scope of work is defined by the owner. The permit is issued for a specific scope of work. The authority does not exist for a State agency to expand the scope of work determined by the building owner.

COMMENT: "260" linear feet should be deleted, not added.

RESPONSE: This typographical error in the "asbestos hazard abatement project" definition has been corrected.

COMMENT: Glove bag should not be limited to "damaged" acm.

RESPONSE: "Damaged" has been deleted.

N.J.A.C. 5:23-8.3 Enforcement: licensing; special technical services

COMMENT: Under paragraph (b)2, the subchapter is extending to contractors. The Department should inform contractors that this is the case.

RESPONSE: The subchapter has always applied to contractors who undertake subchapter 8 jobs. Any contractor who does not perform a subchapter 8 job in compliance with this subchapter should be reported to the Department of Labor as well as to the Department of Community Affairs.

N.J.A.C. 5:23-8.3(b)

COMMENT: A licensed contractor should not be required for removal of non-friable asbestos-containing material such as floor tile. Also, include "non-friable siding" and "roofing" in the list.

RESPONSE: It is within the jurisdiction of the Department of Labor to determine when a licensed contractor is needed.

N.J.A.C. 5:23-8.4 Variations

COMMENT: DCA should address problems with variances which are expensive and should not always be required.

RESPONSE: One purpose of this proposal is to reduce the number of variations by codifying state-of-the art requirements.

COMMENT: DCA should not continue to issue variations for occupancy. Local code officials lack the experience and expertise regarding occupancy during asbestos abatement.

RESPONSE: The Department believes that abatement in an occupied building should be codified. Construction officials issue variations only on the recommendation of the ASCM firm, which is responsible for technical evaluations.

N.J.A.C. 5:23-8.4(b)

COMMENT: This section requires the "appropriate fee." The fee should be defined and fixed as the same fee listed in N.J.A.C. 5:23-8.4(c).

RESPONSE: It is.

COMMENT: Retain 20-day response time for permit/variance applications.

RESPONSE: The 20-day limit is statutory and has not been changed.

COMMENT: The fee for a technical variation is too high and increases the cost of the project. Variances should be issued per building to eliminate the need for multiple variances for a project.

RESPONSE: One permit, one certificate of occupancy is required per building. For variances which require separate review and evaluation a separate fee is appropriate.

COMMENT: When the State of New Jersey is the building owner, the fee should be waived.

RESPONSE: This is not standard practice.

N.J.A.C. 5:23-8.4(d)

COMMENT: The regulations should require a letter of approval from US EPA. The EPA regulations do not allow for dry removal.

RESPONSE: The Department has deleted the subsection covering dry removal to conform to US EPA requirements.

N.J.A.C. 5:23-8.4(e)

COMMENT: The Department should retain the one year limit because it can take more than six months for a housing authority to get a change order approved and executed. Variances should be good until project is completed once project is started (unless the project is abandoned).

RESPONSE: The one year limit has been retained and the section has been amended to make the variations effective for 12 months.

N.J.A.C. 5:23-8.5 Construction permit for asbestos abatement

COMMENT: In paragraph (b)1, the type and amount of training for "properly trained maintenance and/or security personnel" should be given.

RESPONSE: Specifying the amount and scope of training is not within the scope of these rules.

N.J.A.C. 5:23-8.5(c)

COMMENT: State that only the ASCM firm under contract has jurisdiction over project. This will prevent harrassment by ASCM firm if terminated for non-performance or default.

RESPONSE: The language has been added to the definition section under "authorized personnel." An ASCM firm not under contract has no business on the site.

N.J.A.C. 5:23-8.5(d)

COMMENT: The language stating that "plans and specs [include] type and percentage of asbestos" should specify percentage. Language should be changed to: "type and composition percentage (from laboratory bulk analysis) of the asbestos" so that percentage is not construed as total material in work area.

RESPONSE: It is clear in the rules that the percentage refers to the percentage of acm.

COMMENT: At "DEP," add "E."

RESPONSE: The change has been made.

N.J.A.C. 5:23-8.5(h)

COMMENT: Update the Federal address.

RESPONSE: The change has been made to adopted subsection (i).

N.J.A.C. 5:23-8.6 Coordination with other permits

COMMENT: Under subsection (a), the certification concerning whether asbestos will be disturbed should be given by ASCM, not by an architect, engineer, or contractor.

RESPONSE: The Department disagrees. That could be interpreted as an unwarranted restraint of trade.

COMMENT: The assessment should be made by an AHERA-certified inspector.

RESPONSE: No, subchapter 8 applies to more than schools and it would be inappropriate to extend AHERA requirements to projects outside the scope of AHERA.

N.J.A.C. 5:23-8.6(a)

COMMENT: Certification by an architect/engineer should include requirement that an architect/engineer should have a U.S. EPA inspector and management planner certificate.

RESPONSE: This could be regarded as an unwarranted restraint of trade.

COMMENT: The regulations should define what is meant by "disturb."

RESPONSE: This is clear within the context.

N.J.A.C. 5:23-8.6(b)

COMMENT: Subsection (b) states that the assessment must be performed by "the New Jersey Department of Health, county or local Department, or by a private business entity authorized by the New Jersey Department of Health. . . ." What kinds of entities would this include?

COMMENT: In paragraph (b)1, "assessment" should be defined and the regulations should specify who is authorized to perform an assessment.

COMMENT: What kind of assessment is required? How thorough?

RESPONSE: These questions should be directed to the Department of Health.

N.J.A.C. 5:23-8.7

COMMENT: There should be a definition of the point in the project at which a precommencement inspection should take place.

RESPONSE: A precommencement inspection should take place when the work site is ready, but work has not begun. The Department is not aware of any problems resulting from this understanding.

COMMENT: The police, fire department, etc. should be notified that an asbestos hazard abatement project is taking place.

RESPONSE: The Department does not believe this is necessary. Public safety is protected by the licensed ASCM firm, the AST, and by the inspections by the local construction official. Worker safety is provided by regulations promulgated and enforced by the U.S. Department of Labor.

COMMENT: It should be required that an AST enter containment at least twice daily. "Continuously be present" has no meaning.

RESPONSE: The Department disagrees. The AST is required to be on the site ensuring compliance with subchapter 8.

N.J.A.C. 5:23-8.7(b)

COMMENT: This subsection should be under a separate heading "Pre-sealant inspection."

RESPONSE: This subsection was not proposed for change. The Department is not aware of any misunderstandings from the current codification.

N.J.A.C. 5:23-8.10 Asbestos safety technician

N.J.A.C. 5:23-8.10(a)

COMMENT: DCA should allow construction officials to become ASTs.

RESPONSE: DCA does allow this, but construction official experience does not count toward the AST experience requirement.

N.J.A.C. 5:23-8.10(d)

COMMENT: The duties of the AST have been increased dramatically which might affect the manageability and cost of the project.

RESPONSE: The new AST section represents a combining of two previous sections. The duties have not been expanded, except as required by the new section on occupied buildings. The AST's duties have been clearly delineated for abatement projects in occupied buildings. These duties, however, are not new. The AST was present on abatement projects subject to subchapter 8 that had previously been approved through variation.

COMMENT: The regulations should be more specific about the placement of manometers.

RESPONSE: The Department disagrees. Buildings are configured differently and the placement of manometers is part of the work specifications.

COMMENT: In paragraph (d)1, change "removal" to "abatement" to keep legal access to the entire project.

RESPONSE: The change has been made to N.J.A.C. 5:23-8.7(c)3ii.

COMMENT: What if there are multiple rooms on one side of the containment wall? Will monitoring device be required to test pressure differential between each room and the other side of containment or just based on 10,000 square feet of wall guideline?

COMMENT: If pressure differential between each room is required to be monitored, this will be time-consuming and distracting to AST. Extra manometers will not increase project safety. The key is a large enough pressure differential and working monitoring devices.

RESPONSE: In a building configuration with multiple rooms on one side of the containment, manometers are not required at each room space. The Department believes that the 10,000 square foot guideline is reasonable and provides for safety. The size of the work area is the determining factor.

COMMENT: How often should the AST measure the pressure differential? It should be monitored at the beginning of the shift and every four hours thereafter.

RESPONSE: Because work shifts may vary in duration, this clarifying language is helpful and has been added to N.J.A.C. 5:23-8.19(c)4i(1).

COMMENT: Paragraph (d)5 should specify whether the AST is to ensure the smoke testing of all glove bags or 25 percent of them. The AST cannot ensure that all glove bags have been tested if he only witnesses the testing of 25 percent. Is 25 percent an arbitrary figure? Four commenters indicated that enforcement of the smoke testing of glove bags will be a big problem.

RESPONSE: The 25 percent has been deleted. In conformance with the NIBS Guidelines, each glove bag will be tested after it is attached.

COMMENT: These amendments increase the AST's work. The monitoring and recordkeeping leave little time for actual work.

RESPONSE: This is their actual work. The format of the proposal was confusing. The AST's duties have not changed.

COMMENT: Smoke testing would not detect leaks caused by poor attachment of glove bags to substrate.

RESPONSE: The regulation has been amended, in conformance with the NIBS Guidelines, to require that all glove bags be smoke tested after they have been attached to the pipe.

COMMENT: This conflicts with the notification requirements of N.J.A.C. 5:23-8.19.

RESPONSE: The language has been clarified in paragraph (d)6 to reflect the notification requirements for both occupied and unoccupied buildings.

COMMENT: Why not allow laptop computers? Most ASCMs keep two records on site anyway, one for government which is altered as necessary.

RESPONSE: Laptop computers are not sufficiently fraud proof at this time. The Department is not aware that dual records are kept. Anyone who is aware of such a practice should report it to the Department.

COMMENT: Why require bound books? They are very difficult to use. Some companies can bind books; is this allowed?

RESPONSE: The Department believes that previously bound books decrease the likelihood of tampering with the job record.

COMMENT: Paragraph (d)8 calls for the AST to update the log "continuously." He cannot fulfill his other duties if he is continuously updating the log. Also, it is not necessary to initial each entry. Initialing at the end of each page should be sufficient.

RESPONSE: The requirement to update the log continuously is not confusing. Asbestos safety technicians understand the responsibilities for log entries. Continuous entries create a better record of the job. In addition, prompt entries are generally more detailed and more accurate.

N.J.A.C. 5:23-8.10(e)

COMMENT: Delete "over a period of time."

RESPONSE: The Department agrees and has deleted the phrase. "Over a period of time" is an undefined term and can be interpreted by either the Department or the regulated individual in a variety of ways. If the Department takes action against an AST for failure to demonstrate a minimally acceptable level of competence and the AST appeals this determination, then it will be up to an administrative law judge to establish whether the Department acted reasonably in that instance. This job will be made easier without the inclusion of this vague and unenforceable phrase in the regulations.

COMMENT: It is hard for AST to ensure contractor compliance when the contractor won't listen to instructions.

RESPONSE: If the contractor does not respond, the AST must still enforce the rules; therefore, the AST can issue a stop work order.

N.J.A.C. 5:23-8.10(g)

COMMENT: Subsection (g) makes conviction of any crime grounds for revocation or suspension. What crimes and offenses? Motor vehicle? Assault? Falsification of records? Define very carefully. This should be limited to crimes in connection with the work of an AST.

RESPONSE: The Department does not find this section confusing. During its research into this question and, based on the advice of the Department's Deputy Attorney General, the Department determined that the current language is both clear and effective. Because the AST is acting in the role of public official, conviction of any crime that involves dishonesty or other conduct not befitting a public official is relevant here, not just crimes in connection with a person's work as an AST.

N.J.A.C. 5:23-8.11 Asbestos safety control monitor

COMMENT: Subsections (b), (c), (e), and (f) should each require certified statements from ASCM and its principals that they have not defaulted, been disbarrred from, or otherwise been prohibited from performing, or failed to complete, any contracts for this type of work, where applicable. This would enable DCA to weed out bad apples. DCA could refuse to reauthorize or revoke license.

RESPONSE: This is a contractual issue that is not currently enforced through the licensing system.

COMMENT: DCA should use its licensing authority to prevent frivolous harrassing action among ASCM firms. This should also include DCA's ability to limit freedom of information from one monitoring firm to investigate activities of another monitoring firm.

RESPONSE: The Department agrees with this comment and intends to propose an amendment to N.J.A.C. 5:3-2.1, specifying what information is privileged and what is public. That amendment, then, will apply to all business information required by the Department, and not solely to information required of ASCM firms.

COMMENT: The applicants should be of "good moral character."

RESPONSE: This is a vague term that would be very difficult to prove or enforce.

COMMENT: Salary is not an indicator of work ability and should not be required as relevant information.

RESPONSE: The salary information will be required as privileged or proprietary information, not as public information.

N.J.A.C. 5:23-8.11(b)

COMMENT: Most ASCM's do not have a person trained in reading of plans. They should be required to have an architect, engineer, or a licensed code official.

RESPONSE: It is the responsibility of the firm to determine the type of employees it needs. It is not within the scope of these rules to make that determination.

N.J.A.C. 5:23-8.11(c)

COMMENT: This language could be interpreted to mean that DCA has control over the hiring and firing of secretaries and management staff. But using unlicensed staff should be grounds for removing a license.

RESPONSE: The language has been clarified to refer to "licensed personnel" and "principals."

COMMENT: Subparagraph (c)3v requires ASCM's to obtain the same insurance that is required for other third party agencies enforcing the UCC. Because the nature of asbestos work differs from other work performed under the UCC, the Department should research what insurance is applicable and obtainable for ASCM's.

RESPONSE: The Department has a reasonable general liability insurance requirement as a result of a careful, thorough study which included public notice and comment.

COMMENT: The regulations should specify whether there are 60 calendar days or 60 working days for submission of the final report. One commenter also supported the change to allow ASCM's to make the final report available to the Department upon request rather than automatically requiring submission.

RESPONSE: If there is no specification, the regulation refers to calendar days. Upon adoption, subparagraph (c)3xvi specifies that the final report would be made available to the Department within 10 days of a written request, rather than "upon request."

N.J.A.C. 5:23-8.11(d)

COMMENT: Performing the required sampling and analysis for OSHA involves a minimal cost and should not be considered a conflict of interest.

RESPONSE: Conflict demands that the ASCM not contract with the contractor for anything, including OSHA monitoring. The ASCM cannot remain independent on the job if there are contractual relationships with the contractor.

COMMENT: To what extent can ASCM and contractor not use same lab? Are past relationships covered? How far in the past? Why is it a conflict if Lab A analyzed contractor and ASCM samples at same time?

RESPONSE: As long as the lab is independent of both, there is no problem. The language has been clarified.

N.J.A.C. 5:23-8.11(g)

COMMENT: Subsection (g) makes conviction of any crime grounds for revocation or suspension. This should be limited to crimes in connection with the work of an ASCM.

RESPONSE: The Department has researched this question and, upon the advice of the Department's Deputy Attorney General, has determined that the current language provides a clear, effective, enforceable requirement. Because the ASCM is acting in the role of public

official, conviction of any crime that involves dishonesty or other conduct not befitting a public official is relevant here, not just crimes in connection with a firm's work as an ASCM.

N.J.A.C. 5:23-8.13 Pre-project procedures

COMMENT: The regulations should require that the owner use an ASCM firm to perform the site evaluation. "Owner shall have evaluated" should be changed to "AST" who is trained and knowledgeable.

RESPONSE: This issue is not within DCA's jurisdiction. Evaluations of and requirements for credentialed employees are made in compliance with other State and Federal laws.

N.J.A.C. 5:23-8.14 Operations and maintenance activities

COMMENT: In Class C work, workers should have minimum 16-hour DOH course and OSHA-required physical exam and respirator fit test; then they can remove less than 10 linear feet of pipe insulation or less than 25 square feet of surface material.

RESPONSE: Operations and maintenance work is outside the scope of these regulations, although it is not outside the scope of the UCC Act. The Department has not chosen to regulate operations and maintenance activity at this time.

COMMENT: Operations and maintenance can be used as an excuse to perform asbestos abatement. The requirements here should be tightened, not loosened.

COMMENT: As with the comment given for the definition of operations and maintenance activity, this section should include a time limit, for example, one year.

RESPONSE: The Department has retained in the definition the one year provision in order to prevent the removal of small amounts of asbestos at a time to avoid an abatement project.

COMMENT: This is a reasonable change. It allows building owners to maintain facilities. Approve defining project threshold as **removal** of less than 10 square feet or less than 25 linear feet acm. Include language: "The stabilization of any amount of asbestos containing material used to cover piping boilers, tanks, structural members . . . shall also constitute operations and maintenance."

RESPONSE: The language has been clarified at N.J.A.C. 5:23-8.14(a) to specify that stabilization of thermal insulation also constitutes an operations and maintenance activity. The clarification was made upon adoption in response to comments received requesting clarification.

COMMENT: We oppose the elimination of minor work and the expansion of operations and maintenance. This section currently limits removal of acm to 10 linear/25 square feet per building per year. Its deletion eliminates a major protection for operations and maintenance workers used as asbestos abatement workers. The employer can easily bend the proposal to have workers perform asbestos abatement if it is described as ancillary to routine tasks (painting, etc.). Compliance through employer's intention is not enforceable. The proposed operations and maintenance activity section allows an unlimited number of events that disturb acm. This is public health calamity. Was the operations and maintenance section changed to accommodate ASCM firms? A clear outlining of operations and maintenance requirements is needed, as are requirements that all operations and maintenance activity be under supervision of DOL-approved supervisor.

RESPONSE: The Department declines to provide procedures in regulations for activities for which no permit is required. The time limit for projects has been retained. The Department does not have the jurisdiction to decide when a Department of Labor certified supervisor is required. The Department of Labor makes that determination.

COMMENT: AHERA limits operations and maintenance personnel with 16 hours of asbestos control training to three square/three linear feet acm to comply with AHERA which requires that operations and maintenance activities must be performed by fully permitted abatement workers under direction of supervisor and in employ of EPA-approved contractor (that is, licensed DOL contractor). These limitations were designed to thwart what DCA is proposing. Therefore, it is recommended that training for operations and maintenance be extended from 16 hours to four days (asbestos abatement workers) per proposed AHERA Schools Hazard Reauthorization Act. In addition, operations and maintenance activity should require supervisor and should specifically reference NESHAPs, which recently adopted this requirement.

RESPONSE: The Department of Community Affairs does not set training requirements. The Department of Health is responsible for training; the Department of Labor regulates work practices. This comment addresses areas outside the scope of Subchapter 8. The Department does not enforce AHERA. As stated in the previous comment, the Department has reconsidered and has retained the per project per year qualification in the operations and maintenance definition.

COMMENT: Operations and maintenance section should include a reference to routine floor cleaning.

RESPONSE: Routine floor cleaning is maintenance and is outside the scope of these regulations.

COMMENT: Retain the requirement for training and work practices.

RESPONSE: Training and work practices are outside the scope of these regulations.

N.J.A.C. 8.15 Asbestos hazard abatement project

N.J.A.C. 5:23-8.15(a)

COMMENT: Is AST required at each work area if they are in same building, for example, multiple or remote work areas covered by same permit? The regulations should clarify that the AST must be on site from the initial site mobilization through the final tear down of criticals and decon.

RESPONSE: This requirement is codified at N.J.A.C. 5:23-8.10(d)1. The AST can cover more than one work area in the same building, but cannot cover more than one building.

N.J.A.C. 5:23-8.15(b)

COMMENT: What if there is a septic system and not sewers?

RESPONSE: The waste cannot be run into a septic system unless or until the Department of Environment Protection and Energy or the Environmental Protection Agency decides it can be done.

COMMENT: The five micron filter system for waste/standing water is excellent. This will save a lot of time and money on projects.

RESPONSE: Thank you for the comment.

COMMENT: Allowing filtered waste water is inadvisable and a violation of Federal law.

RESPONSE: The Department does not believe this violates Federal law. Had the commenter been more specific as to which Federal law this allegedly violates, the Department could be more specific in its response.

COMMENT: Please write out "micron" or ($1x10^{-6}$).

RESPONSE: The symbol suffices for clarity.

COMMENT: Paragraph (b)9 requires pressure differentials that are excessive and potentially destructive to many building systems. One commenter suggested pressure differentials of 0.02 in. w.c. for unoccupied buildings and 0.03 in. w.c. for occupied buildings. Another commenter suggested using 0.02 in. w.c. for consistency with OSHA. This commenter thought there was no need to discriminate between occupied and unoccupied buildings. Asbestos abatement in both should be conducted in a safe manner.

RESPONSE: The Department agrees that abatement in occupied and unoccupied buildings should be conducted in a safe manner; that is the purpose of these regulations. The Department does not agree that the required pressure differential levels are potentially destructive. Please refer to the comment on pressure differential at the beginning of the comment summary.

COMMENT: The measuring device that is required should be a digital manometer with a continuous printout. Cheap manometers are too easy to manipulate. The digital manometers are more expensive, but are much more accurate.

RESPONSE: The Department agrees. The specification has been added. In addition, magnehelics, which have a high degree of inaccuracy, have been deleted; "appropriate" devices changed to "approved" devices for clarity; and the reference to N.J.A.C. 5:23-8.17(b)4 changed to N.J.A.C. 5:23-8.17(d)6; to conform to an adopted pressure differential requirement. (Note: The "appropriate" to "approved" change was also made at N.J.A.C. 5:23-8.15(b)9i; and 8.19(c)4ii(1).)

COMMENT: What if there are a large number of rooms on one or the other side of the containment? Is a separate manometer required for each room?

RESPONSE: A separate manometer is not required for each room. The Department believes that the 10,000 square foot guideline provides for adequate safety.

COMMENT: If the exhaust is into occupied areas, air should be filtered through air filtration devices (AFD) unit to ensure adequate filtration. NYC allows piggybacking AFD units when exhausting into occupied areas.

RESPONSE: This provision, at N.J.A.C. 5:23-8.15(b)10, has been deleted. It is a highly unusual situation when exhaust cannot be directed

to the outside. Therefore, exhaust to the inside should be addressed through a variation with adequate specified controls. The Department requests public comment on whether additional rules are necessary.

COMMENT: What are "other controlled make-up air inlets?"

RESPONSE: There are several devices available that control make-up air.

N.J.A.C. 5:23-8.15(c)

COMMENT: One commenter stated that the alternative in subparagraph (c)1i should not be allowed. Testwell Craig tested GPAC, Brand, Red Baron and they found that only GPAC performed as indicated. Although the goal of the amendments is to eliminate the requirement of patented systems, other systems do not work. Solid swinging doors cause a loss of negative pressure every time door is opened. These factors should be considered before another system is approved, especially in occupied buildings. Another commenter indicated that the requirement that alternative doors swing both ways be deleted as it precludes the use of the Red Baron system.

RESPONSE: The language has been clarified to specify that the door shall allow for adequate exiting in accordance with the Building Subcode of the UCC.

COMMENT: No clothes, respirators, etc. should be stored in the clean room. The clean room and equipment room should be large enough to accommodate workers and door swing.

RESPONSE: Clean clothes and clean respirators need to be left in clean room. The clean room and equipment room should be adequately sized.

COMMENT: There should be no smoking anywhere in the building where abatement is taking place.

RESPONSE: This is outside the scope of the subchapter. Smoking is not allowed in the work area.

N.J.A.C. 5:23-8.15(d)

COMMENT: Area should be pre-cleaned prior to laying of poly sheeting. Untrained workers are allowed to perform pre-commencement cleaning "if room and objects in it are shown to be free of asbestos." How is this to be shown? Bulk analysis? Air sampling? Both? Subchapter 8 should reference the OSHA standard for asbestos (a direct exposure standard). OSHA will probably prohibit use of untrained workers in pre-abatement cleaning. The Department should eliminate this proposed revision.

RESPONSE: Worker protection is under the jurisdiction of the Department of Labor and is not within the scope of these regulations or the authority of the Department of Community Affairs.

COMMENT: Caution signs should be in English and the predominant language of the adjacent neighborhood and of the work crews.

RESPONSE: Workers should have taken the DOH training course which should enable them to recognize both the hazard and the caution signs.

COMMENT: The list of items should be qualified by "including ... but not limited to ..." and should include books.

RESPONSE: The qualifying language has been added. It is not necessary to expand the list.

COMMENT: This section allows the ASCM to approve the use of fluorescent lighting and wall receptacles if ground fault circuit interruptors (GFCI) are used. How will the Department ensure that receptacles can be cleaned afterwards? Also, why allow fluorescent lighting and not other kinds of lighting?

RESPONSE: The section has been modified to include all types of lighting if there are GFCI and they are cleaned.

COMMENT: One commenter said that the use of lighting and receptacles is an excellent addition; contractor and AST should be required to verify that GFCIs are working. Another commenter said that leaving the lighting on may violate Federal law.

RESPONSE: The Department has no reason to believe this violates Federal law.

N.J.A.C. 5:23-8.15(e)

COMMENT: Another exception to total enclosure should be given for surfaces which are to be abated and which contain asbestos. This will eliminate the need to obtain a technical variance from the requirement of two layers of poly sheeting on the floor if the floor tile is the surface where asbestos is to be abated.

RESPONSE: Poly is not required to cover the asbestos hazard to be abated. Therefore, no variance is required.

COMMENT: If work area is unfinished (that is, basement, mechanical room) where protection of surfaces from water damage is not required, poly on floors and walls should be optional as long as negative air pressure differential can be established without it. Contractor must, then, clean and encapsulate **all surfaces** in work area. This "no poly" method has been successfully used through variance.

RESPONSE: This is properly addressed through the variation process.

COMMENT: Rules must be effectively enforced. No variation should be given from poly requirements.

RESPONSE: The variation process is an effective part of the UCC enforcement system.

N.J.A.C. 5:23-8.15(f)

COMMENT: All expanding foam should be fire-rated.

RESPONSE: The Department agrees that expanding foam should be flame resistant. In addition, the Department has addressed the question of combustibility more clearly at N.J.A.C. 5:23-8.15(e)4 and N.J.A.C. 5:23-8.19(c)1.

COMMENT: Dropping asbestos more than 15 feet elevates fiber count. An enclosed chute is good for 15 to 40 feet. Work at greater than 40 feet should be properly scaffolded. Misters should be required in the work area to ensure that the material is kept wet. Another commenter stated that, although an increase in height will increase free-floating fibers in work area, this won't matter because contractors say ASTs don't enforce the current rule.

RESPONSE: Paragraph (g)3 is being deleted because it is a worker safety issue that is covered by OSHA and is not within the jurisdiction of this Department.

COMMENT: Contaminated waste can be put in a leak-tight container, and not necessarily double-bagged.

RESPONSE: The Department has made the change in paragraph (g)4 (adopted as (g)3) to clarify that a "leak proof container" may be used.

COMMENT: Several Federal citations are inaccurate.

RESPONSE: The Federal citations have been checked and have been changed where necessary.

COMMENT: Delete the words "in writing." If disposal of filtered waste water into a sanitary drain is regulated, there is no need to get permission. The Department should inform and educate local treatment works as to the requirements of the regulation.

RESPONSE: The phrase "in writing" has been changed to "allowed by permit."

N.J.A.C. 5:23-8.15(h)

COMMENT: The pre-sealant, clean-up, and final inspections should have criteria established in the regulations.

RESPONSE: The job site has to meet the requirements of the rule at each step.

N.J.A.C. 5:23-8.17 Glove bag technique

COMMENT: This limits the glove bag technique to abatement projects with less than 500 linear feet of asbestos-containing pipe insulation. Glove bag work is difficult and is not always the preferred method. Although the Department should move away from patented technologies, maybe the removal of more than 500 linear feet by glove bag should be allowed by a specified variation procedure or at the discretion of the ASCM. US EPA does not measure by linear feet. One commenter suggested reviewing and incorporating the recommendations in a published NIOSH/EPA pamphlet.

RESPONSE: The Department has accepted the recommendations of National Institute of Building Sciences (NIBS) on this question. The Department has clarified the specific procedures for the use of glove bags or limited containment technologies. (The term "limited containment technologies" has been substituted for "glove bag" in the section heading to make it clear that the Department is not requiring the use of one particular patented method or device.) The Department acknowledges that glove bag work may not be the preferred abatement method. This subchapter does not require its use. However, this subchapter does set clear procedural requirements for the use of glove bags or other limited containment technologies. The recommendations in the NIOSH/EPA pamphlet to which the commenter refers were less than scientific and were based on a very limited test of the glove bag method. The Department opted for the clarity and specificity of the NIBS Guidelines which are developed through a concensus process.

COMMENT: OSHA regulations require negative air pressure for glove bag work; subchapter 8 should also require this. Another commenter stated that if the entire room is used as a work area enclosure,

then all openings in the HVAC system should be sealed off and there should be a two stage decontamination chamber and a shower.

RESPONSE: Although subchapter 8 did require negative air pressure when using glove bags, the requirements have been revised to require a detailed process in which the room must be clearly labeled, cleaned, and the air must be monitored. In addition, in conformance to the NIBS Guidelines, glove bags are allowed to be used only once, each glove bag must be smoke tested after it is attached, all air in-takes, exhaust system components, and plugs must be sealed off. An option has been included regarding the smoke testing of glove bags if a mini-enclosure with negative air pressure is erected to define the work area.

COMMENT: Is the entrance of a glove bag work area enclosure an airlock? It does not meet the airlock definition in N.J.A.C. 5:23-8.2.

RESPONSE: The entrance to the glove bag work area is not required to be an airlock.

N.J.A.C. 5:23-8.17(b)

COMMENT: Preparation of work area should include cleaning.

RESPONSE: Pre-cleaning is not necessary in a glove bag abatement. Cleaning and air sampling at the completion of the glove bag removal are required.

COMMENT: Is one air change every 15 minutes and minimum pressure differential 0.02 inches w.c. possible in a small (five foot by five foot) work area? multiple work areas?

RESPONSE: The pressure differential is a standard level. This level of pressure differential does not exert much additional force and is appropriate for small work spaces as well as larger ones. Please see the more complete Department response on the question of pressure differential in the comments at the beginning of this summary. The use of pressure differential is optional during glove bag use.

N.J.A.C. 5:23-8.17(d)

COMMENT: Donut-shaped cloth is not easy to maneuver. Cloth can be bent around surface instead.

RESPONSE: The language has been modified at paragraph (d)3 to allow other effective configurations of cloth.

COMMENT: Change wording to ... "before commencement of the removal ..."

RESPONSE: The change requested by this comment is not necessary because the section to which it refers has already been deleted and replaced with technical standards from NIBS (N.J.A.C. 5:23-8.17(a)).

COMMENT: Water used for cleaning tools should be required to be added to asbestos waste or filtered before disposal. Also, glove bags are not commonly available with retractable tool pouches. Standard operating procedure is to retract tools through the glove. Rumor is that DCA will grant a variation for this for a fee.

RESPONSE: The adoption clarifies that waste water that is part of the glove bag removal must be added to other waste water and filtered before disposal. The Department believes that glove bags with retractable tool pouches are commonly available. However, language has been added to clarify that any glove bag with a place where tools can be placed is acceptable.

N.J.A.C. 5:23-8.18 Demolition

N.J.A.C. 5:23-8.18(a)

COMMENT: Please define "structure." Also, in buildings to be demolished, will the asbestos abatement be performed in accordance with this subchapter? Should state that the licensed contractor is still required for demolition.

RESPONSE: "Structure" is defined in the UCC at N.J.A.C. 5:23-1.4. It is not necessary to repeat the definition here. If the building to be demolished is a partial demolition and is to be re-occupied, the applicable provisions of this subchapter must be met. In complete demolition projects, the rules promulgated by the Environmental Protection Agency (EPA) apply. In addition, the Department has determined that, for clarity, all demolition requirements will be delineated at N.J.A.C. 5:23-2.

N.J.A.C. 5:23-8.18(d)

COMMENT: TEM levels should be acceptable for clearance before demolition; retesting should not be necessary if area was properly cleared by ASCM and air testing results were OK.

RESPONSE: In partial demolition, the air clearance requirements in this subchapter are the same as those for other projects in which the building is to be re-occupied. In complete demolition projects, air clearance is not required by this subchapter.

COMMENT: Why take another air sample if the building was not demolished within 30 days? Some fugitive fibers will always be present, so no air sampling is really representative of fiber levels in air.

RESPONSE: The answer to this comment is similar to the answer above. Language has been added to N.J.A.C. 5:23-8.18(a) to clarify that for partial demolition projects in which the building is to be re-occupied, air monitoring must be performed in accordance with the requirements of this subchapter to ensure clean air at the time of re-occupation.

COMMENT: This opens a large loophole. Final air and clearance should be required at all demolition sites.

RESPONSE: Final air and clearance is required by this subchapter at all demolition and partial demolition sites at which the building is to be re-occupied, and not at sites at which the building is not to be re-occupied.

N.J.A.C. 5:23-8.19 Abatement in occupied buildings

COMMENT: The pressure differentials proposed are not realistic and documentation exists on the potential damage that can be caused by a pressure differential of 0.05 inches w.c.

RESPONSE: As stated in the general summary of this issue: the Department does not believe that an additional pressure of .259 psf, the additional pressure at 0.05 inches w.c., will cause damage in a building designed to withstand greater force than that.

COMMENT: One commenter considers this a relaxation of existing requirements and recommends the continued use of variations for occupancy. This commenter is reluctant to rely on ASCM's. Finally, if abatement is to be allowed in occupied buildings, back-up generators should be required to maintain negative pressure.

RESPONSE: The Department does not consider this a relaxation of existing requirements. This is a codification of current requirements for a variation for abatement in an occupied setting. The suggestion that back-up generators be required in an occupied setting would require a new proposal. The Department will study this issue and will prepare a new proposal, if necessary.

COMMENT: The regulations should call for the laboratory test results to be available within a designated time frame (for example, one to two hours) rather than simply requiring that analysis be made on site to accommodate arrangements where analysis can be done in a nearby lab.

RESPONSE: Given the presence of pressure differential and air monitoring requirements, this is a reasonable suggestion. The change has been made to N.J.A.C. 5:23-8.19(c)4i(3) to require a turn-around time of four hours.

COMMENT: The regulations should permit employees certified under any recognized quality assurance program to perform the laboratory analysis.

RESPONSE: The Department has not provided for grandfathering because these rules do not apply to all asbestos hazard abatement jobs. The Department will recognize equivalent quality assurance certification. The Department will determine equivalency upon submission of each request.

COMMENT: This is an improvement because it sets evacuation standards. Abatement criteria are established for re-occupancy, but no level is established for ordinary occupancy. Admittedly, this is not feasible. Therefore, the contractor establishes pre-abatement background levels. This should be done by TEM. Also, samples taken outside work area during abatement projects should be TEM. DCA should "drive technology" by requiring TEM. We recommend a phase-in of TEM by requiring both TEM and PCM pre-commencement for a set period of time.

RESPONSE: The Department has set the requirements based on a need for quick results and therefore continues to allow the use of PCM.

N.J.A.C. 5:23-8.19(b)

COMMENT: What type of notification is required? Certified mail? Regular mail? Posting on door? This should be part of ASCM scope of work for the project.

RESPONSE: The notification requirements are clear in the regulations. Notices must be posted in a visible location. Although job sites differ, this requirement is clear.

COMMENT: The issue of notification of child care/educational facilities should be addressed in this section. DCA currently requires notification of each guardian, a person posted at each decon, and additional monitoring. This should be codified.

RESPONSE: This requirement is part of the Federal AHERA law.

COMMENT: Maintaining notifications on site should be AST's, not owner's, responsibility because AST is on site every day.

RESPONSE: The Department believes the responsibility more appropriately belongs to the building owner because it is the building owner who hires the AST and who is ultimately responsible for everything on the premises. Additionally, the AST would not necessarily pass through areas of the building other than those where abatement is taking place.

N.J.A.C. 5:23-8.19(c)

COMMENT: Why require plywood and gypsum board? Why not two sheets of plywood? Is this cosmetic? Another commenter suggested that the requirement for ½ inch plywood increases costs unnecessarily and indicated that ¼ inch plywood is adequate.

RESPONSE: This commenter mis-read the regulations. The requirements is for plywood or gypsum board. The ½ inch requirement is to provide structural stability; ¼ inch plywood has inadequate structural strength.

COMMENT: This requirement is excessive and unnecessary. HVAC system's seams should be taped, then wrapped in two layers of poly. Perimeter return ducts should be cut or boxed out, caulked, covered with critical barriers. Pressure differential is too high. The AST should smoke test these systems twice each shift.

RESPONSE: This is recommended practice in the NIBS Guidelines which provide state-of-the-art, technically and structurally sound guidelines for abatement of asbestos. These Guidelines are the work of a consensus process that includes asbestos hazard abatement experts and building scientists. The Department has decided to rely on the expert knowledge in these Guidelines to ensure public health and safety during asbestos hazard abatement projects. Because these abatement projects will take place in occupied settings, the Department believes that the protections detailed in the proposal and in the NIBS Guidelines are justified and necessary.

COMMENT: Return air duct work must be kept in operation and, essentially, a duct must be created around a duct. At the same time, 0.02 inches w.c. must be maintained. This is technically very difficult. Costs will increase.

RESPONSE: This is recommended practice in the NIBS Guidelines on which the Department relies for technical expertise regarding asbestos abatement in an occupied setting.

COMMENT: These sections require that a space be constructed that is 0.04 inches w.c. greater than the work space. This would require dedicated equipment and ridged construction. What is the methodology for preventing contaminants from going to adjacent areas? There are no scientific articles on this. This requirement complicates a simple matter. This level of containment is not required in biological or nuclear clean-up.

RESPONSE: The Department accepts this recommended work practice in the NIBS Guidelines on which the Department relies for technical expertise regarding asbestos abatement. The comparison to biological or nuclear clean-up is not valid because those clean-ups deal with static sources and because they are not performed in an occupied setting.

COMMENT: Define "in a similar manner." Who decides how similar? Also, the requirement for 0.05 inches w.c. pressure differential should be changed to 0.02 inches w.c. The return air duct should be outside the work area.

RESPONSE: These requirements are adapted from the NIBS Guidelines. They effectively place all operating ducts in occupied buildings outside the work area.

COMMENT: Requirements to box out active duct work are too extensive and costly for benefits. How does prep cost remain within the five percent estimate with such extensive prep required?

RESPONSE: These requirements are adapted from the NIBS Guidelines. They have been the standard on which a variation for abatement in an occupied setting has been based. The major cost of an abatement job is the labor associated with the abatement itself. Construction requirements do not add significant cost in comparison.

COMMENT: Define "annular space."

RESPONSE: This is a common term that does not require definition in the rule.

COMMENT: Field measurement on air filtration devices (AFD) can only be done prior to installing negative air system. Once installed, ducting cannot be separated to do field measurement. This could cause contamination in ducts which could be exhausted to clean areas. One commenter strongly recommends the use of fiber aerosol monitoring (FAM) devices with alarms.

RESPONSE: The flow is measured at the in-take. The Department does not agree that it is necessary to open the duct in order to determine the flow rate. Once the flow rate is determined from the initial exhaust, the manometer takes a continuous reading which ensures that the rate is maintained. Thus, there is no need to take subsequent exhaust volumes. The Department declines to require the use of FAM devices, which are expensive and which are of dubious value since they measure fiber count at only one place.

COMMENT: Sensor tubes should be put where air pressure differential filtration devices will not cause false readings.

RESPONSE: Language has been added to subparagraph (c)4i(3) that accomplishes this.

COMMENT: Maximum levels must be established if this section is adopted.

RESPONSE: The function of this requirement is to ensure adequate air exchanges. This is accomplished by establishing a minimum. Establishing a maximum is not necessary.

COMMENT: This defines a set of buildings per UCC. Will Class A buildings (that is, warehouse) which require Class A building materials during renovations no longer require those materials for asbestos abatement (as is currently required)? Another commenter stated that **all** materials used in occupied removal projects should be fire retardant.

RESPONSE: The requirements for non-combustible materials used in buildings are established in the UCC. They apply to all materials used in projects in the building; this includes asbestos hazard abatement projects.

COMMENT: On-site reading of final air samples should be permitted. This would allow quicker reoccupancy when there is a tight time constraint. If the AST is allowed to read daily samples on site, he should be able to read finals on site. Also, samples per work shift should be better defined. For example, require one sample at the beginning of the shift and every four hours thereafter. Also, the AST cannot perform his other duties if he is to "continually" monitor waste removal.

RESPONSE: These are reasonable suggestions and have been included in the final rule. This is also addressed at N.J.A.C. 5:23-8.10(d). In response to the last comment, "continually" was changed to "closely" at N.J.A.C. 5:23-8.19(c)7ii.

COMMENT: Two commenters indicated that requiring a lab tech on-site is excessive. On-site ASTs could read on-site samples. Is this allowed? Another commenter indicated that the requirement for on-site laboratory technicians to be in the asbestos analysts register of the AIHA should be phased in over a two year period because it takes approximately nine months to one year to become a participant in this program. Also, should allow the use of mobile labs. Another commenter stated that the AST often performs on-site sample reading on projects. This should be clarified in regulations.

RESPONSE: The AST may perform on-site sample reading if the AST is a listed lab technician. The Department has decided to allow the use of mobile labs or nearby labs provided that the specified turnaround time can be met and has also clarified the regulations at N.J.A.C. 5:23-8.19(c)4i(3) to show that the Department will accept technicians who are certified by a program equivalent to the AIHA upon the submission of proof of equivalency.

COMMENT: Define adjacent space—per air sampling requirement. Another commenter asked whether the 10,000 square feet measurement mean space directly adjacent to work area or **total** remaining occupied space in the building?

RESPONSE: The adjacent space means directly adjacent and refers to the total area of all adjacent spaces.

COMMENT: "All" air samples may be interpreted to mean an average and not "each and every" sample.

RESPONSE: "All" does not mean "average." However, the language at N.J.A.C. 5:23-8.19(c)4i(1) has been changed to "each."

COMMENT: Two commenters suggested that the entire building does not have to be evacuated; maybe only the affected area should be evacuated. There are circumstances in which complete evacuation is not possible (jail, for instance). The Department should consider requiring evacuation for those parts of the building under direct threat of contamination and should clarify how much of the building must be evacuated.

RESPONSE: The Department has considered evacuation requirements. The rule requires that, first, the pressurized space must be evacuated; then, if the situation cannot be controlled, the building must be evacuated.

COMMENT: The word "accredited" is unnecessary since a laboratory is defined in N.J.A.C. 5:23-8.21(a)1.

RESPONSE: There is no harm in repeating the requirement.

COMMENT: What about projects with multiple adjoining rooms? (See N.J.A.C. 5:23-8.10(d) comment).

RESPONSE: This comment has been addressed in the response to N.J.A.C. 5:23-8.10(d). The rule makes it clear that monitoring is required for each 10,000 square feet of adjacent space.

COMMENT: This requirement is too stringent and unreasonable. Use 0.02 inches w.c. per New York State and New York City regulations.

RESPONSE: The Department believes that 0.05 inches w.c. is not too stringent, does not result in much additional pressure being exerted, and is a reasonable requirement.

COMMENT: In the contingency plan, at least 0.02 inches w.c. should be required.

RESPONSE: The Department believes the requirement is reasonable as proposed. Please refer to the longer discussion of pressure differential at the beginning of the comment summary.

COMMENT: In step 5 of the reoccupancy requirements, there is no reoccupancy until 0.05 inches w.c. In step 6, if 0.05 inches w.c. is not reached within 24 hours, no reoccupancy is allowed. Step 6 is redundant and unnecessary.

RESPONSE: In Step 5, a limited area is affected; in Step 6, the entire building is affected. The requirements are not redundant.

COMMENT: Requiring notification of the building owner is excessive and impractical. Stopping work activities and investigating the problem should suffice.

RESPONSE: The Department believes that the building owner has a right to know.

COMMENT: Work should stop for high fiber counts outside the work area.

RESPONSE: If the pressure differential has been maintained, the fiber count may reflect fibers from another source. That does not justify stopping work.

COMMENT: Requiring evacuation in the event of a power outage is excessive. Stopping job until power is restored is sufficient.

RESPONSE: Engineering controls depend on power. Evacuation is appropriate if controls fail.

COMMENT: The security required is excessive. An alarm system could be used instead. Most of the systems are inside the work area, so the guard wears protective equipment. The owner requires three guards alone for the areas mentioned in regulations. Another commenter called for 24-hour manned security for overnight occupancy. Another commenter stated that work area security should be the contractor's responsibility and asked, "What is a 'high risk' area?" If vandalism occurs, security should be required, whether the project is in a "high risk" area or not.

RESPONSE: A "high risk" area is an area in which there is a "high risk" of damage to the project or to the abated material. In areas in which the risk of damage is high, a guard is required.

COMMENT: Later occupancy of waste transport routes should be based on PCM testing and readings below 0.010f/cc. This is better than requiring wet wipe/HEPA vacuuming. Requiring poly on floors and walls is unnecessary. Waste is double-bagged and transported to dumpster in covered container. If a bag breaks outside containment, the subchapter should require cleaning and air testing. HVAC could be shut down if waste is transported during least occupancy. Waste removal through occupied buildings may allow exposure of occupants. Two commenters stated that requiring polyethylene sheeting on waste removal route is excessive because the proposed amendments already require HEPA vacuuming and wet wiping.

RESPONSE: The Department has amended this section to require air monitoring. Wet wiping and HEPA vacuuming are required if the results of the air monitoring are not satisfactory. In addition, the requirement for polyethylene sheeting has been deleted.

COMMENT: Monitoring the waste removal process is appropriate if air monitoring is conducted by time weighted average (TWA) monitoring on the workers who are transporting the waste.

RESPONSE: This is a worker protection issue that is not within the jurisdiction of the Department's regulations.

COMMENT: This paragraph is redundant and should be deleted. Additionally, these requirements are not practical for certain projects, such as in prisons or housing authority buildings.

RESPONSE: These requirements are not redundant. These are the current requirements for a variation for an asbestos hazard abatement project in an occupied building. The requirements have proven to be effective which is the reason the Department is codifying the process. Should a prison need to request a variation for unusual circumstances, the Department will review and respond to the variation request. Housing authorities must comply with these requirements and are no longer required to apply for a variation to do so.

N.J.A.C. 5:23-8.20 Removal of non-friable asbestos-containing material

COMMENT: A DOL-licensed contractor should be required for removal of non-friable acm when removal will not contaminate building. If the removal is an operations and maintenance activity, a licensed contractor is not required, only DOH certified workers are allowed. Why the difference?

RESPONSE: The Department of Community Affairs does not determine when a licensed contractor is required; the Department of Labor makes that determination.

N.J.A.C. 5:23-8.20(a)

COMMENT: Two commenters said that a licensed contractor should not be required to remove floor tiles if methods listed in industry guidelines are followed. Properly-trained maintenance people could do this work. A licensed hauler, however, should be required.

RESPONSE: The reference to "licensed contractor" has been deleted because it is within the jurisdiction of the Department of Labor to determine when a licensed contractor is needed.

COMMENT: One commenter indicated support for the proposal. However, the commenter requested clarification of this section to apply to both occupied and unoccupied settings. Clarify "safe work practices" add "(e.g. RFCI work practices for resilient flooring removals)."

RESPONSE: The Department believes that it is clear that this section applies to both occupied and unoccupied buildings. The Department also believes that "safe work practices" is clear.

COMMENT: A construction permit should not be required; this should be considered "ordinary repair" per N.J.A.C. 5:23-2.14(b)1.

RESPONSE: The threshold for a construction permit is the same for asbestos (subchapter 8) and for non-asbestos (subchapter 2) projects in this case. No permit is required for the non-friable removal of floor tile.

N.J.A.C. 5:23-8.20(b)

COMMENT: Disposal of non-friable acm should not have to comply with standards for friable acm. This exceeds Federal requirements (NESHAP). This section should be deleted.

RESPONSE: These requirements are not within the jurisdiction of the Department of Community Affairs. They are within the jurisdiction of the Department of Environmental Protection and Energy and are referenced here.

N.J.A.C. 5:23-8.21 Air monitoring methodology

COMMENT: N.J.A.C. 5:23-8.21(a)4 calls for all pumps to be calibrated prior to initial sampling, using a primary standard. This is not practical and the regulations should call for the use of a secondary standard (rotometer) that can be brought on site.

RESPONSE: The regulation requires that the pump be calibrated off-site to a primary standard before it is used; it must be re-calibrated using a secondary standard on site after use.

N.J.A.C. 5:23-8.21(b)

COMMENT: The language regarding testing results is not clear. It encourages the analyst to fix results to be less than 0.01 f/cc regardless of actual concentration calculated.

RESPONSE: The Department does not believe that the regulations encourage fraud. Should the commenter be aware of fraudulently reported results, the Department should be contacted immediately.

N.J.A.C. 5:23-8.21(c)

COMMENT: Leaf blowers and fans are not necessary; leaf blowers alone are adequate. Requiring a fan for every 10,000 cubic feet is excessive. Clarify what is needed for separate spaces less than 10,000 cubic feet.

RESPONSE: The Ad Hoc Committee appointed to recommend amendments to Subchapter 8 recommended this requirement. The Department agrees. Both leaf blowers and fans are necessary for the air circulation required for aggressive air sampling. One fan for every 10,000 cubic feet is necessary to keep the air circulating. One fan should be placed in each separate space less than 10,000 cubic feet.

N.J.A.C. 5:23-8.21(d)

COMMENT: TEM clearance should be required only for schools per 40 CFR 763.90i. This EPA requirement allows for analysis by PCM which

is adequate and realistic. Three commenters asked whether a section of the current air monitoring requirements was omitted (N.J.A.C. 5:23-8.23(d)) and stated that it should be retained. TEM is much more expensive. PCM should be allowed. Another commenter stated that subsection (d) requires TEM analysis of post tests for an asbestos hazard abatement project and then asked whether this means that five expensive TEM post tests are required for the abatement of 11 square feet or 26 linear feet of acm?

RESPONSE: TEM is generally available, is no longer much more expensive, is the preferred technology, and is necessary to ensure that buildings are safe for reoccupancy. The Department believes that this is a reasonable requirement.

N.J.A.C. 5:23-8.21(e)

COMMENT: One commenter stated that five samples per work area is excessive with multiple work areas and small enclosures. This commenter recommended changing this to two samples per work area and five samples in work area over 10,000 cubic feet. The commenter also pointed out that because the length of a work shift varies the monitoring requirements should be given in hours.

RESPONSE: The Department requires five samples because five samples are necessary to obtain valid results. The Department has clarified that the monitoring is required at the beginning of the work shift and every four hours thereafter.

COMMENT: Subsection (e) is in conflict with 40 CFR 763.90(i) (AHERA) in that it allows PCM analysis of post-tests for glove bag operations up to 500 linear feet. This should be clarified to conform to th AEHRA requirement of TEM analysis of post-tests for removed quantities greater than 260 linear feet.

COMMENT: One commenter recommends using 0.01 f/cc analyzed by TEM.

RESPONSE: In AHERA, TEM is required for the projects over 160 square/260 linear feet. The scope of subchapter 8 is broader than that of AHERA. Subchapter 8 allows PCM testing for glove bag operations. If a project is covered by AHERA, the contractor is responsible for compliance with AHERA requirements that are more stringent than the subchapter 8 requirements for other public buildings.

N.J.A.C. 5:23-8.22 Disposal of asbestos waste

COMMENT: Delete reference to non-friable acm.

RESPONSE: This requirement is not within the jurisdiction of the Department of Community Affairs; it is within the jurisdiction of the Department of Environmental Protection and Energy.

COMMENT: Any acm that is more than one percent must be packaged. Landfills say that packaged means bagged. It is impossible to bag roofing material. Containers should be acceptable. Please clarify.

RESPONSE: This requirement is not within the jurisdiction of the Department of Community Affairs; it is within the jurisdiction of the Department of Environmental Protection and Energy.

Additional Comment

COMMENT: One commenter requested that the Department delete date restrictions which no longer apply. Several other commenters submitted comments on sections that had been moved, but not changed; the substance of these comments are addressed elsewhere in this Summary.

RESPONSE: The commenters were confused by the format of the proposal rule text, which depicted as proposed new text many provisions that were only being recodified without change or with only minor changes. Although a recodification table was included in the proposal and the requirement changes were explained in the proposal Summary, the large scale deletion and addition of largely unchanged text to show recodification evidently made it difficult for readers to readily discern the changes made. For example, in response to the commenter's request to delete no longer applicable date restrictions, these restrictions appeared in N.J.A.C. 5:23-8.23, which was recodified through deletion and proposal as a new rule at N.J.A.C. 5:23-8.21, with the date restrictions no longer present. The Department has been assured by the Office of Administrative Law that a clearer method for depicting such large scale recodification with amendments will be developed.

Summary of Agency-Initiated Changes:

1. At N.J.A.C. 5:23-2.17(c), a change has been made to clarify that the certification regarding the abatement of asbestos prior to demolition can be made prospectively.

2. At N.J.A.C. 5:23-8.2, the definition of "glove bag" has been amended to add the phrase "or other techniques or practices approved by the Department" to clarify that the Department is not requiring the use of any patented system, method or device.

3. At N.J.A.C. 5:23-8.5(e)4, "authority having jurisdiction" has been changed to "enforcing agency" throughout the subchapter. This change is made upon adoption to make this section consistent with the rest of the subchapter.

4. At N.J.A.C. 5:23-8.6(a)1i, the word "minor" has been deleted because the term "minor work" has a distinct meaning within the context of the Uniform Construction Code.

5. At N.J.A.C. 5:23-8.10(d)2, the requirement for the AST to test the seal and fit of each worker's respirator has been deleted because the Department is preempted by the Federal Occupational Safety and Health Act (OSHA) in the promulgation and enforcement of standards that are purely for worker protection.

6. At N.J.A.C. 5:23-8.11(b)4viii, connections between the ASCM and any abatement contractor are prohibited as constituting a conflict of interest. The rules already prohibit financial connection between the ASCM and any other entity on a given job. The abatement contractor is added to this provision to clarify this existing conflict of interest provision.

7. At N.J.A.C. 5:23-8.15(f)1, the word "taping" has been added to this section describing the sealing of bags containing asbestos-contaminated waste. This is standard industry practice and is added to the rule for clarity and consistency.

8. At N.J.A.C. 5:23-8.15(f)8, this paragraph has been amended to straighten out references to "filtration" and "pressure differential" that were confused in the proposal. Additionally, a cross-reference to the requirement for field testing has been added.

9. At N.J.A.C. 5:23-8.15(g)3, the words "singly bagged" have been deleted because bagging asbestos-contaminated waste prior to placing it in an appropriate, leak-proof container adds no additional measure of protection, particularly if the waste includes sharp edges that will cut the bag.

10. At N.J.A.C. 5:23-8.17(b)4, the minimum pressure differential specified has been deleted because this is not necessary in the context of a glove bag removal.

11. At N.J.A.C. 5:23-8.17(b)5, the requirement for protective clothing and respirators has been deleted because the Department is preempted by Federal OSHA.

12. At N.J.A.C. 5:23-8.17(d)18, a change has been made to allow only one use of a glove bag for consistency with the NIBS Guidelines.

13. At N.J.A.C. 5:23-8.18(a), the section on demolitions has been changed to clarify that the requirements of this subchapter only apply to **partial demolitions.** Because the subchapter is designed to ensure that buildings are made safe for occupancy by the general public, it makes no sense to impose these requirements on buildings that are to be totally demolished and will not be reoccupied prior to demolition.

14. At N.J.A.C. 5:23-8.18(b), a cross reference to the existing requirement for a demolition permit contained in subchapter 2 has been added.

15. At N.J.A.C. 5:23-8.19(b)4, because variations issued by the Department will no longer be required for abatement projects in occupied buildings, a statement has been added to require that the Department receive notification 10 days prior to the commencement of any abatement project in an occupied building to ensure that the Department continues to receive notice that these projects are beginning.

16. At N.J.A.C. 5:23-8.19(c)1i, the depth of the space to be created in front of the access area for purposes of protecting building occupants has been changed from two inches to three inches for consistency with the NIBS Guidelines. This is a nominal change that imposes no additional hardship or cost.

17. At N.J.A.C. 5:23-8.19(c)3iv, clarifying language has been added to the section on the use of strippable coating in place of polyethylene sheeting to indicate that it is the building owner who will make the determination as to when there is a period of minimal occupancy and this product may be applied and that this information is to be included in the approved plan.

18. At N.J.A.C. 5:23-8.19(c)4i(2), language has been added to indicate that the chain of custody to be established for air samples must be set forth in writing as part of the approved plan to provide evidence that this requirement is being met and how it is to be met.

19. At N.J.A.C. 5:23-8.19(c)4i(3), a sentence has been added to indicate that a written record of the test results should be kept at the site and included as part of the final report. This statement simply

underscores the existing requirement that all pertinent information regarding the abatement project be kept on site for review and be included as part of the final report.

20. At N.J.A.C. 5:23-8.19(c)4i(4), language has been added to require that reanalysis of air samples be performed within 24 hours. Without this time constraint, the reanalysis of air samples for quality control purposes might become meaningless.

21. At N.J.A.C. 5:23-8.19(c)4ii(4)(A), this section has been modified to require smoke testing in conformance with the NIBS Guidelines because the precommencement pressure differential has been reduced and because pressure differential does not adequately test for isolation of the work area.

22. At N.J.A.C. 5:23-8.19(c)5iii(2), language has been added to clarify that, in taking the second set of air samples, samples should be drawn from each place where a high test result was obtained.

23. At N.J.A.C. 5:23-8.19(c)6, language has been added to clarify the security and safety precautions for abatement in occupied settings. This has been done by stating that provision must be made for round the clock equipment monitoring. This will ensure that the ASCM has made arrangements for all of the required engineering controls to remain functioning and for filters to be changed as necessary until the job is completed.

24. At N.J.A.C. 5:23-8.20(a)1, the reference to N.J.A.C. 5:23-8.19 was added because the requirements for occupied buildings are contained there and not in N.J.A.C. 5:23-8.15.

25. At N.J.A.C. 5:23-8.20(a)2, the reference to obtaining a construction permit pursuant to subchapter 2 has been deleted because no construction permit is required.

26. At N.J.A.C. 5:23-8.20(c), the reference to the NIOSH pamphlet has been deleted because this pamphlet is dated and provides information based on a less-than-scientific study of the removal of roofing material. Additionally, language has been added to indicate that a construction permit "shall be obtained if required" because the requirement for a construction permit will depend entirely on the scope of work.

27. At N.J.A.C. 5:23-8.21(b)2vii, language has been added to state that the work area must be kept reasonably clean. This is necessary for air sampling to be performed.

28. At N.J.A.C. 5:23-8.22(a)1, the disposal requirements have been deleted and replaced with a cross-reference to existing DEPE and Federal requirements.

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 8
Recodification Table

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5:23-2.17 Demolition or removal of structures

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

(d) Asbestos abatement: Before a structure can be demolished or removed, the owner or agent shall document that the requirements of USEPA 40 CFR 61 subpart M have been or shall be met. A permit to demolish or remove the structure shall not be issued until the owner or agent notifies the enforcing agency that all friable asbestos or asbestos-containing material that will become friable during demolition or removal has been ***or will be*** properly abated ***prior to demolition***.

SUBCHAPTER 8. ASBESTOS HAZARD ABATEMENT SUBCODE

5:23-8.1 Title; scope; intent

(a) This part of the regulations, adopted pursuant to 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 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 abatement contractors; and issuing asbestos worker performance permits for asbestos abatement workers.

[i. Copies of N.J.A.C. 8:60 may be obtained from the New Jersey Department of Health, Asbestos Control Program, Division of Occupational and Environmental Health, CN 360, Trenton, New Jersey 08625-0360.]

*[ii.]***i.*** Copies of N.J.A.C. 12:120 may be obtained from the New Jersey Department of Labor, Division of Workplace Standards, Asbestos Control and Licensing, CN 054, Trenton, New Jersey 08625-0054. These rules provide that any asbestos abatement project, excluding an operations and maintenance activity, 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 and Energy has authority to enforce regulations regarding the transport and disposal of asbestos-containing materials pursuant to N.J.S.A. 13:1D-9 and 13:1E-1 et seq. These rules are cited as N.J.A.C. 7:26.

i. Copies of N.J.A.C. 7:26 may be obtained from the New Jersey Department of Environmental Protection ***and Energy***, *[Division of Hazardous Waste Management, Twin Rivers Professional Bldg., East Windsor, New Jersey 08520]* ***Division of Solid Waste Management, 840 Bear Tavern Road, CN 414, Trenton, New Jersey 08625***.

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. 5:23-8.21.

(b) (No change.)

(c) This subchapter, which pertains to educational facilities and public buildings 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 abatement 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 building that houses a day care center, nursery or educational facility shall be subject to this subchapter when an

asbestos hazard abatement 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. An asbestos hazard abatement project shall have a construction permit from the enforcing agency.

2. All common areas in a building, or part thereof, leased by a public entity, such as, but not limited to, building entrances and lobbies, rest rooms, cafeterias, hallways, stairwells, and elevators where public employees may normally *[transverse]* ***traverse*** and all areas with mechanical equipment that serve the areas occupied by the public employees, shall be subject to this subchapter when an asbestos hazard abatement project takes place within the building or any part of the building.

3. (No change.)

4. Projects involving the removal of non-friable, miscellaneous asbestos-containing material from interior spaces shall be subject to this subchapter where the method chosen to remove the non-friable material may cause the building environment to become contaminated with airborne asbestos fibers. Removal shall be in accordance with N.J.A.C. 5:23-8.20.

(d) Until further action is taken, this subchapter remains advisory for all other buildings and structures in the State.

(e) This subchapter seeks to provide and ensure public safety, health, and welfare insofar as they are affected by asbestos and asbestos-containing materials. It is not intended to, nor shall it be construed to, conflict with or impede the operation of the asbestos work standards issued by the Occupational Safety and Health Administration, 29 CFR Section 1910.1001 et seq., 29 CFR Section 1926.58 and N.J.A.C. 12:100-12, the Asbestos Subchapter of the New Jersey Safety and Health Standards for Public Employees. The purpose of this subchapter is to assure that work is performed in a safe manner as a pre-condition to the issuance of a certificate of occupancy.

1.-2. (No change.)

3. Asbestos that is, or that can readily become, friable was a widely used construction material. Its removal, replacement, repair, enclosure or encapsulation shall be considered construction work and shall therefore require a construction permit issued pursuant to the State Uniform Construction Code Act (N.J.S.A. 52:27D-119 et seq.). Asbestos and asbestos-containing materials were, in many cases, used in order to satisfy important code requirements pertaining to fire safety. Accordingly, where asbestos was used originally to satisfy fire code requirements, it shall not be removed unless it is replaced***,*** as part of the project, with material or assembly which has equivalent fire resistive or heat resistive characteristics. Additionally, any encapsulation materials or methods shall conform to the construction requirements of the Uniform Construction Code.

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.

...

"Amended water" means water to which a surfactant has been added.

"Asbestos hazard abatement project" means the removal, enclosure, or encapsulation of more than *[ten]* ***25*** square feet of asbestos-containing material used on any equipment*[,]* ***or surface area such as*** wall, or ceiling area; or the removal or encapsulation*[, using a liquid material applied by a pressurized spray,]* of *[260]* more than *[25]* ***10*** linear feet of asbestos-containing material on covered piping.

"Authorized personnel" means the owner, the owner's representative, asbestos abatement contractor personnel, asbestos safety control monitor personnel, emergency personnel, or a representative of any Federal, state, or local regulatory agency or other personnel *[related to]* ***under contract for or having jurisdiction over*** the project.

"Certificate of Completion" shall mean the certificate issued by the asbestos safety control monitor signifying that the asbestos hazard abatement work has been completed in conformance with N.J.A.C. 5:23-8.

"Construction permit for asbestos abatement" means required official approval to commence any asbestos hazard abatement project. This permit is issued by the enforcing agency.

...

"Critical barrier" means two layers of ***nominal*** six mil polyethylene sheeting that completely seals off the work area to prevent the distribution of fibers to the surrounding area, such as the opening between the top of a wall and the underside of ceiling construction, electrical outlets, nonremovable lights, HVAC systems, windows, doorways, entranceways, ducts, grilles, grates, diffusers, wall clocks, speaker grilles, floor drains, sink drains, etc.

...

"Engineering controls" means all methods used to maintain low fiber counts in work areas and occupied spaces, including, but not limited to, air management, barriers to ensure public safety, and methods to confine airborne asbestos fibers to the work area.

...

"Flame-resistant polyethylene sheet" means a single polyethylene film in the largest sheet size possible to minimize seams, ***nominal*** six mil thick, conforming to requirements set forth by the National Fire Protection Association Standard 701, Small Scale Fire Test for Flame-Resistant Textiles and Films.

...

"Glove bag" means a polyethylene bag ***or other techniques or work practices approved by Department*** especially designed to enclose sections of equipment for the purpose of removing *[damaged]* asbestos-containing material without releasing fibers into the air.

"Glovebag work area enclosure" means the enclosure that defines the work area for glovebag activity.

"HEPA" means High Efficiency Particulate Air filter, capable of filter efficiency of 99.97 percent down to 0.3 um (microns).

...

"NESHAP" means the National Emission Standards for Hazardous Air Pollutants (40 CFR Part 61).

"NIOSH" means the National Institute for ***Occupational*** Safety and Health.

...

"Occupied building" means a building or structure where occupancy is permitted in certain areas outside of the required containment during an asbestos hazard abatement project.

"Operations and maintenance activity" means corrective action not intended as asbestos abatement. The amount of friable asbestos-containing material that can be abated ***per year*** per project is *[10]*** ***25*** square feet or less or, if on covered piping, *[25]*** ***10*** linear feet or less.

...

"Polyethylene sheet" means a single ***nominal*** six mil thick polyethylene film.

...

"Public building" means any building or structure or part thereof, owned, leased or managed by the State or any of its departments, divisions, bureaus, boards, councils, authorities, or other agencies; or by any county, municipality, or any agency or instrumentality thereof.

...

"Separation barrier" means a wall constructed to isolate the clean area from the work area and to support the polyethylene sheets.

...

"Strippable coating" means a water-based latex material, which is either available in aerosol cans or pre-mixed for spray application, formulated to adhere *[gently]* to surfaces and to be removed cleanly by peeling off at the completion of the abatement project.

...

"Water column (w.c.)" means a unit of measurement for pressure differential.

5:23-8.3 Enforcement; licensing; special technical services

(a) Except as is otherwise provided in (b)1 below, the provisions of this subchapter shall be enforced by municipal enforcing agencies utilizing asbestos safety control monitors or by the New Jersey Department of Community Affairs, hereafter cited as the Depart-

ment, if applicable, and shall be administered and enforced uniformly throughout the State. This subchapter shall be in addition to existing regulations already adopted pursuant to the Uniform Construction Code Act (P.L.1975, c.217 as amended) and known as the Regulations for the Uniform Construction Code (N.J.A.C. 5:23). This subchapter contains administrative procedures for the inspection of asbestos abatement work involving removal, encapsulation, enclosure, repair, renovation, or demolition work which disturbs asbestos.

1. (No change.)

(b) The joint regulations adopted by the New Jersey Department**s*** 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 an asbestos hazard abatement project.

ii. A licensed contractor shall not be required for an operations and maintenance activity.

2. Nothing herein shall be construed as limiting the ability of the Department of Labor to cite contractors for violations of the provisions of this subchapter.

(c) (No change.)

5:23-8.4 Variations

(a) No variations from the requirements of this subchapter shall be made except upon written approval from the enforcing agency. The application for a variation shall be filed by the owner or his agent and forwarded to the enforcing agency with the recommendation of the asbestos safety control monitor. Any variation shall be consistent with N.J.A.C. 5:23-2.

(b) An application for a variation pursuant to this section shall be filed in writing with the enforcing agency and shall include specifically:

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

2. A statement of the manner by which strict compliance with said provisions would result in practical difficulties*[:]* ***;***

3. A statement of the nature and extent of such practical difficulties;

4. A statement of feasible alternatives to the requirements of this subchapter which would adequately protect the health, safety and welfare of the occupants or intended occupants and the public generally and which would adequately prevent contamination of the environment. Plans describing any relevant aspects of the variation requested, as pertaining to the layout of the work area, work procedures, exit requirements, or safety, shall be submitted with the statement of feasibility; and

5. The appropriate fee.

(c) When the Department is the enforcing agency, the fee for an application for a variation from this subchapter shall be *[$432.00]* ***$647.00*** and shall be paid by check or money order payable to the "Treasurer, State of New Jersey."

*[(d) Variation for a dry removal shall be requested as follows:

1. When an asbestos abatement project cannot meet the requirements for the standard procedures for using amended water for the removal of asbestos-containing material, the building owner shall file with the Department an application for a variation for dry removal. The application for a variation shall be filed by the owner or his agent and forwarded to the Department with the recommendation of the asbestos safety control monitor. The Department shall review the application and approve or deny it in writing stating the reasons for denial.

i. The application shall contain:

(1) A certification that the project will be in accordance with the notification and work practices of NESHAP;

(2) A statement as to why dry removal is necessary;

(3) A list of the precautions required to be undertaken in order to protect the work area and building environment; and

(4) The fee for an application for a variation for dry removal shall be $432.00 and shall be paid by check or money order payable to "Treasurer, State of New Jersey."]*

*[(e)]****(d)*** The validity of an approved variation shall be determined as follows:

1. Any approved variation shall become invalid if the authorized work is not commenced within 12 months after the approval of the variation, or if the authorized work is suspended or abandoned for a period of *[six]* ***12*** months after the time of commencing the work.

5:23-8.5 Construction permit for asbestos abatement

(a) It shall be unlawful to undertake an asbestos hazard abatement project unless the owner of the facility, or an authorized representative on behalf of the owner, first files an application in writing with the enforcing agency and obtains the required permit. This permit shall serve as notice for public record in the office of the enforcing agency. All work shall be monitored and controlled by the asbestos safety control monitor who will advise the enforcing agency of its findings.

1. The enclosure of any amount of asbestos-containing material used to cover pipes shall not require a permit for asbestos abatement pursuant to this subchapter, but it may be considered construction work.

2. A construction permit shall be obtained when required by the enforcing agency pursuant to N.J.A.C. 5:23-2.

(b) All asbestos abatement work shall be conducted in unoccupied buildings, unless a written statement signed by the asbestos safety control monitor denoting portions of the building that may be occupied is filed as required by N.J.A.C. 5:23-8.19(c)8.

1. The asbestos safety control monitor shall not be required to file such a written statement denoting the occupancy of the building by maintenance personnel who are properly trained and/or security personnel essential to the building operation.

2. The asbestos safety control monitor shall not be required to file such written statement denoting occupied portions of the building for a cleared area in a multi-phase project that has received a Temporary Certificate of Occupancy from the enforcing agency when such occupancy applies to contractors or related personnel involved with post-abatement activity.

(c) The Department or a municipality utilizing an asbestos safety control monitor which has been authorized by the Department to enforce the Asbestos Hazard Abatement Subcode within its jurisdiction shall be the sole enforcing agency for asbestos hazard abatement work.

(d) 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.-iii. (No change.)

iv. Four sets of plans and specifications indicating: the scope of the proposed work; type and percentage of the asbestos; 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 including, but not limited to, separation barriers, critical barriers, and the route of travel for removing asbestos waste from the work area; a copy of the site plan; and a floor plan indicating exits. The approved plans and specifications shall be distributed as follows: one set each to the construction official, asbestos safety control monitor, building owner, and project site.

v. Documentation that all buildings will be unoccupied at the time an asbestos abatement project takes place, except as approved by the asbestos safety control monitor as delineated in N.J.A.C. 5:23-8.19.

vi. The name and address of the New Jersey Department of Environmental Protection ***and Energy*** registered waste hauler and of the New Jersey Department of Environmental Protection ***and Energy*** registered landfill where asbestos waste will be deposited.

vii. (No change.)

viii. The method of air analysis used pursuant to N.J.A.C. 5:23-8.21 for determining the final clearance level in order to reoccupy the building.

3. It shall be the responsibility of the owner or his agent to file with the enforcing agency, in the event of any change in (d)2i, iii and vi above. Such change shall be filed as an amendment to the application and shall be forwarded to the Department as set forth in (h) below. The replacement firm shall assume all responsibilities for the asbestos abatement work to continue, while the preceding firm still bears responsibility for its action.

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

1.-2. (No change.)

3. A written release of the plans and specifications by the asbestos safety control monitor.

4. Cursory plan review shall be done by the enforcing agency to determine the need of replacement material for maintaining the structural integrity of a building; if required, a separate construction permit shall be issued by the *[authority having jurisdiction]* ***enforcing agency***. In addition, a review shall be done to ensure that means of egress *[is]* ***are*** maintained in occupied buildings.

(f) The issuance of the construction permit for asbestos abatement authorizes preparation of the work area. This initial preparation of the work area shall be observed by the asbestos safety technician to ensure compliance with this subchapter. No actual asbestos abatement work shall commence until*[:]*

[1. A] ***a*** pre-commencement inspection has been conducted and approved by the asbestos safety technician.

(g) A permit, once issued, shall remain valid only as long as all of the information contained in the application remains correct and is adhered to. Any change shall require an amendment to the application before the change takes place. Failure to adhere to these requirements may result in a stop work order.

(h) The owner or his or her agent shall notify the Department in writing within three business days of the issuance of the construction permit for asbestos abatement, if the enforcing agency is a municipal enforcing agency and not the Department. Such notice shall be supplied in the form of a copy of the completed application for a construction permit for asbestos abatement and a copy of the permit.

1. (No change.)

(i) The owner or his or her agent shall notify the following in writing as required in NESHAPS (40 CFR *[61.146]* ***Part 61, Subpart M***):

1. Notification shall be sent to:

i. U.S. Environmental Protection Agency
*[Asbestos NESHAPS Contact
Air and Waste Management Division]*
Region II NESHAP
26 Federal Plaza***, Room 1033***
New York, New York *[10007]* ***10278***; and

ii. New Jersey Department of Community Affairs
Bureau of Code Services
Asbestos Safety Unit
CN 816
Trenton, New Jersey 08625-0816

5:23-8.6 Coordination with other permits

(a) When a building owner or an authorized representative on behalf of the owner submits an application for a construction permit for repair, renovation, or demolition work, the following information shall be required to be given to the construction official having jurisdiction before a construction permit is issued:

1. An architect/engineer certification concerning whether asbestos will be disturbed and to what extent it will be disturbed during the planned construction work.

i. Where *[minor]* ***any*** work not requiring an architect/engineer is involved then this certification will be required of the contractor undertaking the work.

(b) When it is certified that asbestos may become disturbed in a building or structure subject to this subchapter, an assessment performed by the New Jersey Department of Health, county or local health department, or by a private business entity authorized by the New Jersey Department of Health shall be required, unless the requirement for an assessment has been waived.

1. Boiler and water storage tank removal projects which require the removal of asbestos insulation from the boiler, water storage tank and piping shall not require an assessment before a permit is issued by the enforcing agency.

2. If the assessment indicates that the work and the disturbance which will result from it has made asbestos hazard abatement work necessary, then the construction official shall inform the building owner, or his agent, that all asbestos abatement work shall conform to this subchapter.

i. The work which will cause the disturbance will not be permitted to proceed until the hazard abatement work is complete or the asbestos-containing material clearly presents no further hazard.

ii. The construction official shall issue a partial permit for work which clearly will not disturb or interfere with the asbestos hazard abatement work.

5:23-8.7 Inspections; violations

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

1. (No change.)

2. The asbestos safety technician shall ensure that:

i.-iv. (No change.)

3.-4. (No change.)

(b) (No change.)

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

1.-2. (No change.)

3. The asbestos safety technician shall ensure that:

i. (No change.)

ii. All *[removed]* ***abated*** asbestos-containing material has been properly placed in a locked secure container outside of the work area.

4. If all is in order, and acceptable air results have been achieved, the asbestos safety technician shall issue a written notice of authorization to remove barriers from the work area.

(d) Final inspections shall be conducted as follows:

1. Upon notice by the owner or by the contractor and 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 rules of the New Jersey Department of Environmental Protection and Energy, N.J.A.C. 7:26-1, which is referenced in N.J.A.C. 5:23-8.22.

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 enforcing agency.

(e) The Department inspections shall be conducted as follows:

1. The Department shall make scheduled and/or unannounced periodic inspections of any work area involving asbestos abatement work for the purpose of enforcing this subchapter.

(f) Violations: The asbestos safety 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 asbestos safety technician shall direct such corrective action as may be necessary. If the contractor fails to comply with the corrective action required, or if the contractor or any of their employees habitually and/or excessively violate the requirements 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 enforcing agency, which 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 Certificate of occupancy; certificate of completion

(a) Certificate of occupancy requirements are as follows:

1. It shall be unlawful to re-occupy the portion of a building that was vacated during an asbestos hazard abatement project until a

certificate of occupancy has been issued by the enforcing agency. The certificate of occupancy shall be issued upon receipt of a certificate of completion issued by the asbestos safety control monitor and verified by the enforcing agency that the building or a portion of a building is in conformance with all applicable requirements of the Uniform Construction Code and that any walls, floors, trim, doors, furniture or other items damaged during the work shall be repaired and refinished to match existing materials.

2. The application for a certificate of occupancy shall be in writing and submitted in such form as the Department may prescribe and shall be accompanied by the required fee as provided for in this subchapter.

i. The application shall include the following:

(1)-(2) (No change.)

(3) Certificate of Completion submitted by the asbestos safety control monitor;

3. (No change.)

(b) Certificate of Completion requirements are as follows:

1.-3. (No change.)

4. A Certificate of Completion shall be issued only if:

i.-ii. (No change.)

iii. All requirements of this subchapter have been met.

iv. An acceptable final air monitoring level has been attained pursuant to N.J.A.C. 5:23-8.21 and documentation of that air level has been submitted in writing.

5:23-8.9 Fees

(a) The enforcing agency that issues the construction permit and the certificate of occupancy for an asbestos hazard abatement project shall establish by regulation/ordinance the following flat fee schedule:

1.-2. (No change.)

(b) The authorization and reauthorization fees for the asbestos safety control monitor are delineated in N.J.A.C. 5:23-8.11.

(c) The application fee for certification as an asbestos safety technician is delineated in N.J.A.C. 5:23-8.10.

(d) All fees shall be paid by check or money order, payable to "Treasurer, State of New Jersey".

5:23-8.10 Asbestos safety technician

(a) Any candidate for certification as an asbestos safety technician shall submit an application to the Department accompanied by the required application fee established in (c) below. The requirements for certification as an asbestos safety technician are as follows:

1. At least 24 college credits in academic sciences, including biology, chemistry, industrial hygiene, environmental science, physics, geology or related fields; or one year of work experience which included performing environmental assessment activities, which may be substituted for this education requirement;

2. Successful completion of a course in air monitoring methods consisting of a minimum of 30 contact hours that shall include hands-on experience with using and calibrating various types of air monitoring equipment; or six months of work experience performing air monitoring including at least 30 hours of on-the-job training, which may be substituted for this education requirement.

3. Successful completion of *[an approved]* ***a*** training course for asbestos worker/supervisors approved by the New Jersey Department of Health pursuant to N.J.A.C. 12:120 and N.J.A.C. 8:60;

i. One year of experience in monitoring asbestos abatement activities may be substituted for completion of an approved training course;

ii. Six months of experience monitoring asbestos abatement may be substituted for completion of an approved training course if the individual is an industrial hygienist certified by the American Board of Industrial Hygiene;

4. Successful completion of a course for asbestos safety technicians approved by the New Jersey State Department of Health;

5. Successful passing of an examination for asbestos safety technicians approved by the New Jersey Department of Health (pursuant to N.J.A.C. 12:120-6.12 and 8:60-6.12).

(b) The Department shall renew the certification following submission of an application, payment of the required fee pursuant to (c) below, and verification by the Department that the applicant meets the requirements for the certification in this section.

1. Every two years any certification already issued shall be renewed upon submission of an application, payment of the required fee, and verification by the Department that the applicant has met such continuing educational requirements as may be established by the Commissioner. The Department shall renew the certification previously issued for a term of two years. The renewal date shall be 45 days prior to the expiration date. The expiration dates shall be July 31 or January 31.

2. The Department shall issue, upon application, a duplicate certification upon a finding that the certification has been issued and the applicant is entitled to such certification to replace one which has been lost, destroyed, or mutilated. Payment of a fee as established by N.J.A.C. 5:23-8.10(c) shall be required.

3. The Department may establish by rule continuing education requirements as deemed necessary for the renewal of a certification.

(c) No application for certification or recertification shall be acted upon unless said application is accompanied by a *[$40.00]* ***$43.00*** fee.

(d) Duties of the asbestos safety technician shall be as follows:

1. The asbestos safety technician shall perform all air sampling specified in this subchapter, as delineated in N.J.A.C. 5:23-8.21 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]* ***abatement*** project at all times and shall continuously 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 technican shall be on site from the initial preparation of the work area through the approved final visual inspection, and shall perform all inspections pursuant to N.J.A.C. 5:23-8.7.

2. The asbestos safety technician shall direct the actions of the contractor verbally and in writing to ensure compliance with this subchapter. The asbestos safety technician shall require that all workers present a valid asbestos worker performance 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 negligence and/or flagrant disregard for the safety of any person, including the possibility of contaminating the building environment and the emergence of an 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 continually violates the requirements of any regulation, then 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 enforcing agency, who shall issue a Stop Work Order to the contractor and have the work area secured until all violations are abated.

3. The asbestos safety technician shall calculate, based on the actual available output (not the rated output) of the air filtering units, 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 enforcing agency who shall take necessary measures to ensure corrective action;

4. ***At the beginning of each work shift, every four hours thereafter, and at the end of the contractor's work day, the*** *[The]* asbestos safety technician shall monitor pressure differential by ***digital*** manometers ***with continuous printout***[, magnehelics,]* or other *[appropriate]* ***approved*** low pressure monitoring devices for each work area. One or more separate monitoring systems

shall be installed for every 10,000 square feet of separation surface adjacent to the work area. Pressure monitoring shall be representative of all adjacent areas. The pressure differential shall meet the minimum requirement set forth in N.J.A.C. 5:23-8.15(b)9 or *[8.17(b)4]* ***8.17(d)6i*** or 8.19(c)4ii, as appropriate.

5. The asbestos safety technician shall ensure that the contractor smoke tests all the glovebags *[to be utilized]* ***after they are attached and*** before the commencement of *[the project]* ***work***. *[The asbestos safety technician shall personally witness the smoke testing of at least 25 percent of these glovebags.]*

6. *[Upon]* ***For unoccupied buildings, upon*** receipt of testing results indicating that concentrations above the acceptance criteria established in N.J.A.C. 5:23-8.21 have occurred 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 enforcing agency and the Department within three business days from receipt of the results. ***For occupied buildings, the procedure set forth at N.J.A.C. 5:23-8.19 shall be followed.***

7. The asbestos safety technician shall monitor the removal of all asbestos-contaminated waste from the work area to ensure that it takes place in conformance with N.J.A.C. 5:23-8.22, in the following manner:

i. Direct removal by a collector/hauler registered with the New Jersey Department of Environmental Protection and Energy pursuant to N.J.A.C. 7:26 and pursuant to New Jersey Department of Transportation rules at N.J.A.C. 16:49.

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

8. The asbestos safety technician shall keep an up-to-date and comprehensive daily log of on-site activities. The log shall be updated continuously. The name of the project, name of the asbestos safety technician, and date shall be recorded daily. Each entry shall contain the event, the time of event and shall be initialed by the asbestos safety technician. 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 name of each person entering the work area. The log shall be a bound book and all entries shall be in ink. The log shall be kept at the project 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.

9. 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.

(e) Penalties: The Department may suspend or revoke a certification, or assess a civil penalty of not more than $500.00, for each offense, if the Department determines that an individual:

1. Has violated the provisions of the Uniform Construction Code regulations;

2. Has obtained a certification by fraud or misrepresentation;

3. Has aided or abetted in practice as an asbestos safety technician any person not authorized to practice as an asbestos safety technician under the provisions of this subchapter.

4. Has fraudulently or deceitfully practiced as an asbestos safety technician.

5. Has been grossly negligent or has engaged in misconduct in the performance of any of his duties;

6. Has failed*[, over a period of time,]* to maintain a minimally acceptable level of competence;

7. Has been found to have accepted or failed to report an offer of a bribe or other favors in a proceeding under this act or other appropriate law of this or any other state or jurisdiction;

8. Has failed to comply with any order issued by the Department;

9. Has made a false or misleading written statement, or has made a willful material omission in any submission to the Department;

10. Has failed to enforce this subchapter; or

11. Has performed the duties of an asbestos safety technician without being certified as such.

(f) In addition to, or as an alternative to, revoking or suspending a certification or assessing a penalty, the Department may issue a letter of warning, reprimand, or censure with regard to any conduct which, in the judgment of the Department, warrants such a letter. Such letter shall be made a part of the certification file of the individual. A copy of such action shall be sent to an officer of the asbestos safety control monitor firm employing the individual.

(g) Conviction of a crime or an offense shall constitute grounds for revocation or suspension of a certification.

5:23-8.11 Asbestos safety control monitor

(a) An asbestos safety control monitor may be an individual, partnership, corporation, or other business entity organized for the purpose of enforcing and administering this subchapter.

1. Each asbestos safety control monitor shall enter into a contract for each asbestos hazard abatement project with the building owner or his authorized agent. The contract shall specify: the scope of the project with the provision that the asbestos safety control monitor shall carry out all the rules and responsibilities established by this subchapter, how the asbestos safety control monitor is to be paid for its services and the name of the employee who shall serve as the representative of the asbestos safety control monitor authorized to review and approve all documents related to the administration of this subchapter.

2. Each asbestos safety control monitor authorized by the Department shall organize its operation to effectively fulfill the requirements of this subchapter. Each person assigned to perform the duties of an asbestos safety technician shall be certified as an asbestos safety technician by the Department.

3. The asbestos safety control monitor shall report to the Department through its designee and shall be subject to the orders and directives of the Department in matters relating to the enforcement of this subchapter.

(b) The Department shall authorize the establishment of an asbestos safety control monitor:

1. No person shall undertake the services described in this section or enter into any contract pursuant to this subchapter without first receiving the authorization of the Department.

i. Except that applicants who have received notice from the Department that their application is complete and suitable for processing may begin to promote or otherwise make their anticipated availability known provided that the applicant discloses in writing at the time of undertaking any such activity that he has not yet been authorized by the Department.

2. Applicants for authorization as an asbestos safety control monitor shall submit an application on the prescribed form, with the required fee pursuant to (h) below, and any additional information the Department may require.

3. Following a determination by the Department that an application is complete and suitable for processing, the Department shall review and evaluate the information contained in the application and such other information as the 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 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 Department shall provide the applicant with a written explanation of the reasons for denial.

4. The application for authorization shall contain information relating to:

i. The financial integrity of the applicant as evidenced by a reviewed financial statement prepared by an independent certified public accountant;

ii. The qualifications of the management and technical personnel of the applicant, including a statement that all technical personnel who are to be assigned as asbestos safety technicians are certified by the Department;

iii. The type of analysis done (for example, NIOSH 7400) and the laboratory(ies) that do the procedures. If the applicant does its

own lab analysis, it shall list the type of equipment used and the personnel using it, with their qualifications. All laboratories shall be accredited by the National Institute of Standards and Technology (NIST). The laboratory shall be a current proficient participant in the American Industrial Hygiene Association Proficiency Analytical Testing Program or any other recognized equivalent program for PCM. All laboratory analysis shall be performed in accordance with N.J.A.C. 5:23-8.21;

iv. The names of all technical personnel, including asbestos safety technicians with their certification numbers, and their range of salaries and other compensation;

v. The policies and procedures of the applicant for the hiring, training, education, and supervision of all technical personnel involved in the supervision and performance of duties pursuant to this subchapter;

vi. The prior experience of the applicant in performing similar or related functions;

vii. The capability of the applicant to review plans and specifications and to inspect asbestos abatement work to ensure that the completed work is in compliance with this subchapter;

viii. A statement that the applicant is not affiliated with, or infuenced or controlled by any producer, manufacturer, supplier or vendor of products, supplies or equipment used in asbestos hazard abatement ***or by any abatement contractor***; and

ix. Proof of insurance as required pursuant to N.J.A.C 5:23-8.11(c)3v.

5. Authorization shall be valid for a period of one year. The expiration dates shall be March 31 or September 30.

6. Applications for reauthorization shall be filed with the Department at least 60 days prior to the scheduled expiration for the current authorization from the Department. The asbestos safety control monitor shall make current the information previously submitted to the Department. The asbestos safety control monitor shall provide additonal information as the Department may request. The application shall be accompanied by the fee established pursuant to (h) below. The Department may conduct such additional investigations of the applicant as it may deem necessary.

i. Within 30 days following receipt by the Department of an application for reauthorization, the Department shall make its determination as to whether the asbestos safety control monitor continues to meet the requirements of the regulations. In the event of disapproval, the Department shall provide the asbestos safety control monitor with a written explanation of the reasons for such disapproval. Each reauthorization shall expire one year from the date of the current authorization from the Department.

ii. The Department, on its own motion or at the request of any asbestos safety control monitor, may grant a temporary reauthorization of such agency for a period not to exceed 60 days.

(c) Records shall be maintained by the asbestos safety control monitor of all inspections, applications, approved plans, air tests, log sheets and any other information that may be required by the enforcing agency or the department. These records shall be open to department audit and shall not be destroyed or removed from the offices of the asbestos safety control monitor without the permission of the department.

1. The asbestos safety control monitor shall provide the Department with written notification of any change of ***licensed*** personnel and ***any change of principals*** within 30 days.

2. The enforcing agency shall be the sole agent for the collection of all fees and penalties from the property owner, the designated agent or anyone in their employ.

3. Each asbestos safety control monitor shall have the following responsibilities:

i. To maintain an adequate number of certified staff to enforce the Asbestos Hazard Abatement Subcode for the projects contracted;

ii. To review and approve the plans and specifications, release them in writing, and forward them to the enforcing agency for issuance of a permit;

iii. To be subject to the department's rulings, directives and orders;

iv. To provide adequate supervision to its employees to ensure conformance to the provisions of this subchapter;

v. To carry liability insurance equal to that required of private enforcing agencies pursuant to N.J.A.C. 5:23-4.14(a)5;

vi. To process and return all documents, plans, specifications, and applications within the time frame specified by this subchapter.

vii. To provide technical assistance to the building owner in the preparation of a construction permit application;

viii. To provide written notification of the start of a project to the department a minimum of 10 days prior to the start of the project and telephone notification to the department by the asbestos safety technician on the first day of the start of the project;

ix. To perform all required inspections and reinspections pursuant to this subchapter;

x. To perform all tests required by this subchapter;

xi. To give testimony at a hearing or in court, as required by the construction official or the Department;

xii. To prepare all reports required by this subchapter or as may be required by the Department from time to time;

xiii. To meet its obligations under its contract with the building owner;

xiv. To issue and maintain documentation and certification, including, but not limited to, plan release, permit application and permit issued by the enforcing agency (if a firm is the duly authorized agent of the owner), variations submitted, written notice to proceed, written notice to remove barriers, certificate of completion, violation notices, daily logs, inspection records, observations, calculations, backup records, air monitoring results and a separate listing of any contractor deficiencies observed during the course of the work;

xv. To ensure the attendance of all technical and supervisory employees at required training and orientation programs; and

xvi. Upon completion of an asbestos hazard abatement project, the asbestos safety control monitor shall submit a final comprehensive report consisting of, but not limited to, plan release, permit application and permit issued by the enforcing agency (if a firm is the duly authorized agent of the owner), variations submitted, written notice to proceed, written notice to remove barriers, certificate of completion, violation notices, daily logs, inspection records, observations, calculations, backup records, air monitoring results and a separate listing of any contractor deficiencies observed during the course of the work. The final report shall be submitted to the building owner within 60 days of issuance of the Certificate of Completion. A copy of the final report shall be made available to the Department *[upon]* ***within 10 days of written*** request.

(d) Whenever an asbestos safety control monitor enters into a contract to provide asbestos safety control monitoring services in connection with an asbestos hazard abatement project, the asbestos safety control monitor shall not have any economic relationship with another party involved with the project. Laboratory services needed by the asbestos safety control monitor shall not be provided by any laboratory that has any economic relationship with the abatement contractor.

1. The asbestos safety control monitor may perform air monitoring required pursuant to the related OSHA requirements only through a contract with the building owner.

(e) Penalties, suspension and revocation procedures are as follows:

1. In addition to any other remedies provided by the Uniform Construction Code regulations, N.J.A.C. 5:23, the department may suspend or revoke its authorization of any asbestos safety control monitor or assess a civil penalty of not more than $500.00 per violation, if the department determines that the authorization or reauthorization was based on the submission of fraudulent or materially inaccurate information, or that the authorization or reauthorization was issued in violation of this subchapter, or that a change of facts or circumstances makes it unlikely that the asbestos safety control monitor can continue to discharge its responsibilities under this subchapter in a satisfactory manner, or any provision of this subchapter has been violated, or that the asbestos safety control monitor has been negligent or has emerged in misconduct in the

performance of any of its duties, or that the asbestos safety control monitor has failed*[, over a period of time,]* to maintain a minimally acceptable level of competence.

i. During the period of suspension, the affected asbestos safety control monitor shall not be authorized to discharge any of its responsibilities under this subchapter unless otherwise specified in the notice of suspension or order of the Department.

2. The Department shall notify such asbestos safety control monitor of its suspension or revocation in writing. Copies of the notice of suspension shall be forwarded by the Department to all building owners with implementing contracts with the affected asbestos safety control monitor. The suspension shall be effective on the date the affected asbestos safety control monitor receives the notice of suspension or on any later date that may be designated in the notice of suspension.

3. The Department may revoke its approval of any asbestos safety control monitor without previously suspending its authorization. In such event, the Department shall send a written notice to the affected asbestos safety control monitor of its intention to consider revocation of its authorization stating the grounds therefore. The notice shall be sent to the affected asbestos safety control monitor and to all building owners with implementing contracts with the affected asbestos safety control monitor.

i. No such asbestos safety control monitor shall reapply for approval as an asbestos safety control monitor until the expiration of one year from the date of the order of revocation.

4. Upon the suspension or revocation of approval of an asbestos safety control monitor, any building owner with an implementing contract with the asbestos safety control monitor shall have the right to terminate its contract with such asbestos safety control monitor and be free of all obligations thereunder and to enter into an implementing contract with any other asbestos safety control monitor.

(f) In addition or as an alternative to revoking or suspending an authorization, or assessing a penalty, the department may issue a letter of warning, reprimand, or censure with regard to any conduct which, in the judgment of the department, warrants such a response. Such letter shall be made part of the authorization file of the firm.

(g) Conviction of a crime or an offense shall constitute grounds for revocation or suspension of an authorization.

(h) Authorization and reauthorization fees are as follows:

1. Authorization fee: Any asbestos safety control monitor submitting an application to the Department under this subchapter for approval as an asbestos safety control monitor shall pay a fee of *[$3,250]* ***$3,500*** for the authorization which is sought.

2. Once authorized, the asbestos safety control monitor shall pay a fee of six percent of the gross revenue earned solely from asbestos safety control monitoring activities. This fee shall be payable quarterly, accompanied by a completed form prescribed by the Department, and is due within one month of the close of the indicated quarter according to the following schedule: First quarter—January 1 to March 31; second quarter—April 1 to June 30; third quarter—July 1 to September 30; and, fourth quarter—October 1 to December 31. The monies obtained from the preparation of plans and specifications and payments for laboratory services shall not be included in the calculation of this quarterly fee.

3. Reauthorization fee: Any asbestos safety control monitor submitting an application to the department under this subchapter for reapproval as an asbestos safety control monitor shall pay a fee of *[$1,625]* ***$1,750***.

5:23-8.12 Application of asbestos

(a) This section shall apply to the application of asbestos, except as provided in (a)1 below.

1. This section shall not apply to asbestos materials which are applied in solid, non-friable form, such as floor tiles or cement pipe.

(b) 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 application work.

1. No person may cause or allow surface coating by spraying on any building structure, facility, installation or internal or external portion thereof, using asbestos or any friable material containing in excess of 0.25 percent by weight of asbestos. See N.J.A.C. 7:27-17.

2. The direct application of asbestos material during construction or renovation of structures, facilities or installations by means such as troweling by hand shall be prohibited.

3. The only permissible applications of asbestos-containing materials during construction or renovation of structures, facilities or installations shall be those in which the asbestos is securely bound into a solid matrix before the application is performed, such as floor tiles in which asbestos is a minor component.

5:23-8.13 Pre-project procedures

Before an asbestos abatement project begins, the owner shall have evaluated whether or not the scope of work for a specific project will require that all surfaces in the work area are to be HEPA vacuumed and/or wet-wiped. This is in order to remove any dust which may contain asbestos 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.

5:23-8.14 Operations and maintenance activities

Operations and maintenance activity, as defined in N.J.A.C. 5:23-8.2, involves asbestos abatement work that may be performed without application or notice to the enforcing agency. Mechanical, electrical, plumbing or general construction work that involves the incidental disturbance of asbestos-containing material shall also be considered an operations and maintenance activity. Examples 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.; disturbance or routine maintenance activities which may involve asbestos-containing material; clean up of asbestos debris from a floor; and maintenance activities that may include the removal of asbestos-containing material, if required in the performance of another maintenance activity not intended as asbestos abatement, or minor repairs to damaged insulation which do not require removal. ***The stabilization of any amount of asbestos-containing materials used to cover piping, boilers, tanks, structural members, or similar equipment by applying duct tape, re-wettable glass cloth, canvas, cement, or other sealable material to seal exposed areas where asbestos fibers may be released, shall also constitute an operations and maintenance activity.*** Asbestos hazard abatement projects shall not be broken down into smaller component parts in order to qualify as an operation and maintenance activity.

(b) Specific records of each operations and maintenance activity 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 enforcing agency and for public inspections during normal business hours.

1. The information required shall be:

i. Location/name/number of building;

ii. Exact locations of the work area within the building;

iii. Type of abatement work conducted;

iv. Scope of work;

v. Type of replacement material used (if applicable);

vi. Date;

vii. Name(s) and address(es) of personnel; and

viii. Location of the disposal site.

(c) A certificate of occupancy or completion is not required for an operations and maintenance activity.

(d) Requirements concerning wetting methods are as follows:

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

2. Asbestos materials shall be wetted using amended water applied by means of an airless sprayer to minimize the disturbance of asbestos-containing material. Asbestos-containing materials shall

be wetted from the initiation of the maintenance or renovation operation that disturbs asbestos-containing material. 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 water-soaked and remains wet until final disposal.

(e) Asbestos-containing material shall be disposed of as specified in N.J.A.C. 5:23-8.22.

5:23-8.15 Asbestos hazard abatement projects

(a) No asbestos hazard abatement work including preparation shall be performed or continued without having a certified asbestos safety technician at the work area.

(b) Protective clothing, equipment, and general procedures for asbestos abatement shall be subject to the following requirements:

1. Only authorized personnel shall be permitted in the work area. The contractor shall provide the required respirators and protective clothing to all who may inspect or visit the work area;

2. The protective clothing and equipment requirements set forth in this section shall be used to prevent the contamination by persons engaged in asbestos abatement projects of areas and buildings accessible to or used by the public;

3. All persons entering the work area shall wear protective clothing. All clothing worn during removal operations shall be disposed of as contaminated waste. The requirement that clothing be disposed of as contaminated waste shall not include rubber boots, respirators, eye protection, hard hats, and other protective clothing, which can be easily cleaned.

4. (No change.)

5. All tape, spray-on adhesives, glove bags, glue, and other materials used in the abatement process shall be of sufficiently high quality to serve their intended purpose;

6. The contractor shall have available sufficient inventory of protective clothing, respirators, filter cartridges, polyethylene sheeting, duck tape, spray-on adhesives, and air filters. Sufficient personal protective equipment shall be available for usage by authorized personnel;

7. The contractor shall have available shower stall(s) and sufficient plumbing for these showers including hot and cold running water and sufficient hose length and drain systems or an acceptable alternate such as a portable decontamination trailer with showers. Waste shower water shall be added to asbestos-contaminated waste material before disposal in a permitted asbestos waste landfill or it shall be solidified using an approved polymer to prevent leaks or accidental spills within a facility or during transport for disposal to a permitted asbestos waste landfill or it shall be filtered using a five μ filter and disposed of in the sanitary drain, if allowed by local treatment works by regulation or *[in writing]* ***as allowed by permit***;

8. The contractor shall have available adequate ladders and/or scaffolds and sufficient temporary lighting equipped with ground fault circuit interruptors for the asbestos safety technician and all others who may inspect the work;

9. The contractor shall have available HEPA filter equipped air filtering equipment capable of filtering asbestos fibers to 0.3 μm at 99.97 percent efficiency and of sufficient quantity and capacity to cause a complete air change or total air filtration within the work area at least once every 15 minutes. Nothing in this subchapter shall be construed to limit the maximum exhaust capacity from the work area. If the situation warrants, the specifications for the abatement project may require additional air changes per hour. The exhaust capacity from the work area shall be sufficient to establish a pressure differential between the work area and all adjacent spaces greater than or equal to 0.03 inches. w.c. for unoccupied buildings and greater than or equal to 0.05 inches w.c. for occupied buildings.

i. Pressure differential shall be monitored by ***digital*** manometers ***with continuous printout***[, magnehelics,]* or other *[appropriate]* ***approved*** low pressure monitoring devices. The asbestos safety technician shall zero and level the gauges each time a reading is taken.

ii. One or more separate pressure monitoring systems shall be installed by the asbestos safety control monitor firm near the entrance(s) to the work area and between the work area and any interior spaces from which make-up air is drawn.

iii. In unoccupied buildings, if the pressure differential drops below 0.01 inches w.c., the asbestos safety technician and the contractor supervisor shall investigate and evaluate the engineering controls to determine the source of the pressure loss and the contractor shall institute corrective action as indicated.

iv. In occupied buildings, the procedures set forth in N.J.A.C. 5:23-8.19 shall be followed.

10. Air shall flow into the work area through all openings, including the decontamination chamber and waste exit ports, any areas in the work area where air leakage may occur, and other controlled makeup air inlets. Air shall 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; however, in such cases, this must be no closer than 40 feet to an HVAC intake]*. 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 an 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. Asbestos-containing material shall be disposed of as specified in N.J.A.C. 5:23-8.22.

(c) Decontamination procedures are as follows:

1. The contractor shall provide an adequate decontamination unit consisting of a serial arrangement of rooms or spaces adjoining the work area or a decontamination trailer. Each airlock shall be clearly identified and separated from the other by polyethylene crossover sheet doors designed to minimize fiber and air transfer as people pass between areas. A minimum of two layers of polyethylene sheeting shall be required for floors, walls, and the ceiling for on-site constructed decontamination units. Polyethylene crossover sheet doors shall have at least three layers of polyethylene sheeting and be weighted so as to fall into place when people pass through the area. Decontamination chamber doors shall be of sufficient height and width to enable replacement of equipment that may fail and to safely stretcher or carry an injured worker from the site without destruction of the chamber or unnecessary risk to the integrity of the work area. Such doors must be at least *[4]* ***four*** feet wide, and the distance between sets of doors must be at least *[4]* ***four*** feet.

i. As an alternative to the use of polyethylene crossover sheet doors, any other suitable method to accomplish this end shall be acceptable, if it is approved by the asbestos safety control monitor. Alternative doors shall *[swing in both directions]* ***provide for adequate exiting in accordance with the building subcode of the Uniform Construction Code***.

2. The decontamination areas shall consist of the following:

i. Clean room: In this room persons remove and leave all street clothes and put on clean disposable coveralls. Appropriate NIOSH approved respiratory protection equipment is also picked up in this area. No asbestos contaminated items are permitted in this room.

ii.-iii. (No change in text.)

3. In order to prevent contamination of the environment, the contractor shall be responsible for controlling access at the work 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 ensure that all persons who enter the work area shall observe the following work area entry and exit procedures:

i. Person enters clean room and remove street clothing, puts on protective clothing and a respirator, and passes through shower room into equipment room.

ii.-iii. (No change.)

iv. Before leaving the work area, the person shall remove all gross contamination and debris from the coveralls using a vacuum with a high efficiency particulate air (HEPA) filter. In practice, this is usually carried out by one person assisting another.

v.-viii. (No change.)

4. The contractor shall ensure that filters in cartridge type respirators used during the preparation and abatement phase of the project are removed, wetted*,* and discarded as contaminated waste. All new filters shall be in place in the respirator prior to reuse. For powered air purifying respirators or supplied air respirators, the manufacturer's instructions shall be followed about the proper decontamination sequence.

5. (No change.)

6. Nondisposable footwear shall remain inside the contaminated area until completion of the activity, and shall be thoroughly cleaned at that time.

(d) Preliminary preparations in the work area shall be conducted as follows:

1. The contractor shall provide and post in clearly visible locations, appropriate caution and/or danger signs indicating that asbestos work is being conducted and that unprotected persons should not enter;

2. Employees of the contractor permitted pursuant to N.J.A.C. 8:60 and N.J.A.C. 12:120 or persons employed by the building owner who have successfully completed a maintenance/custodial or worker training course approved by the New Jersey Department of Health shall clean with wet cloths and/or with HEPA vacuums as appropriate all objects that can be removed from the work area without disrupting the asbestos-containing material. Objects shall include*, **but not be limited to,*** furniture, equipment, drapes, and curtains. The cloths used for cleaning shall be disposed of as asbestos contaminated waste. If the room and objects within it are shown to be uncontaminated by asbestos, then other employees of the building owner or contractor may remove such objects;

3. The contractor shall install or build a decontamination facility in accordance with this section;

4. The contractor shall arrange for shutting down and sealing off all electrical, heating, cooling, and ventilating or other air handling systems. However, if approved by the asbestos safety control monitor, the *[fluorescent]* lighting and the receptacles in the work area may be used if these are properly protected by ground fault circuit interruptors ***and can be adequately cleaned following abatement***;

5. (No change.)

(e) Isolation and barrier construction in the work area shall be conducted as follows:

1. (No change.)

2. All vertical and horizontal surfaces except those of asbestos-containing materials shall be sealed with watertight polyethylene sheeting except as provided in (e)3 below;

3. The only permissible exception to total enclosure shall be:

i.-ii. (No change.)

iii. Staircases; and

iv. Controlled makeup air inlets into the work area.

4. Polyethylene sheeting shall be used to isolate contaminated from uncontaminated areas. This polyethylene sheeting shall be replaced or repaired immediately if torn or damaged. One layer of polyethylene sheeting shall be required for walls and two layers of polyethylene sheeting shall be used to seal open space between work areas and non-contaminated areas and for all floors. ***In buildings required by the Uniform Construction Code to be of noncombustible construction, all materials used to construct separation barriers must meet the Uniform Construction Code, building subcode requirements for that building and all plastics used must be flame resistant.***

(f) Initial activity in the work area shall be conducted in the following order:

1. Remove filters from all heating, ventilating, and air conditioning systems. Wet the filters and place them in polyethylene bags, double bagged with visible labels, for disposal as asbestos-containing waste. Squeeze all excess air out of the bag before sealing to prevent puncture during disposal. Secure bags by twisting, ***taping,*** folding over, and sealing them with duct tape.

2. The contractor shall wet clean and/or HEPA vacuum all non-removable non-asbestos items such as radiators and suspended light fixtures in the work area, including built-in equipment; and ***shall*** cover with two layers of polyethylene sheeting taped securely in place;

3. The contractor shall detach and wet clean removable electrical, heating, and ventilating equipment and other items which may be connected to the asbestos surfaces. These items shall be removed from the work area and returned and reattached to their proper place when the work area has been decontaminated and final air testing has provided satisfactory results;

4. The contractor shall seal all floor, wall, and ceiling penetrations with suitable material such as expanding foam insulation before covering the surfaces with polyethylene sheeting. The contractor then shall seal all openings between the work area and uncontaminated areas including*[,]* but not limited to, windows, doorways, elevator openings, skylights, corridor entrances, floor and sink drains, air ducts, grills, grates and diffusers with critical barriers consisting of two layers of polyethylene sheeting taped securely in place or stapled or fastened by spray-on adhesives, glue beads, or horizontal wood battens or the equivalent. Floor drains shall be sealed individually and then covered as all other floor surfaces with two layers of polyethylene sheeting. Separation barriers may be constructed to support the critical barriers. Separation barriers shall not block any required means of egress;

5. For floor covering two layers of polyethylene sheeting shall be used. The first layer of floor sheeting shall extend up the wall at least 12 inches. The second layer shall be extended up *[side]*walls at least 24 inches. Sheeting shall be sized so as to minimize the number of seams necessary. No seams shall be located at the joints between walls and floors;

6. Wall sheeting shall consist of one layer of polyethylene sheeting. It shall be installed to minimize joints and shall overlap floor sheeting by at least 18 inches. No seams shall be located at the corners. Wall coverings shall be taped first to the upper most edge of the wall and shall hang straight down;

7. When a strippable coating is used in place of polyethylene sheeting, it must be manufactured for the specific application required for walls, floors, or windows.

i. When dry, the strippable coating must have a class A rating as a building material and must meet the following requirements when tested in accordance with ASTM E-84: flame spread no greater than 20, fuel contributed 0, and smoke developed no more than 110.

ii. The strippable coating shall be applied uniformly in such a manner as to achieve a minimum uniform final thickness of six mil for each layer required pursuant to this subchapter.

iii. Manufacturer's specifications shall be followed for the method of application and for the protection of the applicators and building occupants.

iv. Use of the product shall be authorized in advance by the asbestos safety control monitor firm. The material shall be delivered to the project site in unopened, factory-labeled containers.

8. As all existing ventilating systems in work area are to be sealed throughout the removal operation, an alternative system shall be utilized. Install approved HEPA equipped air *[pressure differential]* ***filtration*** units with filters in place. HEPA equipped air *[pressure differential]* ***filtration*** units shall be of sufficient number and capacity to ensure that total air volume is exchanged at least once every 15 minutes and an acceptable *[differential]* pressure ***differential*** is established and maintained. These units shall be rated by the manufacturer as to their actual working air capacity ***and field tested pursuant to N.J.A.C. 5:23-8.10(d)4***.

(g) Sequence of asbestos removal activities shall be as follows:

1. The asbestos-containing material shall be sprayed with water containing an additive to enhance penetration (amended water) or removal encapsulant. All wetting agents shall be tested on a small area before use to ensure effectiveness. A fine low-pressure spray of this solution shall be applied to prevent fiber disturbance preceding removal. The removal encapsulant or amended water shall be sprayed on as many times and as often as necessary to ensure that the asbestos material is adequately wetted throughout (especially that asbestos nearest the substrate) to prevent dust emission. *[No

dry removal of asbestos is allowable unless a variation for dry removal is obtained from the Department pursuant to N.J.A.C. 5:23-8.4.]*

2. As a method of organizing the asbestos removal work, workers shall begin working on the areas nearest to the decontamination unit and work towards the HEPA equipped air *[pressure differential]* ***filtration*** units. If this is not feasible, the asbestos safety control monitor firm shall approve an alternative to this requirement.

[3. Asbestos-containing material located more than 30 feet above the floor shall be placed into inclined chutes, or placed onto scaffolding, or containerized at that height for eventual disposal. Asbestos-containing materials shall not be dropped or thrown to the floor from 30 feet or greater. For materials located at heights greater than 40 feet above the floor, an enclosed chute shall be constructed to transport removed material directly to containers located on the floor or, alternatively, a vacuum transport system may be employed.]

*[4.]***3.*** The wet material from each section shall be packed and sealed into labeled six mil polyethylene bags and double bagged with visible labels ***or placed in labeled, leak-proof containers***, prior to starting the next section. Water-soaked fallen material shall be picked up while wet.

*[5.]***4.*** Contaminated material containing sharp edged items shall be cut to manageable size while adequately wet, *[singly bagged]* and then placed in suitable leak-tight and puncture-proof containers or wrapped individually in two separate polyethylene sheets and double bagged.

*[6.]***5.*** Bags and drums shall be marked with the label prescribed by 40 CFR *[61.22(c)]* ***Part 61, Subpart M*** of the US EPA, 29 CFR 1926 of OSHA, and 49 CFR—Parts 100-199 of the US DOT Hazardous Waste Hauling regulations. The outside of all containers shall be wet-cleaned or HEPA vacuumed before leaving the work area.

*[7.]***6.*** After completion of this removal phase (stripping), all surfaces from which asbestos has been removed shall be scrubbed using nylon or bristle brushes and wet sponged or cleaned by an equivalent method to remove visible asbestos-containing material. During this work, the surfaces being cleaned shall be kept wet using amended water or a removal encapsulant. All disposable equipment shall be packaged for disposal. Containers shall be washed with amended water or a removal encapsulant and shall have all exterior particulate matter removed prior to removal from the contaminated area.

*[8.]***7.*** All accessory equipment shall be moved to the equipment room and decontaminated for removal.

*[9.]***8.*** All free water (in contaminated areas) shall be retrieved and added to asbestos-contaminated waste and/or placed in plastic lined leak-tight drums and/or solidified with an acceptable polymer or it shall be filtered using a five μ filter and disposed of in the sanitary drain, if allowed by local treatment works by regulation or *[in writing]* ***as allowed by permit***.

*[10.]***9.*** (No change in text.)

(h) Final clean-up of the work area shall be conducted as follows:

1. The contractor shall first clean all surfaces in the work area using a fine spray or mist of amended water or removal encapsulant applied to all surfaces followed by the wet-wiping procedure using disposable cloths. These cloths shall be disposed of or rinsed thoroughly on a frequency sufficient to eliminate visible accumulation of debris. The contractor shall allow all surfaces to dry before re-entering the work area and proceeding to (h)2 below.

i. The contractor shall notify the asbestos safety technician in writing that a pre-sealant inspection is requested.

2. (No change.)

3. The polyethylene sheeting used to protect floors, walls, fixtures and equipment shall be carefully removed and rolled up, with the contaminated portion on the inside, and packaged for disposal. Tape and any other debris shall also be disposed of in sealed polyethylene bags labeled as asbestos-contaminated waste.

4. (No change.)

5. The polyethylene sheeting used to maintain critical barriers between work areas and clean area***s*** such as those in doorways, windows and air vents shall be sprayed with encapsulant, but not removed until air monitoring is completed and satisfactory results have been obtained.

6. After completion of the cleaning operations the contractor shall:

i. Notify the asbestos safety technician that a clean-up inspection can be performed to ensure all visible asbestos has been removed and the area is dust free;

ii. Request final air clearance monitoring of the work area.

7. After the work area is found to be in compliance with the acceptance criteria, the following tasks shall be performed by the contractor:

i. All critical barriers shall be removed and bagged in polyethylene bags for disposal;

ii.-iii. (No change in text.)

8.-9. (No change.)

(i) Special precautions shall be implemented, where appropriate, including, but not limited to, the following examples:

1. Asbestos abatement projects involving ceiling tile and T-grid components, elevators, carpet, contaminated soil and projects in tunnels, crawl spaces, plumbing access panels, and/or involving live electrical panels or live steam lines are likely to present unique conditions that will require special precautions in addition to the procedures described in this section. In instances where special precautions need to be instituted, they shall be described in plans and specifications approved by the asbestos safety control monitor firm.

Recodify existing N.J.A.C. 5:23-8.13 as 5:23-8.16 (No change in text.)

5:23-8.17 *[Glove bag technique]* ***Limited containment removals***

(a) *[The removal of asbestos-containing material by use of the glove bag shall be limited to not more than 500 linear feet of insulation from equipment, such as, but not limited to, pipe fittings, elbows, pipe and ducts contained in a glove bag work area enclosure.]* ***The following procedures shall be followed for the use of glove bags or other techniques or work practices approved by the Department which similarly contain asbestos fibers.*** The glove bag work area enclosure shall be either an enclosure, built out of polyethylene sheeting around the glove bag, or the entire room if no enclosure is built.

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

1. (No change.)

2. The work area where the technique is to be utilized shall be roped off and appropriate caution and/or danger signs posted on the perimeter to prevent unauthorized personnel from entering the work area.

3. All necessary materials and supplies shall be brought into the work area before any removal begins.

4. One air change every 15 minutes shall be provided in a glovebag work area enclosure. *[A minimum pressure differential of 0.02 w.c. shall be maintained at all times.]*

5. *[Any person physically involved in abatement activity shall wear protective clothing and an adequate respirator.]* ***If no mini-enclosure is established, then the contractor shall arrange for shutting down and sealing off all electrical, heating, cooling, and ventilating or other air handling systems.***

i. If approved by the asbestos safety control monitor, the lighting and receptacles in the work area may be used if these are properly protected by ground fault circuit interruptors and can be adequately cleaned following abatement.

(c) The following is a list of equipment and tools for the removal of asbestos by the glove bag technique:

1. Glove bag(s) in suitable number, size and configuration for the specific abatement project. The glove bag is an air-tight, tear-resistant enclosure, designed to enclose an object from which asbestos-containing material is to be removed, constructed of a minimum of six mil polyethylene or other suitable material with inward projecting

longsleeve gloves, a tool pouch ***or other place where tools can be placed,*** and facilities for water application and a HEPA equipped vacuum attachment.

2.-3. (No change.)

4. Six mil polyethylene disposal bags ***or leak-proof containers*** with the proper markings for asbestos waste;

5. (No change.)

6. Tools such as*[:]* a small scrub brush*[;]***,*** a utility knife for cutting the insulation, a stapler, wire cutters*[:]***,*** smoke tubes with aspirators bulb*[:]***,*** a bone saw ***or other appropriate tool,****[:]* tin snips*[;]***,*** duct tape and wettable cloths;

7. A roll of six mil polyethylene; and

8. (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 (such as broken lagging, or hanging) exists. If there is damage, then the affected portion of the pipe shall be wrapped in polyethylene and fully secured with duct tape. This procedure will prevent excessive 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. All dust and debris on the floor and other surfaces which has accumulated due to the abatement project and which contains asbestos 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 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 project.

2. (No change.)

3. Place the necessary tools into the pouch located inside the glove bag. This will usually include the bone saw, utility knife, rags, scrub brush, wire cutters, tin snips and pre-cut wettable cloth. Cut out a donut shape in the cloth with the inner diameter one-half-inch smaller than the diameter of the pipe beneath the insulation. The outer diameter of the donut should be three inches longer than the diameter of the pipe insulation being removed. Finally, cut a slit in each of the two donuts so they can be slipped around the pipe. ***A piece of cloth that can be easily bent around the surface to be cleaned may be used instead of the donut-shaped cloth.***

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 polyethylene or duct tape (see (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. Before the commencement of the *[project]* ***abatement work, but after the glove bag is attached***, the contractor shall smoke test *[all the]* ***each*** glove bag*[s]* to ensure that *[they do]* ***it does*** not leak. The asbestos safety technician shall personally witness the smoke testing of *[at least 25 percent]* ***each*** of these glove bags. Using the smoke tube and aspirator bulb or other ***approved*** smoke generating device, place the tube into the wetting agent sleeve (two-inch opening to glovebag). Fill the bag with visible smoke. Remove the smoke tube and twist the wetting agent sleeve to close it. While holding the wetting agent sleeve tightly, gently squeeze the glovebag and look for smoke leaking out, especially at the top and ends of the glovebag. If leaks are found, they shall be taped closed using duct tape and the bag shall be re-tested.

i. Exception: If negative pressure is established and maintained at .02 inches w.c., smoke testing of glove bags is not required.

7.-8. (No change.)

9. If the section of pipe is covered with a protective jacket, this is removed first, using the wire cutters to cut any bands and the tin snips to remove the jacket. It is important to fold the sharp edges in to prevent cutting the bag when it is placed in the bottom. A box may be put in the bottom of the bag when the tools are placed in, and the metal placed in the box to further protect the bag from being cut.

10. (No change.)

11. Once the ends are cut, the section of insulation should be split from end to end using the utility knife. The cut should be made along the bottom of the pipe and the wetting agent continuously supplied. Again, care should be taken when using the knife not to puncture the bag. Some insulation may have wire to be clipped as well. Again, a box may be used as in (d)9 above to protect the bag from puncture.

12.-17 (No change.)

18. Remove all the tools *[from the tool pouch]* and draw them out into one of the arm sleeves, twist the sleeve tightly, and seal with tape, and cut the sleeve away from the bag, cutting through the tape. In this manner, the contaminated tools may be placed directly into the next glovebag without being cleaned. Alternatively, the sleeve with the tools in it can be placed in a bucket of water, opened underwater and dried without releasing asbestos into the air. ***This water shall be handled as asbestos-contaminated waste.*** Rags and scrub brushes cannot be cleaned in this manner and should be discarded with the asbestos-contaminated waste. *[If more than one adjacent section of pipe insulation is to be removed, the glovebag may be loosened at each end and slid along the pipe to be used again on the next section. In this case, the tools would remain in the bag for continued use.]* No more than *[two uses]* ***one use*** of a glovebag shall be permitted.

19.-20. (No change.)

21. All surfaces in the work area should be cleaned using disposable cloths wetted with wetting agent. These cloths shall be disposed of or rinsed thoroughly to eliminate visible accumulation of debris. Then, when these surfaces have been allowed to dry, all surfaces shall be cleaned again using a HEPA filtered vacuum. ***If no mini-enclosure was built, then the entire room shall be cleaned.***

22. Place any contaminated articles or debris into the bag with the waste.

23. Twist the top of the bag closed, fold this over, and seal with duct tape. Label the bag with labels prescribed by 40 CFR *[61.22(c)]* ***Part 61, Subpart M*** of the USEPA, 29 CFR 1926 of OSHA and 49 CFR—Parts 100-199 of the US DOT Hazardous Waste Hauling regulations.

24. Asbestos-containing waste material shall be disposed of as specified in N.J.A.C. 5:23-8.22.

25. Air sampling shall be conducted after completion of glovebag projects pursuant to N.J.A.C. 5:23-8.21 to determine if undetected leakage occurred. Once the area has been found to be safe for re-entry by unprotected personnel, the barriers may be removed.

5:23-8.18 Demolition

(a) *[Before a structure can be demolished or removed, the owner or his agent shall document that the requirements of the USEPA 40 CFR 61 subpart M have been or shall be met. A permit to demolish or remove the structure shall be obtained pursuant to N.J.A.C. 5:23-2 and this permit shall not be issued until the owner or his agent notifies the enforcing agency that all friable asbestos or asbestos-containing materal that will become friable during demolition or removal has been been properly abated in accordance with the procedures listed in this section.]* ***In buildings undergoing partial demolition and in buildings to be reoccupied by persons other than workers wearing appropriate NIOSH-approved respiratory protection, all friable asbestos or asbestos-containing material that will become friable during demolition must be properly removed.***

(b) The removal of asbestos shall require a construction permit in accordance with N.J.A.C. 5:23-8.5. ***Additionally, a demolition permit must be obtained pursuant to N.J.A.C. 5:23-2.***

(c) Asbestos abatement shall be done in accordance with all applicable provisions of this subchapter.

(d) Air monitoring samples during the removal phase and final air samples after removal shall be required for an asbestos abatement project.

*[1. Results of .02 fibers/cc or less shall be attained by phase contrast microscopy (PCM) prior to demolition;

2. If the demolition does not take place within 30 days of obtaining the fiber level above, the building or portion of a building to be demolished will be resampled to ensure compliance with (d)1 above;

3. If air levels above .02 fibers/cc are obtained in either of the above cases, the areas where the asbestos removal took place must be recleaned and resampled until they do meet the required level.

4. If the work area is to remain unoccupied prior to demolition or is to be occupied only by workers wearing appropriate NIOSH-approved respiratory protection equipment, then final air testing shall not be required.]*

5:23-8.19 Abatement in occupied buildings

(a) The requirements of this section are intended to prevent contamination and exposure of building occupants to asbestos fibers.

(b) The building owner shall notify building occupants in writing 20 business days prior to the commencement of an asbestos abatement project. The building owner shall outline in writing any procedures and/or precautions that are deemed necessary in order to protect the health, safety and welfare of the occupants. This notification shall include, but not be limited to: relocation plans, if any; entrances and exits that may temporarily be blocked and alternate routes to be used; the name and telephone number of the owner's representative for the occupant to call in case of an emergency or to answer any questions with regard to the project. This notification shall accompany the application for a construction permit for asbestos abatement and shall be filed with the enforcing agency.

1. This notification shall be posted seven days prior to the preparation of the work area, in visible locations, for the benefit of the affected occupants of the work place, and in areas immediately adjacent to the asbestos abatement project. It shall be the owner's responsibility to ensure that these postings are maintained throughout the project.

2. When circumstances require immediate removal of asbestos-containing material, notification shall be provided to the building occupants as soon as possible.

3. Nothing in this section shall be interpreted as prohibiting the building owner from providing additional notification.

4. The asbestos safety control monitor firm shall notify the Department in writing 10 days prior to the commencement of an abatement project in an occupied building.

(c) A building or structure or part thereof may be occupied during an asbestos abatement project when all of the following conditions are met:

1. Isolation conditions include a requirement that the work area be physically separated from occupied areas by separation barriers of rigid construction consisting of nominal two inch by four inch studs spaced 16 inches on center and covered with a minimum of one-half inch plywood or comparable metal framing and ½ inch gypsum board covering. All seams shall be caulked to render the barrier air tight before two layers of polyethylene sheeting are applied on both sides. The polyethylene sheeting shall overlap at the seams. All penetrations around conduits, pipes, ducts or other openings between the work area and adjacent spaces shall be sealed, using materials determined to be suitable in accordance with the applicable subcode. ***In buildings required by the Uniform Construction Code to be of noncombustible construction, all materials used to construct separation barriers shall meet the Uniform Construction Code, building subcode requirements for that building and all plastics used shall be flame resistant.*** A separate means of egress for abatement personnel, materials and equipment shall be maintained. Adequate fire evacuation routes shall exist for all building occupants at all times.

i. Whenever the building in which this work area is located exceeds four stories in height and when stair, elevator or similar shafts lie within or adjacent to the separation barriers or the work area, then special seals shall be installed. Such seals shall be constructed in the same manner as the separation barriers and shall create a space not less than *[two]* ***three*** inches in depth in front of the entire access area which space is sealed on both sides and positively pressurized with HEPA filtered air so that the pressure in the sealed space is *[.02]* ***.05*** inches w.c. greater than that in the work area or the shaft.

ii. All HVAC systems located in the work area shall be shut down. If HVAC equipment is located in the work area and must be operated to service other areas of the building, then the HVAC equipment shall be isolated from the remainder of the work area by an enclosure constructed in a manner similar to the separation barriers and the space between the equipment and the seal shall be positively pressurized with HEPA filtered air to at least .05 inches w.c. greater than the work area.

iii. Where return air ductwork which must be kept operating is located within the work area, then it shall be isolated from the work area by an enclosure forming an annular space around the duct which is positively pressurized with HEPA filtered air to at least .02 inches w.c. greater than the work area. The enclosure shall be constructed in a manner similar to that required for separation barriers.

iv. All electrical systems in the work area shall be shut down. Their use may be approved by the asbestos safety control monitor if they are properly protected by ground fault circuit interruptors***, they are cleanable,*** and provided that such other precautions as may be necessary are taken to ensure the safety of all who are in the work area.

2. Engineering controls shall be implemented as follows:

i. The asbestos safety technician shall verify exhaust capacity through appropriate field measurement and record these results in writing. The verification of exhaust flow rate via use of devices for monitoring pressure drop across filters on air filtration devices shall not be a substitute for appropriate field measurement. All exhaust from the work area shall be directed to the exterior of the building. If exhaust to the exterior of the building is not feasible, exhaust from the work area shall be directed into a second set of in-line air filtration devices, which, then, shall be permitted to be discharged into designated spaces approved by the asbestos safety control monitor.

ii. The contractor shall install a sufficient number of HEPA filter equipped air filtration units to cause a complete air change or total air filtration within the work area at least once every 15 minutes. (Nothing in this subchapter shall be construed to limit the maximum exhaust capacity from the work area or to prohibit additional air changes per hour.) The exhaust capacity from the work area shall be sufficient to establish a pressure differential between the work area and all adjacent spaces greater than or equal to 0.05 inches w.c. (Nothing in this subchapter shall be construed to limit the maximum pressure differential established between the work area and occupied spaces.)

(1) Make up air shall not be drawn through openings in the separation barriers in buildings greater than four stories in height, unless those openings are equipped with systems or devices which will not permit air flow except toward the work area and the air filtration and exhaust units located in the work area.

3. Work area protection shall be assured as follows:

i. Floors shall be covered with two layers of polyethylene sheeting which shall overlap at the seams and which shall be applied to the floor, individually sealed. The first layer shall extend up the wall at least 12 inches. The second floor layer shall be installed and extend up sidewalls at least 24 inches.

ii. Walls shall be covered with one layer of polyethylene sheeting individually sealed to the wall. The layer shall hang straight down overlapping the second layer of floor sheeting on the wall by at least 18 inches.

iii. Sheeting shall be sized to minimize the number of seams. No seams shall be located at the joints between walls and floors. As a minimum, no seam shall stop within 12 inches of a corner and sheeting shall overlap at least 12 inches between seams of adjacent layers.

iv. When a strippable coating is used in place of polyethylene sheeting, it shall be used in accordance with N.J.A.C. 5:23-8.15(f)7

and the product shall be applied during ***periods of*** minimal occupancy ***as determined by the owner and included in the approved plan***.

[v. If the occupied portion of the building includes sleeping areas or if the building is greater than four stories in height, only noncombustible materials or fire retardant lumber tested in accordance with the ASTM standard E84, approved flame-resistant polyethylene, fire retardant expanding foam insulation, or similar materials, shall be used for preparation work, including critical barriers, separation barriers, wall and floor coverings, the decontamination chamber(s), and the sealing of penetrations.]

4. Monitoring shall be conducted as follows:

i. Air sampling shall be done as follows:

(1) At a minimum, *[two samples per work shift]* ***one sample at the beginning of each work shift, one every four hours thereafter, and one at the end of the contractor's work day*** for every 10,000 square feet of occupied space adjacent to the work area shall be collected and analyzed. Air samples shall be taken in areas where the greatest potential for fiber migration exists. *[This shall include]* ***In addition to the requirements noted above, air samples shall be taken at*** the entrance(s) to the work area and any other interior spaces from which make-up air is drawn. Additional samples shall be taken for ***all*** areas such as stairwells, communicating shafts, elevators, plenums, ducts which pass through the work area and which are in service, and unusual room and building configurations. If air levels exceed the permitted fiber count, the applicable requirements of the contingency plan in (c)5 below shall be followed.

(A) At least one air sample shall be collected and analyzed during the work shift inside the work area. The results of this test will not, however, trigger the requirements of the contingency plan.

(2) A secure chain of custody for air samples shall be established ***in writing as part of the approved plan*** by the asbestos safety control monitor firm. The final disposition of samples (whether they should be retained or disposed of after analysis and if retained, who keeps them) *[must]* ***shall*** be determined prior to the commencement of asbestos abatement.

(3) The services of a testing laboratory, as delineated in N.J.A.C. 5:23-8.21(a)1 and 2, shall include a microscope and laboratory technician at the project site *[in order that verbal reports on air samples can be obtained immediately]* ***or the capacity to obtain results within four hours from start of sample***. The laboratory technician shall be listed in the Asbestos Analyst Registry of the American Industrial Hygiene Association for PCM analysis ***or qualified by other programs recognized by the Department as equivalent***. *[The]* ***If the laboratory technician is on site, the*** owner shall provide a safe and clean space for the analysis of samples separate and distinct from the work area. Air samples are to be analyzed via NIOSH 7400 and verbal results made available for a determination regarding continued occupancy. ***A written record of test results shall be kept at the job site and included in the final report.***

(4) Ten percent of all abatement samples shall be re-analyzed ***within 24 hours*** at a laboratory for quality control purposes.

(5) Daily occupancy shall be allowed when the results of all the air samples are less than or equal to 0.010 fibers/cc by Phase Contrast Microscopy. If air levels exceed 0.010 fibers/cc, the contingency plan during abatement in (c)5 below shall be followed.

(6) In the case of reoccupancy and final clearance, all air samples used to determine reentry shall be analyzed by *[and at]* an accredited laboratory.

ii. Pressure monitoring shall be carried out as follows:

(1) Pressure differential shall be monitored by ***digital*** manometers ***with continuous printout****[, magnehelics,]* or other *[appropriate]* ***approved*** low pressure monitoring devices. ***Sensor tubes used for monitoring shall be placed so that the air filtration devices shall not cause false readings.*** The asbestos safety technician shall zero and level the gauges each time a reading is taken.

(2) One or more separate pressure monitoring systems shall be installed by the asbestos safety control monitor firm near the entrance(s) to the work area and between the work area and any interior spaces from which make-up air is drawn.

(3) Written documentation of pressure differential shall be provided by the asbestos safety technician either by continuous *[read-out]* ***printout*** devices *[or periodic readings of display. Periodic readings shall be recorded during the abatement process and, in addition, the]**. **The*** asbestos safety technician and the contractor supervisor will ensure, prior to the completion of the work shift, the integrity of the containment site before workers depart.

(4) The pressure differential shall be greater than or equal to *[0.1]* ***0.05*** inches w.c. at the pre-commencement inspection (at the time of approval immediately prior to the start of abatement work).

(A) *[As an alternative]* ***In addition*** to providing a pressure differential greater than or equal to *[0.1]* ***0.5*** inches w.c. for the pre-commencement inspection, a smoke test *[may]* ***shall*** be conducted to demonstrate that the work area has been isolated properly and that pressure differentials have been established to prevent fiber migration from the work area.

(5) Daily Occupancy shall be allowed when the pressure differential is equal to or exceeds 0.05 inches w.c. If the air pressure differential drops below 0.05 inches w.c., the contingency plan during abatement in (c)5 below shall be followed.

5. Contingency plan during abatement shall be implemented as described below. These are the minimum requirements which shall be enforced by asbestos safety control monitors. These requirements shall not limit the asbestos safety control monitors from instituting additional requirements, if necessary, for the protection of the building occupants.

i. If the pressure differential drops below 0.05 inches w.c., the following procedures shall be implemented:

(1) The asbestos safety technician and the contractor supervisor shall investigate and evaluate the engineering controls to determine the source of the pressure loss.

(2) The contractor shall institute corrective action such as: additional sealing, critical barrier maintenance and construction, changing of exhaust unit filters, adjustment of make-up air, operation of additional exhaust units or other necessary measures to reestablish an acceptable pressure differential.

ii. If the pressure differential drops below 0.01 inches w.c., the following procedures shall be implemented:

(1) The contractor shall cease abatement activity in the work area.

(2) The asbestos safety control monitor shall notify the building owner to evacuate the pressurized space(s). The pressurized space(s) shall include all space outside the work area which is pressurized to maintain the required pressure differential relative to the work area and is isolated from the rest of the building in terms of air flow. The pressurized space may include the entire building exclusive of the work area or any part of the building that is pressurized to isolate it from the work area.

(3) The asbestos safety technician and the contractor supervisor shall investigate and evaluate the engineering controls and determine the source of the pressure loss.

(4) The contractor shall institute corrective action such as: additional sealing, critical barrier maintenance and construction, changing of exhaust unit filters, adjustment of make-up air, operation of additional exhaust units or other necessary measures to reestablish an acceptable pressure differential.

(5) Reoccupancy shall not be permitted in any area unless a pressure differential of 0.05 inches w.c. or greater is reestablished.

(6) If a pressure differential of 0.05 inches w.c. or greater is not reestablished within 24 hours of the first reading below 0.01 inches w.c., then the building shall be evacuated.

iii. If air levels exceed 0.010 f/cc, the following procedures shall be implemented:

(1) The asbestos safety technician and the contractor supervisor shall investigate and evaluate the engineering controls to determine the source of the high air level.

(2) An additional/second PCM air sample shall be taken ***at each place at which a high air level was obtained***. The additional/second PCM sample may be split, and if the result of the air sample is less than or equal to 0.010 f/cc the contingency plan is terminated. If the result of the air sample exceeds 0.010 f/cc, the contractor,

in consultation with the asbestos safety control monitor, shall choose the option of cleaning and retesting by PCM analysis or analyzing the split sample by TEM analysis. If the result of the TEM analysis exceeds 0.010 f/cc, then cleaning shall be undertaken.

(3) The decision as to the timing of the cleaning activity shall be made by the asbestos safety control monitor firm in consultation with the building owner and the contractor.

(4) Cleaning shall include, but not be limited to, wet wiping and misting the air. Cleaning the affected area shall be continued outside of containment and PCM sampling shall also be continued until the result in the area is equal to or less than 0.010 f/cc by either PCM or TEM analysis.

(5) If laboratory analysis of air samples does not yield a reading less than or equal to 0.010 f/cc within 24 hours of receipt of the first test result above 0.010 f/cc, then the building shall be evacuated.

(6) Reoccupancy shall not be permitted in any area where PCM analysis reveals results greater than 0.010 f/cc, unless TEM results indicate asbestos fibers are equal to or less than 0.010 f/cc. In the case of reoccupancy, all air samples used to make the determination to allow reentry shall be analyzed by an accredited laboratory.

iv. If a power outage occurs during active abatement work, the building occupants shall be evacuated until the air samples determine that the occupied spaces are safe, and power has been restored. If a power outage occurs when the building is unoccupied, occupancy will not be permitted until air samples determine that the spaces to be occupied are safe and power has been restored.

6. Security shall be required as follows:

i. In high risk areas, the owner shall provide a 24 hour security guard to ensure protection against damage or vandalism to separation barriers, engineering systems, monitoring devices, or other equipment.

ii. The owner shall provide continuous unlimited access for the asbestos safety technician in all occupied spaces for installation, maintenance, and data collection from monitoring systems.

iii. The asbestos safety control monitor firm shall include provisions in the plan and the asbestos safety technician shall ensure that filters are changed as necessary and that pressure differential is maintained around the clock until the project is completed.

7. Waste removal shall be accomplished as follows:

i. The waste removal route of travel is to be designated on the abatement plans and shall be separate and distinct from the normal route of travel used by building occupants. Waste removal shall occur during the time of least amount of building occupancy. If the route of travel is to be used the following day by building occupants, ***air monitoring must be performed, and if the results of air levels exceed 0.010 f/cc, then*** the waste removal route is to be wet wiped using amended water *[and]*,* HEPA vacuumed ***and retested until an acceptable air level is achieved*** prior to allowing occupancy of the area.

[ii. The waste removal routes shall be protected by one layer of polyethylene sheeting on floors, windows, doors and HVAC.]

*[iii.]***ii.*** The waste removal process shall be *[continually]* ***closely*** monitored visually and through air sampling by the asbestos safety technician.

*[iv.]***iii.*** No dumpster shall remain on the premises overnight unless the dumpster is locked and labeled to indicate that it contains asbestos-contaminated waste.

8. A written statement shall be signed by the asbestos safety control monitor denoting that an asbestos abatement will occur during building occupancy and verifying that the above requirements will be maintained. This written statement shall accompany the application for a construction permit for asbestos abatement and shall be filed with the enforcing agency. This statement shall include the areas to be occupied during the abatement and the number of occupants.

5:23-8.20 Removal of non-friable asbestos-containing material

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

1. When the removal method will cause the building environment to become contaminated with airborne asbestos fibers caused by a combination of mechanical and manual tasks, such as grinding the surface of vinyl asbestos floor tiles, then complete separation of the worksite from the rest of the building shall be required and the precautions and procedures as delineated in N.J.A.C. 5:23-8.15 ***or 8.19, as appropriate,*** 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 asbestos fibers, such as when an electric heating appliance is used to loosen vinyl asbestos floor tiles or when the "Recommended Work Practices for the Removal of Resilient Floor Coverings" (latest edition) by the Resilient Floor Covering Institute are followed in removing floor tile, sheet vinyl flooring and the associated adhesives, then general isolation of the work area from the surrounding environment by the closing of doors and windows in the removal areas, when feasible, safe work practices and proper clean-up procedures 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 material and/or asbestos-contaminated waste shall conform to the New Jersey Department of Environmental Protection and Energy requirements specified in N.J.A.C. 7:26.

(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 build 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) Heath Hazard Evaluation Report No. HETA 84-321-1590 shall be followed]*. A construction permit ***shall be obtained if required*** 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. 5:23-8.22]* ***regulations for the disposal of such material adopted by the New Jersey Department of Environmental Protection and Energy*.**

5:23-8.21 Air monitoring methodology

(a) 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 currently enrolled in the American Industrial Hygiene Association Proficiency Analytical Testing Program or an equivalent recognized program.

2. Analysis by PCM shall use the NIOSH 7400 method delineated in "Fibers" publication in the NIOSH Manual of Analytical Methods, 3rd edition, 2nd supplement, August 1987 or the latest edition. Maximum turnaround time from sample collection through data reporting shall be 24 hours.

3. For transmission electron microscopy (TEM) analysis, laboratories shall participate in the National Institute of Standards and Technology—National Voluntary Laboratory Accreditation Program (NIST-NVLAP) and shall certify that the analysis they performed was according to the protocol listed in Appendix A to Subpart E of 40 CFR 763. Maximum turnaround time from sample collection through data reporting shall be 72 hours.

4. All pumps shall be calibrated prior to initial sampling using a primary standard. Pumps shall be re-calibrated with a minimum of a secondary standard before and after each sample is collected. Protocols shall be established for periodic calibration, using a primary standard. The frequency of primary recalibration checks shall be initially high, until experience is accumulated to show that it can be reduced while maintaining the required sampling accuracy. Records shall be kept of all calibrations and shall be part of the daily log.

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

1. A minimum of three samples per ***eight hour*** shift shall be collected ***(one at the beginning of each shift, one every four hours**

thereafter, and one at the end of the contractor's work day)*. One stationary sample shall be collected within the clean room of the decontamination unit 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 that 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. For abatement projects in occupied buildings, additional samples shall be taken in spaces adjacent to the work area and inside the work area and analyzed *[on-site]* by PCM as required by N.J.A.C. 5:23-8.19(c)4. The contingency plan in N.J.A.C. 5:23-8.19(c)5 shall be followed if test results indicate that this is necessary.

(c) Post abatement visual inspections and air monitoring shall comply 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 subsequent 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 this 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*[.]* ***as follows:***

i. The fans shall be placed in each room to be sampled so as to cause settled fibers to rise and enter the air.

ii. Prior to air monitoring, floors, ceilings, and walls shall be swept with the exhaust of a one-horsepower leaf blower. The areas which would be subject to dead-air conditions shall be swept clean.

iii. The fans used shall be capable of creating a minimum air velocity of 500 feet per minute. These fans may be of the oscillating type.

iv. The sampling pump and sampling media shall be placed in the abatement area on a random basis to provide unbiased and representative samples. Stationary fans shall be placed in locations which will not interfere with air monitoring equipment. Fan air shall be directed toward the ceiling.

v. One fan shall be used for each 10,000 cubic feet of the work area.

vi. The leaf blower and its use must meet the criteria set forth in EPA document 560/5-85-024, "Guidance for Controlling Asbestos-Containing Materials in Buildings," appendix section M.1.5, or any replacement criteria set forth by the 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.

vii. The work site shall be kept free of non-asbestos abatement debris that would render aggressive air sampling impractical.

(d) Post abatement sampling and analysis for an asbestos hazard abatement project shall be performed as per EPA 40 CFR 763.90i. Samples collected within the affected work area shall be analyzed by TEM.

(e) Post abatement sampling and analysis for an asbestos hazard abatement project utilizing the glovebag technique and encapsulation shall be as follows:

1. One sample per 10,000 square feet of work area with a minimum of five samples shall be required. Samples collected within the affected work area may be analyzed by PCM to confirm completion of an asbestos abatement project using the methodology specified in NIOSH 7400.

(f) For TEM analysis, 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. Maximum turnaround time from sample collection through data reporting shall be 72 hours.

(g) For PCM analysis, 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 0.01 fibers per cubic centimeter.

(h) 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 equipped air pressure differential units to filter the air.

5:23-8.22 Disposal of asbestos waste

(a) *[This subsection shall apply to the]* ***The*** disposal of friable/non-friable asbestos-containing material and asbestos-contaminated waste from the project site ***shall be*** in accordance with New Jersey Department of Environmental Protection ***and Energy*** requirements specified in N.J.A.C. 7:26 ***and 40 CFR Part 61, Subpart M***.

*[1. Disposal of asbestos waste shall be conducted as follows:

i. A notification of intent to dispose of asbestos shall be sent to the New Jersey Department of Environmental Protection at least 10 days prior to actual disposal. The notification shall be sent to the Division of Waste Management, Bureau of Field Operations, 120 Route 156, Yardville, New Jersey 08620 pursuant to N.J.A.C. 7:26-1 et seq.

ii. All asbestos waste materials destined for disposal shall be wetted and packaged in permanently sealed, leak-tight containers (such as six mil polyethylene bags, double bagged with visible labels) in accordance with 40 CFR 61.140-158 (Subpart M) before it can be legally transported and disposed of. No haulage of loose asbestos is permitted.

iii. A locked, secure container shall be provided if asbestos waste is to be stored outside unattended.

iv. The notification of (a)i above shall include the following:

(1) Name, address, and telephone number of the removal project;

(2) Quantity and nature of the waste to be disposed;

(3) Name, address, and New Jersey Department of Environmental Protection registration number of the collector-handler;

(4) Name and address of the landfill at which disposal will occur;

(5) Date and time of disposal;

(6) A copy of any written notification required by 40 CFR 61.146 and 61.155.

v. Asbestos waste which is properly packaged is classified as Waste ID No. 27, non-hazardous industrial waste, and shall be disposed of at a landfill which is registered by the New Jersey Department of Environmental Protection in conformance with the following:

(1) The asbestos waste container shall be taken to the landfill by a vehicle that is registered by the New Jersey Department of Environmental Protection;

(2) The landfill used must be registered by the New Jersey Department of Environmental Protection to accept Waste ID No. 27;

(3) The specific landfill facility chosen must be one designated by the New Jersey Department of Environmental Protection to accept Waste ID No. 27;

(4) The waste hauler must possess a valid solid waste transporter registration issued by the New Jersey Department of Environmental Protection. A licensed solid waste transporter shall be a commercial collector/hauler or shall be the removal company if they are so registered;

(5) Asbestos waste can be hauled in trucks or in dumpster containers provided the load is comprised only of asbestos in bags and does not contain any other wastes or asbestos-containing wastes which could compromise the integrity of the permanent containers;

(6) If rough surfaces or other materials are present in the load which could potentially puncture the permanent containers, then those containers shall be enclosed in temporary fiber or steel drums during loading, transport, and unloading operations. In addition, asbestos wastes shall not be loaded into or hauled with vehicles containing compaction devices;

(7) To determine which landfill to use for a particular project, N.J.A.C. 7:26-6.5 shall be consulted.]*

(a)

DIVISION OF HOUSING AND DEVELOPMENT

Notice of Administrative Correction

New Home Warranties and Builders' Registration Denial, Suspension or Revocation of Registration; Warranty Contributions; Amount: Due Date

N.J.A.C. 5:25-2.5 and 5.4

Take notice that the Department of Community Affairs has discovered errors in the text of N.J.A.C. 5:25-2.5(a) and 5.4(a)1. The word "suspended" was deleted from N.J.A.C. 5:25-2.5(a) by an amendment promulgated at 24 N.J.R. 1149(a) and 2244(b). However, its deletion was not reflected in the 10-19-92 Code update. In the last sentence of N.J.A.C. 5:25-5.4(a)1, the phrase "passed through the owner" should read "passed through to the owner." The word "to" was deleted through typographic error in the printing of the proposal and adoption at 24 N.J.R. 2663(a) and 3525(c); it was not bracketed for deletion in the Department's proposal (see PRN 1992-335). Through this notice of administrative correction, published pursuant to N.J.A.C. 1:30-2.7, both errors are rectified.

Full text of the corrected rules follows (addition indicated in boldface **thus**; deletion indicated in brackets [thus]):

5:25-2.5 Denial, suspension or revocation of registration

(a) A certificate of registration may be denied[, suspended] or revoked if the registrant or applicant or an officer, partner or stockholder of the registrant or applicant has at any time:

1.-5. (No change.)

(b)-(e) (No change.)

5:25-5.4 Warranty contributions, amount, date due

(a) Each builder not participating in an approved private plan shall contribute to the State plan in an amount equal to a percentage of the purchase price of the home, or of the fair market value of the home on its completion date if there is no good faith arms' length sale, determined in accordance with (b) below, each time he sells a home. When the cost of land is not included in the sale, the purchase price shall be deemed to be 125 percent of the contract amount and shall be the basis for calculating the premium and the dollar value placed on the Certificate of Participation.

1. Whenever the seller of a new home is not the builder who constructed it, or a builder taking from the builder who constructed it, such as a mortgagee in possession, receiver in bankruptcy, or executor of an estate, such person shall not be excused from payment of premiums or from taking corrective action on complaints, dispute settlement, or the like in the same manner as would any builder. Such person may contract with a builder for follow-up services that may be required pursuant to the warranty, or may, at his option, pay 0.8 of one percent of the purchase price of the new home and be relieved of the obligation to provide such follow-up services. The State plan shall then stand in his place with regard to any claims made pursuant to this subchapter, but shall not stand in his place if the homeowner elects not to file a claim in accordance with this subchapter and elects, rather, to pursue any other remedy against the seller. The claims procedure established by this subchapter shall be the exclusive remedy whereby the State plan shall stand in the place of the seller. The Department shall inspect the new home for any defects. The list of defects shall be attached to the Certificate of Participation. Uncompleted portions shall be excluded from the warranty coverage until completed, in accordance with N.J.A.C. 5:25-3.4(a)1. The additional amount paid shall not be passed through **to** the owner.

2.-4. (No change.)

(b)-(f) (No change.

HEALTH

(b)

EPIDEMIOLOGY, ENVIRONMENTAL AND OCCUPATIONAL HEALTH SERVICES

Youth Camp Safety Act Standards

Readoption: N.J.A.C. 8:25

Proposed: March 1, 1993 at 25 N.J.R. 756(a).
Adopted: May 10, 1993 by Bruce Siegel, M.D., M.P.H., Commissioner, Department of Health.
Filed: May 11, 1993 as R.1993 d.264, **without change.**

Authority: N.J.S.A. 26:12 et seq., specifically N.J.S.A. 26:12-5.

Effective Date: May 11, 1993.
Expiration Date: May 11, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption can be found in the New Jersey Administrative Code at N.J.A.C. 8:25.

(c)

DIVISION OF FACILITIES EVALUATION AND LICENSING

Maternal and Child Health Consortia Licensing Standards Fiscal Management and Staffing

Adopted Amendments: N.J.A.C. 8:35A-1.2, 3.4, 3.6, 4.1 and 5.3

Proposed: March 15, 1993 at 25 N.J.R. 1116(a).
Adopted: May 13, 1993 by Bruce Siegel, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).
Filed: May 14, 1993 as R.1993 d.285, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: June 7, 1993.
Expiration Date: September 8, 1997.

Summary of Public Comments and Agency Responses:

COMMENTERS: G. Lynn Brown, Executive Director of Planned Parenthood Greater Camden Area; Jean Buerle Farley, Executive Director of Central New Jersey Maternal and Child Health Consortia; Dennis H. Collette, President and Chief Executive Officer for Newton Memorial Hospital; Lyda Sue Cunningham, President of Northwest New Jersey Maternal and Child Health Network; Ralph A. Dean, Executive Vice-President of New Jersey Hospital Association; Arthur T. Dunn, President of The Hospital Center at Orange; Jane Leikind, Vice-President of Strategic Services for Monmouth Medical Center; Tracy McArdle, Public Health Director for Atlantic County Department of Human Services; Kevin J. O'Brien, Director of Strategic Planning and Marketing for St. Peter's Medical Center; Karen E. Walanuik, Director of Nursing for Community Nursing Services, Michael D'Agnes, Treasurer of Hudson Perinatal Consortium, Inc. and Morris Cohen, M.D., President of Gateway Maternal and Child Health Consortium.

COMMENT: Commenters questioned the policy with respect to use of unspent funds by consortia.

RESPONSE: As long as the consortia are fulfilling their required services, the Department will permit the consortia boards to take unspent funds into account when developing a subsequent year's budget, subject to review and approval by the Department. While a specific formula was not proposed, the Department would consider a reasonable allowance for working capital and financial reserves appropriate, with other unspent funds allocated to offset future years' expenditures.

COMMENT: The funding source should be broadened either to all providers, all consortium members or some other source, such as hospital rate setting fees or the Health Care Subsidy Fund.

RESPONSE: P.L. 1992, c.160 requires hospitals to provide for its regional maternal and child health consortia. Furthermore, requiring hospitals to be the primary funding source is reasonable for the following reasons:

1. Prevention activities are a primary goal for the consortia and should reduce the demand for costly, and often uncompensated, tertiary care. As a result, hospitals will derive most of the financial benefits of the consortia successes.

2. Significant cost shifts to consumers and non-hospital providers who are not required to be members of the consortia would be counter-productive to the goal of a community-based, balanced consortia.

3. Non-hospital providers are mostly State and/or Federally funded. These agencies will be bearing the cost burden of providing direct services to the populations needing access for preventive care.

The Department has no statutory authority to utilize rate setting commission fees to offset this assessment. The uses of the Health Care Subsidy Fund will be determined by the Essential Health Services Commission. In both cases, the funding source is still the hospitals.

COMMENT: The Department's budgetary oversight was perceived as "micro-management" by a commenter.

RESPONSE: The Department reserves the right to approve all consortia budgets to assure their viability and to also monitor their performance in accordance with regulatory requirements. Additionally, the Department has a responsibility to all New Jersey hospitals to assure the reasonableness of MCH Consortia budgets. The Department has no current intention of "line item vetoing" or substituting its judgment regarding staff payment.

COMMENT: Under a deregulated competitive environment, hospitals should not be forced to pay for programs that should be funded by other sources.

RESPONSE: Even under a deregulated competitive environment, the Department has a requirement to ensure quality of care. The consortia are designed to enhance quality of care in hospitals as well as establish a regional system of care. They, in effect, serve the hospitals. Since, in a deregulated environment, hospitals will be a primary beneficiary of the financial benefits of prevention, it is reasonable to fund these services through the hospitals.

COMMENT: The 1993 revenue cap of all consortium members should be adjusted to account for the consortia budget. Another hospital suggested that the total amount of the assessment should be reduced, since the perinatal adjustment is not included in the Revenue Caps of all hospitals.

RESPONSE: Although, due to the cap on revenue caps, not all hospitals received full adjustments, it is incorrect to state that the perinatal adjustment is not in the revenue cap. Chapter 160 does not identify which elements are not recognized if the hospital is subject to cap adjustment in section 3a(3) of P.L. 1992, c.160. Perinatal adjustments were not specifically eliminated.

The Department does not have the authority to approve an additional adjustment. The revenue cap was set for the 1993 transition year, based upon specific requirements found in P.L. 1992, c.160. This statute required that the revenue cap be set to include the perinatal adjustment, but also provided that a hospital's revenue cap could not exceed its 1992 approved revenue. The statute further requires hospitals to "provide for its ... regional maternal and child health consortia, as applicable."

COMMENT: The consortia should be allowed to structure their activities to meet the needs of its member hospitals without mandated services, functions and/or positions.

RESPONSE: The purpose of the consortia is to improve maternal and child health in the State of New Jersey, not solely to meet the needs of its member hospitals. The minimum staffing levels required in the licensure rules are modest, and the Department believes this provides consortia substantial flexibility in the manner that mandated activities of the rules are met.

While some areas of New Jersey have less serious problems with infant mortality and morbidity than others, improvement in pregnancy outcomes could be achieved in all areas through the mix of education, outreach and coordination that the consortia will provide.

N.J.A.C. 8:35A-1.2

COMMENT: Community Nursing Services recommends the term "health care provider member agency" be replaced with "hospital provider" to clarify that only hospitals are required to provide financial support to consortia.

RESPONSE: As the rule mandates that only hospital members must be assessed dues, it agrees with the comment and the definition of a "member in good standing" will be changed to reflect its particular meaning with respect to financial obligations of hospitals. The Department does recognize that a non-hospital provider may participate in supporting a consortia's activities financially. However, this is non-mandatory and therefore is not necessary to reflect in the definition contained in this rule.

N.J.A.C. 8:35A-3.4(c)

COMMENT: Several commenters who interpreted the phrase "assessments from all member health care facilities" to include every member agency of the consortia, advised the Department that many small non-profit member agencies may have to withdraw from the consortia because of an inability to pay.

RESPONSE: The Department intends that the consortia receive sufficient funding only through assessment of hospital members. The Department believes this is appropriate for the following reasons:

1. Prevention activities are a primary goal for the consortia and should reduce the demand for costly, and often uncompensated, tertiary care. As a result, hospitals will derive most of the financial benefits of the consortia successes.

2. Significant cost shifts to non-hospital providers who are required to be members of the consortia would be counterproductive to the goal of a community-based balanced consortia.

3. Non-hospital providers will be bearing the cost burden of providing direct services to the populations needing access for preventive care.

Therefore, the language of the rule has been amended to clarify this intent; the term "health care facilities" is replaced with "acute care hospital."

COMMENT: St. Peter's Medical Center asks that the term "hospital" be replaced with "health care facility." One commenter believes that a 90 day delinquency period is too restrictive because of cash flow and financial problems experienced by many hospitals.

RESPONSE: The Department believes the term "hospital" is clear and therefore has not made the recommended change. A 90 day grace period is sufficient, given the much smaller budgets of the consortia. Inadequate, untimely or unpredictable financing will make these small agencies non-viable.

COMMENT: The Northwest New Jersey Maternal and Child Health Network sought approval to limit its billing to 10/12 of the 1993 assessment, since support from the Robert Wood Johnson Foundation was available for the first quarter of 1992.

RESPONSE: The Department recognizes the need to consider the particular circumstances and financial issues of each consortia; however, this flexibility cannot be applied universally to all consortia, as some consortia have fixed costs relative to staffing, rent, etc. The Department reserves final approval of budgets pending the review and depending upon the impact on staff or services.

COMMENT: One consortia questioned the authority of the Department of Health to approve a consortium's budget when the State is not funding the consortium.

RESPONSE: The Department has authority, pursuant to its responsibility to license health care facilities. DOH approval of a consortium's budget is necessary in order to assure the adequacy of quality of services provided in the perinatal network. In addition, it is deemed administratively necessary to establish this procedure in order to assure the appropriate utilization of funding that is being derived from acute care hospitals throughout the State.

COMMENT: The consortia should be given flexibility to determine their staffing levels, their budget, their assessment and their payment schedule. Carryover Robert Wood Johnson Foundation funds should be offset against the assessment.

RESPONSE: The Department is amenable to reviewing circumstances and regional financial issues on an individual basis. However, this flexibility cannot be applied universally to all consortia, as some consortia have fixed costs relative to staffing, rent, etc. The Department will reserve approval of budgets, pending review, and depending upon the impact on staff and services. In the meantime, hospitals should pay their full perinatal assessment.

COMMENT: It was commented that a hospital's licensure status should not be dependent on being a member in good standing through

the payment of an assessment. Licensure should be totally dependent upon the quality of care and facilities of the institution.

RESPONSE: Quality of care at the member hospitals is enhanced by active participation in a regional system. It is also more cost effective to provide education and coordination services on a regional basis. Therefore, conditioning licensure on membership in a consortia is a proper action by the Department of Health, and consistent with requirements in licensure that mandate expenditure of funds for training, communications systems, quality assurance, administration, and other services, which may be offered directly or through contract with non-hospital employees.

N.J.A.C. 8:35A-5.3

COMMENT: The New Jersey Hospital Association recommends delay or elimination of the proposed staffing requirements. St. Peter's Medical Center recommends elimination of all references to staffing qualifications. Gateway Maternal and Child Health Consortium believes staffing needs should be determined by the consortia and not prescribed by the Department.

RESPONSE: The new staffing requirement is important to ensure that each consortia has adequate staff for implementation of the total quality improvement program. This is one of the most essential functions of the consortia as they move from the planning phase to implementation. The delineation of minimum qualifications is necessary to ensure that staff have appropriate education and training. The standards remain unchanged.

Full text of the adopted amendment follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*).

8:35A-1.2 Definitions

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

...

"Member in good standing" means that *[a health care provider]* ***acute care hospital*** member agency has made timely payment of MCHC financial assessments in accordance with the MCHC by-laws, which are based on a budget approved by the Department of Health pursuant to N.J.A.C. 8:35A-3.4(c).

...

8:35A-3.4 Submission of documents and data

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

(c) The MCHC shall submit an annual budget plan for its next calendar year to the Department by October 1 for the Department's review and approval. The budget plan may be approved if the MCHC identifies all projected salary and non-salary costs necessary to implement both the regional perinatal plan and functions listed in N.J.A.C. 8:35A-3.1, and revenue sources that include assessments of all member *[health care facilities]* ***acute care hospitals*** that are adequate to support the expenses submitted in the budget plan.

8:35A-3.6 Reportable events

(a) The MCHC shall report to the Department of Health the termination of employment of the administrator/executive director, and the name and qualifications of the administrator's replacement, within seven days of the termination.

(b) The MCHC shall report to the Department of Health whenever a hospital is not a member in good standing, within 15 days of the delinquency.

8:35A-4.1 Responsibility of the governing authority

(a) The MCHC shall have a governing authority appointed in accordance with N.J.A.C. 8:33C, which shall assume legal responsibility for the management, operation, and financial viability of the MCHC. The governing authority shall be responsible for, but not limited to, the following:

1.-4. (No change.)

5. Delineation of the duties of the officers of any committees, or equivalent, of the governing authority. When the governing authority establishes committees, their purpose, structure, responsibilities, and authority, and the relationship of the committee to other entities within the MCHC, shall be documented;

6. Establishment of the qualifications of members and officers of the governing authority, the procedures for electing and appointing officers, and the terms of service for members, officers, and committee chairpersons or equivalent; and

7. Development of an allocation and collection system to ensure adequate revenue from the *[health care provider]* ***acute care hospital*** members of the MCHC who have been assessed dues in accordance with the by-laws necessary to fund the budget approved by the Department of Health.

8:35A-5.3 Staff qualifications

(a) Each MCHC shall have:

1. An administrator/executive director who has a master's degree and at least three years of administrative or supervisory experience in health care planning of administration or financing, at least one year of which shall have been in maternal and child health services;

2. A registered professional nurse with a master's degree in nursing, public health or administration from an accredited college or university and certification by the National Certification Corporation for the Obstetric, Gynecologic and Neonatal Specialties or the American Nurses Association, and two years of experience in clinical maternal and child nursing; and

3. Staff adequate to perform the functions of N.J.A.C. 8:35A-3.1 and the regional perinatal plan, including, but not limited to:

i. A research/data specialist with training in research methods and experience in data analysis; and

ii. A community outreach coordinator with a bachelor's degree from an accredited college or university with one year's experience in community outreach.

(a)

DIVISION OF HEALTH FACILITIES EVALUATION

Long Term Care Licensing Standards

Use of Restraints and Psychoactive Drugs; Pharmacy Supplies; Establishment of Alzheimer's and Dementia Care Services

Adopted Amendments: N.J.A.C. 8:39-13.4, 27.8, 29.4 and 33.2

Adopted Repeal and New Rule: N.J.A.C. 8:39-27.1

Adopted New Rules: N.J.A.C. 8:39-45 and 46

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Proposed: November 16, 1992 at 24 N.J.R. 4228(a).

Adopted: April 21, 1993 by Bruce Siegel, M.D., M.P.H., Commissioner of Health (with approval of the Health Care Administration Board).

Filed: April 26, 1993 as R.1993 d.230, **with technical and substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: June 7, 1993.

Expiration Date: June 20, 1993.

Summary of Public Comments and Agency Responses:

The proposed amendments and new rules were published in the New Jersey Register on November 16, 1992. Eight letters of comment were received during the comment period, which closed on January 6, 1993. Comment letters were received from the New Jersey Association of Health Care Facilities (NJAHCF); the New Jersey Association of Non-Profit Homes for the Aging (NJANPHA); the Department of Human Services, Division of Medical Assistance and Health Services; the New Jersey Pharmaceutical Association; Automated Pharmaceutical Services; Robert M. Piegari of the Francis E. Parker Memorial Home; Donna Berry, RN, of Brother Bonaventure Extended Care Center; and the Division of Mental Health Advocacy of the New Jersey State Department of the Public Advocate.

COMMENT: Robert M. Piegari, President of the Francis E. Parker Memorial Home in New Brunswick, New Jersey, requested the following changes to the proposed standards at N.J.A.C. 8:39-27.1:

At paragraph (e)5, change the specific time frame for obtaining a physician order from eight hours to 24 hours;

At paragraph (e)6, change required evaluation and documentation of the physical and mental condition of patient in emergency restraints to once every shift until written order is obtained;

At paragraph (d)7, delete review by interdisciplinary committee within 48 hours, as this review is not feasible;

At paragraph (g)2, change to weekly assessment of continued use of restraints from every 48 hours;

At paragraph (g)3, change the time frame of review from monthly to quarterly;

At subsection (h), require written order of physician only, rather than written approval of interdisciplinary committee or equivalent, for use of restraints beyond 30 days, and delete the requirement for a weekly nursing assessment and interdisciplinary approval in writing.

RESPONSE: The intent of the proposed standards is to ensure patient safety and protect patient rights in light of well-documented studies regarding the effects of restraints on the physical and emotional well-being of patients. The proposed standards have striven to achieve a balance between quality of care for patients and realistic constraints placed upon the resources of long term care facilities.

The proposed rule at N.J.A.C. 8:39-27.1(e)5 pertains to those situations in which restraints must be used on an emergency basis. Such a situation would be indicative of a change of the patient's condition and would necessitate notification of the physician in a timely manner so that he or she can evaluate the change in condition and order appropriate treatment. The eight-hour requirement permits the interval of a shift or night period before the order is obtained (a telephone order is permitted). The Department believes this time frame is necessary for patient safety. The requested change at paragraph (e)6 would not provide an adequate level of care for patients in emergency restraints, and no change is made in the requirement.

The commenter has requested the deletion of the interdisciplinary review at N.J.A.C. 8:39-27.1(d)7. This request reflects the intent of the Department in an earlier review; the phrase was left in through an editing error and was not presented in the proposal which was published in the New Jersey Register.

The requested changes at N.J.A.C. 8:39-27.1(g)2 and 3 have been considered. However, the suggested time frames of weekly assessment and quarterly review are inconsistent with the Department's intent. Facilities must monitor and assess each patient's need for restraints on an on-going basis and use restraining devices only in instances in which alternative treatment and/or remediation are not possible. Similarly, at N.J.A.C. 8:39-27.1(h), the intent is that an interdisciplinary review of each patient in restraints every 30 days will ensure input from all disciplines about the patient's condition and the appropriate level of care. Consequently, no change is made.

COMMENT: Donna Berry, R.N., Director of Nursing at Brother Bonaventure Extended Care Center of Elizabeth General Medical Center, does not believe "that such regulations will contribute to improvement of care in long term care facilities" nor that they will be cost effective. Specifically, Ms. Berry is concerned about the need for a nursing assessment within 24 hours in an emergency and within 48 hours in a non-emergency situation. The commenter also states that "requiring written approval by an interdisciplinary committee for continuation beyond 30 days of use of restraints and weekly assessment by a registered nurse would place undue stress on a staff that is already overwhelmed by a variety of new regulations."

RESPONSE: As noted in the earlier response, the Department's intent is to achieve a balance between the quality of care provided to long term care patients and the resources available to the facility. The guiding principles, however, have been patient rights and "least restrictive environment." The standards have been modeled after the Federal OBRA regulations and have spelled out with more specificity the Department's interpretation of OBRA's inent. The questions raised by the commenter regarding nursing assessments, for example, would involve both quality of care and patient safety issues. The proposed rules require that a registered professional nurse observe and evaluate the patient within the given time frames; licensed nursing personnel, not necessarily R.N.'s, may have completed earlier interventions. Upon consultation with the Nursing Home Advisory Group, including the professional associations of long term care facilities in New Jersey, the time frames specified were considered appropriate.

At N.J.A.C. 8:39-27.1(h), the Department had made some earlier changes in the text which were inadvertently not included in the standards published in the New Jersey Register at proposal. These changes included the deletion of the documentation requirement at N.J.A.C. 8:39-27.1(h)1, and a change in language at paragraph (h)2 as follows: "An interdisciplinary review shall be conducted at least every 30 days to approve the continued use of restraints." These changes have been made to delete a superfluous documentation requirement on the R.N. and to lessen the requirement that an interdisciplinary "committee" meet for this purpose and substitutes the concept of an interdisciplinary "review," which is seen as less onerous. Similarly, the "committee or equivalent" requirement at N.J.A.C. 8:39-27.1(h) is changed to "an interdisciplinary review." Finally, the word "written" is deleted at N.J.A.C. 8:39-27.1(f), as a physician order is, by definition, written. These changes have been made in this adoption.

COMMENT: The Division of Mental Health Advocacy of the New Jersey State Department of the Public Advocate has commented extensively on the proposed amendments at N.J.A.C. 8:39-27.1. Following is a summary of the comments and this Department's responses:

The Public Advocate has noted that N.J.A.C. 8:39-27.1(a) contains two terms: "restraints" and "physical restraints." Clarification is requested.

RESPONSE: The term "restraints" was intended to include, and at the same time differentiate, the use of physical restraints and psychopharmocologic agents. The Department's philosophy regarding the use of restraints is, in order of preference: a restraint-free environment; then a "least-restrictive" environment; and, finally, the judicious, frequently reviewed, use of physical restraints when all other interventions have failed. Consequently, the majority of standards at N.J.A.C. 8:39-27.1 refer to the use of physical restraints and define them accordingly. The practice of using psychopharmacologic agents to "restrain" patients is not permitted; however, the appropriate use of these agents is included at N.J.A.C. 8:39-27.1(d) to highlight and address the manner in which these agents should be used and monitored.

However, the Public Advocate's request for clarification has prompted a review of the language throughout N.J.A.C. 8:36-27.1, and the Department believes that the deletion of the modifier "physical" will not alter the intent of the standards and may offer some clarification. Consequently, this term is deleted throughout the section, and the concept of "restraints" will stand unmodified.

COMMENT: The Public Advocate has commented that the term "imminent harm" at N.J.A.C. 8:39-27.1(c)3i is too vague to effectively restrict restraint use; this commenter believes that restraints should not be used for all potential "harm" but only for imminent physical harm.

RESPONSE: The Department has previously responded to this comment in the New Jersey Register, at 24 N.J.R. 596, that the terms "physical" or "bodily" are implicit in the descriptive phrase "imminent harm." No change is made to this language.

COMMENT: The Public Advocate has commented that the language "clinical contraindications" as described at N.J.A.C. 8:38-27.1(c)4 allows each facility sole discretion to specify clinical contraindications, thereby giving no Departmental guidance for the safe use of restraints.

RESPONSE: The proposed standard relies on the facility's ability to identify essential clinical contraindications which may be specific to individual patients. The Department does not find it appropriate to issue a list of such contraindications, as they relate to specific clinical judgements; consequently, no modification is made to this standard.

COMMENT: The Public Advocate comments that New Jersey law does not permit an exception to the informed consent requirements with respect to the use of restraints, citing *In Re Conroy,* 98 *N.J.* 321 (1985) and *Largey v. Rothman,* 110 *N.J.* 204 (1988). The Public Advocate therefore recommends deletion of the phrase "when clinically feasible" from N.J.A.C. 8:39-27.1(c)6.

RESPONSE: The proposed rule at N.J.A.C. 10:39-27.1(c)6 requires a facility to have a protocol for obtaining consent from the resident prior to use of restraints, where clinically feasible. The Department has proposed this standard for the purpose of enhancing residents' rights and safety, which it believes is consistent with the Public Advocate's purpose in making this comment. However, the Department believes the above cases, which are of great significance in New Jersey case law, are not directly on point to the issues raised in the comment and may be distinguished in terms of their relevance to the question of informed consent for the use of restraints to protect a resident from imminent harm.

In Re Conroy concerned a patient's right to choose to continue life-sustaining treatment, and provided individuals a fundamental right to accept or reject medical treatment in the face of terminal illness. The facts underlying *Largey* addressed informed consent for surgery. The

import of *Largey* was to alter the legal standard for consent to disclosing that necessary information to allow a reasonable or "prudent patient" in order to make an informed decision, rather than what a "reasonable physician" would disclose.

The initial inquiry in determining the relevance of this doctrine to the proposed rule is whether one should consider the use of restraints as a "treatment," subject to the same level of informed consent requirements as the treatments rendered in *Largey* and *Conroy.* Restraints are a device or mechanism employed to restrict the resident's ability to ambulate. They are not classifiable as a treatment in the same sense as surgery, radiation therapy, or oxygen therapy required to sustain life. The modality is necessary to protect a resident from imminent harm or risk of serious injury, and as such can be distinguished factually from the case law established in *Largey* and *Conroy.*

The Department is unaware of, and indeed, the commenter has not provided, any New Jersey cases in which a court specifically inferred a right to informed consent by a patient prior to the use of restraints. Similarly, there is no New Jersey statute explicitly providing that restraints are subject to the doctrine of informed consent. Again, although the Department concurs with the goal of enhancing resident rights and reducing unnecessary use of restraints, it is unwilling to extend the informed consent doctrine fully to the use of restraints by administrative rulemaking. Absent such direction from the courts or legislature, the Department believes the consent procedure as outlined represents the limit of its authority in this area.

There are substantial protections afforded to individuals by the body of the rules, mandating evaluation, the use of least-restrictive alternatives, physician and nursing assessments and orders. These procedures, tied to the consent requirement outlined in the rule, provide an unprecedented degree of safeguards and relief to individuals who believe they have been improperly restrained. As such, no changes are made to the rule.

COMMENT: The Public Advocate commented that the rule at N.J.A.C. 8:39-27.1(c)7, by permitting a family to give informed consent for restraints, allows a facility to "sidestep the legal requirements of guardianship and informed consent.

RESPONSE: The Department views this rule in context with the preceding requirement discussed above. That is, where a request for informed consent cannot be properly made due to the patient's inability to formulate the necessary understanding of the benefits, risks, and alternatives to restraints, an alternate procedure of seeking consent from their family or guardian is required. The process of obtaining a legal guardian for an individual deemed incompetent is time-consuming and burdensome, and where the resident has executed an advance directive naming a health care representative, it is unnecessary.

In view of the perceived limits of the doctrine of informed consent to the use of restraints outlined above, the Department believes that seeking consent from a resident's family or guardian as specified in the rule provides a heretofore unavailable level of safety and protection to resident safety, dignity, and rights.

COMMENT: The Public Advocate has commented that the proposed standards at N.J.A.C. 8:39-27.1(e)4 and 5 do not require a physical examination by a physician at the time of application of emergency restraints. The Advocate would like the standards to conform to the guidelines of the American Psychiatric Task Force Report on Restraints and Seclusion, requiring a physician's examination within one hour. The commenter also notes that the proposal does not require a face-to-face physician evaluation immediately prior to administration of non-emergency restraints, and that the reference to a "plan of care" would seem to encourage the use of PRN restraint orders.

RESPONSE: The Department concurs with the concern for patient safety and welfare as set forth by the Office of the Public Advocate. However, the Department would note that the stringent guidelines in the APA Task Force Report apply to a specific psychiatric population and have somewhat less applicability to the general patient population in long term care. Long term care facilities are guided by Federal regulations for all patients, which require a Resident Assessment Protocol and a new reassessment using the Minimum Data Set upon any significant change in the resident's condition. This would trigger a reassessment upon a behavioral or clinical change in a resident's condition which preciptates the needs for use of restraints. This Department relies on professional nursing assessments with medical consultation as necessary in the long term care setting and believes that this system provides adequate protection for these patients. In addition, the required assessments would seem to mitigate against the concept of PRN orders. No change is made in the standards.

COMMENT: The Public Advovcate believes that the phrase "nursing scope of practice" at N.J.A.C. 8:39-27.1(i) and (j) is unclear and should be replaced by a term whose meaning is well understood by both service providers and the public.

RESPONSE: The Department accepts the Public Advocate's request for clarification, and amends the proposed language to read: "in accordance with the scope of practice as set forth by the New Jersey Board of Nursing." The rules of this Board delineate the scopes of practice for different levels of nursing personnel.

COMMENT: The Public Advocate has raised questions about the need for checking and limb release for "stable" versus "unstable" patients, indicating that the frequency should not vary whenever the method of restraint creates a risk of circulatory impairment (N.J.A.C. 8:39-27.1(i)1 and 2).

RESPONSE: The Department would point out that the frequency of visual observation, according to the proposed standards, may entail some professional judgement depending on the stability of the patient's condition, but that limb release must be carried out at least once every two hours for all patients. No changes are made to the proposed standards.

COMMENT: The Public Advocate has raised a concern that the category for restraints for overnight sleeping, with reduced clinical oversight (N.J.A.C. 8:39-27.1(j)), "should specify unambiguously that this category may not include any method of restraint which creates a risk of circulatory obstruction."

RESPONSE: The Department accepts this suggestion, and adds the following language: "5. Prohibition of any method of restraint which places the resident at clinical risk for circulatory obstruction."

N.J.A.C. 8:39-27.1(b)

COMMENT: The New Jersey Pharmaceutical Association commented that, contrary to the Department's assessment of the economic impact of the rules, the proposed new rule at N.J.A.C. 8:39-27.1(b) would involve additional cost to the facility. The commenter stated that the facility would have to financially compensate members of the interdisciplinary committee who are not employees of the facility, such as consultant and/or provider pharmacists, for their time.

RESPONSE: Although the Department acknowledges that the rule requires minimal input from pharmacists, on balance, it is believed that their presence will markedly enhance the committee's ability to understand the interactions between psychoactive drugs, resident behavior, and efforts to minimize restraint use. Since the enactment of OBRA 1987 and 1989, a greater part of a consultant's time is spent in the review of chemical restraints. Moreover, the proposed committee could be part of the pharmacy and therapeutics committee or pharmaceutical services committee or could meet concurrently. The Department retains the proposed language.

COMMENT: The commenter from Automated Pharmaceutical Services suggested that the wording of the amendment at N.J.A.C. 8:39-29.4, Mandatory pharmacy control policies and procedures, be changed to better reflect the intent of the regulation: that the use of a limited amount of prescription stock would be permitted only for use in stat medication orders, or to replace lost or otherwise unavailable doses.

RESPONSE: Department staff have reviewed the proposed amendment, agree with the recommendation, and have made the recommended changes.

N.J.A.C. 8:39-29.4(b)

COMMENT: The New Jersey Pharmaceutical Association objected to the proposed amendment at N.J.A.C. 8:39-29.4(b) on the grounds that it would lead to "serious deterioration" in the control of drug storage and administration by allowing facilities to "bulk-stock" prescription medications. The proposed addition requiring that stock medications be monitored for accountability would require additional staff time and could require staff to count the remaining dosage units in each container at each change of shift. The commenter further stated that the rule could result in patients receiving additional, unnecessary doses when the provider pharmacy is late with a delivery. Also, differences in labeling could lead to confusion on the part of staff. The commenter requested that, if the amendment is adopted, (1) the rule restrict the practice to critical drugs only, (2) the quantity allowed in the bulk container be minimal to reflect the infrequency of the need, and (3) administration

of doses from bulk containers be limited to stat orders and unavailable or lost doses with full documentation of the reason provided.

RESPONSE: The rule is intended to allow facilities to stock prescription medications in limited supply with adequate accountability. The Department acknowledges the appropriateness of such an allowance, given the number of requests which the Department has received for waiver from the current rule, which permits stock to be kept of over-the-counter drugs only. Facilities have indicated a need to maintain a stock of prescription drugs to handle such cases as new orders, orders not received from the provider pharmacy, dropped dosages, and incorrect dosages received from the provider pharmacy.

Facilities presently employ mechanisms designed to avoid the errors described by the commenter. The requirement for accountability of stock prescription medications could be satisfied through the use of a declining inventory sheet for each drug, as is currently the case in many long-term care facilities. Medications are accounted for after each use and do not require shift-to-shift counting. Also, the Department is aware of potential problems and currently monitors this area during the survey process. Consequently, the rule was not further amended upon adoption.

The comment letter from the New Jersey Association of Health Care Facilities included recommendations for the following changes to the proposed new rules at N.J.A.C. 8:39-45 and 46:

COMMENT: N.J.A.C. 8:39-45.1(a) should be changed to read State certified programs.

RESPONSE: The Department does not have specific authority for certification of Alzheimer's/dementia programs. However, in order to clarify that licensed long term care facilities planning to establish Alzheimer's/dementia programs must have approval for these programs through the Department's licensure survey process, the words "Department approved programs, upon the successful completion of a Department survey based on the standards contained in N.J.A.C. 8:39-45 and 46" have been added to the rule. The added text conveys, in a more detailed manner, the purpose the Department outlined in the proposed Summary—to provide standards of compliance for any facility holding itself out as providing Alzheimer's services.

COMMENT: N.J.A.C. 8:39-45.2(a) should be changed to read "No facility may advertise or hold itself out as providing such an Alzheimer's/dementia program..."

RESPONSE: The recommended change has not been made, as the intent of the rule is to provide assurance to consumers that a facility advertising or holding itself out as providing an Alzheimer's/dementia program does in fact provide a level of care that is unique from traditional long term care services and appropriate to patient needs. If the suggested addition of "such" was made, the Department believes advertising or representations would be permissible for any form of Alzheimer's/dementia program, as long as it did not indicate "state-approved." This would clearly frustrate the intention of the rule.

COMMENT: The Association requests clarification of language "65 percent of the advisory standards...", as found at N.J.A.C. 8:39-45.2(a), and recommends that the language be changed to read "65 percent of the nineteen Advisory elements."

RESPONSE: The Department's intent is to require compliance with the current Advisory standards in N.J.A.C. 8:39-46 in order to be recognized by the Department. Current advisory standards are those in effect at the time compliance is evaluated by the Department.

COMMENT: For continuity, the title of Subchapter 46, Alzheimer's/Dementia Programs should be changed to include the word "Standards."

RESPONSE: Upon publication, the proposed subchapter was titled "Subchapter 46, Alzheimer's/Dementia Programs—Advisory Standards.

COMMENT: Language at N.J.A.C. 8:39-46.3(c) should not be specific in nature, since this citing of examples could cause problems for some programs; the words "such as pathways and gardens with non-toxic flora" should be deleted.

RESPONSE: The Department has made the requested change, since the deletion does not affect the basic requirement, that is, the provision of arrangements which allow residents freedom to ambulate in a controlled setting.

COMMENT: The New Jersey Association of Non-Profit Homes for the Aging also addresses its comments to the new rules proposed at N.J.A.C. 8:39-45 and 46, and expresses concerns regarding "the addition of such regulations and the purpose for adding them" at this time. NJANPHA cites an Office of Technology Assessment (OTA) summary report which indicates that there is "an absence of consensus among experts about the particular features that are necessary for a special care unit." Reference is made in the NJANPHA comment letter to an Alzheimer's Association specialist who states that a major concern of the Association is that regulating Alzheimer/dementia care is an attempt to "generalize a population which cannot be generalized." The NJANPHA commenter further cities the OTA summary report which states that "until more is understood about effective services and features, the nursing home provisions of OBRA '87 ... should be used to regulate special care units." According to the comment letter, "what is needed is time for innovative approaches to be developed to create the best possible environment for meeting the needs of our Alzheimer/dementia individuals." NJANPHA recommends the use of a "uniform checklist" developed by Department, industry and consumer representatives as an alternative to the proposed mandatory and advisory rules for Alzheimer's/dementia programs. NJANPHA expresses concern that the Department is "establishing a new precedent by making advisory regulations mandatory for the first time." Additionally, the NJANPHA comment letter states "that there is no support for the Department's claim that while Alzheimer's/dementia care is special care, and requires extra staffing, special physical features and other considerations, there is no need for additional reimbursement."

RESPONSE: The Department agrees with many of the considerations which NJANPHA has cited from recent publications and experts in Alzheimer's/dementia care. The Department has, in fact, been guided by many of these considerations during the development of the rules proposed at N.J.A.C. 8:39-45 and 46. In February, 1991, for example, several Department staff attended the seminar "Developing Special Care Units for Persons with Dementia." At that seminar, the Senior Project Director with OTA, who had primary responsibility for the summary report cited by NJANPHA, discussed public policy issues and the lack of comprehensive data concerning the role of special care units in meeting the needs of Alzheimer's/dementia persons. The Department has carefully examined the summary report of OTA's "Special Care Units for Persons with Dementia: Consumer Education Research, Regulatory and Reimbursement Issues." In addition, prior to development of proposed N.J.A.C. 8:39-45 and 46, the Department convened an advisory group to assist in the development of the rules, with representatives from the Department's Gerontology program, consumer groups, the COPSA Institute for Alzheimer's Disease and Related Disorder, as well as members from both NJAHCF and NJANPHA. The advisory committee carried out a search of current literature concerning Alzheimer's/dementia. Staff of the Gerontology program shared information from their training guide and resource manual "Managing the Client with Dementia," which is intended to assist with training of staff who work with dementia clients.

Throughout the many meetings with its advisory committee, the Department been guided by many of the principles and concepts expressed by NJANPHA. Because of this, the Department believes that the proposed rules do, in fact, reflect consideration of the individuality of the Alzheimer's/dementia resident and the diversity of ways to meet the needs of such residents. The Department been careful not to imply that such care must be provided in a "special care unit," or to prescribe specific ways in which care should be delivered.

The Department believes that the advisory rules at N.J.A.C. 8:39-46 encourage the development of innovative and individualized programs. This is based upon the anticipated leadership of such programs by staff who have pursued education beyond the minimum in-service training, who are familiar, for example, with the causes and progression of dementias, the care and management of dementia residents and effective ways to communicate with and reach these residents, and who have access to a consultant gerontologist with training and/or experience in the care of residents with dementia.

The NJANPHA commenter suggests that additional time is needed for innovative approaches to be developed for the care of Alzheimer's residents. However, the Department is well aware that many facilities throughout New Jersey are at the present time claiming to offer specialized services to dementia residents, when in fact there is no evidence available to assure that these programs have provided any services materially different than those routinely delivered to all residents in the facility.

As stated in the summary of the proposed new rules, the intent of the Department is to provide a measure of consumer protection to families seeking the best care for their loved ones with Alzheimer's Disease or dementia by ensuring that care providers are aware of, and trained in, "state-of-the-art" techniques for communicating with and offering services to these residents. The Department believes that adoption of the mandatory N.J.A.C. 8:39-45 and the advisory N.J.A.C. 8:39-46

will allow sufficient flexibility for individual and innovative programs to be developed which will truly be unique in the ways they are meeting the specific needs of the dementia residents at that facility. Furthermore, this flexibility will allow for the programs to be modified as further research data accumulates, resident population changes and/or experience indicates that certain modifications will, in fact, create the "best possible environment for meeting the needs of our Alzheimer/dementia individuals."

Some New Jersey long-term care facilities have already succeeded in implementing unique programs which truly address the special needs of Alzheimer's/dementia residents. These programs are varied. Some utilize existing staff and space and meet the Alzheimer/dementia resident's needs with little additional expense to the long-term care facility. Other programs have built special units with environmental modifications. Adoption of the new mandatory and advisory rules will allow these facilities to be recognized as providing a superior level of care to dementia residents. There are, however, many long-term care facilities which advertise that they provide special care units or programs for Alzheimer's/dementia residents, yet are unable to demonstrate any aspects of the unit or program which are in fact "special" in the ways which they address the particular needs of such residents. The Department believes that adoption of the rules without further delay will help to protect residents and families from such falsely advertised programs and from unnecessary additional expenses.

The Department of Human Services, Division of Medical Assistance and Health Services (DMAHS), also commented on the proposed new rules at N.J.A.C. 8:39-45 and 46:

COMMENT: The Division considers the promulgation of rules governing the treatment of Alzheimer's disease premature, given the recent analysis of the subject by the Federal Office of Technology Assessment.

RESPONSE: Refer to the above response to the NJANPHA comment letter for the Department's position on this issue.

COMMENT: DMAHS opposed the rules, based upon their potential fiscal impact on the Medicaid Program.

RESPONSE: In response to this concern, the Department agreed to delete the word "special" from the proposed rules before publication of the notice of proposal, in order to ensure that Alzheimer's/dementia programs would not be considered to be among the category of special long-term programs which are eligible for increased reimbursement through the Division of Medical Assistance and Health Services.

Summary of Agency-Initiated Changes:

At N.J.A.C. 8:39-46.4(a), the word "activity" has been deleted and the words "Alzheimer's/dementia" added, to better meet the intent of the rule and delineate responsibility for provision of activities programming.

At N.J.A.C. 8:39-46.5(a), the word "nutrition" has been deleted and the words "Alzheimer's/dementia" added, to better meet the intent of the rule and delineate responsibility for provision of nutritional intervention.

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

8:39-13.4 Mandatory staff education and training for communication

(a-(d) (No change.)

(e) All nursing and professional staff of the facility shall receive orientation and annual training in the use of restraints including at least:

1. Policies and procedures in accordance with N.J.A.C. 8:39-27.1;
2. Emergency and nonemergency procedures;
3. Practice in the application of restraints and alternative methods of intervention; and
4. Interventions by licensed and non-licensed nursing personnel.

(f) (No change in text.)

8:39-27.1 Mandatory policies and procedures for the use of restraints

(a) The standards in this section shall apply to the use of restraints in all resident care areas. *[Physical restraints]* ***Restraints*** are defined as devices, materials, or equipment that are attached or adjacent to a person and that prevent free bodily movement to a position of choice with the exception of devices used for protective supports.

(b) The facility shall have an interdisciplinary committee, or an equivalent process, which includes at least representatives of medical staff, nursing, social work, pharmacy, and resident activities. The committee shall have responsibility for the use of restraints in the facility, shall meet at least quarterly, and shall document its activities, findings, and recommendations.

(c) The interdisciplinary committee or equivalent shall develop, review at least annually, revise as needed, and ensure implementation of written policies and procedures addressing at least the following:

1. Protocol for the use of alternatives to *[physical]* restraints, such as staff or environmental interventions, structured activities, or behavior management. Alternatives shall be utilized whenever possible to avoid the use of restraints;
2. Protocol for the use and documentation of a progressive range of restraining procedures from the least restrictive to the most restrictive;
3. A delineation of indications for use, which shall be limited to:

i. Prevention of imminent harm to the resident or other persons when other means of control are not effective or appropriate; or

ii. Prevention of serious disruption of treatment or significant damage to the physical environment;

4. Contraindications for use, including at least clinical contraindications, convenience of staff, or discipline of the resident;
5. Identification of restraints which may be used in the facility, which shall be limited to methods and mechanical devices that are specifically manufactured for the purpose of physical restraint. Locked restraints, double restraints on the same body part, four-point restraints, and confinement in a locked or barricaded room shall be not permitted;
6. Protocol for informing the resident and obtaining consent when clinically feasible, and documenting the consent in the resident's record;
7. Protocol for notifying the family or guardian, obtaining consent if the resident is unable to give consent, and documenting the consent in the resident's record; and
8. Protocol for removal of restraints when goals have been accomplished.

(d) The interdisciplinary committee shall monitor, evaluate, and document the effects of all psychopharmacologic agents. These agents shall be administered only upon written physician orders as part of the resident's treatment plan and shall not be used as a method of restraint, discipline, or for the convenience of staff.

(e) Procedures for the application of *[physical]* restraints in an emergency shall include at least the following:

1. Licensed nursing staff only shall be authorized to initiate the use of emergency restraints;
2. The application of restraints shall begin with the least restrictive alternative that is clinically feasible;
3. Emergency restraints shall be used only when the safety of the resident or others is endangered, or there is imminent risk that the resident will cause substantial damage to the physical environment;
4. The facility shall notify the attending physician or another designated physician and request an order within two hours;
5. The facility shall obtain a physician order within eight hours;
6. Licensed nursing personnel shall evaluate and document the physical and mental condition of the resident in emergency restraints at least every two hours;
7. There shall be an assessment of the resident by a registered professional nurse within 24 hours; and
8. Continuation of emergency restraints shall occur only upon physician orders, which must be renewed every 24 hours to a maximum of seven days.

(f) In non-emergency cases, a resident shall be *[physically*] restrained only after the attending physician or another designated physician has executed an order for restraint as part of the resident's plan of care.

(g) The facility shall continuously attempt to remediate the resident's condition to eliminate or lessen the need for restraints. If the use of restraints is required beyond one week, at least the following shall be included:

1. The need for the continued use of restraints shall be implemented only as part of the physician's medical care plan;

2. Every resident in restraints shall be assessed by a registered professional nurse at least every 48 hours for the continued use of restraints; and

3. After remediation attempts, there shall be an interdisciplinary review of the record of any resident whose assessment indicates the need for continued use of restraints. This review shall occur within *[thirty]* ***30*** days of the initiation of the use of restraints.

(h) Continuation of the use of restraints beyond 30 days shall occur only upon written approval of the committee or its equivalent, and shall include at least the following:

1. The registered professional nurse shall assess the need for continued restraints at least weekly; and

2. An interdisciplinary review shall be conducted at least every 30 days to approve the continued use of restraints.

(i) The facility shall have written policies and procedures to ensure that interventions while a resident is restrained, except as indicated at (j) below, are performed by nursing personnel in accordance with nursing scope of practice ***as set forth by the New Jersey Board of Nursing***. The policies and procedures shall include at least the following and shall be implemented:

1. Periodic visual observation which is performed with the following frequency:

i. Continuously if clinically indicated by the resident's condition; or

ii. At least every 15 minutes while the resident's condition is unstable; and

iii. Thereafter, at least every one to two hours based upon an assessment of the resident's condition;

2. Release of restraints at least once every two hours in order to:

i. Assess circulation;

ii. Perform skin care;

iii. Provide an opportunity for exercise or perform range of motion procedures for a minimum of five minutes per restrained limb and repositioning; and

iv. Assess the need for toileting and assist with toileting or incontinence care;

3. Ensuring adequate fluid intake;

4. Ensuring adequate nutrition through meals at regular intervals, snacks, and assistance with feeding if needed;

5. Assistance with bathing as required at least daily; and

6. Ambulation at least once every two hours if clinically feasible.

(j) The facility shall have written policies and procedures for interventions by nursing personnel for residents in restraints for overnight sleeping. These policies and procedures shall include at least the following and shall be implemented in accordance with nursing scope of practice ***as set forth by the New Jersey Board of Nursing***:

1. Visual observation based on resident's condition occurring at least every one to two hours;

2. Administration of fluids as required;

3. Toileting as required; *[and]*

4. Release of restraints at least once every two hours for repositioning and skin care, if clinically indicated*[.]**; and***

5. Prohibition of any method of restraint which places the resident at clinical risk for circulatory obstruction.

8:39-27.8 Mandatory supplies and equipment for patient care

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

8:39-29.4 Mandatory pharmacy control policies and procedures

(a) (No change.)

(b) If the facility uses and contracts with a provider pharmacy, both over-the-counter and prescription medications shall be kept as stock. These medications shall be approved by the pharmacy and therapeutics committee, monitored for accountability, and labeled to include drug name, drug strength, manufacturer's name, lot number, expiration date, recommended dosage for over-the-counter medications, and applicable cautionary and/or accessory labels.

(c)-(j) (No change.)

8:39-33.2 Mandatory quality assurance policies and procedures

(a) The quality assurance program shall identify problems in the care and services provided to the patients and shall include the audit of medical records.

(b) The interdisciplinary committee or equivalent shall develop a program of quality assurance for the use of restraints that is integrated into the facility quality assurance program and includes regularly collecting and analyzing data to help identify problems and their extent, and recommending, implementing and monitoring corrective actions where needed.

(c) The quality assurance program shall include the collection and evaluation of data at least quarterly. This data shall include at least the following:

1. All emergency restraint applications;

2. Indicators of the frequency of the use of restraints in the facility;

3. Evaluation of all cases in which there is:

i. A failure to obtain or receive a physician's order;

ii. A failure to follow and monitor procedures in accordance with N.J.A.C. 8:39-27.1(f) through (j); or

iii. A negative clinical outcome; and

4. Indicators of the frequency of the use of psychopharmacologic agents.

(d) (No change in text.)

SUBCHAPTER 45. ALZHEIMER'S/DEMENTIA PROGRAMS—MANDATORY STANDARDS

8:39-45.1 Scope and purpose

(a) Long-term care facilities may establish ***Department approved*** programs ***upon the successful completion of a Department survey based on the standards contained in this subchapter and N.J.A.C. 8:39-46*** to meet the needs of residents with Alzheimer's disease or other dementias. In addition to meeting all mandatory requirements specified in N.J.A.C. 8:39-1 through 43 of the long-term care licensing standards, and the rules in this subchapter, the program shall provide individualized care based upon assessment of the cognitive and functional abilities of Alzheimer's and dementia *[patients]* ***residents*** who have been admitted to the program. The standards in this subchapter shall apply only to those long-term care facilities that operate *[an]* ***a Department approved*** Alzheimer's/dementia program.

(b) *[An]* ***A Department approved*** Alzheimer's/dementia program means an organized plan of special services which may be provided to residents who are located either in a distinct physical unit or integrated throughout the existing facility.

8:39-45.2 Program requirements

(a) No facility shall advertise or hold itself out as providing an Alzheimer's/dementia program, unless it is recognized by the Department of Health as meeting at least 65 percent of the advisory standards in N.J.A.C. 8:39-46, Advisory Alzheimer's/dementia programs.

(b) A facility seeking to establish an Alzheimer's/dementia unit or program shall obtain a determination of whether a Certificate of Need is required prior to establishment of or implementing the program. An Alzheimer's/dementia program alone shall not constitute a new health care service within the meaning of N.J.A.C. 8:33-1.6 or 2.6 and shall not be eligible for increased reimbursement as a special care program funded through the Division of Medical Assistance.

SUBCHAPTER 46. ADVISORY ALZHEIMER'S/DEMENTIA PROGRAMS—ADVISORY STANDARDS

8:39-46.1 Advisory Alzheimer's/dementia program policies and procedures

(a) The long-term care facility should have written policies and procedures for the Alzheimer's/dementia program that are retained by the administrative staff and available to all staff and to members of the public, including those participating in the program.

(b) The facility should establish criteria for admission to the program and criteria for discharge from the program when the patient's needs can no longer be met, based upon an interdisciplinary assessment of the patient's cognitive and functional status.

8:39-46.2 Advisory staffing

(a) Staffing levels should be sufficient to provide care and programming, based upon patient census in the program and an interdisciplinary assessment of the cognitive and functional status of patients in the program.

(b) The facility should establish criteria for the determination of each staff member's abilities and qualifications to provide care to patients in the program.

(c) The facility should provide an initial and ongoing educational, training and support program for each staff member which includes at least the causes and progression of dementias, the care and management of patients with dementias, and communication with dementia patients.

(d) Each Alzheimer's/dementia program should have a full-time employee, with specialized training and/or experience in the care of patients with dementia, who has been designated as coordinator/director and whose duties include responsibility for the operation of the program.

(e) A consultant gerontologist should be available to patients and to the program, as needed, to address the medical needs of the patient. "Consultant gerontologist" means a physician, psychiatrist, or geriatric nurse practitioner who has specialized training and/or experience in the care of patients with dementia.

8:39-46.3 Advisory environmental modification

(a) The program should include appropriate facility modifications to ensure a safe environment which allows each Alzheimer's/dementia patient to function with maximum independence and success.

(b) The facility should develop safety policies and procedures and a security monitoring system which are specific to the program, based upon the physical location of the program, as well as the individual needs of the Alzheimer's/dementia patients.

(c) The facility should provide indoor and outdoor arrangements which allow patients freedom to ambulate in a controlled setting*[, such as pathways and gardens with non-toxic flora]*.

(d) Doors should be marked with items familiar to the individual patient which enhance the patient's ability to recognize his or her room, and bathrooms are specially marked and easily accessible.

8:39-46.4 Advisory activity programming

(a) The *[activity]* ***Alzheimer's/dementia*** program should provide a daily schedule of special activities, seven days a week and at least two evenings per week, designed to maintain patients' dignity and personal identity, enhance socialization and success, and to accommodate the various cognitive and functional abilities of each patient.

8:39-46.5 Advisory nutrition

(a) The ***Alzheimer's/dementia*** nutrition program should provide nutritional intervention as needed, based upon assessment of the eating behaviors and abilities of each patient. Interventions may include, but are not limited to, the following:

1. Verbal and non-verbal eating cues;
2. Modified cups, spoons, or other assistive devices; and
3. Simplified choices of foods or utensils.

(b) The ***Alzheimer's/dementia*** nutrition program should provide a small dining room, separate room, or designated dining area furnished to meet the needs of the patients, with staff members or trained volunteers to assist.

8:39-46.6 Advisory social services

(a) The facility should provide individual and group counseling to patients if appropriate, utilizing techniques designed to reach the dementia patient and to maintain the patient's maximum level of functioning.

(b) Families should be encouraged to, and provided with, opportunities to participate in planning and providing patient care.

(c) The facility should provide individual and group counseling, support and education groups for families, and information and referral on bioethical and legal issues related to dementia, including competence, guardianship, conservatorship and advance directives.

(d) Family members should be referred to community Alzheimer's Disease Support Groups or other family counseling agencies, as required.

(e) Discharge care plans, including preparation for discharge from the unit, should be discussed with the legal next of kin, and if possible, with the patient at the time of admission to the program.

(a)

DIVISION OF HEALTH FACILITIES EVALUATION AND LICENSING

Hospital Licensing Standards
Funding for Regionalized Services; Obstetric Services Structural Organization
Adopted Amendments: N.J.A.C. 8:43G-5.10, 19.1 and 19.20

Proposed: March 15, 1993 at 25 N.J.R. 1117(a).
Adopted: May 13, 1993 by Bruce Siegel, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).
Filed: May 14, 1993 as R.1993 d.286, **without change.**

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: June 7, 1993.
Expiration Date: February 5, 1995.

Summary of Public Comments and Agency Responses:

The Department received six letters of public comment. The identity of the commenters is as follows: Gail Calandrillo, Director of Planning for Holy Name Hospital; Dennis H. Collette, President and Chief Executive Officer for Newton Memorial Hospital; Arthur T. Dunn, President of The Hospital Center at Orange; Jane Leikind, Vice-President of Strategic Services for Monmouth Medical Center; Kevin J. O'Brien, Director of Strategic Planning and Marketing for St. Peter's Medical Center; Carole Stapleton Rhodes, Chief Planning Officer for UMDNJ.

COMMENT: Several commenters do not believe hospitals should bear the entire financial obligation for consortia activities. They comment that funds should also be provided by other member agencies, the insurance industry, or from sources such as hospital rate setting fees or the Health Care Subsidy Fund.

RESPONSE: P.L. 1992 c.160 requires hospitals to provide for its regional maternal and child health consortia. Furthermore, requiring hospitals to be the primary funding source is reasonable for the following reasons:

1. Prevention activities are a primary goal for the consortia and should reduce the demand for costly, and often uncompensated, tertiary care. As a result, hospitals will derive most of the financial benefits of the consortia's successes.

2. Significant cost shifts to consumers and non-hospital providers who are not required to be members of the consortia would be counterproductive to the goal of a community-based balanced consortia.

3. Non-hospital providers are mostly state and/or federally funded. These agencies will be bearing the cost burden of providing direct services to the populations needing access for preventive care.

The Department has no statutory authority to utilize rate setting commission fees to offset this assessment or to assess the insurance industry. The uses of the Health Care Subsidy Fund will be determined by the Essential Health Services Commission. In both cases, the funding source is still the hospitals.

COMMENT: It is unfair to assess only hospitals with obstetric services. Birthing centers and hospitals with pediatric services should also be assessed.

RESPONSE: In the 1993 transition year only hospitals with obstetric services received a perinatal adjustment. Most hospitals with pediatric services have obstetric services and are already included. The planning process currently only covers obstetric services. The process for pediatric regionalization will begin this year. There is nothing in the regulation which would preclude the regions from assessing birthing centers after the transition year.

COMMENT: The amount of money collected under the assessment is excessive.

RESPONSE: The assessment of $4.8 million was calculated based on an analysis of the operating budgets submitted by the consortia in their certificate of need applications, and an assessment of their ability to meet mandatory service requirements. The consortia now have an expanded role regarding pediatric services which increases their responsibilities well beyond their traditional levels of functioning which included perinatal services only. Additionally, their respective requirements regarding perinatal services have also expanded considerably.

COMMENT: It is inappropriate to mandate the provision of pediatric services in accordance with HealthStart standards in N.J.A.C. 8:43G-19 which applies only to hospitals with obstetric services. This regulation could require a hospital to develop a service which it could not support for inpatient due to a lack of licensed inpatient beds.

RESPONSE: HealthStart pediatric standards are applicable only to ambulatory pediatric services; there is no requirement for inpatient pediatric services.

The proposed amendments address the system of regionalized comprehensive perinatal services, and therefore include references to both prenatal and pediatric services. Additionally, neonatal care is included in the definition of perinatal and as such would include pediatric care delivered to these infants.

COMMENT: Hospitals should not be forced to pay for programs that should be funded by other sources under a deregulated competitive environment.

RESPONSE: Even under a deregulated competitive environment, the Department has a requirement to ensure quality of care. The consortia are designed to enhance quality of care in hospitals as well as establish a regional system of care. Since in a deregulated environment hospitals will be a primary beneficiary of the financial benefits of prevention, it is reasonable to fund these services through the hospitals.

COMMENT: The Department should delay mandatory inclusion of hospitals with licensed pediatric beds but no obstetric beds until the development of the regional pediatric process.

RESPONSE: The Department believes pediatric services are integral to the concept of regionalized perinatal services and is therefore not willing to exempt providers with licensed pediatric beds from participating in the system as developed to date.

COMMENT: The original assumptions regarding a mark-up of hospital rates to fund the activities of the consortia are no longer valid.

RESPONSE: The costs of maintaining the activities of a viable consortia are unaffected by the changes to the hospital reimbursement system.

COMMENT: A hospital's licensure status should not be dependent on being a member in good standing through the payment of an assessment. Licensure should be totally dependent upon the quality and facilities of the institution.

RESPONSE: Quality of care at the member hospitals is enhanced by active participation in a regional system. It is also more cost effective to have education and coordination services conducted on a regional basis. Therefore, conditioning licensure on membership in a consortia is a proper action by the Department of Health.

COMMENT: Regional Perinatal Centers should be required to provide appropriate outreach programs for indigent populations.

RESPONSE: The Department will review this proposal, but cannot adopt an additional requirement without reproposal.

Full text of the adoption follows.

8:43G-5.10 Funding for regionalized services

(a) (Reserved)

(b) All hospitals with licensed obstetric or pediatric beds or designated as a Community or Regional Perinatal Center pursuant to N.J.A.C. 8:33C shall be a member in good standing of a Maternal and Child Health Consortium as defined in N.J.A.C. 8:35.

8:43G-19.1 Scope of obstetrical standards; definitions; structural organization

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

(c) All hospitals with obstetric services shall, in accordance with N.J.A.C. 8:33C, satisfy the following conditions:

1. The hospital shall be designated as a Community Perinatal Center or a Regional Perinatal Center; and

2. The hospital shall be a member of a Regional Maternal and Child Health Consortium.

(d) All Community Perinatal Centers and Regional Perinatal Centers shall provide services in accordance with a letter of agreement approved by the Maternal Child Health Consortium for its region. Such services shall include:

1. Prenatal and pediatric services in accordance with the HealthStart Standards, N.J.A.C. 10:49-3; and

2. Routine prenatal care which incorporates use of a comprehensive standardized perinatal record.

(e) All Community Perinatal Centers shall have a written protocol which addresses the management of patients assessed to be at risk during the prenatal period. This protocol shall assure referral of the patient to a provider with advanced capabilities in maternal-fetal medicine for initial consultation and, if appropriate, treatment.

(f) All Regional Perinatal Centers shall have a distinct prenatal clinic service devoted to women identified as high risk.

(g) All Regional Perinatal Centers shall provide high risk infant follow-up services in accordance with N.J.A.C. 8:33C-8.2(c).

8:43G-19.20 Newborn care patient services

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

(c) A Community Perinatal Center—Intermediate may provide care to neonates greater than 1,499 grams and 32 weeks gestation. A Community Perinatal Center—Intermediate may provide care to infants born in the facility who are below the specified weight and age criteria only if the infant does not require a higher level of care than otherwise specified for Community Perinatal Center(s)—Intermediate and if it has been documented in the medical record that the birth was expected to meet the weight and age criteria. Service restrictions placed on Community Perinatal Center(s)—Intermediate include:

1. (No change.)

2. A Community Perinatal Center—Intermediate shall not provide total parenteral nutrition, except in cases where authorization has been received from the neonatologist on-call at the Regional Perinatal Center. Authorization from the neonatologist on-call at the Regional Perinatal Center shall be obtained on a daily basis and shall be documented in the medical record.

3. (No change.)

(d) A Community Perinatal Center—Intensive may provide care to neonates greater than 999 grams and 28 weeks gestation. A Community Perinatal Center—Intensive may provide care to infants born in the facility who are below the specified weight and age criteria only if the infant does not require a higher level of care than otherwise specified for Community Perinatal Center(s)—Intensive and if it has been documented in the medical record that the birth was expected to meet the weight and age criteria. A Community Perinatal Center—Intensive may provide long term ventilatory support and total parenteral nutrition.

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

(a)

DIVISION OF HEALTH FACILITIES EVALUATION

Hospital Licensing Standards

Hospital Payments to Maternal and Child Health Consortia

Adopted Concurrent Amendment: N.J.A.C. 8:43G-5.10

Proposed: March 15, 1993 at 25 N.J.R. 1295(a).

Adopted: April 29, 1993 by Bruce Siegel, M.D., M.P.H., Commissioner, Department of Health (with approval of the Health Care Administration Board).

Filed: April 29, 1993 as R.1993 d.236, **with a substantive change** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 26:2H-1 et seq., specifically 26:2H-5.

Effective Date: April 29, 1993, Readoption of Emergency Amendment;
June 7, 1993, Amendment.
Expiration Date: February 5, 1995.

Summary of Public Comments and Agency Responses:

The Department received seven letters of public comment. The identity of the commenters follows: Jean Buerle Farley, Executive Director of the Central New Jersey Maternal and Child Health Consortia; Lyda Sue Cunningman, President of the Northwest New Jersey Maternal and Child Health Network; Ralph A. Dean, Executive Vice President of the New Jersey Hospital Association; Jane Leikind, Vice-President of Strategic Services for Monmouth Medical Center; Frank Vaul, Assistant Vice-President of Finance for Kimball Medical Center; and Kevin O'Brien, Director of Strategic Planning and Marketing for St. Peter's Medical Center.

COMMENT: The allocation formula in N.J.A.C. 8:43G-5.10(c) should be adjusted to reflect the degree to which a hospital cares for large numbers of uninsured patients.

RESPONSE: Uninsured patients who are eligible for charity care will be paid for through the Health Care Subsidy Fund. Under deregulation, since the transition year's revenue cap is based on amounts collected, the hospital can make an adjustment of patient charges to account for other uninsured patients.

COMMENT: Several commenters emphasize that costs of the consortia are in addition to the costs of the new perinatal regulations and the recent reimbursement changes.

RESPONSE: The Department recognizes that there have been substantial changes in the hospital reimbursement system in the last year. However, the consortia need only be modestly successful for hospitals to recover their costs. If each consortia prevents only five intensive care admissions for low birthweight (at an average of $124,000 per admission) the entire cost of this program will be offset. To the extent that these babies are uninsured or the insurance would not have covered the entire costs of the care, the hospitals will directly and solely benefit.

COMMENT: The New Jersey Hospital Association does not believe hospitals should be the only funding source for consortia activities, and requests that other providers and insurance companies be required to contribute to the cost. The Department was also requested to consider funding from sources such as hospital rate setting fees or the Health Care Subsidy Fund.

RESPONSE: P.L. 1992, c.160 requires that hospitals provide for its regional maternal and child health consortia. Furthermore, requiring hospitals to be the primary funding source is reasonable for the following reasons:

1. Prevention activities are a primary goal for the consortia and should reduce the demand for costly, and often uncompensated, tertiary care. As a result, hospitals will derive most of the financial benefits of the consortia's successes.

2. Significant cost shifts to consumers and non-hospital providers who are not required to be members of the consortia would be counterproductive to the goal of maintaining a community-based, balanced membership for the consortia.

3. Non-hospital providers are mostly State and/or Federally funded. These agencies will be bearing the cost burden of providing direct services to the populations needing access for preventive care.

The Department has no statutory authority to utilize rate setting commission fees to offset this assessment. The uses of the Health Care Subsidy Fund will be determined by the Essential Health Services Commission. In both cases, the funding source remains acute care hospitals.

COMMENT: The Central New Jersey Maternal and Child Health Consortium is concerned that data used to calculate the perinatal adjustments may have double counted infants who were admitted to the normal newborn nursery, transferred to neonatal intensive care and then back transported to the normal newborn nursery.

RESPONSE: Most newborns either have only one admission to the normal newborn nursery or are admitted directly to the NICU and then to the normal newborn nursery. To the extent that potential "double-counting" occurred on a Statewide basis, the proportional amount paid by each hospital would not change. The Department therefore does not believe a change to the methodology is necessary.

COMMENT: Several commenters believe consortia should be given discretion to determine their funding needs and the mechanisms by which to obtain funds. The Northwest New Jersey Maternal and Child Health Network sought approval to limit its billing to 10/12 of the 1993 assessment since support from the Robert Wood Johnson Foundation was available for the first quarter of 1992. The Central New Jersey Maternal and Child Health Consortium advised the Department that consortia may not need the full amount allocated for 1993 because of the demands of start up and planning, and should therefore be allowed to collect only the amount needed to operate in compliance with Department of Health regulations.

RESPONSE: The Department recognizes the need to consider the particular circumstances and financial issues of each regional consortia and will review consortia budgets on an individual basis. However, such circumstances cannot be addressed by specific rules as some consortia will not have adequate resources to cover fixed costs relative to staffing, rent, etc. The Department reserves final approval of budgets pending the review of available funds in consideration of and the impact on staff and services.

COMMENT: Several hospitals commented that the perinatal adjustment, as approved by the Hospital Rate Setting Commission, was not included in all of the hospitals' 1993 revenue caps. The commenters assert that in the absence of full inclusion of the perinatal adjustment, the Department should reconsider the proposed allocation and collection system. Commenters recommended alternatives such as reducing the total amount of the assessment or adjusting the 1993 revenue cap of all consortium members to account for the consortia budget.

RESPONSE: It is incorrect to state that the perinatal adjustment is not in the revenue cap. Chapter 160 does not identify which elements are not recognized if the hospital is subject to cap adjustment in section 3a(3) of P.L. 1992, c.160. The perinatal adjustments were not specifically earmarked for elimination. Furthermore, the Department does not have the authority to approve an additional adjustment. The revenue cap was set for the 1993 transition year based upon specific requirements found in P.L. 1992, c.160. This statute required that the revenue cap be set to include the perinatal adjustment but also provided a hospital's revenue cap could not exceed its 1992 approved revenue. The statute further requires hospitals to "provide for its ... regional maternal and child health consortia, as applicable."

As a result of the legislative mandate to maintain funding of essential regional public health services in 1993 rates, the Department has not made the recommended changes. To clarify the application of this requirement, the rule has been amended at N.J.A.C. 8:43G-5.10(c) to reflect that all hospitals who "were eligible for the perinatal adjustment shall make monthly payments...".

This change on adoption is not viewed by the Department as so substantive as to require reproposal in accordance with N.J.A.C. 1:30-4.3. The change effectuates the purpose of the rulemaking, as stated in the adopted emergency amendment and concurrent proposal published in the New Jersey Register at 25 N.J.R. 1295(a). The Department has substituted the term "eligible for" for the term "which received" in order to more accurately describe the hospitals. This change on adoption does not create a change in impact on the regulated public, nor does it enlarge or diminish the requirements. The amount to be paid by the hospitals is not changed by this amendment on adoption. The change simply updates the description of the hospitals required to make monthly payments to the Maternal and Child Health Consortium to which they belong.

Full text of the adopted amendment follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

8:43G-5.10 Funding for regionalized services

(a)-(b) (Reserved.)

(c) Prior to the designation of the Maternal and Child Health Consortium pursuant to the certificate of need process and after the expiration of the Robert Wood Johnson Foundation funding for consortia on or before March 1, 1993, all hospitals *[which received]* ***eligible for*** a perinatal adjustment in a 1993 revenue cap approved by the Hospital Rate Setting Commission shall make monthly payments based on that adjustment to the Maternal and Child Health Consortium to which they belong.

HUMAN SERVICES

(a)

OFFICE OF LEGAL AND REGULATORY LIAISON

Public Comments and Petitions Regarding Department Rules

Readoption with Recodification: N.J.A.C. 10:1-2 Recodified as N.J.A.C. 10:1A

Adopted: May 10, 1993 by William Waldman, Commissioner, Department of Human Services.
Filed: May 12, 1993 as R.1993 d.271, **without change.**
Authority: N.J.S.A. 30:1-12 and 52:14B-4(f).
Effective Date: May 12, 1993, Readoption;
June 7, 1993, Recodification.
Expiration Date: May 12, 1998.

Summary of Public Comments and Agency Responses:
No comments received.

Full text of the readoption with recodification follows.

CHAPTER 1A
PUBLIC COMMENTS AND PETITIONS
REGARDING DEPARTMENT RULES

SUBCHAPTER 1. PUBLIC COMMENTS AND PETITIONS REGARDING DEPARTMENT RULES

Recodify existing 10:1-2.1 to 2.4 as 10:1A-1.1 to 1.4 (No change in text.)

(b)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Statewide Respite Care Program Manual

Readoption with Amendments: N.J.A.C. 10:14

Proposed: March 1, 1993 at 25 N.J.R. 876(a).
Adopted: May 6, 1993 by William Waldman, Commissioner, Department of Human Services.
Filed: May 7, 1993 as R.1993 d.256, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).
Authority: N.J.S.A. 30:4F-1 et seq.
Effective Date: May 7, 1993, Readoption;
June 7, 1993, Amendments.
Expiration Date: May 7, 1998.

Summary of Public Comments and Agency Responses:
The Department of Human Services (the Department) has received six letters of comment in response to the proposal. The names of the commenters, and the name of each of the respective agencies, are as follows:

Kenneth Dolan, Executive Director
Home Care Council of New Jersey

Lisa Walz-Pigott, Special Services Coordinator
Visiting Nurse Association of Sussex County, Inc.

Jean Alan Bestafka, Executive Director
Home Health Services and Staffing Association of New Jersey

Nancy Verblaauw, Coordinator, Statewide Respite Care Program
County of Bergen Department of Human Services

Susan Riley, Grant Coordinator
SalemCare, Inc., Visiting Nurse Agency

Cheryl Sperber, In-Home Service Unit Manager
Senior Citizens United Community Services

COMMENT: Three commenters, Kenneth Dolan, Lisa Walz-Pigott and Jean Alan Bestafka, discussed the new provision at N.J.A.C. 10:14-5.2(h), which requires that private duty nurses used by the Statewide Respite Care Program be employed by agencies licensed by the New Jersey Division of Consumer Affairs, Department of Law and Public Safety. All three commenters stated the belief that this provision is too restrictive, and requested, variously, that the Division also include employing agencies licensed by the New Jersey Department of Health or accredited by organizations approved by the Department of Human Services.

RESPONSE: The Department has decided to extend the rule to include licensed nurses employed by agencies licensed/accredited by any of the three governmental entities noted above. The text of N.J.A.C. 10:14-5.2(h) is being amended upon adoption, for the reasons which follow.

The Department does not believe that this is a substantive change requiring republication. The inclusion of the other two licensing/accredited agencies is similar to the standard used in the Title XIX (Medicaid) Home Care Programs (reference is made to N.J.A.C. 10:60-1, Definitions for "home health agency" and "homemaker agency"). While the Statewide Respite Care program is now completely State-funded, the Department believes that the same standard can be applicable to both home care and respite care programs.

This change does not affect the primary criteria for private duty nurses, because all private duty nurses must be licensed as an LPN or RN, in accordance with N.J.A.C. 13:37. The agency employing these nurses must be approved by a governmental entity. This is the current practice with Medicaid in reference to home care services, and the Department does not wish to have a more restrictive standard in its Statewide Respite Care Program.

COMMENT: Ms. Walz-Pigott expressed concern about the requirement of written notification by the agency if services are reduced, considering the additional paperwork a burden on both the sponsor agency and the caregiver.

RESPONSE: The Department responds with the explanation that this provision, at N.J.A.C. 10:14-3.3(e)1, refers to an action by the sponsor agency to terminate, reduce or suspend respite care services. The Department wishes to retain this standard, because clients should be notified in these situations. However, the sponsor agencies may negotiate a change in the service package with the consent of the client, in which case, written notification might not be necessary.

COMMENT: A further comment by Ms. Walz-Pigott concerns the inclusion of the income of both spouses in determining eligibility for respite care. (See N.J.A.C. 10:14-4.1.) The commenter describes those instances where an elderly woman takes care of her higher income spouse but who is deemed ineligible for respite care services because of the inclusion of the husband's income in determining the caregiver/wife's eligibility for relief. Ms. Sperber shares this concern, noting that when the person requiring care is the partner with the higher income, the spouse/caregiver is frequently denied respite relief, or must pay a copayment which the couple cannot afford.

RESPONSE: The Department's response is that no change is being made in the provision at this time, although the possibility of changing this rule is under consideration. A change of this nature would be too substantive to make upon adoption (see N.J.A.C. 1:30-4.3).

COMMENT: A second matter Ms. Sperber mentions is the requirement that billing for the client's copayment shall be submitted within six weeks following provision of the services, N.J.A.C. 10:14-6.3(c). The commenter stated the view that expecting the billings to be submitted within that period was "unrealistic", because the subcontractors typically submit their bills three to four weeks after providing the service.

RESPONSE: The Department's response is that the client is required to pay the respite care service copayment within a specified period or be denied services, and that the consumer has to know the extent of his or her liability. The Department has already liberalized the rule and cannot extend the billing period further.

COMMENT: The third issue Ms. Sperber raises "is a request to change the definition of who is included in the administrative staff. Currently, the program coordinator is considered to be part of the administration, when in fact her primary function is the provision of direct care. We feel the 19% limit on administration costs is inadequate to meet the staffing needs of the program, as it is currently defined."

RESPONSE: The statute (N.J.S.A. 30:4F-15) limits the percentage which a contracting agency may allocate as administrative costs to ten percent. The Department must comply with the statutory standard. The

Department permits an agency to allocate up to an additional tenth of the remaining budget to cover the cost of assessing (evaluating) applicants.

COMMENT: Two commenters, Nancy Verblaauw and Susan Riley, have discussed out-of-home respite placements. Ms. Verblaauw was concerned at the proposed reduction in respite care services from the maximum of 28 days to 14 days. (See N.J.A.C. 10:14-6.2(c).) Attached to Nancy Verblaauw's letter were letters from clients who supported the extension of campership services. The second commenter, Susan Riley, also wrote in support of the out-of-home respite placements in nursing facilities (NF) and residential health care facilities (RHCF), which have been provided for respite care for fourteen days annually. Ms. Riley wrote to request that the fourteen day limit be raised.

RESPONSE: Limitation in the number of days for out-of-home respite placements has been a feature of the program since its inception. This limitation is intended to serve as a cost containment feature, as well as being consistent with the short-term and temporary nature of respite care. In response to the commenters' rationale, that is, the extent of the needs of the person requiring care, vis-a-vis the needs of the caregiver, the Department is extending the maximum from the proposed 14 days of camp or if inpatient respite care to 21 days, with the proviso that the overall cost limitation, or cap, of $3,000 of respite care not be exceeded. The number of camp days will be increased up to 21 days, instead of the proposed limit of 14 days. The Department is making this change in response to public comment, and will provide more relief for the caregiver, while staying within allocated costs.

The agency notes that the policy regarding out-of-home placement had not previously been codified. There was an informal policy of allowing 28 days for campership. When the proposal appeared in the Register, the proposed standard was 14 days. The agency is extending this time period by seven days which should be more beneficial to persons who participate in the respite care program and who need campership service.

Summary of Changes Upon Adoption:

The Department is amending N.J.A.C. 10:14-5.2(h) and 6.2(c) in response to public comments and for the reasons indicated above.

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

10:14-1.2 Scope of service

(a) This chapter shall apply to all activities and persons participating in the Statewide Respite Care program, including but not limited to applicants, eligible persons, caregivers and sponsors.

(b) Pursuant to N.J.S.A. 30:4F-7 et seq., the New Jersey Statewide Respite Care Program is limited to the provision of and payment for short-term, intermittent respite care for frail elderly and functionally impaired adults.

10:14-1.3 Target population; priority of services

(a) The target population is limited to those individuals providing basic, daily care to the eligible person, who are at risk of severe illness, fatigue, or stress due to the demands of their caregiving responsibilities.

(b) Situations to be given priority in receiving services are those where the eligible person is at risk of institutionalization due to the temporary incapacity of a caregiver.

10:14-1.4 Definitions

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

"Applicant" means a functionally impaired person 18 years of age or older who would be at risk of long-term institutional placement if his or her regular caregiver could not continue in that role without the assistance of temporary home and community support services, including respite care.

"Campership" means a day or overnight accredited camp program for functionally impaired adults.

. . .

"Companion or sitter services" means a non-medical, basic supervision service which is provided for the eligible person in his or her home on a short-term, intermittent basis. Companion or sitter services are intended for those eligible persons who do not require any personal care assistance, medical assistance, or housekeeping services during the time when respite care services are provided.

. . .

"Eligible person" means an applicant who meets the eligibility criteria as set forth in this chapter.

"Emergency" means providing respite care in the case of a sudden or unexpected event that impairs the ability of the caregiver to continue in that role. Such circumstances include, but are not limited to, sudden illness of a caregiver, the caregiver's spouse or children; a natural disaster; a death in the family of the caregiver; or an accident affecting the caregiver, the caregiver's spouse, or the caregiver's children.

"Functionally impaired" means the presence of a chronic physical or mental disease, illness, or disability as certified by the physician or a sponsor-provided assessment team, which causes physical dependence on others, and which leaves a person unable to attend to his or her basic daily needs without the substantial assistance or continuous supervision of a caregiver.

"Homemaker/home health aide services" means services which include personal care (that is eating, grooming, hygiene and toileting), household tasks, and activities provided to eligible persons in their homes.

. . .

"Medical day care" means a program of medically supervised, health related services provided in an ambulatory care center to persons who are nonresidents of that center.

"Peer support" means the provision of mutual support services for caregivers involved in the Statewide Respite Care program.

"Private Duty Nursing" means hourly service delivered by licensed nursing personnel in the eligible person's home.

. . .

"Respite" or "respite care" means the provision of temporary, short-term care for, or the supervision of, an eligible person on behalf of the caregiver in emergencies or on an intermittent basis to relieve the daily stress and demands of caring for the functionally impaired adult. Respite may be provided hourly, daily, overnight, or on weekends and may be provided by paid or volunteer staff. The term includes, but is not limited to, companion or sitter services, homemaker and personal care services, adult day care, short-term inpatient care in a licensed nursing facility, residential health care facility or overnight camp program, private duty nursing and peer support and training for caregivers.

. . .

"Social adult day care" means a comprehensive social and health related outpatient program for the frail, moderately handicapped, slightly confused recipient who needs care during the day.

"Sponsor" means a county or regional agency, either public or private non-profit, which contracts with the Department of Human Services to administer the local program and arranges for services for eligible persons after making an eligibility determination.

SUBCHAPTER 3. APPLICATION PROCESS

10:14-3.1 General provisions

(a) (No change.)

(b) All applications for eligibility determination shall be made to the sponsor agency in the county where the applicant resides. The sponsor agency shall make a determination of eligibility and perform appropriate assessments within 30 days after the receipt of an application.

10:14-3.2 Authorized agent

(a) Where the applicant is incompetent or incapable of filing an application on his or her own behalf, the sponsor agency shall recognize any of the following persons, listed in order of priority, as an authorized agent for the purpose of initiating such application:

1. A legal guardian;

2. A close relative of the applicant by blood or marriage, such as a parent, spouse, son, daughter, brother or sister;

3. A representative payee designated by the Social Security Administration;

4. A staff person of a public or private social service agency, of which the person is a client, who has been designated by the applicant to so act; or
5. A friend of the applicant.

10:14-3.3 Responsibilities in the application process
(a)-(b) (No change.)
(c) The applicant has the responsibility to:
1. Complete the eligibility application forms truthfully, legibly, and accurately; and
2. Provide the sponsor agency with documentation that supports statements made on the eligiblity application, when required.
(d) The applicant/eligible person has the responsibility to notify the sponsor agency whenever one of the following occurs:
1. His or her address changes;
2. His, her or their annual income changes to an amount that will change their eligiblity for services or their co-payment requirement;
3. His or her marital status changes; or
4. His or her liquid resources change to exceed $40,000.
(e) The sponsor agency shall provide the applicant with the written statement of eligibility determination within 30 days of receipt of the application.
1. When the respite services are terminated, reduced or suspended, the "eligible person" shall be given written notification of the determination and the right to a hearing as provided in N.J.A.C. 10:14-7.

SUBCHAPTER 4. ELIGIBILITY

10:14-4.1 Eligibility standards
(a) For the purposes of the Statewide Respite Care Program, an eligible person shall meet the following eligibility standards:
1. (No change.)
2. The maximum income level, not including the income of the spouse or family of the individual, shall be 300 percent of the Federal Supplemental Security Income standard for an individual living alone, in effect under section 1611(a)(1)(A) of the Social Security Act (as increased pursuant to section 1617 of such Act). In the case of an individual and a spouse who are both dependent on the caregiver, the couple's combined income shall be subject to this same income standard; and
3. (No change.)
4. An eligible person shall have liquid resources (as declared by that individual) that do not exceed $40,000. In the case of an individual and a spouse who are both dependent on the caregiver, the couple's combined liquid resources shall not exceed $40,000.

10:14-4.2 Confidentiality and disclosure of information
(a) All personally identifiable information regarding applicants, eligible persons or caregivers obtained or maintained under the Statewide Respite Care Program shall be confidential and shall not be released without the written consent of the applicant, eligible person, their authorized agent, or caregiver.
(b) The prohibition against unauthorized disclosure in (a) above shall not be construed to prevent:
1. The release of statistical or summary data or information in which applicants or eligible persons cannot be identified.
2. The release to the Attorney General, or other legal representative of the state, of information or files relating to the claim of any applicant, eligible person, or their authorized agent challenging the program's statute, rules, or a determination made pursuant thereto, or against whom an action or proceeding for the recovery of incorrectly paid benefits has been instituted.
3.-4. (No change.)

SUBCHAPTER 5. SPONSORS AND PROVIDERS

10:14-5.1 Qualifications and requirements of sponsors
(a) The Commissioner, based upon the recommendations from the county Human Services Advisory Councils, shall designate one sponsor agency for the Statewide Respite Care Program in each county in New Jersey, subject to the following qualifications:
1. A sponsor agency shall be a public or private nonprofit agency and shall contract annually with the Department of Human Services to administer the local respite program.
2. Each sponsor agency shall demonstrate its ability to purchase respite services from provider agencies and individuals in the county and shall provide evidence of its capability to deliver the full range of respite services mandated by the program as defined in N.J.A.C. 10:14-1.4, the definition for Respite or Respite Care.
(b) Each sponsor agency shall satisfy the following requirements:
1. Annually determine the maximum number of eligible persons to be served in its respective county based on the financial allocation made by the Department of Human Services. The sponsor shall not admit or serve more eligible persons than can be afforded with available resources.
2. Maintain a waiting list of those persons eligible for respite care, but not able to receive it.
3. Determine the eligibility of all applicants for service under the Statewide Respite Care Program.
4. Determine sources of payment for respite services for each eligible person and assess and collect all co-payments through retrospective billing.
5. Verify the income of each eligible person applying for services under the Statewide Respite Care Program and determine the eligible person's ability to contribute to the cost of the respite services. This income verification shall be determined on an annual basis, or sooner if circumstances change.
6. Develop a Service Plan for each person served under the Statewide Respite Care Program.
7. Submit monthly statistical and financial reports on the respite program in its respective county to the Department of Human Services.
8. Agree to comply with the program rules contained in this chapter.
(c) Any breach of contract provisions or of (a) and (b) above by the sponsor agency may constitute grounds for contract cancellation upon reasonable notice of such by the Department of Human Services.

10:14-5.2 Qualifications and requirements for provider agencies
(a) Provider agencies shall be accountable to the sponsor agency for the provision of respite services and shall enter into contracts with the designated sponsor agency.
(b)-(c) (No change.)
(d) An individual desiring to provide services under the Statewide Respite Care Program shall enter into a sub-contract with the sponsor agency as a provider and be subject to all requirements of provider agencies.
(e) All individuals providing respite care which includes homemaker/home health aide or personal care services shall be certified homemaker/home health aides.
(f) The sponsor agency and/or Department of Human Services shall reserve the right to cease purchasing services from any provider agency when any breach of the rules contained in this chapter occurs, constituting grounds for contract cancellation upon reasonable notice.
(g) All medical day care centers utilized for the Statewide Respite Care Program shall be licensed to provide medical day care in accordance with N.J.A.C. 8:43F-2.
[(h) Private duty nurses utilized by the Statewide Respite Care Program shall be employed by agencies licensed by the New Jersey Division of Consumer Affairs, Department of Law and Public Safety, in accordance with the provisions of N.J.S.A. 56:8-1.1 and N.J.S.A. 34:8-43 et seq.]
***(h) Private duty nurses utilized by the Statewide Respite Care Program shall be:**
1. Nurses employed by agencies licensed by the New Jersey Division of Consumer Affairs, Department of Law and Public Safety, in accordance with the provisions of N.J.S.A. 56:8-1.1 and N.J.S.A. 34:8-43 et seq.;
2. Nurses employed by home health agencies licensed by the New Jersey Department of Health, in accordance with N.J.A.C. 8:42; or

3. Nurses employed by accredited agencies approved by the Department of Human Services, in accordance with N.J.A.C. 10:60-1.2.*

SUBCHAPTER 6. FEES

10:14-6.1 Provider reimbursement and payment levels

(a) The Department of Human Services shall determine reimbursement and payment levels for the respite services to be provided under the program.

(b) Reimbursement levels for services provided under the Statewide Respite Care Program shall be those levels used by the Division of Medical Assistance and Health Services for Medicaid reimbursements for homemaker, home health aide, and private duty nursing services, N.J.A.C. 10:60; nursing home and hospital inpatient care, N.J.A.C. 10:63-1.7 and N.J.A.C. 8:1-1 et seq.; and medical day care, N.J.A.C. 10:65-2.

1. In the event that a Medicaid participating nursing facility is not available a licensed nursing facility may be utilized at the lowest semi-private rate.

(c) Reimbursement for companion or sitter services shall be up to $7.00 per hour for services rendered on weekdays and $8.00 per hour for services rendered on weekends.

(d) Enrolled Medicaid providers for social adult day care shall be reimbursed at the Medicaid rate. Providers not enrolled with Medicaid shall be reimbursed up to $30.00 for a full day session.

(e) Reimbursement for campership service shall be up to $75.00 per day.

10:14-6.2 Service and cost limitations for eligible persons

(a) Each eligible person shall receive up to $3000.00 of respite services in a calendar year. Those service levels shall be adjusted based on funding available to the Department of Human Services.

(b) A sponsor may request an exception to an eligible person's service level. The request shall be made in writing to:

Office of Special Initiatives
Division of Medical Assistance and Health Services
CN 712
Trenton, NJ 08625-0712

(c) Placement in a licensed nursing facility or in a licensed residential health care facility or a campership shall not exceed *[14]* ***21*** days in a calendar year.

10:14-6.3 Sliding fee scale for co-payments

(a) Co-payment fees shall apply to eligible persons rendered respite care services in accordance with the co-payment fee scale set forth in (b) below. In all cases the point at which cost-sharing shall be initiated will be based upon the most current Supplemental Security Income (SSI) guidelines in effect under section 1611(c)(1)(A) of the Social Security Act (as increased pursuant to section 1617 of such Act). The threshold beyond which an eligible person becomes ineligible for program services, is 300 percent of the SSI guidelines.

(b) The sliding fee scale shall be as follows:

Income as a percentage of the Monthly SSI level	Percent of Costs To Be Paid By Eligible Person
175%	5%
176%-207%	10%
208%-238%	15%
239%-269%	20%
270%-300%*	25%

*Institutional SSI level

(c) All co-payments shall be billed by the sponsor agency within six weeks following provision of the services contained in the service plan.

(d) When co-payment is not made within 90 days of billing, the sponsor agency shall suspend service until payment is made. The sponsor agency shall provide written notice of this action to the eligible person 10 days prior to the effective date of the proposed suspension of services.

(e) The sponsor agency shall not be held liable for the uncollected co-payment, as long as sponsor agency has expended reasonable efforts to collect any or all co-payments.

(f) Sponsor agencies may see a reduction or waiver of co-payment through submission of a written request to the Department of Human Services, Office of Special Initiatives, Division of Medical Assistance and Health Services, CN 712, Trenton, New Jersey 08625. Requests for reduction or waiver of co-payment shall only be considered for the following reasons:

1. Death of the client;
2. Demonstrated financial hardship.

(g) No reduction or waiver of co-payment may be made without written Departmental approval.

10:14-6.4 Procedures for program reporting

(a) Each sponsor agency shall submit monthly data to the Department of Human Services, Division of Medical Assistance and Health Services, Office of Special Initiatives in a format specified by the Department containing the following information:

1. The number of eligible persons served by all provider agencies in the county;
2. The number of units of respite care provided per type of respite care to all eligible persons in the county;
3. Expenditures for program administration;
4. Financial data on the services provided; and
5. Other information necessary for successful management of the program.

SUBCHAPTER 7. APPEALS

10:14-7.1 Appeals process

An applicant who is denied participation in the program because he or she does not qualify as an eligible person has the right to request a hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and the Uniform Administrative Procedure Rules, N.J.A.C. 1.1 within 21 days of receipt of the written determination. There shall be no right to a hearing if an individual has been determined to be an "eligible person" but respite services cannot be provided under N.J.A.C. 10:14-5.1(b). Appeals shall be directed to:

Administrative Hearing Unit
Office of Legal and Regulatory Liaison
Division of Medical Assistance and Health Services
Department of Human Services
CN 712
Trenton, New Jersey 08625

(a)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Manual For Hospital Services Reimbursement Methodology

Adopted Concurrent Amendment: N.J.A.C. 10:52-1.1
Adopted Concurrent New Rules: N.J.A.C. 10:52-5, 6, 7, 8 and 9

Proposed: April 5, 1993 at 25 N.J.R. 1582(a).

Adopted: May 10, 1993 by William Waldman, Commissioner, Department of Human Services.

Filed: May 10, 1993 as R.1993 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. 30:4D-6(a)1, 30:4D-7, 7a, b and c; 30:4D-12, P.L. 1992, c.160; 1902(a)(13) of the Social Security Act; 42 U.S.C. 1396a; 42 CFR 447.251, 253.

Effective Date: May 10, 1993, Adopted Concurrent Amendment and New Rules; June 7, 1993, Changes upon Adoption.

Expiration Date: February 8, 1995.

Summary of Public Comments and Agency Responses:

The following words and/or phrases shall have the following meaning in this Summary:

"Department" shall refer to the New Jersey Department of Human Services.

"Division" shall refer to the Division of Medical Assistance and Health Services.

"DRG" shall refer to Diagnosis Related Group.

"Hospitals" shall Refer to acute care general hospitals unless otherwise indicated.

"Medicare" shall refer to Title XVIII of the Social Security Act.

"Medicaid" Shall refer to Title XIX of the Social Security Act.

The phrase "Chapter 83" is a generic reference to N.J.S.A. 26:2H-1.

The phrase "Chapter 160" refers to P.L. 1992, c.160, which required the Department to establish a rate setting methodology for Medicaid.

Summary of Public Comments and Agency Response:

Comments on the proposed amendment and new rules were submitted by the following hospitals: University of Medicine and Dentistry of New Jersey (UMDNJ); Elizabeth General Medical Center; Kimball Medical Center, Deborah Heart and Lung Center (two comments); Newcomb Medical Center; St. Francis Medical Center; Hackensack Medical Center; Bayonne Hospital.

Comments were also submitted by the New Jersey Hospital Association (NJHA) and Besler & Company, Inc.

One comment was filed in response to the public notice which appeared in several newspapers in February, 1993. The commenter will remain anonymous to insure confidentiality pursuant to N.J.A.C. 10:49-9.4.

The law firm of Cohen, Shapiro, Polisher, Shiekman and Cohen submitted three separate sets of comments on behalf of several hospitals. The first group of hospitals included Hackettstown Community Hospital, Newton Memorial Hospital, Wallkill Valley Hospital and Warren Hospital (the "Hospitals"). The second group of hospitals included Alexian Brothers of Elizabeth, Inc., Bergen Pines County Hospital, Beth Israel Hospital, Dover General Hospital and Medical Center, Elizabeth General Medical Center, Holy Name Hospital, Medical Center of Ocean County, Monmouth Medical Center, Newcomb Medical Center, Newton Memorial Hospital, Rancocas Hospital, Riverview Medical Center, Shore Memorial Hospital, St. Clare's/Riverside Medical Center, St. Francis Medical Center (Trenton) and Warren Hospital (the "Hospitals"). The third group of hospitals included Atlantic City Medical Center, Barnert Hospital, Bergen Pines County Hospital, Columbus Hospital, East Orange General Hospital, Elizabeth General Medical Center, General Hospital Center at Passaic, Newcomb Medical Center, Our Lady of Lourdes Medical Center, Palisades General Hospital, St. Clare's/ Riverside Medical Center, St. Elizabeth Hospital and Warren Hospital (the "Hospitals").

In general, since the commenters frequently presented the same concerns, the summary of comments, and agency response, is presented on an issue-by-issue basis.

COMMENT: Hospitals did not have the detailed information needed to review their Medicaid rates.

RESPONSE: The Division of Medical Assistance and Health Services provided each hospital with a schedule of Medicaid Direct Patient Care Rates as well as the hospital's mark-up factors. Also since the Division utilized many of the same processes as had been utilized under Chapter 83, much of the data used to establish the rates had been previously sent.

COMMENT: Hospitals could not appeal their rates timely without the supporting rate schedules.

RESPONSE: Hospitals could preserve their appeal rights by filing an appeal notice with the Division. Many hospitals have therefore preserved their appeal rights.

COMMENT: There is a need to continue to receive payments from the Health Care Subsidy Fund.

RESPONSE: The Governor's FY 1994 Budget includes funding to continue this program of disproportionate share payments. If the Legislature enacts the Budget as proposed, the program will continue for low income clients with special needs.

COMMENT: N.J.H.A. asked about the Department's intentions as to the continuation of the Transition Adjustment.

RESPONSE: The Department proposed the Transition Adjustment to ease the transition to a new Medicaid rate setting system. The Department will continue to assess appropiateness of this adjustment each year.

COMMENT: The regulations limit future increases to the amounts recognized under the Tax Equity and Fiscal Responsibility Act. N.J.H.A. questioned the statutory authority for the upper payment limit and the use of the TEFRA limitations.

RESPONSE: The Department may implement an economic factor to project rates in future years. The Division plans to utilize the TEFRA allowable increase which in recent years has been based on the national hospital market basket rate of inflation to move the current year rate into future years. The upper payment limit requirement is in 42 CFR 447.272c.

COMMENT: Chapter 83 rates set by the Hospital Rate Setting Commission resulted in underpayments to hospitals in 1992 and/or prior years. These rules do not compensate hospital for past underpayments.

RESPONSE: Chapter 160 repealed Chapter 83 and all hospital payers were required to develop new rate setting methodologies. The methodology implemented by the Department is prospective only.

COMMENT: The figures in the economic impact statement for disproportionate share payments are different from the numbers in the Public Notice published in February. In addition, is Federal funding available for these payments?

RESPONSE: Federal funding is available for all of these payments. The projected disproportionate share payments for CY 1993 are $600 million for the Health Care Subsidy Fund—Charity Care, $143 million for the Hospital Relief Fund and $20 million for the Special Subsidy for Mentally Ill and Developmentally Disabled Clients. All of these funds are comprised of Federal and State funds and do add to the $763 million included in the public notice.

COMMENT: The regulations are unclear concerning the funding levels for the charity care component of the disproportionate share payment.

RESPONSE: The regulations repeat the distribution of dollars outlined by Chapter 160.

COMMENT: Several commenters suggested that calculation corrections would require a full rate appeal and that the requirements are too vague.

RESPONSE: The Department does not require a full rate review to correct a calculation error and, in fact, the rules allow different time frames for calculation errors and rate appeals. The Department believes that the requirements for a rate review are fully set out in the rule. They are designed to preserve the Department's discretion to consider a variety of factors relevant to whether a rate adjustment is warranted.

COMMENT: The requirements for a rate review are too complex and go beyond what is required under Federal law which does not require a hospital to provide its efficiency.

RESPONSE: Federal law gives the states discretion on what factors should be considered in appeals. The Department deems efficiency to be an important factor in determining if rate adjustments are to be made. Medicaid programs are under no obligation to reimburse for costs resulting from a hospital's inefficiency.

COMMENT: Some of the documents being required as part of the rate appeal are proprietary and should not be released to the public.

RESPONSE: The Department believes the documents are required to document the efficiency of the facility. Hospitals can seek protective orders to prevent other hospitals from obtaining proprietary documents from the agency.

COMMENT: Requiring hospitals to produce efficiency studies and marginal cost reports will make hospitals reluctant to undertake efficiency studies.

RESPONSE: The Department does not believe that the requirement to produce these studies in order to seek increases in their Medicaid rates should deter hospitals from undertaking these studies which can produce the benefit of substantial cost savings for hospitals. The Medicaid program is not required to reimburse costs resulting from inefficiencies. On the contrary, the desire to increase efficiency and Medicaid reimbursement may encourage hospitals to undertake efficiency studies.

COMMENT: Chapter 83 principles are essentially the same as the Boren Amendment requirements.

RESPONSE: The Department does not agree. The Boren Amendment only requires Medicaid programs to reimburse the costs that must be incurred by economical and efficient facilities.

COMMENT: Since Medicaid reimbursed hospitals under Chapter 83 principles until adoption of these regulations on March 12, 1993, the Department acknowledged its debt to reimburse facilities for what would have been recognized as prior year adjustments under Chapter 83.

RESPONSE: The Department does not agree. The Department's rate setting rules are no longer governed by Chapter 83.

COMMENT: Inclusion of prior year settlements in a hospital's revenue cap requires Medicaid to pay for prior year settlements.

RESPONSE: The Department does not agree. The revenue cap is simply the maximum amount each hospital can collect from all payers. Payers are free under Chapter 160 to develop their own rate setting system. The Department has implemented a hospital rate setting system for Medicaid that meets all State and Federal requirements.

COMMENT: The regulations retroactively alter the State Plan.

RESPONSE: The Department does not agree. The Department has submitted a State Plan Amendment which, like the rules, is effective for all discharges on or after March 12, 1993.

COMMENT: The regulations should include a provision for working capital.

RESPONSE: The Department does not agree. Medicaid is not required to reimburse for working capital.

COMMENT: Medicaid should continue to pay for any Medicare shortfalls since some clients are eligible for both Medicaid and Medicare.

RESPONSE: The Department is not required to absorb a cost shift from any payer. The Department will continue to reimburse hospitals for Medicare copayment and deductible claims for dually eligible clients.

COMMENT: The overall impact cannot be verified by using data historically used to review Chapter 83 rates. The commenter requested the Department to validate his/her numbers.

RESPONSE: The projection of Medicaid payments in the rules is based upon historical Medicaid paid claim data from the Division of Medical Assistance and Health Services, Medicaid Management Information System (MMIS) and simulations done by State staff. However, the Department cannot validate the estimates produced by the commenter.

COMMENT: The Medicaid nursing home rate setting system rebases annually. This system should also rebase annually.

RESPONSE: The Department does not agree. The choice of base period is influenced in part by the years for which there is reliable cost and charge data available. The availability of data differs from the two rate setting systems.

COMMENT: The direct cost per case may be wrong for some hospitals because the allocation to the Medicaid program may not be correct.

RESPONSE: Hospitals can appeal their rates if they believe the allocation method is incorrect and may document any claim that Medicaid costs are understated or overstated.

COMMENT: The use of the 100 percent standard and the teaching adjustment does not adjust for the clinical uniqueness of some hospitals.

RESPONSE: The Department is not required to pay all the costs incurred by all facilities, only the costs that must be incurred by economical and efficient facilities. Federal law permits the State to establish Statewide class or peer group rates.

COMMENT: Chapter 160 requires the Essential Health Services Commission to use Medicaid rates to reimburse hospitals for charity care clients. Therefore the cost of these clients should be included in the Medicaid rates.

RESPONSE: The Department does believe it is appropriate that Medicaid rates should be based upon Medicaid cost data.

COMMENT: Crossover claims should be included in the rate setting process.

RESPONSE: The Department does not agree. The Department pays coinsurance and deductible for dually eligible clients.

COMMENT: Capital facility costs should be reconciled annually as was done under Chapter 83.

RESPONSE: The Department does not agree. This is a prospective rate setting system.

COMMENT: Extraordinary expenses should be included in the rates.

RESPONSE: A facility may appeal its rates if it believes they are inadequate.

COMMENT: Peer groupings for teaching adjustment should be eliminated.

RESPONSE: The Department does not agree that this adjustment should be eliminated. The use of peer groupings is a method of tying rates to relative efficiency.

COMMENT: The rates should include a higher operating margin.

RESPONSE: The Department is not required to include an operating margin in the rate. However, in addition to the operating margin in the rates, providers may earn a profit by instituting cost saving measures and improving their efficiency.

COMMENT: The new regulations should be effective on July 1, 1993 which is the start of the State fiscal year.

RESPONSE: Chapter 160 eliminated the State's regulatory basis for Medicaid hospital rates. The Department enacted emergency rates to establish such a regulatory basis. The Department cannot agree to operate without regulations.

COMMENT: The rates should be increased to cover the fees paid to the Essential Health Services Commission and the .053 percent tax paid by the hospitals.

RESPONSE: The Department is not required by Federal law or Chapter 160 to recognize these costs in the Medicaid rate setting system.

COMMENT: Private room differentials were reimbursed as part of reconciliation under Chapter 83 and should be treated similarly in these rates.

RESPONSE: The Department does not agree and is not required to recognize these costs.

COMMENT: The disproportionate share payment is not sufficient and should be increased.

RESPONSE: The Department believes that $763 million in disproportionate share payments to hospitals is generous. In addition, P.L.102-234 limits that amount of disproportionate share payments places a cap on the State.

COMMENT: The continued use of a DRG methodology could result in payments in excess of charges.

RESPONSE: The DRG rate setting methodology is based upon the average cost of treating someone with a specific diagnosis. While some hospital stays result in payments greater than charges, others will result in payments less that charges.

COMMENT: Since rates are based on standards, audits are not required standards.

RESPONSE: Federal law requires the states to conduct periodic audits.

COMMENT: A methodology that was developed for all payers should not be used by one payer.

RESPONSE: The Department's new methodology, while retaining some Chapter 83 factors, was designed to be used by a single payer.

COMMENT: How was the trauma adjustment factor calculated?

RESPONSE: The Department adjusted the DRGs in approved trauma centers by using the ratio of costs in trauma related DRGs compared to the costs for those DRGs in non-trauma hospitals.

COMMENT: Chapter 83 required utilization review of medical records. Is it still required and does the emergency rule address the method of reimbursement for such costs?

RESPONSE: The Department of Health still requires hospitals to conduct utilization reviews. The Medicaid rate does include funding for this activity.

COMMENT: The Hospital Relief Subsidy Fund should be modified to allocate dollars to facilities which treat cardiac disease.

RESPONSE: The Department's allocation was based on a consideration of the needs of the Medicaid population.

COMMENT: Why were Statewide standard rates for all payers used for some DRGs?

RESPONSE: Statewide standards were set based upon data from all payers when there was no Medicaid specific information available. This process was used to assure the establishment of a rate for each DRG.

COMMENT: The Charity Care Component of the Health Care Subsidy Fund was incorrectly calculated by the Department of Health based upon 1990 data and has resulted in a shortfall to the hospital.

RESPONSE: Chapter 160 clearly places the responsibility for this calculation in the Department of Health.

COMMENT: The methodology does not explain how capital is being reimbursed.

RESPONSE: The regulations do include the methodology for capital reimbursement (see N.J.A.C. 10:52-5.18).

Summary of Changes Upon Adoption:

The agency is making the following changes upon adoption. The agency does believe these changes are technical and not substantial enough to require reproposal. These changes are the result of the Division's review of the proposed text. There were no changes in response to public comments.

It should be noted that items 1 through 5 represent generic changes involving codification, word usage, etc., that were made throughout the text.

The changes, and reasons therefore, are as follows:

1. The agency has made technical changes to include the completed codification for each section. For example, "10:52-5.1" has replaced section "5.1" in the proposal. There have been no changes in numbering at the section level. All cross-references were fully codified in the same manner. Again, there were no changes in the sections being referenced.

2. Abbreviations such as "e.g." or "i.e." were deleted and replaced with "for example," or "that is."

3. Tag lines were either removed or included in the text of the rule.

4. There were several instances in N.J.A.C. 10:52-6 where the words "has" or "had" replaced the words "was" or "were."

5. The phrase "workmans compensation" has been changed to "workers' compensation".

The more specific changes will now be discussed on a subchapter by subchapter basis.

N.J.A.C. 10:52-5:

6. The definitions section contains minor technical changes, such as the inclusion of an acronym (PCB) after the definition of "Preliminary Cost Base," lower casing "year," etc.

7. In N.J.A.C. 10:52-5.1, the agency has deleted the phrase "a group of hospitals" and inserted "general acute care hospitals" to make the criteria more specific to eliminate any implication that this would include special hospitals. The amended text does not change the hospitals that are governed by this rate setting methodology. The agency needed to add this clarifying language to comply with the enabling legislation which specifically refers to acute care hospitals (P.L. 1992, c.160).

In addition, the summary accompanying the original proposal indicated there was a separate regulation governing special hospitals which has been proposed at 24 N.J.R. 4477(a).

The other change in this section indicates that it is the function of the Division to implement a rate. This language also appears at N.J.A.C. 10:52-5.6. The Division is now vested with the statutory responsibility to implement a rate setting methodology and make payment under Title XIX (Medicaid). Therefore, the rate established by the Division will be implemented as the basis of Medicaid payment to hospitals.

The word "propose" is being deleted because the Division will not be "proposing" a rate for consideration by another State agency, such as the New Jersey Department of Health.

8. N.J.A.C. 10:52-5.4 has been amended to delete the word "standard" and insert "standard reimbursement amounts." The intent of the rule is to enable the Director of the Division to establish a standard reimbursement amount for each DRG so that they may be adjusted for each individual hospital.

The Division does not consider this change to enlarge or curtail the burden upon providers because it is the Division's responsibility to set standard reimbursement amounts.

9. At N.J.A.C. 10:52-5.7, the word "proposed" is being deleted for the reasons indicated in item 7 above.

10. At N.J.A.C. 10:52-5.11 and 5.12, "are" was deleted and "shall be" inserted. This change does not impose any additional burden on hospitals, who are required to complete and file cost reports. The language indicates where the agency will allocate the costs. This standard has been used by the New Jersey Department of Health and is being continued by the Division and does not represent a change in how the State government deals with the cost reports.

11. With respect to N.J.A.C. 10:52-5.14(b)1ii, both dentists and podiatrists are being added to the determination for teaching costs. The proposal included these provider groups at N.J.A.C. 10:52-5.14(b)2, regarding accreditation. This amendment is designed to achieve consistency in both text and practice of recognizing dental and podiatric residents in determining teaching costs.

12. The word "salaries" was added to N.J.A.C. 10:52-5.14(d)5iii to insure consistency. The entire subparagraph concerns "labor costs" and the word "salary" was inadvertently omitted from the attendant category.

13. The Department is deleting N.J.A.C. 10:52-5.17(b)1 because the referenced appendix has been deleted by the New Jersey Department of Health. Proposed N.J.A.C. 10:52-5.17(b)2 is recodified as paragraph (b)1 and the reference to N.J.A.C. 8:31B, Appendix II is deleted. The Department is making this change on its own initiative. The public did not comment on this issue.

14. At N.J.A.C. 10:52-5.18(a)2i(6), the Division has deleted the word "may" and inserted the word "shall" because there is only one option available to calculate the amount of the Price Level Allowance. The phrase "option one" is being relocated.

The Medicaid program proposed one option and the substantive text has not changed. Since the same mathematical formula is being used, this will not create an additional burden on the provider.

15. The Department has changed the word "should" to "shall" in several sections of N.J.A.C. 10:52-6, Financial Reporting Principals and Concepts, in order to insure textual consistency throughout this subchapter. Hospital providers have been, and will continue to be, required to complete and submit cost reports in order to receive reimbursement per N.J.S.A. 30:4D-12. The regulatory language identifies the specific cost centers and the appropriate data to be entered in such cost centers. These requirements are mandatory and therefore "shall" is the appropriate word.

For example, the word "shall" has been added (on adoption) at N.J.A.C. 10:52-6.30(a) to be consistent with the text of N.J.A.C. 10:52-6.12(c). Hospital providers are now required pursuant to provide disclosure of certain information dealing with related firms to the Division of Medical Assistance and Health Services insofar as Medicaid reimbursement is concerned.

Also, cost centers relating to patient care activities such as Medical-surgical acute care units (N.J.A.C. 10:52-6.35), pediatric acute care units (N.J.A.C. 10:52-6.37), neo-natal intensive care unit (N.J.A.C. 10:52-6.42), newborn nursery (N.J.A.C. 10:52-6.43), operating and recovery room (N.J.A.C. 10:52-6.56), and cardiac catheterization unit (N.J.A.C. 10:52-6.46) need consistent language to insure that the appropriate data is entered in these cost centers. Therefore, the word "shall" is being added upon adoption because hospital providers must report costs related to these activities in the appropriate section.

In addition, there are costs which are supportive of the patient care units but have their own cost centers. These centers include dietary (N.J.A.C. 10:52-6.65), research (N.J.A.C. 10:52-6.71) and general administrative services (N.J.A.C. 10:52-6.74). The word "shall" is being added upon adoption because the completion of the cost report and the accompanying data, are a required component of hospital provider cost reporting.

Concerning N.J.A.C. 10:52-6.4, full disclosure based upon N.J.S.A. 30:4D-12 requires providers to fully disclose name of recipient, date of service, nature of service and any other requirement established by regulation. This regulation continues a mandatory requirement to "fully disclose" all significant data on accounting reports.

16. At N.J.A.C. 10:52-6.5, the Division is deleting the reference to the interpretability of "materiality." This is not necessary. Providers are required to include all material information on their cost reports. The agency retains the standard that an amount is material if to exclude it would tend to mislead the user.

17. At N.J.A.C. 10:52-6.11(b), the lead in sentence was amended to avoid confusion. The intent of this section is to inform providers of the specific requirements for self-insurance. The actual requirements for self-insurance were listed in the proposed text under subparagraphs (b)1i to v. The amended wording does not change the requirements that the providers must comply with regarding self-insurance.

18. N.J.A.C. 10:52-6.12(c) has been amended to indicate that hospitals are now required to report to the Division of Medical Assistance and Health Services instead of the New Jersey Department of Health regarding the disclosure of related organizations, such as auxiliaries, guilds, fund raising group, etc. The amount of total transactions remain the same. This change is not an additional burden on hospitals who are already required to report this information. The only change is that hospitals now submit these reports to the Division for Medicaid reimbursement.

19. N.J.A.C. 10:52-6.12(d) deletes the word "Commission" (Hospital Rate Setting Commission) and inserts the word "Division." The change is necessary to insure consistency with subsection (c), because if the hospital is required to report to the Division, it will be the Division that would send any follow-up inquiry if necessary.

20. N.J.A.C. 10:52-6.35 and 6.36 were amended to delete the word "reconciliation" and insert "reconciling items." The Division has not changed how the costs are to be reported. The change in language does not place any additional burden on providers because historically they were required to report costs in this manner.

21. At N.J.A.C. 10:52-6.37(a)1, the term "of age" was added to 14 years for clarification. The policy of specifying the age of the pediatric patient has not changed. Generally, children less than 14 years of age are placed in pediatric units.

22. At N.J.A.C. 10:52-6.38(a)3 and subsequent sections, the Division deleted the word "life" because the correct medical terminology is vital signs.

23. At N.J.A.C. 10:52-6.41(a)2, the Division inserted the word "shall" to be consistent with the language in the other sections. These functions are those that a coronary care unit is already required to perform. This language is also added to N.J.A.C. 10:52-6.44(a)2 for the same reason.

24. At N.J.A.C. 10:52-6.51(a)2 the Division removed the phrase, regarding payments to donors being included as reconciliation. This means that hospitals can include the cost of processing blood donations but can not differentiate between paid donors and voluntary donors. Medicaid is not allowed to pay for a donated service (N.J.A.C. 10:49-5.4(a)2).

25. N.J.A.C. 10:52-7.2 concerning outliers has been augmented upon adoption. The text is taken from existing New Jersey Department of Health regulations at N.J.A.C. 8:31B-3.38(c). Also, since there are only four categories of outliers, the word "five" had to be deleted from N.J.A.C. 10:52-7.2(a). The four categories of outliers are patients who stay shorter or longer than the established DRG, patients assigned to a DRG that is used infrequently and patients who are transferred.

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 1. COVERAGE

10:52-1.1 Definitions

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

"Adjusted admissions" means inpatient admissions increased to reflect outpatient activity and is calculated by admissions multiplied by total gross revenue divided by inpatient gross revenue.

. . .

"Base year" means the year from which historical cost data are utilized to establish prospective reimbursement in the rate year.

. . .

"Current Cost Base" means the actual costs and revenue of the hospital as identified as the Financial Elements in the base reporting period for the purposes of rate setting.

"Diagnosis Related Groups (DRGs)" means a patient classification system in which cases are grouped by shared characteristics of principal diagnosis, secondary diagnosis, age, surgical procedure, and other complications and consuming a similar amount of resources.

"Equalization Factor" means the factor that is calculated based on defined Labor Market Areas and multiplied by hospital costs to permit comparability between differing regional salary costs in setting Statewide standard costs per case.

"Financial Elements" means the reasonable cost of items approved as reimbursable under Medicaid.

"Grouper" means the logic that assigns cases into the appropriate Diagnosis Related Groups in accordance with the clinical and statistical information supplied.

. . .

"Inliers" means inpatient cases who display common or typical patterns of resource use*[,]* ***that*** are assigned to DRGs and have a length of stay within the high and low trim points.

. . .

"Labor Market Area" means counties and municipalities in the State that are grouped in accordance with similar labor costs.

. . .

"Neonate" means a newborn less than 29 days of age.

. . .

"Outliers" means patients who display atypical characteristics relative to other patients in a DRG and have lengths of stay either above or below the trim points.

"Preliminary Cost Base ***(PCB)***" means the estimated revenue a hospital may collect based on an approved schedule of rates which includes DRG rate amounts and indirect costs not included in the all-inclusive rate. Those indirect costs will either be the dollar amount specified or the estimated amount determined by a specific percentage adjustment to the rate.

. . .

"Rate *[Year]* ***year***" means the year in which current reimbursement takes place.

"Trim points" means the high and low length of stay cutoff points assigned to each DRG.

"Uniform Bill-Patient Summary (UB-PS) (also referred to as the UB-82)" means a common billing and reporting form used by the hospital for each Medicaid inpatient.

. . .

SUBCHAPTER 5. PROCEDURAL AND METHODOLOGICAL REGULATIONS

***10:52-*5.1** Derivation of Preliminary Cost Base

(a) For *[a group of hospitals]* ***general acute care hospitals***, the Division of Medical Assistance and Health Services (hereafter referred to as the Division or its designee), on or before March 12, 1993 and on or before January 31 of each subsequent rate year shall *[propose to the Director and Division or its designee hereafter referred to as the Director,]* ***implement*** a rate. For hospitals with a fiscal year of January 1, the rate year will be the calendar year. For hospitals on a fiscal year beginning other than January 1, but before July 1, the rate year will be the year the fiscal year begins and for hospitals on a fiscal year beginning July 1 and December 31, the rate year will be the year the fiscal year ends. The cost base (current cost base) used to set a proposed rate for each hospital shall include:

1. The reasonable direct patient care costs as defined in *[sections 5.13 through 5.19]* ***N.J.A.C. 10:52-5.13 through 5.19***.

2. The reasonable indirect patient care costs calculated according to *[sections 5.13 through 5.19]* ***N.J.A.C. 10:52-5.13 through 5.19***.

3. The reasonable physician costs calculated according to *[sections 5.13 through 5.19]* ***N.J.A.C. 10:52-5.13 through 5.19***.

4. The net income from other sources as defined in *[section 5.16(f)]* ***N.J.A.C. 10:52-5.16(f)***.

5. An economic factor adjustment calculated according to *[section 5.17]* ***N.J.A.C. 10:52-5.17***.

6. A capital component, as defined in *[section 5.18]* ***N.J.A.C. 10:52-5.18***.

7. A technology factor, as defined in *[section 5.17]* ***N.J.A.C. 10:52-5.17***.

***10:52-*5.2** Uniform Reporting: Current costs

Hospitals shall be required to submit reports as required N.J.A.C. *[8:31(a)]* ***8:31B-4***. The Director shall review the actual costs for the institutions as reported in accordance with the Financial Reporting Principles and Concepts (Subchapter 6). The review will be performed according to the methodology outlined below. Costs, so reported, shall be subject to revision due to subsequent audits.

***10:52-*5.3** Costs per case

Direct and indirect care costs will be allocated to the Diagnosis Related Groups (DRGs) and to ambulatory services to determine cost per visit for each hospital, and for each patient within the hospital. This cost finding process is described in *[sections]* ***N.J.A.C. 10:52-*5.9 through 5.12.

***10:52-*5.4** Development of standards

The Director shall develop *[standards]* ***standard reimbursement amounts*** for each Diagnosis Related Group based on the average cost per case for Medicaid recipients. The standards shall be adjusted to account for significant differences in teaching responsibilities and in labor market areas. These standards are developed according to criteria set in *[sections]* ***N.J.A.C. 10:52-*5.13 through 5.20. Standards so developed and issued for a rate year shall remain unaffected and no adjustments, modifications or other changes to the standards shall be made.

10:52-*5.5** ***(*Reserved*[.]**)

*10:52-*5.6 Schedule of Rates

(a) In order to determine reasonable physician costs, hospitals shall report to the Director any significant changes in the contractual basis of any and all physician compensation arrangements which have occurred after the correct Cost Base. Failure to report these changes shall result in these costs not being recognized.

(b) The dollar amount of indirect patient care costs so derived shall remain fixed for the rate period, unless appealed, except as adjusted for inflation or deflation as described in *[sections]* ***N.J.A.C. 10:52-***5.16 through 5.20.

(c) The rates shall include a capital component for Capital Cash Requirements and a Capital Facilities Formula Allowance. Capital Cash Requirements and the Capital Facilities Formula Allowance are described in *[section]* ***N.J.A.C. 10:52-***5.18.

(d) For each hospital, the Division shall *[propose]* ***implement*** a Schedule of Rates for each Diagnosis Related Group.

*10:52-*5.7 Extraordinary expense

If supported by adequate documentation, the *[Proposed]* Schedule of Rates may include an appropriate adjustment for items of extraordinary expense of a non-recurring nature which occurred in the Current Cost Base and which are reported to the Division by October 15 of the year prior to the issuance of the Proposed Schedule of Rates.

[5.8 Reserved.] ***10:52-5.8 (Reserved)***

*10:52-*5.9 Current Cost Base

(a) A hospital's Current Cost Base is defined as the actual costs and revenues as identified in the Financial Elements in the base reporting period as recognized by the New Jersey Department of Health for purposes of rate setting.

(b) The Current Cost Base is used to develop the Preliminary Cost Base (PCB) and Schedule of Rates through:

1. Determination of the costs of Medicaid patients treated in the 1988 base year;

2. Identification of fixed and variable components of the Preliminary Cost Base;

3. Calculation of the operating margin as described in *[section]* ***N.J.A.C. 10:52-***5.20(a)2;

4. Calculation of the economic factor cost component as defined in *[section]* ***N.J.A.C. 10:52-***5.17(a);

5. Calculation of the technology factor as described in *[section]* ***N.J.A.C. 10:52-***5.17;

6. The costs used to set rates for the rate year will be based on 1988 costs.

*[c.]*****(c)*** A hospital's actual cost reports cannot be substituted or rearranged once the Director has determined that the actual cost submission is suitable for entry into the data base.

*10:52-*5.10 Financial elements reporting/audit adjustments

(a) The aggregate Current Cost Base is developed from Financial Elements reported to ***the*** Division and includes:

1. Costs related to Medicaid direct patient care as defined in *[section]* ***N.J.A.C. 10:52-***6.14;

2. Less net income from specified sources;

3. Capital facilities allowance: Capital cash requirements (as defined in *[sections]* ***N.J.A.C. 10:52-***5.18 and 6.18);

(b) All reported financial information shall be reconciled by the hospital to the hospital's audited financial statement. In addition, having given adequate notice to the hospital, the Director may perform a cursory or detailed on-site review at the Division's discretion, of all financial information and statistics to verify consistent reporting of data and extraordinary variations in data relating to the development of the rates. Any adjustments made subsequent to the financial review (including Medicare audits and reviews) shall be brought to the attention of the Division by the hospital, the Department of Health, appropriate fiscal intermediary or payer where appropriate and shall be applied proportionately to the Schedule of Rates. All such adjustments shall be determined retroactively to the first payment on the Schedule of Rates and shall be applied prospectively.

*10:52-*5.11 Identification of direct and indirect costs related to Medicaid patient care

(a) Costs related to Medicaid patient care as adjusted for price level depreciation as reported to the Division *[are]* ***shall be*** classified as follows:

1. Direct patient costs:

i. Routine service costs;

ii. Ambulatory service costs; and

iii. Ancillary service costs.

2. Mixed direct and indirect costs.

3. Indirect patient care:

i. Institutional costs.

(b) Patient care general service and indirect costs (except as noted below) *[are]* ***shall*** then ***be*** distributed to direct cost centers based on allocation statistics reported to the Division on the following basis:

Patient Care General Service	Allocation Basis
CSS: Central Supply Services	Costed requisitions
DTY: Dietary	Patient Meals
HKP: Housekeeping	Hours of Services
L&L: Laundry and Linen	Pounds of Laundry
MRD: Medical Records	Percentage of Time Spent
PHM: Pharmacy	Cost of Drugs
EDR: Education and Research (not including Schools of Nursing and Allied Health)	Percentage of Time Spent
RSD: Residents	Accumulated Costs in Patient Care Cost Centers
PHY: Physicians Coverage (related to research and medical education)	Patient Days
A&G: Administration and General	Accumulated Cost
FIS: Fiscal	Accumulated Cost
PCC: Patient Care Coordination	Percentage of Time Spent
PLT: Plant (less capitalized interest and depreciation)	Square Feet
UTC: Utilities Cost	Square Feet
MAL: Malpractice Insurance	Accumulated Cost
OGS: Other General Services	Accumulated Cost

*10:52-*5.12 Patient care cost findings: direct costs per case, physician and nonphysician

(a) Hospital case-mix shall be determined as follows:

1. Uniform Bill-Patient Summary (UB-PS) data *[are]* ***shall be*** used for determination of hospital case-mix. The appropriate patient records for the reporting period corresponding with the Financial Elements Report *[are]* ***shall be*** classified into Diagnosis Related Groups (DRGs) using the following items:

i. Principal diagnosis;

ii. Secondary diagnosis;

iii. Principal and other procedures;

iv. Age;

v. Sex;

vi. Discharge status; and

vii. Birthweight (newborn).

2. Outliers (patients displaying atypical characteristics relative to other patients, *[e.g.]* ***for example***, inordinately long or short lengths of stay) *[are]* ***shall be*** determined by DRG using established trim points; any case beyond a trim point is considered an outlier. Hospitals must make every attempt to correct unacceptable data and hospitals for which more than 10 percent of the UB-PS data are missing or unacceptable ***and*** must resubmit data or correct the unusable data before case-mix estimation will be attempted.

3. Outpatient case-mix *[will]* ***shall*** consist of emergency service, clinic, home health agency, renal dialysis, home dialysis, ambulatory surgery, same day psychiatry, and private referred patients, as reported to the Division.

4. Same Day Surgical Services *[are]* ***shall be*** considered a clinical, outpatient service but are assigned to a DRG and reported on a UB-PS (a bill type 13X).

(b) Measures of resource use are listed as follows:

1. For each patient with a UB-PS, measures of resource use *[are]* ***shall be*** calculated. These measures of resource use per patient with a reliable record *[are]* ***shall*** then ***be*** multiplied by the estimated number of cases determined in (a) above, and the total inpatient estimate of each measure of resource use *[is]* ***shall*** then ***be*** adjusted to the actual amount of each measure. Hospitals shall make reasonable efforts to correct unacceptable data.

	Center	Measure of Resource Use	Calculation of Inpatients
	ROUTINE SERVICES		
MSA &	Medical-Surgical Acute Care Units	Patient Days	Total LOS less ICU, CCU, NBN and OBS LOS ACU
PED &	Pediatrics		
PSA &	Psychiatric Acute Care Units		
PSY &	Psychiatric/Psychological Services		
OBS	Obstetrics		
BCU	Burn Care Unit		BCU LOS
ICU &	Intensive Care Unit	Patient Days	ICU + CCU LOS
CCU	Coronary Care Unit		
NNI	*[Neo-Natal]* ***Neonatal*** Intensive *[Care]* Care Unit	NNI Patient Days	Total ICU LOS for Newborn DRGs
NBN	Newborn Nursery	NBN Patient Days	Total LOS for Newborn DRGs less ICU LOS
	AMBULATORY SERVICES		
EMR	Emergency Service	EMR Charges (Inpatient EMR	EMR Admissions Revenue EMR Admissions)
CLN	Clinics	CLN Charges	None
HHA	Home Health Agency	OHS Charges	None
	ANCILLARY SERVICES		
ANS	Anesthesiology	ANS Charges	Direct
CCA	Cardiac Catheterization	CCA Charges	Direct
DEL	Delivery and Labor Room	DEL Charges	Direct
DIA	Dialysis	DIA Charges	Direct
DRU	Drugs Sold to Patients	PHM Charges (DRU)	Direct
EKG	Electrocardiology & Diagnostic	EDG Charges	Direct
NEU	Neurology		
LAB	Laboratory	BBK Charges & LAB Charges	Direct
MSS	Medical*-*Surgical Supplies Sold to Patients	CSS Charges (MSS)	Direct
NMD	Nuclear Medicine	NMD Charges	Direct
OCC	Occupational & Recreational	OPM Charges	Direct
SPA	Therapy & Speech Pathology and Audiology		
ORG ***ORR*** *[ORR]*	Organ Acquisition & Operating and Recovery Rooms	ORR Charges	Direct
PHT	Physical Therapy	PHT Charges	Direct
RAD	Diagnostic Radiology	RAD Charges	Direct
RSP	Respiratory Therapy	RSP Charges	Direct
THR	Therapeutic Radiology	THR Charges	Direct

(c) Cost per case allocation:

1. The Direct Patient Care Costs of each center (after the allocation of patient care general services in *[sections]* ***N.J.A.C. 10:52-***5.11 and 5.12) are separated between inpatient, outpatient, and Skilled Nursing Facility (SNF) costs. Outpatient and SNF costs are then excluded from the Preliminary Cost Base (PCB) based on gross revenue reported to the Division. The costs are then divided by the hospital's corresponding total measures of resource use to compute a cost to measure ratio, cost-to-charge, or cost-per-patient day ratio for each center. Each ratio is then multiplied by the corresponding cost center's measures of resource use of each DRG and outpatient case type to calculate costs per cost center for the hospital's case-mix.

i. Patient days will be employed as the Measures of Resource Use to allocate MSA, PED, PSA, and OBS nursing costs. While patient days are used, the MSA, PED, PSA, OBS centers will be combined into ACU and ICU, and CCU will be combined into ICU. All other routine centers will remain as above.

10:52-5.13 Reasonable cost of services related to patient care

(a) The Reasonable Cost of Services related to Patient Care includes:

1. Current non-physician direct patient care costs per case as adjusted by standard costs per case for Medicaid inpatients;

2. Current physician patient service costs, as modified for physician compensation arrangements pursuant to *[section 5.12]* ***N.J.A.C. 10:52-5.12***;

3. Indirect cost pursuant to *[sections 5.11 and 5.16]* ***N.J.A.C. 10:52-5.11 and 5.16***;

4. Less a reduction for income not related to patient care, from those sources specified in *[sections 6.27 through 6.33]* ***N.J.A.C. 10:52-6.27 through 6.33** except all items reported as expense recovery to the Division, shall be so treated; and

5. Current major moveable equipment amount pursuant to *[section 6.2]* ***N.J.A.C. 10:52-6.2***.

(b) The Reasonable Cost of Services Related to Medicaid Patient Care will be adjusted by the application of economic factors pursuant to *[section 5.13]* ***N.J.A.C. 10:52-5.13***.

10:52-5.14 Standard costs per case

(a) The standard to be used in the calculation of the proposed rates for each inpatient DRG is determined as the mean non-physician patient care costs per Medicaid case in all hospitals whose costs are included in the data base, adjusted for labor market differentials, and amount and type of Graduate Medical Education. Standards shall be calculated across all hospitals for which current cost bases were derived from a common reporting period.

(b) For determination of teaching costs, the following criteria shall be followed:

1. All residents initially employed as first*-*year residents (PGY1) by hospitals on July 1, 1987 or later must meet either criteria in (b)1i and ii, or *[(b)1.i. and iii.]* ***(b)1i and iii*** listed below, in order to be included among those residents on which payment is based. To be similarly included, second-year residents (PGY2) must meet these same minimum requirements by July 1, 1988; third-year residents (PGY3), by July 1, 1989; fourth-year residents (PGY4), by July 1, 1990; fifth*-*year residents (PGY5), by July 1, 1991; and all residents by July 1, 1992.

i. Meet all the minimum criteria established by the New Jersey State Board of Medical Examiners required for a New Jersey medical license, with the exceptions of specific requirements for graduate medical education and that, if necessary, foreign medical graduates will be allowed to take the National Boards at the end of their first postgraduate year. The National Boards must be passed before the beginning of PGY3 in order to be counted in such graduates' PGY3.

ii. Graduation from a medical ***, dental*** or osteopathic school accredited by the Accreditation Council for Graduate Medical Education (ACGME) *[or]* ***,*** the American Osteopathic Association (AOA) ***or in the case of dental residents, the American Dental Association (ADA) or in the case of podiatric residents, the Council on Podiatrics Medical Education (CPME)***.

iii. Graduation from a foreign medical school and passage of the Foreign Medical Graduate Examination in the Medical Sciences (FMGEMS) within three attempts. For residents beginning PGY1 in the State of New Jersey in July 1987 only, an Educational Commission for Foreign Medical Graduates (ECFMG) certificate may be substituted for FMGEMS, and passage of FMGEMS, mandatory before January 1, 1989, shall not be limited to three attempts.

2. For all graduate medical education programs which are subject to accreditation by the Accreditation Council for Graduate Medical Education (ACGME), The American Osteopathic Association (AOA), or, in the case of dental residents, the American Dental Association (ADA), or, in the case of podiatric residents, the Council on Podiatric Medical Education (CPME), accreditation must be maintained for residents in these programs to be used in determining the hospital's payment. Residents in unaccredited programs shall not be recognized in the teaching methodology for determining direct and indirect patient care costs.

3. The transfer of residents and associated costs between hospitals is permitted under the following conditions:

i. The number of positions transferred does not exceed the number relinquished;

ii. Both parties to the transfer must submit a letter of agreement to the *[DOH]* ***Department of Health***; and

iii. The Advisory Graduate Medical Education Council of New Jersey (AGMEC) must have recommended the transfer as being consistent with maintenance or improvement of program quality.

4. The approved costs associated with a transferred resident position shall not increase solely as a result of the transfer.

5. Beginning in rate year 1992, the changes in number of residents and associated costs due to transfers shall be reflected in each hospital's rates for the following rate year if the Division is so advised on or before April 15.

(c) Methodology for determining hospital-specific patient care rate adjustments for graduate medical education (GME) shall be as follows:

1. In order to be eligible for GME reimbursement, hospitals must submit each year, before the issuance of rates, documentation that attests to current accreditation for all programs for which accrediting bodies exist.

2. For all programs which have maintained the appropriate accreditation, and have a minimum number of residents equal to the years in that program necessary for it to receive accreditation, direct and indirect patient care costs associated with Graduate Medical Education plus the hospital current costs must be calculated for each patient DRG as follows:

i. All DRGs shall be assigned to one of four mutually-exclusive residency categories: Medicine, Surgery, Pediatrics and OB/GYN. Assignment will be determined by the specialty of the resident who would, in most New Jersey teaching hospitals, have principal responsibility for care of a patient in a given DRG.

ii. Regarding medicine, the following shall apply:

(1) For teaching reimbursement purposes, a medical teaching hospital is defined as having an accredited program, with at least one Full Time Equivalent (F.T.E.) resident per year of the program, in Internal Medicine; Transitional/Flexible First Year; a medical specialty/subspecialty; and/or Radiology.

(2) Reimbursement shall be based on an increase in rates using the methodology described in N.J.A.C. 8:31B, Appendix XI B.I.

iii. Regarding Surgery, the following shall apply:

(1) For teaching reimbursement, a surgical teaching hospital is defined as having an accredited program, with at least one F.T.E. resident per year of the program, in General Surgery; surgical specialty or subspecialty Anesthesiology; and/or Pathology.

(2) Reimbursement shall be based on an increase in rates using the methodology described in N.J.A.C. 8:31B, Appendix XI B.II*, **incorporated herein by reference***.

iv. Regarding Obstetrics/Gynecology, the following shall apply:

(1) For teaching reimbursement, an Obstetrics/Gynecology teaching hospital is defined as having an Obstetrics/Gynecology program with at least one F.T.E. resident per year of the program.

(2) Reimbursement shall be based on an increase in rates using the methodology described in N.J.A.C. 8:31B, Appendix XI B. III*, **incorporated herein by reference***.

v. Regarding Pediatrics, the following shall apply:

(1) For teaching reimbursement, a pediatric teaching hospital is defined as having an accredited pediatric program, with at least one F.T.E. resident per year of the program.

(2) Reimbursement shall be based on an increase in rates using the methodology described in N.J.A.C. 8:31B, Appendix XI B. IV*, **incorporated herein by reference***.

vi. Regarding Family Practice, the following shall apply:

(1) For teaching reimbursement, a Family Practice hospital is defined as having an accredited Family Practice Teaching Program and shall not be considered in neutralizing costs for standard setting.

(2) For payment purposes, a Family Practice supplement shall be based on an increase in rates using the methodology described in N.J.A.C. 8:31B, Appendix XI vii*, **incorporated herein by reference***. A teaching adjustment factor shall be applied in calculating the rates for hospitals experiencing changes in accreditation status or changes in number of residents since the base year, and to reflect any differences between actual and cap resident counts.

(3) Direct and indirect costs, including resident salaries and other educationally related costs, shall be recognized in rates in accordance with the GME reimbursement methodology which neutralizes the costs of teaching within medical, surgical, OB/GYN and pediatric DRG categories and deneutralizes these costs for setting payment rates.

(4) For purposes of payment, all deneutralization factors shall be considered to be equal to *[1]* ***one*** or greater.

(d) Determination of the labor equalization factor to calculate Statewide standard costs per case shall be as follows:

1. An equalization factor shall be calculated for the non-physician direct patient care costs of each hospital (excluding ambulatory care centers) to account for differing hospital pay scales in the calculation of standards. Each hospital's equalization factor is determined as non-physician direct patient care costs (prior to allocation of costs from patient care general services) at average pay scales for all New Jersey hospitals (excluding those hospitals classified as Rehabilitation Facilities) divided by Labor Market Area non-physician direct patient care costs.

2. The Labor Market areas recognized in 1990 rate setting at N.J.A.C. 8:31B-3.22(d)3 will be used for rate setting in subsequent years.

3. Labor Market Areas are:

	Counties or Municipalities
i. Paterson—Clifton—Passaic	Passaic
ii. Hackensack	Bergen
iii. *[Newtown]***Newton*—Phillipsburg	Sussex, Warren
iv. Trenton—Flemington	Mercer, Hunterdon
v. Newark, Suburban	Union, Essex, Somerset, Morris, except cities of Elizabeth, Belleville, East Orange, Irvington and Newark
vi. Jersey City	Hudson
vii. New Brunswick—Perth Amboy	Middlesex
viii. Long Branch—Toms River	Monmouth, Ocean
ix. Atlantic City—Cape May	Atlantic, Cape May
x. Vineland—Millville Camden—Salem	Burlington, Gloucester Cumberland
xi. Newark, Central City (not included in v. above)	Newark, Elizabeth, Belleville, East Orange, Orange, and Irvington

4. This factor is multiplied by the hospital's actual cost per case for all DRGs.

5. Labor costs shall be adjusted to Statewide averages by first grouping all non-physician direct patient care labor costs (after fringe benefit costs have been distributed) into eight labor categories as follows:

i. Registered Nursing: Includes non-physician salaries reported in Routine, CCA, DEL, DIA or ORR cost centers.

ii. Licensed Practical Nursing: Includes non-physician salaries reported in Routine cost centers.

iii. Attendants: Includes non-physician ***salaries*** reported in Routine and CSS cost centers.

iv. Clerical: Includes non-physician salaries reported in Routine cost centers.

v. Health Technical: Includes non-physician salaries reported in BBK, EDG, LAB, RAD, NMD, and THR cost centers.

vi. Therapists/Technical: Includes non-physician salaries reported in OPM, PHM, PHT, and RSP cost centers.

vii. General Services: Includes non-physician salaries reported in DTY, HKP, and L&L cost centers.

viii. Administrative and Clerical: Includes non-physician salaries reported in the MRD, A&G/FIS, PLT, and PCC cost centers.

6. The portion of the routine cost centers that shall be attributed to each of the four types of nursing skill levels is based on the distribution of costs as reported to the Division.

7. By dividing non-physician direct patient care costs by the non-physician hours in each category, the average hourly rates for the eight labor categories are computed for each hospital. The sum of all of the hospital's non-physician direct patient care costs for the eight labor categories divided by the total non-physician hours is equal to the *[statewide]* ***Statewide*** average. To determine each hospital's labor equalization factor***,*** the *[statewide]* ***Statewide*** average cost per hour for each labor category is multiplied by the hospital's number of non-physician labor hours for that category and is added to all other non-physician costs (*[i.e.]* ***that is***, supplies*[,]* ***and*** other costs). This amount is divided by the result of the same calculation using the Labor Market Area cost per hour, rather than *[statewide]* ***Statewide*** average, resulting in the hospital's equalization factor.

8. Whenever the number of hospitals in a given labor market area decreases to a number less than four, the Division shall calculate and compare the mean equalization factors of the Labor Market Area, both before and after the decrease. If they differ by plus or minus one percent or more, that Labor Market Area shall be merged with the geographically continguous Labor Market Area having the most similar hourly wage rate, averaged for all salaried employees and based on the most recent data available; the factors of all Labor Market Areas shall be recalculated and effective in the following rate year.

(e) Calculation of standards shall be as follows:

1. The calculation of standards shall be based on an appropriate sample of hospitals. The cost per case of each hospital's Medicaid patients with UB-PS records categorized by inpatient DRGs is multiplied by each hospital's equalization factor and for the appropriate DRGs and hospitals, reduced by a rate expressing the amount and type of graduate medical education for the hospital pertaining to each DRG. The mean equalized cost of all such records in all hospitals calculated after teaching costs have been removed from hospitals' Preliminary Cost Bases is the incentive standard for each DRG.

2. Determination of Labor Unequalization Factor to Calculate Standard Cost Per Case of Each Labor Market Area.

i. An unequalization factor shall be calculated for the non-physician direct patient care costs of each hospital to account for differing prevailing compensation patterns across New Jersey's Labor Market Areas in the comparison of hospital and standard costs per case. The Statewide standard times the unequalization factor is the unequalized standard in terms of the hospital's Labor Market Area.

ii. The reciprocal of the hospital's equalization factor is the hospital's unequalization factor and is applied to non-physician costs only.

***10:52-*5.15** Reasonable direct cost per case

(a) Inpatient direct cost per case shall be determined as follows:

1. The Reasonable Direct Cost Per Medicaid Case for those hospitals receiving rates in accordance with this subchapter determined for all hospitals, for every DRG shall include incentives and disincentives, as appropriate, which shall be termed the boundaries of payment and are calculated as follows:

i. The labor market standard is calculated after teaching costs have been removed from hospitals' Preliminary Cost Bases multiplied by the amount and type of Graduate Medical Education plus the hospital current physician patient service cost per case.

(b) Inpatient outliers: The costs of low length of stay outliers shall be divided by the low length of stay days to arrive at a low per diem. The costs of high length of stay outliers shall be divided between both high outlier per diems and the inlier rate. The mean high outlier cost net of the inlier rate shall be divided by the acute days of the patient's total stay (admission to discharge) to arrive at a high outlier per diem. High outlier cases shall be reimbursed the inlier rate plus the high per diem multiplied by the acute days of the stay.

***10:52-*5.16** Net income from other sources

(a) The net gain (loss) from Other Operating and Non-Operating Revenues (as defined in *[sections]* ***N.J.A.C. 10:52-***6.27 through 6.34) and expenses of the reporting period which are items considered as recoveries of or increases to the Costs Related to Patient Care (see *[sections]* ***N.J.A.C. 10:52-***6.27 through 6.34) as reported to the Division is subtracted from (added to) indirect costs of the Preliminary Costs Base.

(b) Such revenue shall include all Other Operating and Non-Operating Revenues and Expenses reported per Standard Hospital Accounting and Rate Evaluation (SHARE) cost center costs and "expense recoveries" as Case B and all other items reported as to their case specified in *[sections]* ***N.J.A.C. 10:52-***6.27 through 6.34.

***10:52-*5.17** Update Factors

(a) *[Economic Factor:]* The economic factor*[,]* calculated by the Department of Health*[,]* is the measure of the change in the prices of goods and services used by New Jersey hospitals. After the 1993 rate year, the economic factor will be the factor recognized under the TEFRA target limitations.

(b) *[Technology Factor:]* The technology factor*[,]* calculated by the Department of Health*[,]* takes into account the costs of adopting quality-enhancing technologies.

*[1. The cost components and proxies of the economic factor are shown in N.J.A.C. 8:31B, Appendix II.

i. The remaining proportion of proxy will be multiplied by the percent of change in the Average Hourly Earnings for non-supervisory hospital workers (Northeast).]*

*[2.]****1.*** The hospital-specific economic factor is the weighted average of the recorded and projected change in the value of its components. The weight given to each component is its share of that hospital's total expenditure *[as described in N.J.A.C. 8:31B, Appendix II]*. The projection of individual components shall be based, where appropriate, on legal or regulatory changes which fix the future value of a proxy. Components which are of particular importance may be projected through the use of time series analysis on other relevant indicators.

(c) *[Technology Factor:]* Base-year direct patient care and indirect rates shall be multiplied in succeeding years by a technology factor to provide prospective funds to support hospital adoption of quality-enhancing technologies. The technology factor shall be based on the Scientific and Technological Advancement Allowance recommended annually to the Secretary of the United States Department of Health and Human Services by the Prospective Payment Assessment Commission (ProPAC). The factor shall be composed of the proportion of incremental operating costs associated with ProPAC's identified cost-increasing technologies, and ProPac's allowance for technologies not included in the technology-specific projections, less the proportion of incremental operating costs of cost-decreasing technologies identified by ProPAC.

*[(c)]***(d)*** In addition, the following payment rates will be in effect for these special procedures:

1. Liver Transplants: payment for DRG 480 will be $72,139 in 1988 dollars.

2. Heart Transplants: payment for DRG 103 will be $72,438 in 1988 dollars.

3. Cochlear Implants: payment for DRG 759 will be $21,608 in 1988 dollars.

4. Bone Marrow Transplants: payment for DRG 481 will be $46,599 in 1988 dollars.

5. Neonate rates*[,]**: payment for* DRGs 600 through 630, will be based on 1989 actual New Jersey cost data.

*[(d)]***(e)* For determination of the payment rates, direct patient care is increased for the following components:

*[i.]***1.* Indirect patient care for items other than listed in *[section 5.11]* ***N.J.A.C. 10:52-5.11***;

*[ii.]***2.* Commission fees;

*[iii.]***3.* Capital facilities allowance;

*[iv.]***4.* Irvington General Affiliation adjustment;

*[v.]***5.* Physician fee for service;

*[vii.]***6.* Perinatal cooperative adjustment;

*[ix.]***7.* Child psychiatric hospital direct and indirect;

*[x.]***8.* Resident count correction;

*[xi.]***9.* Special perinatal expense adjustment;

*[xii.]***10.* Trauma center adjustment;

*[xv.]***11.* GME reversal;

*[xvi.]***12.* Hemophillia adjustment;

*[xvii.]***13.* Regional perinatal adjustment; and

*[xix.]***14.* Personnel health allowance;

10:52-5.18 Capital Facilities

(a) Capital Facilities, as defined in *[section]* ***N.J.A.C. 10:52-***6.18, shall be included in the rate in the following manner:

1. Building and fixed equipment:

i. Capital Cash Requirements are all current payments, excluding cash purchases, made for Capital Facilities utilized for Services Related to Patient Care during a reporting period, including lease, principal, reasonable interest as defined in (a)1i(1) below on long term debt, and certain other debt services payments, but excluding the expenditure of specific purpose grants for capital projects. Capital Cash requirements for any year the Schedule of Rates is to be prospectively set shall not include the whole amount of any balloon payments. Rather, balloon payments shall be reported to the Division in a timely manner in order to examine the possibility of refinancing such payments. Capital Cash Requirements shall be reported per Uniform Cost Reporting Regulations.

(1) Reasonable Interest Expense for Capital Facilities for any rate year is defined as the lower of the hospital's actual interest expense for that year or the interest expense the hospital would have incurred had it refinanced or advance refunded its long-term debt at the average interest rate available during that year on bonds of comparable credit quality and Federal income tax status issued by the New Jersey Health Care Facilities Financing Authority, provided that such a refinancing or advance refunding would result in significant present value savings to consumers and is feasible considering issuance costs and tax laws. If either of these provisions is not met, Reasonable Interest Expense shall equal the hospital's actual interest expense.

ii. Capital facilities indebtedness incurred on or before August 31, 1986 shall be reimbursed in accordance with the following requirements except *[that]* where hospitals elect to undertake capital indebtedness on or after September 1, 1986, such hospitals shall be reimbursed in accordance with (a)1vii below.

iii. Capital Facility Formula Allowance: For hospitals receiving a Schedule of Rates the allowance provides funds for replacements or major renovations of the future acute care capital facility needs of the hospital's service area as determined through the planning process; *[i.e.]* ***that is****, 20 percent of current replacement costs, less the portion of the fund target designated by the hospital's governing board at the time its initial Schedule of Rates is set, spread over the adjusted remaining useful life of buildings, building components, and fixed equipment for the target bed complement of the hospital, in accordance with the planning needs of the hospital's service area.

iv. The Capital Facilities Formula Allowance is calculated as follows:

(1) As a measure of the scope of Capital Facilities projected to be needed by a hospital when its present facilities are no longer usable, the number of target beds for hospitals receiving a rate shall be based on the following:

(A) For Pediatric and Obstetric Services (for facilities with 1,000 or more deliveries) target beds equal:

(1.33) multiplied by (Most Recent Actual Year Licensed Beds) multiplied by (Most Recent Actual Year Occupancy Rate). For facilities with less than 1,000 deliveries, no target beds will be included unless the criteria are waived by the Division due to accessibility issues. However, in no case will waivers be considered for facilities with less than 500 deliveries.

(B) For all other services, target beds equal:

(1.175 multiplied by Most Recent Actual Year Licensed Beds) multiplied by (Most Recent Actual Year Occupancy Rate).

(2) The number of target beds is multiplied by an estimated current construction cost per bed. This amount shall be the average construction cost per square foot multiplied by gross square feet per bed, determined in the Dodge Construction System Costs, adjusted for location of the hospital (as updated annually).

(3) The result of (a)1iv*[(B)]*(2) above, is multiplied by *[.20]* ***20 percent*** to arrive at an estimate of the money, in current dollars, a hospital should have towards a down payment on future Capital Facilities.

(4) The available portion of the fund target, determined in accordance with *[sections]* ***N.J.A.C. 10:52-***6.7 through 6.12 is subtracted from the results of (a)1iii above, (*[i.e.]* ***that is****, the Fund Target). Any excess of the Plant Fund balance over the Fund Target is to be offset against the Current Cost Base in rate determination. Any excess of the Fund Target over the Internally Generated Plant Fund Balance is the allowance for replacements and renovations to be included in a hospital's Schedule of Rates over its remaining useful life.

*[iv.]***v.* The yearly Capital Facilities Allowance is computed using information provided by the Uniform Cost Reports as: the prospective year's depreciation and reasonable interest expense (OPTION 2), or the hospital's current yearly amount of capital indebtedness, excluding any portion associated with major moveable equipment, plus the deficiency of the Plant Fund (any funds designated by the hospital's board for the Capital Facilities Formula Allowance against the Fund Target) divided by the adjusted remaining useful life of the hospital (OPTION 1).

(1) Hospitals must have elected the method for reimbursement under Chapter 83 of Capital Facilities Allowance by December 31, 1987.

(2) After hospitals elected or were included in either OPTION 1 or OPTION 2, they will remain on the pertinent reimbursement option for the life of the outstanding debt. This method shall continue to apply if refinancing or advance refunding of this debt occurs.

*[v.]***vi.* Reimbursement for capital facilities indebtedness requiring Certificate of Need approval, batching and incurred on or after September 1, 1986, shall be in accordance with the following requirements:

(1) A Statewide Capital Facilities Allowance shall be calculated as follows:

(A) Total Capital Facilities Allowance including all indebtedness whether or not requiring Certificate of Need approval (as defined in (a)1v above) and an estimate of the annual Capital Facilities Allowance which will result from capital projects approved but not yet bonded or built, for all New Jersey acute care hospitals, will be *[summed]* ***totaled*** and this sum divided by Total Adjusted Admissions to determine the Capital Facilities Allowance per Adjusted Admission. To initiate these provisions, Capital Facilities Allowance (plus approved projects) for 1986 and Adjusted Admissions for 1985 will be used in the calculations defined in this paragraph. Revised calculations shall be performed as needed.

(B) Hospitals shall be reimbursed their actual Capital Facilities Allowance per Adjusted Admission up to the maximum *[statewide]* ***Statewide*** amount calculated as shown in *[(a)1vii]* ***(a)1vi*** (1)(A) above. All amounts included in a hospital's Capital Facilities

Allowance, whether or not requiring Certificate of Need approval, shall be included in calculating the Capital Facilities Allowance per Adjusted Admission.

*[vi.]**vii.* Reimbursement for capital facilities which does not require Certificate of Need approval, or which requires Certificate of Need approval but does not require *[Batching]* ***batching***, incurred on or after January 1, 1988 shall be in accordance with the following requirements:

(1) The hospital's Capital Facilities Allowance per Adjusted Admission, including the new capital costs, shall be compared to the *[statewide]* ***Statewide*** Capital Facilities Allowance per Adjusted Admission in accordance with *[(a)1vii]* ***(a)1i through vi*** above.

(2) Hospitals with costs per Adjusted Admission below the calculated limit shall be reimbursed their actual costs for additional Capital Facilities Allowance in accordance with *[(a)1.ii]* ***(a)1ii*** through v above.

2. Major Moveable Equipment: For the purpose of calculating the Price Level Depreciation Allowance, Major Moveable Equipment is grouped into four categories based on the cost center function where the equipment is utilized: Beds and nursing equipment; Diagnostic and therapeutic equipment; General service equipment; and Business service equipment.

i. The following rules shall apply in calculating the Price Level Allowance for a given year:

(1) Only equipment which has not been fully depreciated at the start of the fiscal year is to be used in the calculation of the Price Level Allowance.

(2) The depreciation recorded and reported on all equipment subject to the Price Level Allowance must be calculated by the straight-line method, using at the time of the cost filing the most recent approved American Hospital Association (AHA) Recommended Useful Life (*[i.e.]* ***that is***, 1978 revision) or Asset Depreciation Range (ADR).

(3) Only capitalized equipment and related capitalized costs can be used in the calculation of the Price Level Allowance.

(4) The price level factors for each of the four categories will be developed by the Division. For years prior to current cost base year, the factors to be used for price leveling depreciation are as follows:

Category	Proxy
Beds and Nursing Equipment	Marshall and Swift Hospital Equipment Cost Index
Diagnostic and Therapeutic Equipment	Marshall and Swift Hospital Equipment Cost Index
General Service Equipment	Producer Price Index (PPI) 1161, Food Products Machinery (41.18%), PPI 1241.02, Laundry Equipment (23.53%). PPI 113 less 1134 and 1136, Metalworking Machinery less Industrial Furnaces and Abrasive Products (35.29%).
Business Service Equipment	PPI 1193 less 1193.06, Business and Store equipment (less Coin Operated Vending Machines) and PPI 122, Commercial Furniture.

(5) Assets retired before the close of the fiscal year are not to be used in the calculation of the Price Level Allowance.

(6) The amount of the Price Level Allowance *[may]* ***shall*** be calculated *[by one of the options.]* ***as follows:***

[OPTION I:] (A) Current year straight-line depreciation of each asset being depreciated is multiplied by the price level factor corresponding to the year the asset was acquired to determine price level depreciation. Straight-line depreciation is then subtracted from price level depreciation and the result totaled to determine the amount of the Price Level Allowance provided by *[Option I.]* ***the following calculation:*** Algebraically the calculation is as follows:

D . . . *(*equals) Current year depreciation, ordered by the year of acquisition of the asset being depreciated.

F . . . *(*equals) Price level factor for the year the asset was acquired.

PLA . . . (equals) Price Level Allowance*.*

PLA . . . (equals) (DxF)-D*.*

(7) The interest component of cash disbursements relative to capitalized Major Moveable Equipment leases is to be classified as interest expense, in accordance with GAAP, and not used as a basis for calculating the price level depreciation premium.

(8) The total Price Level Allowance will be allocated to cost centers based upon the accumulated depreciation of all Major Moveable Equipment not fully depreciated.

10:52-5.19 Division adjustments and approvals

(a) Any modifications including any statutory or regulatory changes or changes in patient care physician compensation arrangements shall be classified as direct or indirect*,* and as to the financial elements affected and each element adjusted proportionately.

(b) The Division shall also approve adjustments to hospitals' Schedules of Rates for 1993 and subsequent years as necessary to subtract approved costs associated with residents not meeting the minimum requirements as defined in *[section]* ***N.J.A.C. 10:52-*** 5.14(b); for any costs associated with residents in programs which have lost accreditation as defined in *[section]* ***N.J.A.C. 10:52-*** 5.14(b); and for any costs associated with previously approved but now vacant residency positions which are unfilled as a result of a hospital's inability to recruit residents meeting these minimum standards. These costs shall include, but ***are*** not *[be]* limited to, resident salaries and fringes, faculty salaries, malpractice and supplies.

(c) The Division may approve hospital appeals to transfer Division approved resident positions and associated costs between hospitals. A hospital may appeal under any option to reduce or increase the number of resident positions by transfer. An addition of resident positions by transfer may not result in a change to a higher teaching status peer group. A reduction of resident positions by transfer may result in a change to a lower teacher status peer group. The approved costs associated with a transferred resident position may not increase solely as a result of the transfer.

(d) The Division shall decide ***to*** which hospitals the approved resident positions and associated costs may be transferred.

10:52-5.20 Derivation from Preliminary Cost Base

(a) Apportionment of *[financial elements]* ***Financial Elements*** based on direct costs shall be as follows:

1. All other Financial Elements are added to direct Medicaid patient care costs as percentages of direct costs per Medicaid case. The Schedule of Rates is set such that all Medicaid patients' rates are based on the cost of services received by Medicaid *[clients]* ***recipients***, including a proportionate share of indirect financial elements requirements of operating hospital facilities.

2. An operating margin shall be calculated and added to hospital rates as follows:

i. Standard per unit indirect reimbursement as defined in *[section]* ***N.J.A.C. 10:52-***5.16 shall be multiplied by 1.01.

ii. The standard amount in each DRG will be multiplied by 1.01.

3. In the event that a hospital is self-insured for employee health benefits, the percentage of personnel health allowance recognized in the rates shall be proportioned to the number of Medicaid *[clients]* ***recipients*** serviced by the facility to financial elements from payers for such costs.

4. Each hospital shall receive from the Division a base rate order detailing the Schedule of Rates.

10:52-5.21 Schedule of rates-effective date

All rates issued pursuant to this subchapter, as approved or modified, shall be effective as of March 12, 1993, of the rate year and then January 1 for subsequent rate years except for fiscal year hospitals whose rates shall be effective as of the first day of the "fiscal" rate year.

SUBCHAPTER 6. FINANCIAL REPORTING PRINCIPLES AND CONCEPTS

*10:52-*6.1 Reporting period

(a) The basic reporting period is the 12 consecutive calendar months utilized for Medicare reporting in the year prior to the hospital's first Medicaid rate.

(b) New hospitals beginning operations on any day other than January 1 must select an initial reporting period beginning on the first day of operation, through the last month preceding the hospital's fiscal year.

(c) Each calendar year's Financial Elements Reporting Forms are due on May 31 of the following year. Each year's Audited Financial Statement is due on May 31 of the following year.

*10:52-*6.2 Objective evidence

(a) Information produced by the accounting process should be based, to the extent possible, upon objectively determined facts. Transactions should be supported by properly executed documents such as charge slips, purchase orders, suppliers' invoices, cancelled checks, etc. Such documents serve as objective evidence of transactions and should be retained as a source of verification of the data in the accounting records.

(b) Certain determinations that enter into accounting records are based on estimates. Such estimates should be based on past experience modified by expected future considerations. Items of Other Operating Expenses, if not directly classified by the hospital, if large in amount, must be identified through a cost study, and if small in amount, costs may be deemed equal to revenue and such costs apportioned among the appropriate natural classifications of expense based on the hospital's estimate or the classifications of the center where *[originating]* ***the costs originated***. Worksheets are provided along with Reporting Schedules to aid the hospital in making all appropriate reclassifications. All such reclassifications should be consistent with the concept of materiality, ***as*** defined in *[section]* ***N.J.A.C. 10:52-***6.5.

(c) Books, papers, records, or other data relevant to matters of hospital ownership, organization, and operation must be maintained. The data must be maintained in an ongoing recordkeeping system which allows the data to be readily verified by qualified auditors.

*10:52-*6.3 Consistency

(a) Consistency refers to continued uniformity during a period and from one period to another in methods of accounting, mainly in valuation bases and methods of accrual, as reflected in the financial statements of an accounting entity. Consistency is very important to the development and analysis of trends on a year to year basis and as a means of forecasting. However, consistency does not require continued adherence to a suboptimal method or procedure. Any change of accounting procedure, consistent with the materiality principle, must be brought to the attention of the Division by way of a cover letter which will accompany the hospital's Financial Elements Report to include both a description and analysis of reporting impact of such accounting procedure changes.

1. As an example, the accounting principle of accrual reporting may cause some hospitals who currently account for vacation on a cash basis to incur a one time reporting of expenses related to vacation time earned by employees but not yet taken. Such one time costs must be included in a cover letter and the Financial Elements Report shall identify only those vacations costs accrued in the current reporting period.

(b) Any accounting and reporting changes due to subsequent revisions of this plan or the documents referred to herein shall be reported in accordance with the instructions which accompany those revisions.

*10:52-*6.4 Full disclosure

The concept of full disclosure requires that all significant data be clearly and completely reflected in accounting reports. *[If, for example,]* ***For example, if*** a hospital were to change its method of accounting for certain transactions, and if the change was a material effect on the reported financial position*[, or operating when,]* the nature of the change in method and its effect must be disclosed when reporting costs. No fact that would influence the decisions of management, the governing board, or other users of financial statements *[should]* ***shall*** be omitted from or concealed in accounting reports.

*10:52-*6.5 Materiality

[Materiality is an elusive concept with the dividing line between material and immaterial amounts subject to interpretation. It is clear, however, that an] ***An*** amount is material if its exclusion from the financial statements would cause misleading or incorrect conclusions to be drawn by users of the statements.

*10:52-*6.6 Basis of Valuation

(a) Historical cost is the basis used in accounting for the valuation of all assets and in recording all expenses (except fair market value in the case of donated non-cash goods and services). Historical cost, simply defined, is the amount of cash or cash equivalents given in exchange for properties or services at the time of acquisition. It is the basis for the valuation of assets and for the recording of most expenses. Cost ordinarily has been the basis of accounting for assets and expenses because it is a permanent and objective measurement that reflects the accountability of management for the utilization of hospital funds.

(b) Although the basis for developing capital-related financial elements shall be Division approved replacement costs of plant and equipment, where appropriate, hospitals shall be required to maintain records and report assets and related depreciation according to both historical values and price leveled values as prescribed in this plan.

(c) Long*-*term investments shall be reported at current market value as with corresponding income or loss reported as realized or unrealized.

(d) Hospitals frequently acquire property, equipment, services and supplies by donation. The property, equipment, service and/or supply shall be considered donated when acquired without the hospital's making any payment for it in the form of cash, property or service. The property, equipment, service or supply shall be valued at acquisition at the fair market value which is the price that the asset would cost by bona fide bargaining between well-informed buyers and sellers at the date of donation (regardless of the date of receipt). The fair market value of donated services must be recorded when there is the equivalent of an employer-employee relationship and an objective basis for valuing such services. The value of services donated by organizations may be evidenced by a contractual relationship which may provide the basis for valuation. The amounts recorded shall not exceed those paid others for similar work.

(e) The value of donated goods or services of a type not consistent with the definition given shall not be included as operating expenses (*[e.g.]* ***for example***, donated services of individuals, such as volunteers, students and trustees).

*10:52-*6.7 Accrual accounting

In order to provide the necessary completeness, accuracy and meaningfulness in reporting data, the accrual basis of accounting is required. Accrual accounting is the recognizing and recording of the effects of transactions and other events on the assets and liabilities of the hospital entity in the time periods in which they apply rather than when cash is received or paid.

*10:52-*6.8 Accounting for minor moveable equipment

(a) Minor moveable equipment includes such items as waste baskets, bed pans, silverware, mops, buckets, etc. The general characteristics of this equipment are:

1. In general, no fixed location and subject to use by various departments within a hospital;

2. Comparatively small in size and unit cost; and

3. Generally, a useful life of less than three years.

(b) There are three ways in which the cost of minor moveable equipment may be recorded:

1. The original cost of this equipment may be capitalized and not depreciated. Any replacement***s*** of or additions to this base stock would be charged to operating expense.

2. The original investment in this equipment may be capitalized and written off over three years. All subsequent purchases shall be written off over three years.

3. All purchases of minor equipment may be capitalized and depreciated over their estimated useful lives.

(c) Once a hospital has elected one of these methods, that method must be used consistently thereafter.

10:52-6.9 Accounting for capital facilities costs

(a) Capital Facilities ***costs*** include owned or leased land, land improvements, buildings, fixed equipment, leasehold improvements, major moveable equipment and related debt service requirements.

(b) Land improvements include paving, tunnels, underpasses, on-site sewer and water lines, parking lots, shrubbery, fences, walls, etc. (if replacement is the responsibility of the hospital).

(c) Buildings include the basic walled structure or shell of a hospital and additions thereto.

(d) Fixed Equipment and Building Components include roofs and attachments to buildings such as wiring, electrical fixtures, plumbing, elevators, heating systems, air conditioning systems, etc. The general characteristics of this equipment are:

1. Affixed to the building and not subject to transfer of movement;

2. Used for general purpose rather than for specific department functions.

(e) Leasehold improvements include betterments and additions made by the tenant to the lease property. Such improvements become the property of the lessor after the expiration of the lease.

(f) Major moveable equipment is that equipment which usually *[was]* ***is in*** a relatively fixed location in the building, but is capable of being moved, generally *[was]* ***has*** a specific function related to cost center functions, and *[was]* ***has*** a life expectancy of at least three years.

(g) Debt service requirements are principal and interest on buildings, fixed equipment, land, land improvements, leasehold improvements, and capitalized renovations as well as escrow payments, in addition to principal and interest required under the terms of a mortgage, but not including operating expenses as defined by GAAP and lease payments required for leased assets capitalized in accordance with the GAAP.

1. Classification of Fixed Asset Expenditures ***shall be as follows***:

i. Assets and related liabilities, as defined above, must be recorded in Unrestricted Funds, since segregation in a separate fund would imply the existence of restrictions on the use of the asset. This includes the costs of construction in progress.

2. Basis of Valuation ***shall be as follows***:

i. Property, Plant, and Equipment, whether owned or leased, must be reported on the basis of cost. Cost shall be defined as historical cost or fair market value at the date of bequest in the case of donated property.

*[i.]****ii.*** Interest and capitalization on site preparation costs associated with borrowings for, or purchase of, major moveable equipment shall be included with the cost of the equipment.

3. Accounting Control ***shall be as follows***:

i. To maintain accounting control over capital assets of the hospital, a plant asset ledger should be maintained as part of a hospital's general accounting records. Some items of equipment shall be treated as individual units within the plant ledger when their individuality and unit cost justify such treatment. Other items of equipment, if they are similar and are used in a single cost center, may be grouped together and treated in a single unit within the ledger so long as such items are depreciated in a manner equivalent in result to individually depreciating each item.

4. Capitalization Policy ***shall be as follows***:

i. If an asset has, at the time of its acquisition, an estimated useful life of greater than three years and a historical cost in excess of $300.00, its cost must be capitalized.

ii. If an asset does not meet the above criteria, its cost must be recorded as an expense in the year it is acquired. Alterations and renovations which are in excess of $300.00 and which extend the life of the asset renovated a minimum of three years must be capitalized. Alterations and renovations that do not meet the above criteria shall be reported as operating expense under repair and maintenance costs in the current period.

iii. The following shall be the required Capitalization Policy for the reporting assets acquired and renovations per (g)6 below, subsequent to a hospital's Medicaid Schedule of Rates. Assets acquired prior to this date shall be reported in accordance with *[Generally Accepted Accounting Principles (GAAP)]* ***GAAP***.

5. *[Interest Expense During Period of Construction:]* Frequently, hospitals borrow funds to construct new facilities or modernize and expand existing facilities. Interest costs incurred during the period of construction must be capitalized as part of the cost of the construction for reporting purposes. The period of construction is considered to extend to the date the constructed asset is put into use. When proceeds from a construction loan are invested and income is derived from such investments during the construction period, the amount of interest expense to be capitalized must be reduced by the amount of such income.

6. Depreciation Policies ***shall be as follows***:

i. Depreciation allowances generated from assets used in the hospital's operations are to be reported as an operating expense in the unrestricted funds. Straight-line depreciation must be reported for all assets, with replacement cost provisions (subject to appropriate planning requirements) and debt service requirements for capital assets utilized for Services Related to Patient Care provided in *[section]* ***N.J.A.C. 10:52-***5.13.

ii. The estimated useful life of a depreciable asset is its normal operating or service life in terms of utility to the hospital. Some factors to be considered in determining useful life include normal wear and tear, obsolescence due to reasonably expected technological advances, climatic or local conditions and the hospital's policy of repair and replacement. Costs of alterations, renovations, etc. over $300.00 which extend the life of an asset at least three years shall be added on the remaining book value of the altered or renovated asset and depreciated straight-line over the remaining useful life of the asset.

iii. The preferred depreciation policy for reporting purposes is for hospitals to record one-half year depreciation in the first year an asset is acquired and one-half year depreciation in the last year of the asset's useful life, but that buildings or major renovations be depreciated based on the month first put into use. However, any depreciation policy consistent with GAAP is acceptable.

iv. When an asset is retired, the difference between its book value (historical acquisition cost plus capitalized renovations less accumulated depreciation) and its net salvage value shall be recorded as an adjustment to that year's depreciation expense in the cost center or classification to which the asset was assigned.

v. When Major Moveable Equipment has reached its useful life, but remains in use, its historical cost and accumulated depreciation may be retained in the accounting records by department. However, hospitals must be able to report fully depreciated assets separately from those which are not fully depreciated.

7. Debt Financing for Plant Replacement, Renovation and Expansion purposes ***shall be as follows***:

i. Debt financing for capital facilities may take many forms. Under the terms of most debt financing agreements, the debtor shall be required to perform or is prohibited from performing certain acts. In many instances, debt financing gives rise to special accounting treatment because of discounts and premiums on bond issues, financing charges, formal restrictions on debt proceeds, and sinking and other required funds.

(1) *[Discounts and Premiums on Bond Issues:]* Discounts and premiums arising from the issue of bonds shall be amortized over the life of the related issue(s).

(2) *[Financing charges:]* Costs of obtaining debt financing other than discounts (*[e.g.]* ***for example***, legal fees, underwriting fees, special accounts costs) shall be reported as deferred costs and amortized over the life of the related debt.

(3) *[Reporting of Debt Proceeds:]* Debt agreements for financing plant replacement and expansion programs may or may not

require formal segregation of debt proceeds prior to their use. Proceeds which are not required to be formally segregated prior to their use shall be reported as other noncurrent assets in the Unrestricted Fund.

8. Sinking and Other Required Funds ***shall be as follows***:

i. These funds are usually established to comply with loan provisions whereby specific deposits shall be used to insure that adequate funds are available to meet future payments of:

(1) Interest and principal (retirement of indebtedness funds); or

(2) Property insurance, related taxes, repairs and maintenance costs, equipment replacement (escrow funds).

ii. Funds of this nature shall also be required to be held by trustees outside the hospital. Income generated from the investment of such funds may be immediately available to the hospital or such income may be held by the trustee for some future designated purpose.

iii. All internally generating sinking and other required funds shall be accounted for in the following manner:

(1) All fund assets, unless the hospital relinquishes control of the fund through a trustee arrangement, must be recorded in the Restricted Internally Generated Plant Replacement Fund as a long-term investment. Payments to a trustee for sinking fund purposes shall be recorded as reductions in the associated long-term debt.

(2) All income generated from the investment of such funds, except as excluded in (g)8i-iii above, must be recorded as non-operating revenue in this fund, except as required under, "Interest Expense during Period of Construction" (see *[Section]* ***N.J.A.C. 10:52-***6.9). Income generated from funds under covenant agreement may be accounted for as an addition to the appropriate restricted fund balance account.

9. Early Debt Retirement ***shall be as follows***:

i. Many bond contracts provide for the calling of any portion or all of the issue at the option of the issuer at a stated value usually above par, for the purpose of enabling the organization to reduce its indebtedness before maturity as occasion arises, or to take advantage of opportunities to borrow on more favorable terms. Bonds are often retired piecemeal through sinking fund operations.

ii. Costs incidental to the recall of bonds before their date of maturity are considered debt cancellation costs. Such costs include bond recall penalties, unamortized bond discounts and expenses, legal and accounting fees, etc. These costs must be reduced by any unamortized bond premiums and recorded in the Unrestricted Fund in accordance with *[Generally Accepted Accounting Principles]* ***GAAP***.

10:52-6.10 Timing differences

Timing differences result when accounting policies and practices used in an organization's accounting differ from those used for reporting operations to governmental units collecting taxes or to outside agencies establishing or making payments based upon the reported operations. These differences shall be reported on the hospital's records when they arise in accordance with relevant American Institute of Certified Public Accountants (AICPA) policies.

10:52-6.11 Self-insurance

(a) Self-insurance by a hospital for potential losses due to unemployment, and worker's compensation claims, but excluding self-insurance for employee health care, to be provided by the hospital asserted or otherwise, places all or part of the risk of such losses on the hospital rather than passing all or part of such losses to a third party. Where this method of insuring is used by the hospital, the payments into the fund or pool (if one is maintained) or payments on actual losses incurred shall be considered as insurance expense.

(b) *[It is required that where self-insurance for other than those items listed above is elected to be used by a facility, the method should conform with the following:]* ***The method of self-insurance elected by a hospital, other than for those items listed in (a) above, must conform to the following:***

1. *[Self-Insurance Fund:]* The hospital or pool establishes a fund with a recognized independent fiduciary such as a bank or a trust company ***as a self-insurance fund***. The hospital or pool and fiduciary enter into a written agreement which includes all of the following elements:

i. *[General Legal Responsibility:]* The fiduciary agreement must include the appropriate legal responsibilities and obligations required by State laws.

ii. *[Control of Fund:]* The fiduciary must have legal title to the fund and be responsible for proper administration and control. The fiduciary cannot be related to the provider either through ownership or control. Thus, the home office of a chain organization or a religious order of which the hospital is an affiliate cannot be the fiduciary. In addition, investments which may be made by the fiduciary from the fund are limited to those approved under State law governing the use of such fund; notwithstanding this, loans by the fiduciary from the fund to the hospital or persons related to the hospital shall not be permitted.

iii. *[Payments by Fiduciary:]* The agreement must provide that withdrawals must be for malpractice and comprehensive general patient liability losses only and those expenses listed in (d) below. Any rebates, dividends, etc. to the hospital from the fund shall be used to reduce allowable cost. Furthermore, evidence of a practice of payments *[form]* ***from*** the fund for purposes unrelated to the proper administration of the fund may result in a withdrawal of recognition of the self-insurance fund. In such instances, payments into the fund shall not be considered an allowable cost.

iv. *[Reporting:]* The agreement must require that a financial statement be forwarded to the hospital or pool members by the fiduciary no later than 60 days after the end of each annual insurance reporting period. This statement must show the balance in the fund at the beginning of the period, current period contributions, and amount and nature of final payments, including a separate accounting for claims management, legal expenses, claims paid, etc., and the fund balance. This report and fiduciary's records must be available for review and audit.

v. *[Income Earned:]* The agreement must provide that any income earned by the fund less any income taxes attributable to such income must become part of the *[Fund]* ***fund*** and must be used in establishing adequate fund levels.

2. Soundness of the *[Fund]* ***fund, as follows***:

i. The hospital *[receives and retains]* ***shall receive and retain*** an annual certified statement from an independent actuary, insurance company, or broker that *[was]* ***has*** actuarial personnel experienced in the field of medical malpractice and general liability insurance. To be independent, there must not be any financial ownership or control, either directly or indirectly in the hospital.

ii. The actuary, insurance company, or broker shall determine the amount necessary to be paid into the fund. The fund should include reserves for losses based on accepted actuarial techniques customarily employed by the casualty insurance industry and expenses related to the self-insurance fund as specified in (b)4 below. The actuary, insurance company, or broker shall also provide for an estimate of the amounts to be in excess of what is reasonably needed to support anticipated disbursements from the fund.

iii. The actuary, insurance company, or broker must state the actuarial basis and the coverage period used in establishing reserve levels. Reserves shall not be recognized as allowable costs for losses specifically denied herein. Thus, reserve payments shall not be recognized for items such as:

(1) Losses in excess of the greater of 10 percent of a hospital's net worth or $100,000 where a hospital elects to pay losses directly in lieu of establishing a funded self-insurance fund;

(2) Losses in excess of coverage levels which do not reflect the decisions of prudent management; and

(3) Losses in excess of coverage for events that occurred prior to a hospital's participation under the Commission.

iv. The actuary, insurance company, or broker must provide its workpapers upon request.

3. *[Claims Management and Risk Management Program:]* A hospital or pool shall have an ongoing claims process and risk management program. The hospital or pool must demonstrate that it *[was]* ***has*** an ongoing claims process to determine whether

malpractice and comprehensive general patient liability exists, its cause, and the cost of claims. A hospital or pool may either utilize its qualified personnel or an independent contractor, such as an insurance company, to adjust claims. In addition, a hospital or pool must obtain adequate legal assistance in carrying out its claims process. Each hospital must also have an adequate risk management program to examine the cause of losses and to take action to reduce the frequency and severity of them. Such risk mangement program has the essential characteristics of programs required by insurers which currently insure providers for these risks. Therefore, a hospital must have an ongoing safety program and professional and employee training programs, etc., to minimize the frequency and severity of malpractice and comprehensive general patient liability incidents.

4. *[Expenses Related to Losses Paid Out of Self-Insurance Fund:]* The following expenses shall be considered costs attributable to a self-insurance fund established by a hospital or pool: expenses of establishing the fund or pool; expenses for administering the claims management program; expenses involved with maintenance of the fund by the fiduciary; legal expenses; actuarial expenses; excess insurance coverage (if purchased by the fiduciary or pool); risk management (if performed by the fiduciary or pool), to the extent that such expenses are related to the hospital's self-insurance program. All other expenses shall not be considered costs attributable to the fund, but shall be included in provider administrative and general costs in the year incurred.

10:52-6.12 Related organizations

(a) Auxiliaries, guilds, fund raising groups and other related organizations frequently assist hospitals. Such organizations are independent if they are so characterized by their own charter, by-laws, tax-exempt status and governing board or a sufficient combination of these characteristics to demonstrate their independent existence from the hospital. The financial reporting of these organizations shall be separate from or combined with reports of the hospitals.

(b) A hospital itself may be a subsidiary to or under the control of a large organization such as a university, governmental entity or parent corporation. It is typical in such situations for hospitals to receive services from these related organizations. Examples of services received are: administration; purchasing; general accounting; and menu planning. In addition, related organizations lease property, plant and equipment to hospitals, as well as paying for various other items, such as insurance. The related organization then usually charges for the service either directly or through a management fee. To be included as Costs Related to Patient Care, all such charges must be similar to those which would have been charged if the transacting organizations were not related. The direct charges must be recorded in the appropriate cost centers as billed, and the management fee must be distributed to the functional centers where services are provided. The hospital shall maintain documentation of the actual management service for which a management fee is recorded.

(c) Disclosure of information by hospitals dealing with related firm(s):

1. For the purpose of insuring prudent buying, hospitals shall report the existence of a related organization and each type of service provided, to the *[Department of Health]* ***Division***, if the total transactions amount to greater than $10,000*[.00]* per year.

2. Hospitals may be related to one or more separate organizations if:

i. The hospital controls through contracts or other legal documents the authority to direct the separate organizations' management or policies;

ii. The separate organization controls through contracts or other legal documents the authority to direct the hospitals management or policies; and/or

iii. The hospital is for all practical purposes the primary beneficiary of the separate organization.

(d) At the *[Commission's]* ***Division's*** request relevant information reported to the *[Commission]* ***Division*** may include:

1. The nature of the legal relationship between the hospital and the related firm(s)*[.]***;***

2. Frequency of business transactions between the hospital and the firm(s);

3. Purchase or lease contractual arrangements between the hospital and firm(s);

4. The amount of money involved; and

5. The financial statements of all related organizations.

10:52-6.13 Financial elements (generally)

The financial elements of the rates shall include the reasonable cost of the following: direct patient care; principal and interest payments; paid taxes, excluding income taxes; education, research and training programs, not otherwise paid for by the State; preservation, replacement and improvement of facility and equipment subject to appropriate planning requirements; reasonable working capital; and where applicable and appropriate, reasonable return on investment. All non-direct costs must be allocated based upon the proportion of Medicaid *[clients]* ***recipients*** serviced by the hospital.

10:52-6.14 Services related to Medicaid patient care

(a) Services related to Medicaid Patient Care include Direct Patient Care; Paid Taxes excluding Income Taxes; and Educational, Research and Training Programs as further defined in *[sections]* ***N.J.A.C. 10:52-***6.14 through 6.21.

(b) Services Related to Patient Care include Routine Services, Ambulatory Services, Ancillary Services, Patient Care General Services, and Institutional Services. Costs Related to ***Medicaid*** Patient Care include salaries and wages, physician compensation, employee fringe benefits, medical and surgical supplies, drugs, non-medical and non-surgical supplies, purchased services and other direct expenses and major moveable equipment costs as determined in accordance with *[sections]* ***N.J.A.C. 10:52-***6.22 through 6.26.

(c) All non-physician services and supplies provided to hospital inpatients, whether provided directly by the hospital or by a vendor, shall be considered services and costs related to patient care.

(d) All costs of services and supplies purchased from a vendor shall be subject to review for reasonableness by the Division.

10:52-6.15 Medicaid direct patient care

Medicaid direct patient care is the provision by a hospital of medically necessary and appropriate health care services to a Medicaid recipient.

10:52-6.16 Paid taxes

Taxes are monies paid to a governmental unit for conducting business related to direct patient care within its jurisdiction. Taxes are a financial element of the Preliminary Cost Base except for Federal, State, or local income, excess profit, or franchise taxes, taxes on property not used for direct patient care, and interest and/or penalties paid thereon. Taxes related to financing of operations through the issuance of bonds, property transfers, issuance or transfer of stocks, and the like, are not classified as taxes; rather, they shall be amortized or depreciated with the cost of the security or asset. Sales and real estate taxes paid by a hospital in the provision of Services Related to Patient Care shall be included as Paid Taxes. All sales and real estate taxes for Services Related to Patient Care shall be reported in the General Administrative Services cost center and also reported separately from other classifications of expense. Employment related taxes, such as FICA, Unemployment Compensation, and *[Workman's]* ***Workers'*** Compensation, shall be classified as employee fringe benefits for all employees, including hospital-based physicians. Monies received by a hospital which chooses to self-insure in lieu of payment of Unemployment Compensation taxes and the associated administrative costs of such a self-insurance program are included as financial elements and classified as employee fringe benefits, if such monies are reasonably related to the hospital's unemployment compensation experience.

10:52-6.17 Educational, research and training program

(a) Educational program costs are the costs incurred by a hospital in the provision of a formally organized, planned program of study in a health service profession approved by an organization which recognizes the professional stature of health services education programs at the national level, net of any grants, tuition, and/or donations received for this purpose. To the extent that approved residen-

cies for primary care physicians require training in ambulatory care facilities associated with a hospital, such reasonable expenses are included. Costs incurred by a hospital for direct patient care services rendered by medical, nursing, or allied health school personnel through an approved program in the hospital are financial elements provided that such costs would be included as financial elements if directly incurred by the hospital rather than under such arrangements. If not salaried or paid a stipend by the hospital, students shall not be considered as functioning in an employee capacity and thus no dollar amount shall be imputed and reported for their services.

(b) Research program costs are those costs incurred by a hospital in systematic, intensive study directed toward a better scientific knowledge of the provision of health care services in a program of the National Institutes of Health or other program approved by the Commission. Specific purpose grants or other funds received to offset the costs of such programs from the Federal government, New Jersey State government, New Jersey Heart Association, or other governmental or charitable organizations sponsoring such programs are applied to offset Costs Related to Medicaid Patient Care.

(c) Training program costs are the costs of providing to employees orientation or other health care related training, including inservice and on-the-job training, primarily designed to benefit the hospital by helping employees better perform their assigned tasks. The costs of providing such training shall be classified as administrative expense. Costs of training and/or educational programs which primarily benefit the employee (*[e.g.]* ***for example,*** tuition reimbursement programs) rather than the hospital shall be classified as employee fringe benefits and shall be reported as such in the appropriate cost centers.

10:52-6.18 Capital facilities

(a) ***With respect to*** Buildings and Fixed Equipment*[:]**,* *[1. The]* ***the*** cost of Capital Facilities used for Services Related to Medicaid Patient Care, except for Major Moveable Equipment as defined in *[sections]* ***N.J.A.C. 10:52-***6.19, are included as financial elements for all hospitals through a Capital Facilities Allowance.

*[2.]****(b)*** The amount of Revenue Related to Patient Care prospectively included for Capital Facilities in a hospital's Schedule of Rates is to be funded in the form of cash and/or investments in the Internally Generated Plant Replacement and Renovation Fund (Plant Fund).

10:52-6.19 Major moveable equipment

(a) Major Moveable Equipment includes straight-line depreciation costs on owned or capitalized leased Major Moveable Equipment plus a Price Level Depreciation Allowance in excess of this historical depreciation and operating lease/rent payments relative to Major Moveable Equipment utilized for Services Related to Patient Care. Leased Major Moveable Equipment is to be capitalized or reported as operating lease costs in accordance with *[Generally Accepted Accounting Principles]* ***(GAAP)***.

1. Major Moveable Equipment Costs so determined are reported as a Natural Classification of Expense of each cost center.

2. Major Moveable Equipment utilized by more than one functional cost center must be assigned to the using cost centers based on an estimate of each center's utilization.

3. Capitalized repair and installation costs shall be included with the cost of the equipment.

4. Interest associated with capitalized financing purchases or leases shall be excluded and reported as *[a reconciliation]* ***reconciling items***, since the Internally Generated Major Moveable Equipment Replacement Fund is established to provide sufficient funds to replace purchased equipment or meet installment payments for financed equipment (both principal and interest).

10:52-6.20 *(*Reserved.*)*

10:52-6.21 *(*Reserved.*)*

10:52-6.22 Natural Classifications of Expense

(a) Salaries and wages, including stipends, payable in cash, for services performed by an employee for a hospital (except a physician, including compensation for time not worked such as on call) vacation, holiday and sickpay or the monetary value assigned to direct services provided to the hospital by a person performing in an employee relationship are considered remuneration. Monetary value shall not be assigned to the services of students or other volunteer workers. All labor costs (including deferred income which qualifies as pension costs) shall be included in the accounting period during which the employee accrues the payment for their services.

(b) ***The following applies to the*** Physician Compensation—Hospital Component***:***

1. That portion of compensation for a physician's (M.D., D.O., D.D.S./M.D.) activities, provided through agreement with a hospital, representing services which are not directly related to an identifiable part of the medical care of an individual patient is the hospital component of physician compensation, and must be split between salaries and fees. Hospital services include teaching, research conducted in conjunction with and as part of patient care (to the extent that such costs are not met by special research funds), administration, general supervision of professional or technical personnel, laboratory quality control activities, committee work, performance of autopsies, and attending conferences as a part of the physician's hospital service activities. The allocation of physician compensation between hospital and professional components and documentation thereof is to be in accordance with Medicare HIM-15, section 2108***, incorporated herein by reference,*** for provider component. ***To obtain the Medicare HIM-15 document or other Medicare manuals write to:***

Department of Health and Human Services
Health Care Financing Administration
Division of Medicare
Regional Office 2
26 Federal Plaza
New York, New York 10278*

(c) ***The following applies to the*** Physician Compensation—Professional Component***:***

1. That portion of compensation for a physician's services provided through agreement with a hospital pertaining to activities which are directly related to the medical care of an individual patient is the professional component of physician compensation (*[i.e.]* ***for example***, remuneration for the identifiable medical services by the physician which contribute to the diagnosis of the patient's condition or to *[his]* ***his or her*** treatment) and must be split between salaries and fees. The allocation of physician compensation between hospital professional components and documentation thereof is to be in accordance with Medicare HIM-15, section 2108. ***For the address for obtaining Medicare documents, see (b) above.***

(d) *[Employee Fringe Benefits]*

Employee Fringe Benefits are amounts paid to or on behalf of an employee, in addition to direct salary or wages, and from which the employee or his beneficiary derives a personal benefit before or after the employee's retirement or death.

1. Fringe Benefits associated with physicians shall be reported with physician's compensation.

2. Pensions, annuities and deferred income arrangement costs for past and current services shall be accounted for and reported in accordance with Employee Retirement Insurance and Security Act (ERISA) and Internal Revenue Service (IRS) requirements. Employee Fringe Benefits include: FICA; State and Federal unemployment insurance; disability insurance; life insurance; employee health insurance; retirement (net of actuarial and realized gains on the investment of related funds); *[Workman's]* ***Workers'*** Compensation insurance; other payroll related employee benefits; tuition reimbursement and other training; moving expenses of new employees of a non-recurring nature; the cost of providing free or subsidized meals or cost to the employee at less than charges to employees; employee parking lot costs net of any revenue received for operation of the facility, and other non-payroll employee benefits.

3. The cost of providing health care services to employees shall be included in classifications of expense in various cost centers providing the funds. Such costs will be factored into the Preliminary Cost Base and Schedule of Rates by certain revenue adjustments. Where a hospital elects to self-insure for *[Workman's]* ***Workers'***

Compensation or unemployment insurance, costs reported shall be the amounts set aside for that accounting period plus associated administrative costs, where a separate fund was established, to the actual amounts of claims paid during the accounting year if a fund is not established. Where a hospital provides free or subsidized health care services to employees or physicians, the hospital's customary charges shall be generated and accounted for separately as personnel health allowances.

4. In order to preserve comparability of hospital expenses for provision of direct patient care, purchased employee health insurance expenses shall be reported as a separate cost center and shall not be distributed to the labor costs of each center. Employee Fringe Benefits shall be assigned to the cost center in which the employee's compensation is reported on the following *[bases]* ***basis***:

Benefit	Basis of Assignment
FICA-non-physician and physician	Direct Cost
All other Payroll Related Benefits including Unemployment Insurance Disability Insurance, Worker's Compensation and Pension and Retirement	Salaries
Life Insurance	Salaries or FTEs
Employee Education and Training	FTEs
Room and Board	FTEs
Cafeteria	FTEs
Parking Lot	FTEs

(e) *[Other Direct Expenses]* Other Direct Expenses include all other direct non-capital operating expenses not classified elsewhere and reported for Costs Related to Patient Care. Other Direct Expenses include the following utilities; non-physician professional fees; licensing fees; dues assessments; travel; postage; printing and duplicating costs; outside training sessions; subscriptions; paid taxes as defined in *[section]* ***N.J.A.C. 10:52-***3.16; and insurance, other than employee fringe benefit insurance programs.

10:52-6.23 Medical and Surgical Supplies

(a) Medical and Surgical Supplies are medically necessary supplies, appliances, and minor moveable equipment (as defined in *[section]* ***N.J.A.C. 10:52-***6.8) furnished by *[and]*,* used at***, and reported by*** a hospital for the care and treatment of a patient during a patient's episode of hospital care *[and reported]*. Medically necessary supplies exclude all supplies furnished by a hospital but used by a patient after his episode of care except those items where it would be medically unreasonable to limit the patient's use of the item to his episode of hospital care (see *[section]* ***N.J.A.C. 10:52-***6.8 for the reporting of minor moveable equipment). The fair market value of donated Medical and Surgical Supplies is assigned to this classification if the commodity would otherwise be purchased by the hospital.

(b) Medical and Surgical Supplies include prosthetic devices, surgical supplies, anesthetic materials, oxygen and other medical gases, intravenous solutions, drugs including medically prescribed food supplements, biologicals, admission kits furnished by the hospital to inpatients not possessing such materials, and other medical care materials. The purchase cost of blood and blood components shall be excluded.

(c) The invoice/inventory cost and related revenue of all Medical and Surgical Supplies for which a separate charge is made to a patient for the use or consumption of the supply must be reported in the Medical and Surgical Supplies or Drugs Sold to Patients cost and revenue centers.

(d) Medical and Surgical Supplies issued by Central Supply Services or Pharmacy for which a separate charge is not made to a patient must be accounted for as an interdepartmental transfer at invoice/inventory cost to the cost center using the supplies and materials. The cost of reusable patient non-charge items used by more than one functional center must remain in or be transferred to the Central Supply Services cost center. The cost of reusable patient non-charged items used by one functional center should be reported in that center. The cost of other Medical and Surgical Supplies not requisitioned from Central Supply Services and for which a separate charge is not made to a patient must be reported in the functional cost center in which the supplies and/or materials are consumed.

(e) The overhead associated with the issuing of Medical and Surgical Supplies shall be reported in the Central Supply Services or Pharmacy cost centers. Except for reusable supplies in (d) above and differences between beginning and end of year inventories, no Medical and Surgical Supplies shall be reported in the Central Supply Services or Pharmacy cost centers.

10:52-6.24 Non-Medical and Non-Surgical Supplies

Non-Medical and Non-Surgical Supplies include the invoice/inventory cost of supplies, instruments, and minor equipment (other than Medical and Surgical Supplies) required for the operation of a hospital for purposes other than the direct provision of care to a patient are reported in the using cost and revenue center***s***. All rebates and quantity purchase discounts shall be offset against these costs.

10:52-6.25 Purchased Services

Purchased Services include the cost of all services purchased that could be accomplished by a hospital's own employees but for which the hospital elects to contract (not necessarily with a formal contract). All physician services shall be classified as physician compensation.

10:52-6.26 Major Moveable Equipment

Major Moveable Equipment, as defined in *[section]* ***N.J.A.C. 10:52-***6.8 are expenses to be included in the costs of each center at historical depreciation costs (for both owned and capitalized leased equipment) plus a price level replacement cost premium, as discussed in *[section]* ***N.J.A.C. 10:52-***6.8 and operating lease expenses. Interest expense incurred through purchase or capitalized leases of Major Moveable Equipment shall not be included with Major Moveable Equipment costs since the use of price level depreciation of such equipment for the financial elements is intended to replace this financial requirement of hospitals and provide adequate funds to replace equipment at the expiration of useful life.

10:52-6.27 Reports of costs and revenues

(a) The financial elements shall take into account a facility's income from all sources, including specific purpose grants and other funds from governmental sources, but excluding income and principal from board or donor restricted funds, gifts and special fund raising projects. Expenses incurred and revenues generated by a hospital for items not included in the definitions of Services Related to Patient Care (*[i.e.]* ***that is*** Routine Services, Ambulatory Services, Ancillary Services, Patient Care General Services, and Institutional Services) shall be classified as either other operating expenses and revenues or non-operating revenue *[and]***. ***These expenses and revenues*** shall be accounted for separately to determine if and how they shall be applied to Costs Related to Patient Care and the Capital Facilities Allowance to determine the hospital's total financial elements or the Current Cost Base. (For *[PCBs]* ***Preliminary Cost Bases*** established using data from all Other Operating and Non-Operating Revenues and Expenses reported as Standard Hospital Accounting and Rate Evaluation (SHARE) cost center costs and "expense recoveries" shall be treated as Case B, as defined *[herein]* ***in (a)2 below***). There are three cases into which such reconciliations are classified:

1. Case A—Expenses and revenues related to activities which the hospital has selected to engage in but which are not an integral part of, or necessary for, the provision of patient care. Such expenses and revenues are netted against each other. Gains are applied as reductions to the Current Cost Base used to determine hospital payment rates, but any losses are not applied.

2. Case B—Expenses and revenues related to activities which the hospital has elected to engage in and which are an integral part of, or necessary for, the provision of patient care. Such expenses and

revenues are netted against each other. Losses are applied as increases to the Current Cost Base and gains are applied as reductions.

3. Case C—Expenses and revenues related to activities which are specifically excluded under the State rules. Expenses and revenues shall not be netted against each other. Neither gains nor losses shall be applied in determination of the Current Cost Base.

(b) Items of other operating expense and revenue shall be excluded from Services Related to Patient Care reporting centers. Other operating expenses and revenues so determined, in addition to non-operating revenues, shall be classified to account for all revenue and expense transactions of the hospital's Unrestricted Fund per the hospital's financial statements. Accounting differences between the hospital's financial statements and the Financial Elements Report shall be reconciled.

(c) Other operating expenses and revenues and non-operating revenues shall be categorized below as:

1. Excluded health care services;
2. Education and research;
3. Sales and services not related to patient care;
4. Patient convenience items;
5. Administrative items; and
6. Other income.

(d) Expenses and revenues of these items are netted against each other and the resulting total gains subtracted from or total losses added to Costs Related to Patient Care and the Capital Facilities Allowance to determine the hospital's Current Cost Base, depending on the Case (A, B, or C) into which the item is classified in *[sections]* ***N.J.A.C. 10:52-***6.27 through 6.33. Items not listed in *[sections]* ***N.J.A.C. 10:52-***6.27 through 6.33 shall be assigned to the case whose definition in *[section]* (c) ***above*** best matches the nature of the item.

10:52-6.28 Excluded Health Care Services

(a) Non-Acute Care Services provided by a hospital such as skilled nursing care (approved or unapproved), intermediate care, residential care services, long***-***term psychiatric care and long***-***term rehabilitation and intermediate care services are not properly acute hospital functions, and hence shall be excluded and treated as Case C. Sufficient accounting records shall be maintained to account for the costs of such operations and such costs shall be excluded from Costs Related to Patient Care by cost center per *[sections]* ***N.J.A.C. 10:52-***5.11 and 5.13.

(b) *[Organ Donations:]* Organs acquired by a hospital and donated to a pool or patient at another hospital are not properly service related to care of patients at the donating hospital, and hence costs and revenues shall not be included in the service definitions. The acquisition costs incurred shall be accounted for in accordance with the definition of the Organ Acquisition cost center but not reported therein. However, costs of such donated organs shall be applied as increases to Costs Related to Patient Care and Revenues and shall be applied as offsets (Case B).

(c) *[Blood:]* In order to encourage hospital solicitation of blood donations, the purchase cost of whole blood or the equivalent units of blood extender and/or plasma shall be excluded and treated as Case C.

(d) *[Provisions of Health Care Services to Another Health Care Facility or Shared Services: Where]* ***When*** a hospital *[care facility]* utilizes the laboratory, data processing, physical therapy department, or other services of a hospital, such costs shall not be included in the Costs Related to Patient Care of the hospital providing the services. The associated costs (including overhead) and revenue shall be excluded from the definitions of those centers in the providing hospital and *[shall be]* treated as Case B.

(e) *[Physician Fees Remunerated to a Hospital: Where]* ***When*** a physician's compensation arrangement with a hospital requires some or all of the physician's fees received directly from patients to be turned over to the hospital, such fees shall not be included in Revenue Related to Patient Care and are treated as Case B.

(f) *[Excluded Ambulatory Services Outpatient Renal and Home Dialysis:]* The cost and revenue related to *[these services]* ***excluded ambulatory services outpatient renal and home dialysis*** shall be treated as Case C. Revenues and expenses are netted, and neither gains nor losses shall be added to the Preliminary Cost Base. Sufficient accounting records shall be maintained to account for the costs of such operations and such direct and indirect cost shall be excluded from Costs Related to Patient Care.

(g) *[Excluded Ambulatory Services;]* ***Concerning the following excluded ambulatory services:***

1. *[HealthStart Maternity Care Health Support Services:]* The revenues and expenses associated with the provision of *[these services]* ***HealthStart Maternity Care Health Support Services*** shall be treated as Case C, netted against each other, with neither gains nor losses added to the Preliminary Cost Base.

[(h) Excluded Ambulatory Services;] ***2. As to*** HealthStart Pediatric Continuity of Care*[: In]***, in*** hospitals with salaried pediatricians, revenues and expenses associated with the non-institutional Medicaid capitated fee shall be treated as Case C and netted against each other. Gains and losses shall be excluded from the Preliminary Cost Base.

10:52-6.29 Education and Research

(a) Approved Education and Research Income such as grants, or contract payments, tuitions and fees received as direct support for approved educational and research programs (with the exception of those from the Graduate Medical Education Program for primary care residency programs in Family Practice, Internal Medicine, Pediatrics or Obstetrics/Gynecology) (see *[section]* ***N.J.A.C. 10:52-***6.73) are used to offset such expenses and treated as Case B. Transfers of Specific Purpose Fund Revenues to the Unrestricted Fund shall be reported as non-operating revenue.

(b) Non-Approved Education and Research (not approved in accordance with *[secton]* ***N.J.A.C. 10:52-***6.17) costs and revenues up to the amount of such costs are excluded. Overhead expenses shall be included in the costs of such program as Case A.

(c) Salaried house physicians hired by the hospital to supplement house coverage of attending physicians or patient units such as residents of non-hospital programs*[,]* shall be included as Case B. Coverage of emergency services and other ambulatory and ancillary services by such physicians shall be included in the cost center definition of these services.

10:52-6.30 Sales and services not related to patient care

(a) Provision of General Services to an External Organization: The provision of data processing, laundry, housekeeping, managerial or other general services by a hospital to an organization other than another health care facility shall be excluded and treated as Case A. Costs of such arrangements *[should]* ***shall*** include associated overhead and be reported in accordance with the reporting of related organizations (see *[section]* ***N.J.A.C. 10:52-***6.12).

(b) Sale of Medical Supplies (other than for an episode of hospital care) to patients such as take-home drugs, excluding those items where it would be medically unreasonable to limit the patient's use to the episode of hospital care, and others shall be excluded. Take-home supplies for renal dialysis and home health care shall be included *[where]* ***when*** included in the provisions of Medicare HIM-29 and HIM-11 (Case A). ***For the address for obtaining Medicare documents, see N.J.A.C. 10:52-6.22(b).***

(c) Sale of Scrap revenue shall be excluded from the revenue center and treated as Case B.

(d) Medical Records Transcription for patients, their legal advocates, or other non-hospital personnel shall be excluded. Costs (to be reported to the revenue received unless direct costing is available) and revenue shall be treated as Case A.

(e) Cafeteria operations, including vending machines, shall be treated as Case C, except for the subsidization of employee meals and meals for students in approved programs. Cafeteria operating losses shall be apportioned among employees, students and others. Subsidization of employee (including resident) meals shall be included as an employee fringe benefit. Subsidization of student meals shall be included as other direct expenses in either EDU or GME cost centers.

(f) Gift and Coffee Shops revenue and expense (including sales tax expense) as well as other activities which may be supported by

volunteers shall be excluded from Services Related to Patient Care. Net gains from the operation of gift and coffee shops operated by volunteers shall not be offset against Costs Related to Patient Care (Case C).

(g) Services Rendered to Staff physicians by a hospital which normally would be incurred in a physician's private practice, such as the provision of medical secretarial services, shall be excluded and treated as Case C so long as the physician's compensation is not provided through agreement with a hospital.

(h) Parking lot or parking garage expenses and revenues at the site of the hospital shall be netted and the remainder apportioned between employees and others. The provision of parking facilities to:

1. Employees shall be included—Losses incurred from the operation of an employee parking lot shall be included as an employee fringe benefit*[.]**;*

2. Staff physicians parking shall be included and treated as Case B*[.]**; **and***

3. Others shall be included as Case B if the hospital's charge for parking is not substantially inconsistent with other parking facilities in the community where the hospital is located. If the Commission determines that the hospital's parking charges are not competitive with other parking facilities, the provision of parking to others shall be treated as Case C.

(i) Non-Patient Room and Board expenses and revenues shall be netted and apportioned among employees, students and others. Sufficient accounting records shall be maintained to identify all related expenses as well as ***the*** number of persons housed. The provision of Room and Board to:

1. Employees and residents (including rotating residents who spend some portion of their residency at the hospital) shall be included. Losses incurred from housing an employee shall be included as an employee fringe benefit as Case B, see Section 6.22(d).

2. Students shall be included if in an approved educational program. Losses incurred from housing a student shall be assigned to Nursing and Allied Health Education (EDU) *[section]* ***N.J.A.C. 10:52-***6.72 and Graduate Medical Education (GME) Case B, see *[section]* ***N.J.A.C. 10:52-***6.73, or Non-Approved Education and Research as Case A.

3. Others not involved with the patient services of the hospital shall be excluded (Case A).

10:52-6.31 Patient convenience items

(a) Television and Radio provided to patients shall be excluded and net gains or losses from such services shall be treated as Case C.

(b) Telephone and Telegraph services provided to patients, including the appropriate portion of the hospital's switchboard costs shall be excluded and net gains or losses from such services *[shall be]* treated as Case C.

(c) Luxury Meals and Items provided to patients or guests shall be excluded and treated as Case A.

(d) Non-Patient Room Rental Income generated from boarders related to or visitors of a patient shall be excluded from Revenue Related to Patient Care and treated as Case B.

(e) Private-Duty Nursing Services *[where]* ***when*** provided through the hospital at the request of the patient and not prescribed by the attending physician shall be excluded and treated as Case C.

(f) Private Room Differential Income above a hospital's most common charge for a semi-private room for similar routine services, when specifically requested by the patient shall be excluded and treated as Case C. *[Where]* ***When*** ordered by the attending physician for medical necessity, income shall be excluded and treated as Case C. Hospitals should maintain separate revenue classifications for medically necessary and patient convenience private room revenue. Patients admitted or transferred to private rooms because of the unavailability of semi-private rooms shall be charged at the semi-private room rate, with a courtesy allowance (Policy Discount) generated for the differential. No attempt shall be made to identify private room Routine Service cost differentials.

10:52-6.32 Administrative items

(a) Administrative Expense Exclusions, as listed in this section, shall not be included in Costs Related to Patient Care and, as such, shall not be included in expenses defined as General Administrative Services (Case C);

1. Life insurance premiums for employees where the hospital is the direct beneficiary;

2. Stockholders servicing costs, such as those incurred to schedule and hold annual meetings;

3. Advertising costs, conducted by hospital personnel or agents of the hospital, which are directed at increasing utilization or medical staff membership, except where attempts to increase medical staff membership is for the procurement of a scarce medical service needed in the service area of the hospital;

4. Costs of membership in organizations not related to the development and operation of the hospital and the rendering of patient care services (*[e.g.]* ***for example*** social or fraternal organizations) shall not be included as an employee fringe benefit; and

5. Monies paid by a hospital to the home office, corporate or order headquarters for:

i. Non-patient care related enterprises;

ii. Abandoned home office planning costs for construction of a new facility; or

iii. The imputed value of services performed by non-paid workers in the case of religious orders.

(b) Income and Other Taxes including penalties for late payment of taxes (see *[section]* ***N.J.A.C. 10:52-***6.16 for full description) shall not be included as Costs Related to Patient Care and, as such, shall not be included in expenses defined as General Administrative Services (see *[section]* ***N.J.A.C. 10:52-***6.74).

(c) Purchase Discounts, revenue from rebates and quantity discounts shall be reported as expense recoveries.

(d) Non-Capital Interest Expenses (interest other than interest or Capital Facilities or Major Moveable Equipment) shall be excluded from Costs Related to Patient Care since short-term borrowing, etc. is addressed through the Financial Element Working Capital Requirements (see *[section]* ***N.J.A.C. 10:52-***6.27(a)) (Case C).

(e) Interest Expense for Major Moveable Equipment shall be excluded from Costs related to Patient Care and treated as Case C. However, hospitals under the "Conditional Accept" or "Not Accept" options, may appeal to the Director to have this interest expense or the interest expense in (d) above included in their PCB.

10:52-6.33 Non-operating revenues (net of expenses)

(a) Income, net of expenses, or Investment in Rental Property to physicians or others shall be excluded from Revenue Related to Patient Care and treated as Case A.

(b) Income or Investment, net of transaction expense, of Operating Fund and/or interest income from financial charges on delinquent accounts receivable shall be applied as offsets against Costs Related to Patient Care and treated as Case B.

(c) Income or Investments, net of transaction expense, of Board Designated Funds shall not be included in Costs Related to Patient Care and treated as Case C.

(d) Unrestricted Income from Donor Restricted Plant and Endorsement Funds shall not be included in Revenue Related to Patient Care and treated as Case C.

(e) Transfer from Restricted Funds, other than Specified Purpose Funds (*[i.e.]* ***that is*** expenditures from principal and interest on gifts which are donor restricted) shall not be included as Revenue Related to Patient Care and treated as Case C.

(f) Unrestricted Donations, net of *[Funding]* ***fund*** Raising Costs, shall not be included at Revenue Related to Patient Care and treated as Case C.

(g) Transfer of Specific Purpose Funds to the Unrestricted Fund and Specific Purpose Grants and other funds received from the Federal Government, New Jersey State Government, New Jersey Heart Association, or other governmental or charitable organizations shall be offset against Costs related to Patient Care (with the exception of those from the Graduate Medical Education Program for primary care residency programs in Family Practice, Internal Medicine, Pediatrics or Obstetric/Gynecology). However, grants on

behalf of the medically indigent shall be reported as contra-deducted from Gross Revenue Related to Patient Care (operating). "Seed Money" received with a grant shall be similarly offset against operating expenses unless this *[would result]* ***results*** in grants being withheld from New Jersey institutions (Case B).

(h) Primary Care residency Specific Purpose Grants and income from primary care residency specific purpose funds (*[i.e.]* ***that is*** grants for the support of LCGME approved residency program in *[Family Practice,]* Internal Medicine, Pediatrics, Obstetrics/Gynecology ***and Family Practice***) shall not offset the costs of such programs and treated as Case C.

(i) Interest Income on Trustee-held funds related to borrowings or loans is a Case B, unless a hospital is prohibited from using the funds to offset current debt service obligations. If the hospital is prohibited from using the funds, the interest and income earned shall be a Case C until these funds are released for the hospital's benefit.

10:52-6.34 Reporting of costs and revenues

Costs and Revenues Related to Patient Care shall be reported *[per the following definitions and Subchapter 6]* ***in accordance with N.J.A.C. 10:52-6.35 through 6.79***.

10:52-6.35 Medical-Surgical Acute Care Units (MSA)

(a) The functions of Medical-Surgical Acute Care Units (MSA) are as follows:

1. Medical-Surgical Acute Care Units provide care to patients on the basis of physicians' orders and approved nursing care plans. Medical-Surgical Acute Care shall include the cost and revenue associated with services to all patients treated in beds normally designated as Medical-Surgical, regardless of the clinical specialty of attending physicians or age of the patient. Include the cost and revenue of beds designated as definitive observation or intermediate care (*[i.e.]* ***such as***, "step down") beds.

2. Revenue generated from charge differentials between private and semi-private rooms (except those assigned for medical necessity) shall be reported *[were]* ***here***, and also ***reported*** as *[a reconciliation]* ***reconciling items***. Medical and Surgical Supplies *[should]* ***shall*** be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23.

3. Functions include serving and feeding of patients; collecting sputum, urine*[;]***,*** and feces samples; monitoring of vital *[life]* signs; operating of specialized equipment related to this function; preparing of equipment and assisting *[of]* physicians during patient examination and treatment; changing *[of]* dressings *[and]***,*** cleansing *[of]* wounds and incisions; observing and recording emotional stability of patients; assisting in bathing patients and helping into and out of beds; observing patients for reaction to drugs; administering specified medication***s***; infusing *[I.V.]* ***intravenous*** fluids; answering *[to]* patients' call signals; and keeping patients' room (personal effects) in order.

(b) Units of Service: Patients (Admissions and Transfers In) and Patient Days.

10:52-6.36 Obstetric Acute Care Unit (OBS)

(a) The functions of Obstetric Acute Care Unit (OBS) are as follows:

1. The provision of care to the mother before, during and following delivery on the basis of physicians' orders and approved nursing care plans shall be provided in the Obstetric Acute Care Unit. Obstetrics may include services to clean gynecological patients treated in beds licensed by the Department of Health as obstetrics.

2. All revenue generated from charge differentials between private and semi-private rooms (except those assigned for medical necessity) shall be reported as *[a reconciliation]* ***reconciling items***. Medical and Surgical Supplies shall be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23.

3. Functions shall include: instructing of mothers in postnatal care and care of the newborn; feeding of patients; collecting of sputum, urine and feces samples; monitoring of vital *[life]* signs; operating specialized equipment related to this function; preparing of equipment and assistance of physician***s*** in changing *[of]* dressings and cleansing *[of]* wounds and incisions; observing and recording emotional stability of patients; assisting in bathing patients and helping into and out of *[bed]* ***beds***; observing patients for reaction of drugs; administering specified *[medication]* ***medications***; infusing *[I.V.]* ***intravenous*** fluids; answering *[of]* patients' call signals; and keeping patients' rooms (personal effects) in order.

(b) Units of Service: Patients (Admissions and Transfers In) Patient Days.

10:52-6.37 Pediatric Acute Care Units (PED)

(a) The functions of Pediatric Acute Care Units (PED) are as follows:

1. Pediatric Acute Care Units provide care to Pediatric patients (normally children less than 14 years ***of age*** and including "boarder patients") in Pediatric nursing units on the basis of physicians' orders and approved nursing care plans. Pediatric Acute Care shall include the costs and revenues associated with all patients, regardless of age, treated on units normally reserved for the care of patients less than 14 years of age and shall not include the costs and revenues of treating patients less than 14 years ***of age*** in Medical-Surgical and Psychiatric Acute Units. Cost and Revenue associated with swing beds (*[i.e.]* ***that is***, those not designated *(*excluding for one type of patient) shall be apportioned among the appropriate Routine Service Centers, as defined *[herein]* ***in N.J.A.C. 10:52-6.35 through 6.78***, based on actual utilization.

2. All revenue generated from charge differentials between private and semi-private rooms (except those assigned for medical necessity) shall be reported as *[a reconciliation]* ***reconciling items***. Medical and Surgical Supplies *[should]* ***shall*** be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23.

3. Functions shall include the following: serving and feeding of patients; collecting of sputum, urine and feces samples; monitoring of vital *[life]* signs; operating of specialized equipment related to this function; preparing of equipment and assisting of physicians during patient examination and treatment; changing *[of]* dressings and cleansing *[of]* wounds and incisions; observing and recording emotional stability of patients; assisting in bathing patients and helping into and out of beds; observing patients for reaction to drugs; administering specified *[medication]* ***medications***; infusing *[I.V.]* ***intravenous*** fluids; answering *[of]* patients' call signals; and keeping patients' rooms (personal effects) in order.

(b) Units of Service: Patients (Admissions and Transfers In) and Patient Days.

10:52-6.38 Psychiatric Acute Care Units (PSA)

(a) The functions of Psychiatric Acute Care Units (PSA) are as follows:

1. Psychiatric Acute Care Units provide care to patients admitted for diagnosis as well as treatment on the basis of physicians' orders and approved nursing care plans. The units shall be staffed with nursing personnel specially trained to care for the mentally ill, mentally disordered, or other mentally incompetent persons. Psychiatric Acute ***Care*** shall include only the costs and revenues associated with services to psychiatric patients in a unit solely designated to the care of the acute mentally ill.

2. All revenue generated from charge differentials between private and semi-private rooms (except those assigned for medical necessity) shall be reported as a *[reconciliation]* ***reconciling item***. Medical and Surgical Supplies should be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23. Special *[Service]* ***Services*** consumed by patients on Psychiatric Acute Care Units shall be reported in the Psychiatric/Psychologica Services Center.

3. Functions shall include the following: serving and feeding of patients; collecting of sputum, urine and feces samples; monitoring of vital *[life]* signs; operating of specialized equipment related to this function; preparing of equipment and assistance of physicians during patient examination and treatment; observing and recording emotional stability of patients; assisting in bathing patients and helping into and out of *[bed]* ***beds***; observing patients for reaction to drugs; administering specified *[medication]* ***medications***; infusing *[I.V.]* ***intravenous*** fluids; answering of patients' call signals; and keeping patients' rooms (personal effects) in order.

(b) Units of Service: Patients (Admissions and Transfers In) and Patient Days.

*10:52-*6.39 Burn Care Units (BCU)

(a) The functions of Burn Care Units (BCU) are as follows:

1. Burn Care Units provide care to severely burned patients that are of a more intensive nature than the usual acute nursing care provided in medical*-*surgical units. Burn Care Units shall be staffed with specially trained nursing personnel and contain specialized support equipment for burn patients who require intensified, comprehensive observation and care. Burn Care Units shall include only the costs and revenues associated with services to burn patients in a unit solely designated for this purpose. Burn patients not in a unit solely designated for this purpose shall be reported in the Intensive Care Units (ICU) center.

2. Functions shall include the following: serving and feeding of patients; collecting of sputum, urine and feces samples; monitoring of vital *[life]* signs; operating specialized equipment related to this function; preparing of equipment and assisting of physicians during patient examination and treatment; changing *[of]* dressings and cleansing *[of]* wounds and incisions; observing and recording emotional stability of patients; assisting in bathing patients and helping into and out of beds; observing patients for reaction to drugs; administering specified medication**s***; infusing *[I.V.]* ***intravenous*** fluids; answering of patients' call signals; and keeping patients' rooms (personal effects) in order.

(b) Units of Service: Patients (Admissions and Transfers In) and Patient Days.

*10:52-*6.40 Intensive Care Units (ICU)

(a) The functions of the Intensive Care Units (ICU) are as follows:

1. Intensive Care Units provide nursing care to patients who, because of surgery, shock, trauma, serious injury or life threatening conditions, require intensified comprehensive observation and care. These units shall be staffed with specially trained nursing personnel and contain specialized equipment for patient monitoring and life support systems. Intensive Care Units include Stroke Care, Pediatric, Intensive Care, Burn Care (not classified in BCU), Medical and Surgical Intensive Care and mixed Intensive Care-Coronary Care Units, but excludes units solely designated 25 Coronary Care Units or *[Neo-Natal]* ***Neonatal*** Intensive Care Units*[,]**.* Medical and Surgical Supplies shall be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23.

2. Functions ***shall*** include ***the following:*** monitoring patients' progress; operating specialized equipment; assisting physicians during examinations and treatments; dispensing prescribed medications, including *[I.V.]* ***intravenous*** solutions; cleansing and dressing incisions and wounds; maintaining patients' charts; and requisitioning and storing medical supplies and drugs kept in these units.

(b) Units of Service: Patients (Admissions and Transfers In) and Patient Days.

*10:52-*6.41 Coronary Care Units (CCU)

(a) The functions of the Coronary Care Units (CCU) are as follows:

1. Coronary Care Units provide the delivery of care *[to]* ***of*** a more specialized nature than that provided to the usual Medical, Surgical, and Pediatric patient. The unit shall contain monitoring and specialized support or treatment equipment for patients who, because of heart *[seizure]* ***attacks***, open heart surgery or life threatening conditions, require intensified, comprehensive observation and care and shall be staffed with specially trained nursing personnel. Coronary patients treated in mixed Intensive/Coronary Care Units shall be included in the Intensive Care Units (ICU) center. Medical and Surgical Supplies shall be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23.

2. Functions ***shall*** include the following: serving and feeding of patients; *[collecting]* ***collection*** of sputum, urine and feces samples; monitoring of vital *[life]* signs; operating of specialized equipment related to this function; preparing of equipment and assistance of physicians during patient examination and treatment; changing *[of]* dressings and cleansing *[of]* wounds and incisions; observing and recording emotional stability of patients; assisting in bathing patients and helping into and out of *[bed]* ***beds***; observing patients for reaction to drugs; administering specified *[medication]* ***medications***; infusing *[I.V.]* ***intravenous*** fluids; answering of patients' call signals; and keeping patients' rooms (personal effects) in order.

(b) Units of Service: Patients (Admissions and Transfers In) and Patient Days.

*10:52-*6.42 *[Neo-Natal]* ***Neonatal*** Intensive Care Units (NNI)

(a) The functions of the *[Neo-Natal]* ***Neonatal*** Intensive Care Units (NNI) are as follows:

1. A *[Neo-Natal]* ***Neonatal*** Intensive Care Unit provides care to newborn infants that is of a more intensive nature than care provided in Pediatric Acute or Newborn Nursing units. Care shall be provided on the basis of physicians' orders and approved nursing care plans. The units shall be staffed with specially trained nursing personnel and contain specialized support equipment for treatment of those newborn infants who require intensified, comprehensive observation and care. *[Neo-Natal]* ***Neonatal*** Intensive Care Units shall be designated perinatal centers by the Department of Health. Medical and Surgical Supplies *[should]* ***shall*** be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23.

2. Functions shall include the following: feeding infants; collecting *[of]* sputum, urine and feces samples; monitoring *[of]* vital *[life]* signs; operating specialized equipment needed for this function; preparing equipment and assisting physicians during infant examination and treatment; changing dressings and cleansing *[of]* wounds and incisions; bathing infants; observing patients for reaction to drugs and administering specified medications including *[I.V.]* ***intravenous*** fluids.

(b) Units of Service: Patients (Admissions and Transfers In) and Patient Days.

*10:52-*6.43 Newborn Nursery (NBN)

(a) The functions of the Newborn Nursery (NBN) are as follows:

1. A Newborn Nursery shall provide nursing care to newborns on the basis of pediatricians' orders and approved nursing care plans. Newborn Nursery should include all normal care newborns. Bassinets maintained for infants other than newborn (pediatrics) shall be included *[were]* ***here***. Medical and Surgical Supplies shall be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23.

2. Functions ***shall*** include ***the following:*** constant observation of newborns; checking on progress of newborns; feeding and diapering newborns; assisting pediatricians during examination and treatment; operating special equipment; dispensing prescribed *[medication]* ***medications***; and educating new mothers on infant care; maintaining newborns' charts; requisitioning and sorting medical supplies, drugs and infants formulae; and scheduling newborns for ancillary services.

3. Costs associated with units designated by the Department of Health as perinatal centers *[should]* ***shall*** be reported in this cost center.

(b) Units of Service: Patient and Patient Days (counted comparably with non-newborn patients).

*10:52-*6.44 Emergency Services (EMR)

(a) The functions of the Emergency Services (EMR) are as follows:

1. Emergency Services provide emergency treatment to sick and injured patients requiring medical care on an immediate, unscheduled basis. Also included *[are]* ***shall be*** non-emergency type patients who request outpatient treatment on an unscheduled basis in the Emergency Room.

2. Functions ***shall*** include ***the following***: assisting critical patients to and from vehicles; expediting treatment for critical patients for ancillary services; coordinating emergency admissions; operation of an ambulance*[,]**;* operation of cast room; assisting physicians in emergency treatment; cleaning and dressing wounds; applying casts; maintaining aseptic conditions; monitoring *[of]* vital *[life]* signs.

(b) Units of Service: Visits.

*10:52-*6.45 Anesthesiology Services (ANS)

(a) The functions of the Anesthesiology Services (ANS) are as follows:

1. Anesthesiology Services are a hospital based service conducted under the direction of either a qualified physician trained in anesthesiology (*[i.e.]* ***that is***, an anesthesiologist) or the operating surgeon.

2. Anesthesia gases and other anesthesia supplies and minor moveable equipment if not individually charged to the patient shall be reported in Anesthesiology. The cost of anesthesiologists' compensation and any other costs associated with anesthesiologists' practice (*[i.e.]* ***that is***, employees of the physician, ***and*** supplies the physician purchases through their private practice, etc.), as well as the revenue generated by the anesthesiologist and anyone under the physician's employment, shall be reported to the extent that the anesthesiologists' compensation is provided through agreement with the hospital. Cost associated with nurse anesthetists employed by the hospital shall also be reported here.

3. Functions shall include the following: obtaining laboratory findings and patient's anesthetic history prior to administration of anesthetics; administering anesthetics; recording ***the*** kind and amount of anesthetic administered; observing patient's condition until all effects of anesthesia have passed; accompanying patient to recovery room or intensive care unit; administering treatment to patients having symptoms of post anesthetic complication; prescribing pre*[-]* and post-anesthesia medications; and carrying out safeguards for administration of anesthetics.

(b) Units of Services: Anesthesia Minutes.

*10:52-*6.46 Cardiac Catheterization (CCA)

(a) The functions of the Cardiac Catheterization (CCA) are as follows:

1. Cardiac Catheterization includes all invasive cardiac diagnostic procedures performed in dedicated or non-dedicated cardiac catheterization or coronary angiographic laboratories. Cardiac catheterization procedures are performed in a limited number of hospitals that are designated as cardiac diagnostic facilities or regional cardiac surgical centers. Medical and Surgical Supplies *[should]* ***shall*** be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23.

2. Functions ***shall*** include ***the following:*** preparation of patients for testing; explaining test procedures to patients; inspecting, testing and maintaining special equipment; and achieving optimal quality physiological and coronary angiographic studies.

(b) Units of Services: Procedures.

*10:52-*6.47 Delivery and Labor Rooms (DEL)

(a) The functions of the Delivery and Labor Rooms (DEL) are as follows:

1. Delivery and Labor Rooms provide nursing care by specially trained personnel to obstetrical patients and patients having gynecological procedures performed in the Delivery Suite. Caesarean sections shall be included if they are performed in a delivery room. Costs of routine housekeeping functions (*[i.e.]* ***that is***, those conducted throughout the hospital) performed by delivery and labor personnel shall be included in the housekeeping center*[—only]* ***. Only*** specialized clean-up procedures unique to Delivery and Labor Rooms functions shall be included in Delivery and Labor. Medical and Surgical Supplies shall be reported in accordance with *[section]* ***N.J.A.C. 10:52-***6.23.

2. Functions shall include the following: maintaining aseptic conditions; enforcing of safety rules and standards; arranging sterile setup for deliveries; monitoring patient and caring for patient's needs while in labor and in recovery; transporting patients within the labor and delivery suite; preparing for delivery; comforting the patient during delivery; assisting the physician during delivery; fetal heart monitoring; amniocentesis (if performed in the delivery suite); circumcision of male newborns; and cleaning up after delivery to the extent of preparation for pickup and disposal of used linen, instruments, utensils and waste.

(b) Units of Services:

1. Deliveries;

2. Gynecological Procedures.

*10:52-*6.48 Dialysis (DIA)

(a) The functions of the Dialysis (DIA) are as follows: Dialysis is a hospital based service employing the use of an artificial kidney machine for cleansing the blood. Dialysis shall include both hemodialysis and peritoneal dialysis procedures. The inclusion of Dialysis take-home supplies, if not individually charged, and other costs and revenues shall be in accordance with Medicare HIM 29 instructions. Dialysis take-home and other supplies individually charged for shall be reported in Medical and Surgical Supplies Sold, whether sold or rented, if such supplies shall be included per Medicare HIM 29. ***For the address for obtaining Medicare documents, see N.J.A.C. 10:52-6.22(b)*.**

(b) Units of Services: Treatments.

*10:52-*6.49 Drugs Sold to Patients (DRU)

(a) The functions of the Drugs Sold to Patients (DRU) are as follows:

1. The Drugs Sold to Patients center shall be used for the accumulation of the invoice cost and corresponding revenue of all pharmaceuticals and intravenous solutions individually charged to patients including chemotherapy drugs. The invoice/inventory cost of non-charged drugs (pharmaceuticals) or *[I.V.]* ***intravenous*** solutions issued by the Pharmacy to other centers shall be transferred to the using centers, preferably on a monthly basis. If such items are sold in other centers, the cost of those items must be transferred to this center. The overhead cost of preparing and issuing drugs and *[I.V.]* ***intravenous*** solutions sold directly to patients must be accumulated in the Pharmacy center.

2. Medically prescribed food supplements, if charged directly to patients shall be included in Drugs Sold to Patients. Cost and revenue associated with blood (*[i.e.]* ***that is***, whole blood and packed red cells) and blood components (*[i.e.]* ***that is***, fibrinogen, ***and*** gamma globulin) shall be excluded from the Laboratory center and reported as *[reconciliation]* ***reconciling items***. Excluded from this center are the cost and revenue associated with drugs furnished to a patient for use after his episode of hospital care (except for those items where it would be medically unreasonable to limit the patient's use to the episode of hospital care). Included in the center are the cost and revenue associated with drugs and *[I.V.]* ***intravenous*** solutions sold under renal dialysis and home health agency programs as specified in Medicare HIM 29 and HIM 11. ***For the address for obtaining Medicare documents, see N.J.A.C. 10:52-6.22(b).***

*10:52-*6.50 Electrocardiology (EKG)

(a) The functions of the Electrocardiology (EKG) are as follows:

1. Electrocardiology is a hospital service that utilizes specialized electrical equipment to record electromotive variations in actions of the heart muscle on an electrocardiograph for diagnosis of heart ailments under the direction of a qualified physician. The cost incurred and revenue generated by personnel or equipment for electrocardiology procedures continuously available as part of the functions of other centers (*[i.e.]* ***that is***, Intensive or Coronary Care Units, Operating and Recovery Rooms, Diagnostic Radiology, and Cardiac Catheterization) shall be included in those centers.

2. The cost of cardiologists' compensation as well as the revenue generated by cardiologists shall be reported to the extent that the cardiologists' compensation is provided through agreement with the hospital.

3. Functions shall include the following: wheeling portable equipment to patient's bedside; conducting stress tests; explaining test procedures to patient***s***; operating electrocardiograph equipment; inspecting, testing and maintaining special equipment; and attaching and removing electrodes from patients.

(b) Units of Service: Electrocardiograms.

*10:52-*6.51 Laboratory (LAB)

(a) The functions of the Laboratory (LAB) are as follows:

1. Laboratory is normally a hospital based pathological or clinical service conducted under the direction of a qualified pathologist. All laboratory operations, including subsidiary laboratories of the hospital, shall be included *[were]* ***here***, whether purchased from outside or performed by the hospital laboratory. Services provided

for outside institutions shall be excluded and reported as *[a reconciliation]* ***reconciling items***. All fields of laboratory work, such as Autopsy, Blood Bank, Chemistry, Cytology, Hematology, Histology, Immunology, and Microbiology shall be included. Laboratory work in poison and infection control, epidemiology (including nursing epidemiology work), and coagulation testing ***shall be included***. Infection control officer costs not related to laboratory work shall be apportioned to benefiting patient care areas. The revenue and cost of performing blood gas analyses are to be included in the Respiratory therapy center, and pathologist compensation costs and revenues related to Nuclear Medicine shall be included in that center.

2. The procuring (drawing), receiving, storing, typing and crossmatching of whole blood, blood components and blood products shall be included in Laboratory. Purchase cost of and patient payments for blood and blood products shall be excluded and reported. The costs associated with procuring blood donations shall be included in Laboratory*[, but payments to donors shall be excluded and reported as a reconciliation per]*.

(b) Units of Service: College of American Pathologists Relative Value Units.

10:52-6:52 Medical and Surgical Supplies Sold (MSS)

(a) The functions of the Medical and Surgical Supplies Sold (MSS) are as follows:

1. The Medical and Surgical Supplies Sold center is used for the accumulation of the invoice cost and revenue of all medical and surgical supplies and equipment sold or rented directly to patients. The invoice/inventory cost of non-charged supplies and equipment issued by the Central Supply Service Center to other centers shall be transferred to the using centers, preferably on a monthly basis. If such items are sold in other hospital centers, the cost and revenue of those items must be transferred to this center. The overhead cost of preparing and issuing medical and surgical supplies and equipment sold or rented directly to patients must be accumulated in the Central Supply Services center.

2. Excluded from this center shall be the cost and revenue associated with supplies furnished to a patient for use after *[his]* ***his or her*** episode of hospital care (except for those items where it would be medically unreasonable to limit the patient's use to the episode of hospital care, *[e.g.]* ***for example***, pacemakers, permanent prostheses, etc., and take-home Dialysis and Home Health Agency supplies included per Medicare HIM 29 and HIM II). *[Rather, the]* ***The*** costs and revenues associated with such items shall be reported as *[reconciliations]* ***reconciling items***. ***For the address for obtaining Medicare documents, see N.J.A.C. 10:52-6.22(b).***

10:52-6.53 Neurology, Diagnostic (NEU)

(a) The functions of the Neurology, Diagnostic (NEU) are as follows:

1. This center shall provide diagnostic neurology services such as electroencephalography and electromyography*[,]* under the direction of a qualified physician. Specialized equipment is used to record electromotive variations in brain waves and to record electrical potential variation for diagnosis of muscular and nervous disorders.

2. The cost of compensation of physicians involved in diagnostic neurology, as well as the revenue generated by these physicians for their activities*[,]* shall be reported to the extent that their compensation is provided through agreement with the hospital.

3. Functions shall include the following: Wheeling portable equipment to patient's bedside; explaining test procedures to patient; operating specialized equipment; inspecting, testing and maintaining special equipment; and attaching and removing electrodes from patients.

(b) Units of Service:

1. EEGs;

2. EMGs.

10:52-6.54 Nuclear Medicine (NMD)

(a) The functions of the Nuclear Medicine (NMD) are as follows:

1. Nuclear Medicine is a hospital based service which provides diagnosis and treatment of patients by injectible or ingestible radioactive isotopes under the direction of a qualified physician.

2. Costs shared with Therapeutic Radiology, Diagnostic Radiology, and Laboratory, such as radiologists, pathologists, radiology office expense and maintenance costs shall be apportioned among the benefiting centers. The cost of compensation of physicians involved in Nuclear Medicine, as well as the revenue they generate*,* shall be reported to the extent that their compensation is provided through agreement with the hospital.

3. Functions shall include the following: Consultation with patient and attending physician; radioactive waste disposal; and storage of radioactive materials.

(b) Units of Service: Procedures.

10:52-6.55 Occupational and Recreational Therapy (OCC)

(a) The functions of the Occupational and Recreational Therapy (OCC) are as follows:

1. Occupational therapy is the application of purposeful, goal-oriented activity, under the direction of a registered therapist and medical director, in the evaluation, diagnosis, and/or treatment of persons whose function is impaired by physical illness or injury, emotional disorder, congenital or developmental disability, or the aging process, in order to achieve optimum functioning, to prevent disability, and to maintain health.

2. Recreational therapy is the employment of sports, dramatics, arts and other recreational programs, under the direction of a registered therapist and medical director to stimulate the patient's recovery rate.

3. The cost of compensation of physicians involved in occupational and recreational therapy as well as the revenue generated by these physicians for their activities shall be reported to the extent that their compensation is provided through agreement with the hospital.

4. Functions shall include the following: Education and training in activities of daily living (ADL); the design, fabrication, and application of splints; sensorimotor activities; the use of specifically designed crafts; guidance in the selection and use of adaptive equipment; therapeutic activities to enhance functional performance; prevocational evaluation and training; and consultation concerning the adaption of physical environments for the handicapped; continuing and organizing instrumental and vocal musical activities; and directing activities of volunteers in respect to these functions. These services shall be provided to individuals or groups.

(b) Units of Service: Visits.

10:52-6.56 Operating and Recovery Rooms (ORR)

(a) The functions of the Operating and Recovery Rooms (ORR) are as follows:

1. Operating and Recovery Rooms provide surgical services to both inpatients and outpatients. These rooms shall be staffed with specially trained personnel who assist the surgeon during operations and the patient immediately thereafter. Cost of and revenue from rooms used for minor and ambulatory surgery or special procedures (*[e.g.]* ***for example***, cytoscopy, endoscopy, gastroscopy) other than a surgical clinic *[should]* ***shall*** be included here. The cost and revenue associated with surgical dental services provided to patients shall also be included.

2. Costs of routine housekeeping functions (*[i.e.]* ***that is***, those conducted throughout the hospital) performed by Operating and Recovery Room personnel shall be reported in the *[housekeeping]* ***Housekeeping*** Center. Only the cost of specialized cleaning procedures unique to Operating and Recovery Rooms and performed by Operating and Recovery Room personnel shall be reported in the Operating and Recovery Room Center. Medical and Surgical Supplies *[are to]* ***shall*** be reported per *[section]* ***N.J.A.C. 10:52-***6.23.

3. Functions shall include the following: The requisitioning of instruments, utensils, medical supplies, and drugs required for surgery; inspecting, testing and maintaining specialized surgical equipment; maintaining aseptic techniques; enforcing of safety rules and standards; assisting in preparing patients for surgery (only while in the *[O.R.]* ***operating room***; exclude preparation work done

on patient floors); assisting the surgeon during operations; counting of sponges, needles and instruments used during operations; preparing patients for transportation to recovery room; monitoring patient and caring for patient's needs while recovering from anesthesia; and pickup and disposal of used linen, instruments, utensils and waste.

(b) Units of Service:

1. Procedures;
2. Minutes.

10:52-6.57 Organ Acquisition (ORG)

(a) The functions of the Organ Acquisition (ORG) are as follows:

1. These centers acquire, store, and preserve all kidneys and other human organs for their eventual transplantation to patients of the hospital. All direct costs incurred by the Laboratory, Operating and Recovery Rooms and other hospital departments in acquiring organs shall be transferred to the Organ Acquisition Center. The costs and revenues (or value of credits) of acquiring organs for a pool or for transplantation to a patient of another hospital shall be reported as an organ donation reconciliation.

2. Functions shall include the following: Conducting sterile autopsies to obtain organs; purchasing of organs from a central pool; harvesting; and preservation of organs.

(b) Units of Service: Transplants.

10:52-6.58 Physical Therapy (PHT)

(a) The functions of the Physical Therapy (PHT) are as follows:

1. Physical Therapy is a service employing therapeutic exercises and massage, and utilizing effective properties of light, heat, cold, water, and electricity in diagnosis and rehabilitation of patients with neuromuscular, orthopedic, and other disabilities under the medical direction of a physiatrist or other qualified physician. Physical Therapy services shall include the provision of clinical and constructive services and the direction of patients in the use, function, and care of braces, artifical limbs, and other devices. This center shall include the cost of physical therapy, related medical supplies, materials and equipment not requisitioned from Central Supply Services and for which a separate charge is not made to a patient.

2. The cost of all supplies and equipment furnished to a patient for use after his episode of hospital care (*[e.g.]* ***for example***, crutches, elastic bandages, etc.) but excluding items where it would be medically unreasonable to limit the patient's use of the item to his episode of hospital care (*[e.g.]* ***for example***, customized braces, prostheses, etc.) shall be excluded from this center.

3. Functions shall include the following: Prescription of therapeutic exercises; counseling of patients and relatives; organizing and conducting medically-prescribed physical therapy programs; application of diagnostic muscle tests; administration of whirlpool and compact baths; changing *[of]* linen on beds and treatment tables; and assisting patients in changing clothes.

(b) Units of Service: Visits.

10:52-6.59 Psychiatric/Psychological Services (PSY)

(a) The functions of the Psychiatric/Psychological Services (PSY) are as follows:

1. This center provides psychiatric and psychological services, such as individual, group, and family therapy to adults, adolescents and families of hospital patients, but excluding costs and revenues associated with psychiatric/psychological clinic visits. Costs and revenues to be reported ***here*** include those related to the compensation of psychiatrists, psychologists, or psychiatric social workers to the extent that such compensation is provided through agreement with the hospital.

2. Functions shall include the following: Evaluation and psychotherapy provided to inpatients; emergency room psychiatric/psychological care; biofeedback training; psychological testing; and shock therapy.

(b) Units of Service: Hours (spent with patients).

10:52-6.60 Radiology, Diagnostic (RAD)

(a) The functions of the Radiology, Diagnostic (RAD) are as follows:

1. Diagnostic Radiology is normally a hospital based service conducted under the direction of a qualified radiologist, and shall include procedures, such as angiograms (except coronary angiograms), arteriograms, computerized axial tomography scans, and echograms (ultrasonography).

2. Cost shared with therapeutic Radiology and Nuclear Medicine such as radiologists, radiology office expense and maintenance costs shall be apportioned among the benefiting cost centers. The salaries of personnel*,* such as bioengineers, assigned substantially full-time for the purpose of maintaining, testing and inspecting Diagnostic Radiology equipment*,* shall be reported here.

3. The cost of compensation of radiologists as well as the revenue they generate*[,]* shall be reported in this center to the extent that their compensation is provided through agreement with the hospital.

4. Functions shall include the following: Taking, processing, examining and *[interpretation of]* ***interpreting*** radiographs and fluorographs; consultation with patient and attending physicians; storage of radioactive materials; and radioactive waste disposal.

(b) Units of Service: California Medical Association Relative Value Units.

10:52-6.61 Respiratory Therapy (RSP)

(a) The functions of the Respiratory Therapy (RSP) are as follows:

1. Respiratory therapy is a hospital based service for diagnosis and treatment of pulmonary diseases. This shall include pulmonary function testing, the administration of oxygen and certain potent drugs through inhalation or positive pressure, and other forms of rehabilitative therapy, under the direction of a qualified physician. Pulmonary function testing is the testing and thorough measurement of inhaled and exhaled gases and analysis of blood, and evaluation of the patient's ability to exchange oxygen and other gases.

2. The cost of compensation of pulmonary physicians involved in rendering respiratory diagnostic and therapeutic services, as well as the revenue generated by these physicians for such activities, shall be reported to the extent that these physicians' compensation is provided through agreement with the hospital.

3. The costs of and revenue generated from all gases administered to patients shall be included in this center, excluding the costs and revenue associated with gases administered as part of the anesthetizing process which are included in the Anesthesiology Center.

4. Functions shall include the following: Transporting therapy equipment to patient's bedside; setting up and operating various types of oxygen and other therapeutic gas and mist inhalation equipment; blood gas testing; observing and instructing patients during therapy; visiting all assigned respiratory cases to insure that physicians' orders are being carried out; inspecting and testing equipment; and enforcing safety rules.

(b) Units of Service: Treatments

10:52-6.62 Speech***-Language*** Pathology and Audiology (SPA)

(a) The functions of the Speech***-Language*** Pathology and Audiology (SPA) are as follows:

1. Speech Pathology provides therapeutic treatment for disorders of production, reception and perception of speech and language. Audiology provides and coordinates services to persons with impaired peripheral and/or central auditory function. The detection and management of any existing communicating handicaps centering in whole or in part on the *[wearing]* ***hearing*** function. Such activities shall be coordinated with medical evaluation and treatment of hospital patients.

2. Functions shall include the following: Audiologic assessment (including basic audiometric testing and screening, examination for site of lesions*,* non-organic hearing loss and various parameters of auditory processing abilities essential for communication function); hearing aid evaluation, selection, orientation, adjustment and other technical related services; audiologic habilitation and rehabilitation including the development, remediation or conservation of receptive and expressing language abilities; demonstrating and evaluating amplification devices and altering systems; evaluating excessively noisy environments; determining through interviews and special tests the etiology, history and severity of speech disorders; and special speech, hearing and language remedial procedures, counseling and guidance.

(b) Units of Services: Visits.

*10:52-*6.63 Therapeutic Radiology (THR)

(a) The functions of the Therapeutic Radiology (THR) are as follows:

1. Therapeutic Radiology is a hospital based service providing therapy by radium and other radioactive substances, including cobalt therapy and linear accelerator treatment, under the direction of a qualified radiologist.

2. Costs shared with Diagnostic Radiology and Nuclear Medicine, such as radiologists, radiology office expense and maintenance costs including salaries of bioengineering personnel*[,]* shall be apportioned among the benefiting centers.

3. The cost of compensation of radiologists involved in therapeutic radiology as well as the revenue they generate shall be reported to the extent that their compensation is provided through agreement with the hospital.

4. Functions shall include the following: Consultation with patients and attending physician; operation of specialized equipment; storage of radioactive material; disposal of radioactive waste; and inspecting, testing and maintaining specialized equipment.

(b) Units of Service: Procedures.

*10:52-*6.64 Central Supply Services (CSS)

(a) The functions of the Central Supply Services (CSS) are as follows:

1. Central Supply Services shall prepare and issue medical and surgical supplies and equipment, except pharmaceuticals and *[I.V.]* ***intravenous*** solutions to patients and to other cost centers.

2. The invoice cost of non-charged supplies and equipment issued to other centers shall be transferred to the using centers, preferably on a monthy basis. The invoice cost of charged medical supplies shall be transferred to the Medical and Surgical Supplies Sold *[center]* ***Center***, preferably on a monthly basis.

3. The cost of non-charged reusable medical supplies and equipment requisitioned from CSS by different centers (*[e.g.]* ***for example***, respirators) shall be reported in the Central Supply Service Center. Costs associated with non-charged reusable medical supplies and equipment requisitioned from only one center shall be reported in that center.

4. Functions shall include the following: Requisitioning and issuing of appropriate supply items required for patient care; preparing sterile irrigating solutions; collecting, assembling, sterilizing, and redistributing reusable items; and cleaning, assembling, maintaining, and issuing portable apparatus.

(b) Statistics: Costed Requisitions of All Medical and Surgical Supplies.

*10:52-*6.65 Dietary (DTY)

(a) The functions of the Dietary (DTY) are as follows:

1. Dietary shall be responsible for the procurement, storage, processing of food, delivery and collecting of trays and nourishment to nursing units or outpatient centers. Costs of delivery of trays to the patient once trays have been prepared or have arrived at the nursing unit shall be reported in the appropriate Routine Service center. The cost of preparing meals for cafeterias, residents, students, visitors, or house physicians shall be reported for luxury and guest meals as per *[section]* ***N.J.A.C. 10:52-***6.27 through 6.33. Cost and Revenue of food supplements *[where]* ***when*** charged to patients *[should]* ***shall*** be reported in the Drugs Sold to Patients center.

2. Functions shall include the following: Preparing diet manuals; recommending diets; preparing selective menus for various diet requirements; recording diet history; nutrition counseling; determining patient food preferences as to type and method of preparation; food storage and preparations; transportation of food trays to and from nursing units; stocking formula room; cashiering; dishwashing; and maintaining sanitary standards in all facilities.

(b) Statistics: Meals.

*10:52-*6.66 Housekeeping (HKP)

(a) The functions of the Housekeeping (HKP) are as follows:

1. Housekeeping shall be responsible for the maintenance of a clean and sanitary environment in the institution. The cost of routine cleansing of all areas, excluding Dietary (DTY) and Boiler Room (RPM) shall be included in housekeeping. The cost of housekeeping to non-acute care areas, gift and coffee shops, offices rented or maintained for fund raising, or non-approved education*[,]* and research programs, and for the room and board of employees, students, or others, as well as the expense and revenue of providing housekeeping to entities outside of the hospital shall not be reported *[were]* ***here*** but shall be reported ***in their appropriate cost center as in N.J.A.C. 10:52-6.35 through 6.78***. Specialized clean-up activities associated with direct care of patients in nursing units and outpatient and ancillary centers shall be reported in those centers ***(see N.J.A.C. 10:52-3.35 through 6.79)***.

2. Functions shall include the following: Maid service; janitorial service; transporting trash to plant staging areas; mopping, stripping and waxing floors; washing of walls, ceilings, partitions and windows (inside and outside); stripping, disinfecting and making beds; and moving furniture and fixtures.

(b) Statistics: Hours of Services.

*10:52-*6.67 Laundry and Linen (L&L)

(a) The functions of the Laundry and Linen (L&L) are as follows: Laundry and Linen is responsible for the requisitioning, laundering, *[distribution]* ***distributing***, *[control]* ***controlling*** and mending *[of]* linen, bedding, wearing apparel*[,]* and disposable linen substitutes used by the hospital. The purchase cost and maintenance of all wearing apparel, as well as all linen, bedding, etc., shall be included. The cost of providing laundry and linen services to non-acute care units and for the room and board of employees, students, and others should not be included in this center.

(b) Statistics: Pounds of Laundry.

*10:52-*6.68 Medical Records (MRD)

(a) The functions of the Medical Records (MRD) are as follows:

1. Medical Records shall be responsible for creating and maintaining a medical record for all patients and for maintaining a tumor registry in accordance with Department of Health requirements ***(N.J.A.C. 8:43G-21.2(a))***. The revenue and costs associated with medical records transcriptions for persons outside of the hospital shall be reported as *[reconciliations]* ***reconciling items***.

2. Functions shall include the following: Coding; typing; abstracting; filing; indexing; accessing; *[preparation of]* ***preparing*** birth and death certificates; processing *[of]* court and other types of inquiries; *[maintenance]* ***maintaining*** and reporting of data such as patient days, visits, ancillary services and statistics by patient, disease, physician and operation; and coordinating the flow of statistics with certain hospital *[stations]* ***centers***.

(b) Statistics: Percentage of time spent.

*10:52-*6.69 Pharmacy (PHM)

(a) The functions of the Pharmacy (PHM) are as follows:

1. The Pharmacy procures, preserves, stores, compounds, manufactures, packages, controls, assays, dispenses, and distributes medications (including *[I.V.]* ***intravenous*** solutions) for inpatients and outpatients under the jurisdiction of a licensed pharmacist. Pharmacy services shall include the maintaining of separate stocks of commonly used items in designated areas.

2. The invoice cost of non-charged pharmaceuticals issued to other cost centers shall be transferred to the using cost centers, preferably on a monthly basis. The invoice cost of charged pharamceuticals and *[I.V.]* ***intravenous*** solutions shall be transferred to the Drugs Sold to Patients center, preferably on a monthly basis.

3. Functions shall include the following: Development and maintenance of formulary(ies) established by the medical staff and consultation and advice to medical *[staff]* and nursing staff on drug therapy; adding drugs to *[I.V.]* ***intravenous*** solutions; determining incompatibility of drug combinations; and stocking *[of]* floor drugs and dispensing machines.

(b) Statistics: Costed Requisition of All Drugs.

*10:52-*6.70 Social Services (SOC)

(a) The functions of the Social Services (SOC) are as follows:

1. Social Services shall obtain, analyze, interpret social and economic information to assist in diagnosis, treatment and rehabilitation of patients. These services shall include*:* counseling of staff and patients in case units and group units; participation in development of community social and health programs and community education. Revenues received by hospitals shall not be reported *[were]* ***here***, but shall be reported with the routine or ambulatory revenue centers where social services were provided and billed.

2. Functions shall include the following: Interviewing of patients and relatives to obtain a social history relevant to medical problems and planning; interpreting problems of social situations as they relate to medical condition and/or hospitalization; arranging for post discharge care of chronically ill; collecting and revising information on community health and welfare resources.

(b) Statistics: Percentage of time spent.

*10:52-*6.71 Research (RSH)

(a) The functions of the Research (RSH) are as follows:

1. This center shall administer, manage, and carry on research projects of the National Institutes of Health or other projects approved by the Commission in approved research. Approved research shall be reported *[per instructions in sections 6.27 through 6.29]* ***pursuant to N.J.A.C. 10:52-6.27 through 6.29***. Separate accounting *[should]* ***shall*** be maintained for each research activity in accordance with relevant contracts, grant agreements, or because of restrictions made on donations. Revenue received for research activities such as specific purpose grants shall be recorded as *[reconciliations]* ***reconciling items***. This center shall include expenses related to fellowships.

*10:52-*6.72 Nursing and Allied Health Education (EDU)

(a) The functions of the Nursing and Allied Health Education (EDU) ***that are included in this cost center*** are as follows:

1. The Nursing and Allied Health Education Center provides organized programs, approved by an organization which recognizes the professional *[statute]* ***stature*** of health services educational programs at the national level, of nursing and medical related clinical education other than for physicians. Hospitals may either operate a school or provide the clinical training activities where a degree is issued by a college or university.

2. Expenses related to the upkeep of student rooms and dormitories.

3. Functions shall include the following: Selecting qualified students; providing education in theory and practice conforming to approved standards; maintaining student personnel records; counseling of students regarding professional, personal and educational problems; selecting faculty personnel, assigning and supervising students in providing medical or nursing care to selected patients; and administering aptitude and other tests for counseling and selection purposes.

*10:52-*6.73 Graduate Medical Education (GME)

(a) The functions of the Graduate Medical Education (GME) are as follows:

1. Graduate Medical Education shall provide an organized program of graduate medical clinical education to interns and residents. A medical residency training program must be approved by the Liaison Committee on Graduate Medical Education or, in the case of osteopathic residencies, approved by the Committee on Hospitals of the Bureau of Professional Education of the American Osteopathic Association. Residency programs in the field of dentistry in a hospital must have the approval of the Council on Dental Education of the American Dental Association.

2. Included *[were all]* ***here shall be*** expenses related to the office of the Director of Medical Education and the housing and board of residents. Expenses associated with fellowships are to be included in the Research (RSH) Center.

3. Functions shall include the following: Selecting qualified students, providing education in theory and practice conforming to approved standards; maintaining student personnel records; counseling of students regarding professional, personal and education problems; and assigning and supervising students.

*10:52-*6.74 General Administrative Services (GAM)

(a) The functions of the General Administrative Services (GAM) are as follows:

1. General Administrative Services shall be those services associated with the overall direction and administration of the institution at all levels that are not readily distinguishable between inpatient and outpatient services. Expenses and revenues directly *[associable]* ***associated*** with services not related to patient care (*[e.g.]* ***for example***, data processing services sold to outside organizations*,* administrative personnel responsible for the operation of skilled nursing facilities, and other exclusions) *[should]* ***shall*** be reported as *[reconciliations]* ***reconciling items***. Detailed reporting of certain Administrative Service expenses shall be provided.

2. General Administrative Services include:

i. Governing Board;
ii. Office of Hospital Administrator Medical Administration;
iii. Medical Administration;
iv. Nursing Administration (persons responsible for more than one functional center);
v. Personnel;
vi. Public Relations;
vii. Communications;
viii. Management Engineering;
ix. Health Sciences Library;
x. Auxiliary Groups;
xi. Data Processing;
xii. Purchasing and Stores;
xiii. Internal Audit;
xiv. Postage;
xv. Medical Library;
xvi. Medical Photography and Illustration;
xvii. Licenses and Taxes (other than income taxes and payroll taxes);
xviii. Insurance (other than Malpractice and Employees Fringe Benefits);
xix. Security;
xx. Planning;
xxi. Professional Association Memberships;
xxii. Legal and Audit Fees;
xxiii. Duplicating and Printing;
xxiv. Financial Administration;
xxv. Motor Pool; and
xxvi. Travel.

*10:52-*6.75 Inpatient Administrative Services (IAM)

(a) The functions of the Inpatient Administrative Services (IAM) are as follows:

1. Inpatient Administrative Services shall be those primarily associated with the overall direction and administration of inpatient services provided in the institution. For example, the hospital admitting office would be assigned to Inpatient Administrative Services, rather than General Administrative Services. Detailed reporting of certain Administrative Services expenses shall be provided ***per N.J.A.C. 8:31B-4.61 through 4.70, incorporated herein by reference***.

*10:52-*6.76 Malpractice Insurance (MAL)

(a) The functions of the Malpractice Insurance (MAL) are as follows:

1. Malpractice Insurance shall include the institution's total premium or self-insurance cost for hospital and professional liability coverage. No other type of insurance coverage shall be included here.

*10:52-*6.77 Employee Health Insurance (EHI)

(a) The functions of the Employee Health Insurance (EHI) are as follows:

1. Employee Health Insurance shall include all premium payments and associated costs with union or group health insurance for employees. Hospitals which are self-insured for employees health insurance shall report no insurance costs in this cost center. However, deductions from operating revenue for personal health programs shall be reported by cost center.

*10:52-*6.78 Repairs and Maintenance (RPM)

(a) The functions of the Repairs and Maintenance (RPM) are as follows:

1. The Repairs and Maintenance center shall be responsible for maintenance and operation of an institution's buildings and equipment in a state of readiness required to perform hospital operations. Repairs and Maintenance of physical plant not used for services related to patient care (*[e.g.]* ***for example***, rental of apartments) shall be reported as *[reconciliations]* ***reconciling items***. Renovation of capital assets is to be distinguished from Repairs and Maintenance Expenses and capitalized with the asset according to the criteria described in *[section]* *10:52-*6.19.

2. The maintenance and repair of specialized equipment in areas such as Diagnostic Radiology, Therapeutic Radiology, or Laboratory shall report such costs in those centers. *[Bio-medical engineers]* ***Biomedical engineers' expenses*** shall be *[treated]* in this *[manner]* ***cost center***.

3. Functions shall include the following: All maintenance of buildings and plant equipment including painting; maintenance of moveable equipment to the extent done by institution employees; and minor improvements and renovation of buildings and plant equipment.

*10:52-*6.79 Utilities Cost (UTC)

(a) The functions of the Utilities Cost (UTC) are as follows:

1. The center shall be used to account for all utility costs such as electricity, gas, oil, disposal services and water. A breakdown of the cost and source of these utilities shall be provided.

2. Telephones shall be considered utilities and thus such costs and revenues shall not be reported in this center. Costs associated with utilities provided to buildings and areas not involved in patient care shall be excluded and reported as *[reconciliations]* ***reconciling items***.

SUBCHAPTER 7. DIAGNOSIS RELATED GROUPS (DRG)

*10:52-*7.1 Diagnosis Related Groups (DRG)

(a) Diagnosis Related Groups (DRG) represent categories of hospital inpatients with similar clinical characteristics and, except for outliers, patients in each DRG can be expected to consume similar amounts of hospital resources. Assignment of a patient to a DRG requires the following information:

1. Principal diagnosis;
2. Secondary diagnosis;
3. Principal and other procedures;
4. Age;
5. Sex;
6. Discharge status; and
7. Birthweight *[(Newborn)]* ***(neonate): A newborn under 29 days of age***.

(b) The appropriate *[definitions]* ***classifications*** are reported here and these are the only *[definitions]* ***classifications*** allowable for DRG assignment.

1. Principal diagnosis: The condition established after study shall be chiefly responsible for occasioning the admission of a patient to the hospital for care. The principal diagnosis must be coded using the International Classification of Diseasess, 9th Revision, with Clinical Modifications (ICD-9-CM).

2. Secondary diagnosis: Conditions that exist at the time of admission or develop subsequently which affect the treatment received and/or the length of stay. Diagnoses which have no bearing on the treatment received during a current hospital stay are not appropriate for use in DRG assignment. All secondary diagnoses must be coded using ICD-9-CM.

3. Principal and other procedures: Diagnostic and therapeutic procedures performed during a patient stay. All procedures must be coded using ICD-9-CM.

4. Age: Patient's chronological age at admission in years.

5. Sex: Patient's sex as male or female.

6. Discharge Status: The circumstances under which a patient left the hospital, coded as routine discharge to home, discharged against medical advice, transferred or died.

7. Birthweight: A newborn's weight in grams at birth.

8. Neonate: A newborn under 29 days of age.

(c) Admission: Patient hospitalized for a condition related to a recent spell of illness.

1. Patients who are treated and subsequently admitted through the emergency room shall be considered admitted to the hospital at the time the physician orders the admission. The cause of the admission shall be considered the cause of the emergency room treatment. Therefore*,* the course of treatment shall be considered one admission. Services rendered in the emergency room shall be reflected in the inpatient record and the UB-82 claim form.

2. Similarly, a patient admitted for a course of treatment as a Same Day Surgery (SDS) patient, who subsequently is admitted from that mode of treatment shall be considered one admission. Services rendered in the SDS mode shall be reflected in the inpatient record and UB-82 claim form.

3. Readmissions are patients admitted to an acute care hospital at another time during the last seven days.

*10:52-*7.2 Outliers

(a) Outliers are patients displaying atypical characteristics relative to other patients in a DRG. The *[five]* ***four*** categories of outliers are defined and the methodology for outlier payment is established *[in this plan]* ***as in N.J.A.C. 8:31B-3.38(c)1***.

***1. High length of stay: Patients assigned to a DRG, but whose Length of Stay (LOS) is longer than the high LOS trim point.**

i. The rate is the inlier rate per case plus a per diem for each acute day from the date of admission to date of discharge. The DRG's with three or fewer high length of stay outlier cases in the base year, the standard high length of stay per diem is the rate.

2. Low length of stay: Patients assigned to a DRG, but whose Length of Stay (LOS) is shorter than the low LOS trim point.

i. The billing rate is limited to either the lower of the inlier rate per case or the sum of the acute days multiplied by the low per diem. For DRG's with three or fewer low length of stay outlier cases in the base year, the standard low length of stay per diem is the rate.

3. Low volume: Patients assigned to a DRG with five or fewer merged cases in the base year.

i. The rate is the standard rate per case and standard per diem if also a length of stay outlier (as described in (a)1 and 2 above).

4. Transfer patients: Patients under medical advice requiring continued acute care who are transferred from one Acute Care Facility to another Acute Care Facility.

i. Where a patient's discharge status is that of a transfer to another acute care facility (inpatient), the rate is limited to the lower of the inlier rate per case or the sum of the acute days multiplied by the low outlier per diem. The hospital which received the transfer patient (and that patient is subsequently a non-transfer status discharge) will receive the appropriate rate per case or per diem based upon DRG assignment and trim point status.*

*10:52-*7.3 List of Diagnosis Related Groups

(a) The following are Major Diagnostic Categories (Organ System Approach):

1. Diseases and Disorders of the Nervous System.
2. Diseases and Disorders of the Eye.
3. Diseases and Disorders of the Ear, Nose, Mouth and Throat.
4. Diseases and Disorders of the Respiratory System.
5. Diseases and Disorders of the Circulatory System.
6. Diseases and Disorders of the Digestive System.
7. Diseases and Disorders of the Hepatobiliary System and Pancreas.

8. Diseases and Disorders of the Musculoskeletal System and Connective Tissue.
9. Diseases and Disorders of the Skin, Subcutaneous Tissue and Breast.
10. Endocrine, Nutritional and Metabolic Diseases and Disorders.
11. Diseases and Disorders of the Kidney and Urinary Tract.
12. Diseases and Disorders of the Male Reproductive System.
13. Diseases and Disorders of the Female Reproductive System.
14. Pregnancy, Childbirth and the Puerperium.
15. Normal Newborns and Other Neonates with Certain Conditions Originating in the Perinatal Period.
16. Diseases and Disorders of Blood and Blood Forming Organs and Immunological Disorders.
17. Myeloproliferative Diseases and Disorders, and Poorly Differentiated Neoplasms.
18. Infectious and Parasitic Diseases (Systemic or Unspecified Sites).
19. Mental Diseases and Disorders.
20. Alcohol/Drug Use and Alcohol/Drug Induced Organic Mental Disorders.
21. Injuries, Poisonings and Toxic Effects of Drugs.
22. Burns.
23. Factors Influencing Health Status and Other Contacts with Health Services.
24. Human Immunodeficiency Virus (HIV) Infections.
25. Multiple Significant Trauma.

(b) The following are abbreviations used in ICD-9-CM DRG English descriptors *[in (c)]* ***listed*** below.

1. w AGE 70 CC: Patients who are over age 70 and/or have a substantial complication or comorbidity.
2. wO AGE 70 CC: Patients who are age 0-70 and have no substantial complication or comorbidity.
3. w CC: Patients with a substantial complication or comorbidity.
4. wO CC: Patients without a substantial complication or comorbidity.
5. O.R. Procedures: therapeutic or diagnostic procedures generally performed in a fully equipped operating room (O.R.).
6. URI: Upper Respiratory Infection.
7. AMI: Acute Myocardial Infarction.
8. CHF: Congestive Heart Failure.
9. D&C: Dilation and Curettage.
10. FUO: Fever of Unknown Origin.
11. NEC: Not Elsewhere Classifiable.

SUBCHAPTER 8 *BASIS OF SPECIFIC PAYMENT FOR DISPROPORTIONATE SHARE HOSPITALS*

10:52-8.1 Disproportionate Share Adjustment

(a) A disproportionate share hospital shall be a hospital designated by the Commissioner of Human Services. At a minimum, each hospital with a Medicaid inpatient hospital utilization rate that is one standard deviation above the mean Medicaid utilization rate for hospitals receiving Medicaid payments in the State, and every hospital with a low income utilization rate above 25*[%]* ***percent*** will be treated as a disproportionate share hospital. A hospital shall be designated as a disproportionate share hospital eligible for a charity care subsidy pursuant to P.L. 1992, c.160 Section 9 if upon establishing a rank order of the percentage of uncompensated care for all hospitals, the hospital is determined by the Commissioner of Health to be at or above the 80th percentile of hospitals with the highest percentage of uncompensated care, or if the hospital is eligible for other uncompensated fund subsidy pursuant to P.L. 1992, c.160, Section 11, if upon establishing a rank order of other uncompensated care for hospitals, has other uncompensated care which is at or above the 45th percentile of all hospitals' other uncompensated care levels.

(b) The Commissioner of ***the Department of*** Human Services may designate additional hospitals as disproportionate share hospitals if it is determined they serve a large number of low income mentally ill or developmentally disabled clients.

(c) The Commissioner ***of the Department*** of Human Services may make additional disproportionate share payments to facilities operating under N.J.S.A. 18A:64G-1 et seq. providing a high level of charity and uncompensated care to low income persons and persons with special needs.

(d) The Commissioner ***of the Department*** of Human Services may also designate a facility as eligible for additional disproportionate share payments if its uncompensated care as a percentage of payments from non-governmental payers is equal to or greater than 30*[%]* ***percent***. In addition, to be designated as eligible for this additional disproportionate share payment, the facility must demonstrate a commitment to the establishment and operation of a managed care program for the uninsured and other low income persons, case management programs for persons with AIDS, tuberculosis or substance abuse and addiction or a program for children at risk of health problems resulting from lack of immunizations, lead poisoning, abuse or birth defects. In addition, a facility must demonstrate a commitment to continuing service to mentally ill clients.

10:52-8.2 Method of Payment

(a) The disproportionate share adjustment shall include at least the adjustment amount recommended by the Commissioner of ***the Department of*** Health based upon a determination regarding payments for charity and uncompensated care from the Health Care Subsidy Fund.

1. For facilities operating under N.J.S.A. 18A:64G-1 et seq., the disproportionate share adjustment recommended by the Commissioner of Health may be increased by an amount recommended by the Office of Management and Budget which will consider the total operating cost of the facility less any third party payments, including all other Medicaid payments, as well as payments from non-State sources for services provided by the hospital during the *[facility's]* ***hospital's*** fiscal year.

2. The recommendation from the Department of Health shall be calculated in the following manner pursuant to P.L. 1992 *[Chapter]***, c.*160.

i. Charity Care component of the Hospital Health Care Subsidy Fund shall be calculated by ranking hospitals using the following formula:

Hospital Specific Approved Uncompensated Care 1991
Hospital Specific Preliminary Cost Base 1992
= Hospital Specific % Uncompensated Care (%UC)

ii. If a hospital's Uncompensated Care percentage (%UC) is among the 80% of hospitals with the highest percentage of uncompensated care, it is eligible to receive a Health Care Subsidy Fund Charity Care adjustment. This adjustment shall equal the product of the facility's hospital specific percentage of uncompensated care times the funds allocated to the Charity Care Component of the Health Care Subsidy Fund. The calculation of the hospital's uncompensated care shall be based upon the amount of uncompensated care reported in 1991 to the Department of Health and shall exclude Medicare bad debt, offsetting Indigency Grants/payments and Uncompensated Care for Excluded Health Services.

iii. A hospital's eligibility for the Other Uncompensated Care Hospital Subsidy Fund payment shall be calculated using the following formula:

Hospital Specific Other Uncompensated Care for Year
Hospital Specific Revenue for Year = Hospital Specific
Percentage of Other Uncompensated Care (%OUC)

A hospital is eligible for a subsidy if, upon establishing a rank order of the %OUC for all hospitals:

(1) In 1993, the hospital is among the 45*[%]* ***percent*** of hospitals with the highest %OUC;

(2) In 1994, the hospital is among the 30*[%]* ***percent*** of hospitals with the highest %OUC; and

(3) In 1995, the hospital is among the 15*[%]* ***percent*** of hospitals with the highest %OUC.

iv. The amount of the subsidy an eligible hospital shall receive shall be based on the following:

Hospital Specific Other Uncompensated Care for Year
Total Other Uncompensated Care for all Eligible Hospitals for Year
multiplied by Total Amount of Subsidy Allocated for the Year
= Hospital Specific Subsidy for the Year

The monies in the Other Uncompensated Care component of the disproportionate share hospital subsidy account shall be distributed to eligible hospitals in accordance with the formulas provided in this section. In 1993, the fund shall distribute $100 million in subsidies to eligible hospitals; in 1994, the fund shall distribute $67 million to eligible hospitals; and in 1995, the fund shall distribute $33 million to eligible hospitals. For 1993, the formulas shall use 1991 Hospital Specific Other Uncompensated Care and Total Uncompensated Care for eligible hospitals and the hospital's PCB for "Hospital Specific Revenue for Year." In 1994 and 1995, the formulas shall use 1992 other Uncompensated Care and Total Other Uncompensated Care for all eligible hospitals and the hospital's 1993 revenue cap established pursuant to *[section 3 of]* P.L. 1992, c.160 ***section 3***.

v. Hospitals eligible for additional disproportionate share payments may receive an additional payment adjustment determined by the Commissioner of the Department of Human Services from the Hospital Relief Subsidy fund. This additional payment shall be based upon the facility's percentage of clients with AIDS, tuberculosis, substance abuse and addiction and complex birth eligibility for such additional disproportionate share payments will be determined by the proportion of low income clients served by the hospital.

(d) Payments from the Hospital Relief Subsidy Fund shall be calculated in the following manner:

1. The facility's 1991 Uncompensated Care as Reported to the Department of Health (1991 UCC%) shall be multiplied by the facility's 1992 Preliminary Cost Base most recently approved by the Hospital Rate Setting Commission divided by the product of the total percentage of non-federal payers at the facility multiplied by the facility's 1992 Preliminary Cost Base most recently approved by the Hospital Rate Setting Commission. The product of this formula will identify the hospital's Hospital Relief Subsidy Eligibility Factor (HRSEF). Hospitals with a HRSEF above 30% shall be eligible for a subsidy.

2. The subsidy shall be an amount allocated by the Commissioner during the fiscal year for this purpose and shall be distributed in the following manner:

i. The payments for admissions for the following categories are taken from the 1991 MIDS file maintained by the New Jersey Department of Health:

(1) HIV (MDC 24)
(2) Mental Health (MDC 19)
(3) Substance Abuse (MDC 20)
(4) Complex Neonates (DRG 600 through 618, 622, 623, 626 and 627)
(5) Tuberculosis as a major or minor diagnosis (ICD-9: 010.0 through 018.9)

3. The funding for the subsidy shall be distributed among eligible facilities based upon the facility's percentage of payments for clients with the above categories as a percentage of all payments for clients in these categories in eligible hospitals.

(e) Disproportionate Share Hospitals which service a large number of low income mentally ill or developmentally disabled clients may also be eligible to receive increased disproportionate share payment. The amount of payments to be made to facilities which serve a large number of mentally ill low income clients will be based upon recommendation by the Division of Mental Health and Hospitals within the Department of Human Services to the Commissioner of the Department of Human Services. This recommendation will identify hospitals essential to preserve the fragile network of mental health providers in the State. The Division of Developmental Disabilities may also recommend an additional payment to facilities who serve a large number of developmentally disabled clients. These additional payments will assure that these low income and special needs clients continue to have access to critical care.

1. The Hospital Subsidy Fund for Mentally Ill and Developmentally Disabled Clients shall be an amount allocated by the Commissioner during the fiscal year for this purpose. It shall be distributed in the following manner:

i. Hospitals who receive funding from the Hospital Relief Subsidy Fund shall only be eligible for a payment from this fund if recognized by the Division of Mental Health and Hospitals and a Short Term Care Facility (STCF) or a Child Community Inpatient Service (CCIS). Payments to STCF and CCIS shall be based upon its distribution of beds for these services times a projection of the cost of providing the service in a state facility.

ii. Hospitals who are not STCF or CCIS, but which are under contract with the Division of Mental Health and Hospitals shall receive an allocation of funds based upon the percentage of services provided by the hospital as a percentage of all services provided by all hospitals.

SUBCHAPTER *[V.]**9.* REVIEW AND APPEAL OF RATES

***10:52-*9.1** Review and Appeal of Rates

(a) All hospitals, within 15 working days of receipt of the Proposed Schedule of Rates*[,]* shall notify the Division of any calculation errors in the rate schedule. If upon review it is determined by the Division that the error is of substantial value, a revised rate will be issued to the hospital within 10 working days. If the discrepancy is determined to be substantial and a revised Schedule of Rates is not issued by the Division within 10 working days, notification time frames above will not become effective until the hospital received a revised Schedule of Rates.

(b) Any hospital which seeks an adjustment to its rates must agree to an operational review at the discretion of the Department of Human Services.

1. A request for a rate review must be submitted by a hospital in writing to the Department of Human Services, Division of Medical Assistance and Health Services, Office of Budget, Fiscal Affairs and Information Systems, CN 712, Trenton, New Jersey 08625, within 20 days after publication of the rates by the Department of Human Services.

2. The Division will not approve an increase in a hospital's rates unless the hospital demonstrates that it would sustain a marginal loss in providing inpatient services to Medicaid recipients at the rates under appeal even if it were an economically and efficiently operated hospital. Any hospital seeking a rate increase must demonstrate the cost it must incur in providing services to Medicaid recipients and the extent to which it has taken all reasonable steps to contain or reduce the costs of providing inpatient hospital services. The hospital may be required at a minimum to submit to the Department of Human Services, the following information:

i. Operational reviews;

ii. Efficiency studies and reports identifying opportunities for cost savings;

iii. Minutes of the meeting of the hospital's board of directors and board's finance committee;

iv. Reports of the Joint Commission on the Accreditation of Health Care Organizations;

v. Management letters;

vi. The hospital's strategic plans, long range plans, facilities plans and marketing plans;

vii. The hospital's annual report;

viii. Any analyses of the hospital's marginal cost in providing services to Medicaid or other categories of patients;

ix. Cost accounting documentation or reports pertaining to the hospital's cost incurred in treating Medicaid recipients or the comparative cost of treating Medicaid and other patients;

x. A copy of the hospital's most recent Medicare cost report with all supporting schedules;

xi. Contracts with other payors providing for negotiated rates or discounts from billed charges; and

xii. Evidence that the appealed rates jeopardize the long term financial viability of the hospital (that is, that the hospital is sustain-

ing a marginal loss in treating Medicaid recipients) and that the hospital is necessary to provide access to care for Medicaid recipients.

*[(b)]**(c)* The Division shall review the documentation and determine if an adjustment is warranted.

*[(c)]**(d)* The Division shall issue a written determination with an explanation as to each request for a rate adjustment. If a hospital is not satisfied with the Division's determination, they may request an administrative hearing pursuant to N.J.A.C. 10:49-10*[, et seq]*. The Administrative Law Judge will review the reasonableness of the Division's reason for denying the requested rate adjustment based on the documentation that was presented to the Division. Additional evidence or documentation shall not be considered. The Director of the Division of Medical Assistance and Health Services shall thereafter issue the final agency decision either adopting, modifying or rejecting the Administrative Law Judge's initial Office of Administrative Law decision. Thereafter, review may be had in the Appellate Division.

(a)

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Hearing Aid Assistance to the Aged and Disabled Eligibility Manual

Readoption: N.J.A.C. 10:69

Proposed: January 19, 1993 at 25 N.J.R. 228(a).

Adopted: May 13, 1993 by William Waldman, Commissioner, Department of Human Services.

Filed: May 14, 1993 as R.1993 d.281, **without change.**

Authority: N.J.S.A. 30:4D-36 through 42, and 30:4D-7, 7a, b, and c.

Effective Date: May 14, 1993.

Expiration Date: May 14, 1998.

Summary of Public Comments and Agency Responses:

No comments received.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 10:69.

(b)

DIVISION OF FAMILY DEVELOPMENT

Public Assistance Manual

Child Support and Paternity Services, HLA Test Results and Refusal to Cooperate Determination; Late Payment Fees, Application for Child Support Services, Timeframes Concerning Paternity Establishment and Out-of-State Cases; Approval of Genetic Testing Laboratories; Medicaid Penalty for Non-Cooperation in Child Support Matters

Adopted Amendments: N.J.A.C. 10:81-11.5, 11.7, 11.9 and 11.20

Proposed: July 6, 1992 at 24 N.J.R. 2328(a).

Adopted: May 13, 1993 by William Waldman, Commissioner, Department of Human Services.

Filed: May 14, 1993 as R.1993 d.282, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3), **and with portions not adopted (N.J.A.C. 10:81-11.21).**

Authority: N.J.S.A. 44:10-3; Family Support Act of 1988 (Public Law 100-485), Section 103(c)(B); 45 CFR 302.75, 303.5(a)(1), 303.5(c), 303.7(b)(2).

Effective Date: June 7, 1993.

Expiration Date: August 24, 1994.

Summary of Changes Upon Adoption:

At N.J.A.C. 10:81-11.5(h)2iii, the phrase "HLA test" has been replaced with "genetic testing" to be consistent with N.J.A.C. 10:81-11.9(d)2.

At N.J.A.C. 10:81-11.9(d)5, the proposed amendment was revised to mandate the use of the State's long arm statute in the establishment of paternity, where appropriate, as outlined under N.J.S.A. 9:17-46(b). Subsequent to the proposed amendment, this Department's Division of Family Development received clarification from the Department of Health and Human Services, Administration for Children and Families, that the proposed amendment appears to restrict the discretion of the CWA/CSP Unit by mandating the use of URESA in the establishment of paternity and support in interstate cases. They advised that Federal regulations at 45 CFR 303.7(b)(1) require states to use their authority to establish paternity "under long arm statutes," whenever appropriate.

The Department will not be adopting the proposed new rule at N.J.A.C. 10:81-11.21. Subsequent to the proposal of N.J.A.C. 10:81-11.21, the Department received final Federal regulations concerning the review and adjustment of child support orders which further amend the proposed new rule to the extent that the result would be considered a substantial change from the proposal. The Department expects to repropose N.J.A.C. 10:81-11.21 in the New Jersey Register in the very near future.

Summary of Public Comments and Agency Responses:

Comments were received from the Bergen County Board of Social Services.

Cooperation in establishing paternity and obtaining support; N.J.A.C. 10:81-11.5(h)2iii.

COMMENT: Given the overwhelming number of excluded cases in which the mother has either lied or withheld information, when there is an exclusion in an HLA test, the burden should be put upon the mother to show by clear and convincing evidence that she has given all truthful information. This "evidence" should include a sworn statement from the mother that she did not have sexual relations with any other man or men around the time of conception.

RESPONSE: The Department agrees with the concept of an affidavit and has modified the proposed amendment to state that it is the client's responsibility to provide evidence that truthful information was given. This evidence shall include an affidavit from the client. In all fairness to the client, the rule will also be modified to state that while genetic testing results may be a factor in determining whether the recipient has cooperated, a finding of non-cooperation cannot be based on genetic testing alone. Genetic testing must be considered along with any other evidence.

Responsibilities of the State agency; N.J.A.C. 10:81-11.7(a)11

COMMENT: A late payment fee should be imposed on obligors who owe child support.

RESPONSE: The IV-D agency is not required to charge a late payment fee under Federal regulations. After considering all the factors involved in this action, it is the decision of the Department to continue not charging a late payment fee at this time.

Responsibilities of the CWA/CSP Unit; N.J.A.C. 10:81-11.9(d)

COMMENT: Clarification is needed as to whether a CWA would need to contact and interview all the laboratories on the list of approved genetic testing laboratories if the CWA chooses the lowest cost vendor.

RESPONSE: The CWA must contact and interview the laboratories on the list, beginning with the lowest cost vendor, until it has chosen a qualifying vendor. Once a vendor is chosen, the CWA is not under obligation to contact or interview other laboratories of higher cost. The proposed amendment has been modified to reflect this clarification.

COMMENT: There is an anomaly between requiring a CWA to file a URESA complaint within 20 calendar days of location, while allowing 90 calendar days for an in-State complaint. Recognizing that these timeframes are Federally mandated, it is suggested that the State petition the Federal authorities to standardize the time for filing a complaint in all cases at 90 calendar days. The rule does not specify that also included with the "20 calendar days" is a "request for location services."

RESPONSE: As the commenter indicates, these timeframes are Federally mandated and, therefore, cannot be altered. It should be noted that the intent of the proposed amendment at N.J.A.C. 10:81-11.9(d)5 is to reflect that, within 20 calendar days of determining that the absent

parent is in another state, the case should be referred to the responding state's central registry for action. With respect to what actions can be taken within 20 calendar days of determining that the absent parent is out-of-State, the proposed amendment has been revised to reflect that the CWA/CSP Unit can file a Uniform Support Petition and General Testimony for URESA or, when necessary, a request for location services.

COMMENT: The procedure of filing the URESA complaint with the "responding State's central registry" is an incorrect procedure. URESA complaints must be filed with Local Family Part Office of the Superior Court so that the necessary judge's certification and related documents can be attached to the complaint.

RESPONSE: Under Federal regulation at 45 C.F.R. 303.7(b)(2), and as stated above, within 20 calendar days of determining that the absent parent is in another state, the case should be referred to the responding State's central registry for action. Although steps must be taken prior to referring the case, which may include filing with the Local Family Part Office of the Superior Court, the case must still be referred to the responding State's central registry within the specified timeframe.

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

10:81-11.5 Cooperation in establishing paternity and obtaining support

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

(h) Refusal to cooperate: If the CWA determines that no good cause exists for the client's refusal to cooperate, the client shall be notified of the determination and given an opportunity to cooperate, withdraw the application for assistance, or have the case closed. The client shall also be advised of his or her rights to a fair hearing to appeal this adverse decision in accordance with N.J.A.C. 10:81-7.1(c).

1. (No change.)

2. If the CWA/CSP Unit determines that the client has refused to cooperate and has not claimed good cause for that refusal, his or her needs will be deleted from the assistance grant and he or she will become ineligible for Medicaid benefits. The Medicaid Only client who refuses to cooperate in establishing paternity and providing information to assist in the establishment of an order for medical support without good cause will become ineligible for Medicaid. The CWA/CSP Unit will refer those Medicaid Only cases where non-cooperation is determined to the unit which handles Medicaid eligibility on the county level.

i.-ii. (No change.)

iii. While *[an HLA test result]* ***genetic testing results*** may be a factor in determining whether the recipient has cooperated, a finding of non-cooperation cannot be based on *[the test]* ***genetic testing*** alone. *[Tests]* ***Genetic testing*** must be considered along with any other evidence *[available, including the mother's testimony, since it is possible that the mother truly believes a certain man to be the father of the child, despite test results. The CWA/CSP Unit shall inquire into the basis of the mother's belief, including whether or not the mother had sexual relations with any other man or men around the probable time of conception.]*, **which evidence is the client's responsibility to provide. The client shall provide evidence that truthful information was given, including an affidavit taken from the client stating that she did not have sexual relations with any other man around the time of conception.*** If it appears that, despite the *[test]* ***genetic testing*** results, the mother has truthfully given all information she has or can reasonably obtain about the paternity of her child, she must be deemed to have cooperated. At that time an affidavit will be taken from the client stating that she has given all the information she has about the paternity of her child.

3. (No change.)

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

10:81-11.7 Responsibilities of the State agency

(a) The State Office of Child Support and Paternity Programs, located in the Division of Economic Assistance, shall be the single organizational unit responsible for the supervision of the administration of the Child Support and Paternity Program. This unit shall be referred to as the Office of Child Support and Paternity Programs (OCSPP). Responsibilities of the OCSPP include, but are not limited to, the following:

1.-10. (No change.)

11. Setting the policy that a late payment fee will not be imposed on obligors who owe child support.

10:81-11.9 Responsibilities of the CWA/CSP Unit

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

(d) Legal action taken by the CSP Unit: If the CSP Unit collects information sufficient to locate the absent parent, legal proceedings shall be initiated for the purpose of establishing paternity and/or obtaining support and medical insurance within 90 calendar days of location.

1. (No change.)

2. Filiation proceedings: With regard to AFDC and AFDC/Medicaid Only cases in which paternity has not been acknowledged, the CWA/CSP Unit shall file a complaint to establish paternity in a court of competent jurisdiction within 90 calendar days of locating the alleged father.

i. Genetic test scheduling: If paternity is denied and the court orders genetic tests, the CWA/CSP Unit shall schedule the test at a legally and medically acceptable State approved facility within one year of successful service or the child reaching six months of age.

(1) The Office of Child Support and Paternity Programs shall develop a list of approved genetic testing laboratories through the competitive procurement process. The State shall award a contract to each laboratory on the list. In order for a county to receive Federal reimbursement for genetic testing fees it must *[contact and interview the laboratories on the list, choosing]* ***choose*** the lowest cost vendor that can provide accessible, timely service and fulfill the unique needs of that agency. ***The CWA must contact and interview the laboratories on the list, beginning with the lowest cost vendor, until a qualifying vendor is chosen. Once a vendor is chosen, the CWA is not under obligation to contact or interview those laboratories of higher cost.*** *[Once a laboratory is chosen the]* ***The*** county must ***then*** request State approval to use the State contract with *[that]* ***the chosen*** laboratory or to independently negotiate a contract with that laboratory at a lower cost than the State contract. If the lowest cost vendor on the list was not the county's choice, reasons for not using that vendor must be given. The same would apply to the next lowest cost vendor and so on until the chosen vendor is reached. Once State approval is granted the county agency will be responsible for carrying out the terms of the contract.

ii.-vi. (No change.)

3.-4. (No change.)

5. Treatment of cases in which the absent parent resides out-of-State: In cases where the absent parent resides out-of-State, proceedings to establish paternity and/or secure child support and medical insurance shall be in accordance with the Uniform Reciprocal Enforcement of Support Act (1968) (URESA) ***or, to establish paternity, in accordance with the State's long arm statute, under the Parentage Act at N.J.S.A. 9:17-46(b); whenever appropriate***. Within 20 calendar days of determining the absent parent is out-of-State, the CWA/CSP Unit, with the client's cooperation, will file a Uniform Support Petition and General Testimony for URESA ***or, when necessary, a request for location services*** with the State's central registry.

i. (No change.)

6.-10. (No change.)

(e)-(k) (No change.)

(l) Title IV-D services available to non-public assistance persons: Appropriate child support services are to be made available to non-public assistance persons upon application filed by such individual with the IV-D Agency. These services shall include locating obligors, establishing paternity and securing support and medical insurance.

1. State of New Jersey Title IV-D Program Application for Child Support Services: Non-public assistance individuals requesting services from the CWA shall apply for such services by signing the

State of New Jersey Title IV-D Program Application for Child Support Services. This form shall be executed in duplicate. (See N.J.A.C. 10:81-11.2(c) regarding application fee.) The CWA will provide an application for services on the day a request is made in person. The CWA will provide an application for services in no more than five working days of receipt of a written or telephone request. Information describing services, rights and responsibilities, fees, cost recovery and distribution policies must accompany all applications for services. An application must be accepted on the day it is received.

i.-ii. (No change.)

2.-5. (No change.)

10:81-11.20 Rules concerning application fee for non-AFDC applicants

(a) Non-AFDC individuals, who do not have an active support order and who do not know the location of the obligor, shall file an application with the CWA/CSP unit. (Individuals with an active support order or those without an active support order who know the whereabouts of the obligor shall file the application for IV-D services at the appropriate county probation department.) See N.J.A.C. 10:81-11.9(l)1 regarding the State of New Jersey Title IV-D Program Application for Child Support Services.

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

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Notice of Administrative Changes and Correction Manual of Requirements for Adoption Agencies Definitions; Public Access to Bureau Records N.J.A.C. 10:121A-1.5 and 2.7

Take notice that the Department of Human Services, Division of Youth and Family Services (DYFS), has requested administrative changes to the definition of "chapter" at N.J.A.C. 10:121A-1.5 and has discovered an error in the text of N.J.A.C. 10:121A-2.7(b)1.

In the definition of "chapter," DYFS requested, and the Office of Administrative Law has agreed to permit, a change of the referenced chapter title from "Manual of Standards for Adoption Agencies" to the current "Manual of Requirements for Adoption Agencies," and to update the recitation of the sections in the chapter to include N.J.A.C. 10:121A-5.10. N.J.A.C. 10:121A-2.7(b)1 contains the illogical statement that "applicants" are file items that must be open to public review. The obviously intended term is "applications."

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

10:121A-1.5 Definitions

The following words and terms, when used in this chapter, shall have the following meanings:

...

"Chapter" means the rules contained in the Manual of [Standards] **Requirements** for Adoption Agencies, as specified in N.J.A.C. 10:121A-1.1 to [5.9]**5.10**.

...

10:121A-2.7 Public access to Bureau records

(a) (No change.)

(b) The Bureau shall make the following items in the files open to public review:

1. [Applicants] **Applications** for certificates and related materials documentation;

2.-10. (No change.)

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

CORRECTIONS

(b)

THE COMMISSIONER

Administration, Organization and Management Definitions: Division of Operations; Indigent Inmate Adopted Amendment: N.J.A.C. 10A:1-2.2

Proposed: March 15, 1993 at 25 N.J.R. 1043(a).

Adopted: May 4, 1993 by William H. Fauver, Commissioner, Department of Corrections.

Filed: May 5, 1993 as R.1993 d.246, **without change.**

Authority: N.J.S.A. 30:1B-6 and 30:1B-10.

Effective Date: June 7, 1993.

Expiration Date: June 1, 1997.

Summary of Public Comments and Agency Responses:

The Department of Corrections received a total of four comments to the proposed amendment from the following individuals: Mary C. Williams, Edna Mahan Correctional Facility for Women; Arthur Wakefield, Jr., East Jersey State Prison (E.J.S.P.); Tyrone Thomas, E.J.S.P.; and Thomas Gerrard, Riverfront State Prison.

COMMENT: All commenters objected to the definition for indigent inmate because they believe the definition serves no productive purpose except to burden inmates with unconstitutional expenses and will deprive inmates of personal funds to pay for various legal services and fees which are currently provided to all inmates free of charge.

RESPONSE: The Department of Corrections reiterates that this amendment is merely adding the term and definition for indigent inmate to N.J.A.C. 10A:1-2.2 in order that interested individuals will have immediate access to the term and definition. References and the language which defines indigent inmates have existed throughout N.J.A.C. 10A since 1987 and these remain unchanged. Further, various services which are provided to all inmates free of charge will not become chargeable as a result of the promulgation of this definition at N.J.A.C. 10A:1-2.2

COMMENT: One commenter objected to the definition of indigent inmate because the commenter believes that a prisoner can only become indigent when an illness or injury did not occur at the prisoner's job site.

RESPONSE: The Department of Corrections disagrees. There is no presumption that an illness or injury which occurred at the prisoner's job site would disqualify an inmate from indigency status.

Full text of the adoption follows.

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.

...

"Division of Operations" means the administrative unit that is responsible for the administration of all correctional facilities within the New Jersey Department of Corrections.

...

"Indigent inmate" means an inmate who has no funds in his or her account and is not able to earn inmate wages due to prolonged illness or any other uncontrollable circumstances, and who has been verified as having no outside source from which to obtain funds.

...

PUBLIC NOTICES

BANKING

(a)

DIVISION OF REGULATORY AFFAIRS

Notice of Receipt of Petition for Rulemaking Land Survey Rules

Petitioner: T.S. Madson II, Executive Director, New Jersey Land Surveyor's Council.

Take notice that the Department of Banking received 12 petitions for rulemaking from Petitioner on April 21, 1993. The petitions request the promulgation of the following rules: (1) Prohibit the use of an owner's survey affidavit and indemnification agreement in lieu of a correct survey; (2) Require that a current land or boundary survey less than 90 days old be used by an appraiser; (3) Define land and boundary surveys and require that such be performed by a registered land surveyor; (4) Prohibit the use of a "sketch of description" map in lieu of a full, current and correct survey; (5) Prohibit the use of any land or boundary survey without an accompanying map, plat, drawing or sketch which meets minimum statutory requirements; (6) Allow for treble damages for licensees who do not take reasonable care when purchasing, soliciting for, receiving or use any land or boundary survey which fails to meet New Jersey minimum technical standards; (7) Define the fiduciary duty of a licensee when ordering or advising a client about ordering a land or boundary survey; (8) Require that licensees collect payment for a land or boundary survey at the same time that payment for the real estate appraiser or credit report is collected by the licensee; (9) Require a land or boundary survey in every financial transaction where the real property is to be used as collateral for any mortgage loan; (10) Prohibit the use of any land or boundary survey over 90 days old; (11) Require the Department to acknowledge receipt of all correspondence and to notify any and all affected parties within five working days following action by the Department; and (12) Prohibit the purchase, promotion or use of a "wash-out" survey.

In accordance with N.J.A.C. 1:30-3.6, the Department shall subsequently mail to the petitioner, and file with the Office of Administrative Law, a notice of action on the petition.

ENVIRONMENTAL PROTECTION AND ENERGY

(b)

WASTEWATER FACILITIES REGULATION PROGRAM

Notice of Adoption of 1992-1993 New Jersey Pollutant Discharge Elimination System (NJPDES) Annual Fee Report and Fee Schedule

Take notice that the Department of Environmental Protection and Energy (Department) hereby adopts the 1992-93 Annual Fee Report and Fee Schedule (Annual Fee Report) for the fiscal year 1993. In accordance with N.J.A.C. 7:14A-1.8, publication of this notice marks the completion of the fiscal year 1993 budgeting process.

The Department held a public hearing on April 5, 1993, at the New Jersey Department of Environmental Protection and Energy's Public Hearing Room, in Trenton, New Jersey. Seven people attended the public hearing. No oral testimony was presented. Five individuals submitted written comments. The following is a list of those persons that provided written comments concerning the 1992-93 Annual Fee Report and Fee Schedule, and general comments concerning the fee assessment methodology and the NJPDES program:

Sandra Grenci, Rahway Valley Sewerage Authority
John D. Alexander, Hoffmann-LaRoche
Michael Rosenberg, SmithKline Beecham
William Hamilton, Merck & Co. Inc.
Arnold Mitnaul, West New York Municipal Utilities Authority

Dennis Hart, Administrator of the Wastewater Facilities Regulation Program, Department of Environmental Protection and Energy and Arnold Schiffman, Assistant Director for Ground Water Quality Management Element, Site Remediation Program, Department of Environmental Protection and Energy, served as hearing officers at the April 5, 1993, public hearing on the 1992-93 NJPDES Annual Fee Report and Fee Schedule. After requesting testimony from the public regarding the Annual Fee Report, Mr. Hart recommends that the Department adopt the 1992-93 Annual Fee Report and Fee Schedule as proposed.

A copy of the record of the public hearing which includes the transcript from the public hearing is available upon payment of the Department's normal charges for copying. Persons requesting copies should contact:

Administrator Dennis Hart
Department of Environmental Protection and Energy
Wastewater Facilities Regulation Program
401 East State Street
CN 029
Trenton, New Jersey 08625

The Department used the existing fee assessment methodology found at N.J.A.C. 7:14A-1.8. Several commenters recommended changes to the fee assessment methodology. The Department has not proposed changes to the fee assessment methodology for fiscal year 1993. Therefore, the Department cannot implement the recommended changes for the 1992-93 fee schedule. In July 1992 Commissioner Scott Weiner convened a Task Force to evaluate and make recommendations to the Department on the NJPDES fee assessment program. The NJPDES Fee Task Force was chaired by former Senator Laurence Weiss. Representatives from the Chemical Industry Council, the Business and Industrial Association, the Association of Environmental Authorities, local government, and other interested parties, worked with Department staff in evaluating the existing NJPDES fee assessment methodology. On March 30, 1993, the Task Force issued their report titled, "NJPDES Fees Task Force Report of Findings." The NJPDES Fee Task Force endorses the Department's initiative to offset fees by utilizing penalties collected pursuant to the Clean Water Enforcement Act. The Department will be proposing rule amendments to incorporate changes in the fee process into the FY94 fee schedule. Interested persons may request a copy of the NJPDES Fees Task Force Report of Findings by contacting Administrator Hart at the address listed above.

Some permittees identified errors in their individual environmental impact calculation and the proposed fee schedule. The Department has corrected those errors. In addition, the Department has reviewed the environmental impact calculations for NJPDES permittees to ensure that fee assessments reflect the calculated environmental impact. The Department has also calculated fees for facilities that received permits since the publication of the Annual Fee Report. As a result of these changes, the Department has revised the rates for Industrial Surface Water, SIUs, Site Remediation Landfills, and Site Remediation Ground Water discharge categories. The Department has adopted a new final rate for Industrial Surface Water dischargers which is the same rate as in FY92. This is consistent with the Department's proposal to maintain fees at the FY92 levels. The adopted SIU rate is still lower than the FY92 rate. Additionally, the Department has reduced all permit fees assessed by the Wastewater Facilities Regulation Program by five percent. This offset is being funded with penalties available in the Clean Water Enforcement Fund. The changes in individual environmental impacts and the adjustments to the rates for Industrial Surface Water and SIU discharge categories will require the Department to apply an additional $0.8 million from the Clean Water Enforcement Fund to the NJPDES program in FY93. The total billing for the Wastewater Facilities Regulation Program is $12,794,772. The Clean Water Enforcement Fund will provide $10,672,200. The Site Remediation Program will assess $4,915,844. The revised rates and the amount to be billed in FY93 are as follows:

Category	Proposed Rate	Final Rate	Amount Billed
Municipal Surface Water	0.421189	0.421189	$5,041,241
Municipal Ground Water	9470.84	9470.84	$ 273,139
Residuals	0.3731	0.3731	$ 118,659
Industrial Surface Water	1.6982	1.73549	$6,338,272
Industrial Ground Water	6017.0277	6017.0277	$ 406,339
SIU	3.549	4.25329	$ 616,782
Site Remediation Landfills	4.430977	4.4104416	$ 929,095
Site Remediation Ground Water	0.00025064637	0.00032513174	$3,986,749

Summary of Public Comments and Agency Responses:

1. COMMENT: The current method of fee assessment results in major inequities in the cost-sharing system of the NJPDES Fee Program. By using a "fee cap" of 10 percent, for example, a few of the largest permittees, who also contribute the majority of the environmental impact, are spared paying for their full share of the "cost" of this environmental impact. The remaining facilities are therefore paying a disproportionate share of the total category budget. (Sandra Grenci, Rahway Valley Sewerage Authority).

RESPONSE: The Department distributes NJPDES program costs based upon environmental impact in accordance with the formula provided in N.J.A.C. 7:14A-1.8(c) through (g). The maximum fee of 10 percent was included in N.J.A.C. 7:14A-1.8(a)10 to ensure that fee assessments would be reasonable. The maximum fee, in conjunction with the linear system for determining environmental impact, is necessary to ensure that no single facility is bearing an unreasonable portion of the NJPDES program costs. The Department disagrees with the commenter's statement that the remaining facilities are paying a disproportionate share of the total category budget. In fact, the remaining facilities are paying their share of the budget as related to their environmental impact.

2. COMMENT: We continue to protest the method of establishing the stream rating factor to calculate the Facility Environmental Value and ultimately the NJPDES permit fee. The documents used to set these values indicates that there has been no degradation of the water quality over the years. However, for Zone 1B of the Delaware River, the Water Use Index (WUI) increased from 2 in the 1990-91 Annual Fee Report to 37 in the 1991-92 Annual Fee Report and continues at 37 in the 1992-93 Annual Fee Report. This significant change created an increase in our Stream Rating Factor from .17 to .87 which is a 412 percent increase. N.J.A.C. 7:14A-1.8(c)1(iv) requires the Department to utilize information listed in the New Jersey Water Quality Inventory Report to generate the WUI. No explanation whatsoever was presented in either of these two inventory reports to justify this mammoth and very selective increase. Further, we must protest a system which allows the NJDEPE to make such a drastic change in the regulatory process without following due process of public comment. (John Alexander, Hoffmann-LaRoche)

RESPONSE: N.J.A.C. 7:14A-1.8(c) requires the Department to utilize information listed in the most recent publication of the New Jersey Water Quality Inventory Report. The Water Use Index (WUI) used in the 1992-93 Annual Fee Report and Fee Schedule has been obtained from the 1990 Water Quality Inventory Report. The WUI for the Upper Delaware was changed to 37 in the 1990 New Jersey Water Quality Inventory Report to accurately reflect the extensive use of the river by the public for recreation. This segment of the Delaware River has very popular "open access" throughout most of its length and is used by swimmers, tubers, jet skiers and kayakers. In addition it is one of the finest natural fishery resources on the east coast. Prior reports relied upon reported information concerning fish stocking and lifeguarded beaches. In 1990, the Department determined that the reliance on reported fishing and bathing data failed to accurately measure the true degree of use in the Upper Delaware River. This new WQI of 37 more appropriately reflects the public use of the Upper Delaware River.

3. COMMENT: In 1992 the New Jersey Legislature appropriated $700,000 from the NJPDES program budget to fund the operation of the State park system for the summer of 1992. The legislation specifically stated that there could be no fee increase as a result of this appropriation. The proposed fee for Hoffmann-La Roche is approximately $35,000 higher than its fee for the previous year FY92. We question whether any or all of this increase was a result of the $700,000 appropriation. (John Alexander, Hoffmann-LaRoche)

RESPONSE: The Department has not subsidized the operations of the Park's system with NJPDES permit fee revenues. The legislation in question, P.L. 1993 c.9, appropriated $700,000 from all fee programs within the Department to fund the operations of the Office of Permit Information and Assistance. This office was established as part of the Department's reorganization to oversee the Department's enactment of the Environmental Management Accountability Act of P.L. 1991, chapters 417 through 423, and to inform applicants of regulatory requirements and to assist applicants and to coordinate projects through the permit process. The overall impact of the Office of Permit Information and Assistance as it relates to the NJPDES program is $102,130 in FY93. Had Hoffmann-LaRoche's pollutant loadings for 1991 remained stable or decreased, their NJPDES permit fee would have been five percent less than their FY92 fee. Hoffmann-LaRoche's fee increase is not a result of this assessment, but is a direct result of higher pollutant loadings.

4. COMMENT: The NJPDES regulations were revised to institute a 10 percent cap on fees for any particular permit holder. The total industrial surface water budget is represented to be $7,373,171. The two facilities which are being charged the maximum fee are only being assessed $700,451. We suggest their fees should be increased to 10 percent of the total budget or $737,317. (John Alexander, Hoffmann-LaRoche)

RESPONSE: The Department wanted to hold fees at last year's levels and/or reduce fees approximately five percent. This action has also been applied to those permittees which the maximum permit fee of 10 percent will be assessed. This reduction in fees has not been passed on to other permittees. This reduction is being funded from additional penalties available from the Clean Water Enforcement Fund.

5. COMMENT: The Department of Treasury routinely takes $3 million from the Clean Water Enforcement Fund as a general revenue anticipation payment. The commenter finds that this practice is not acceptable and should be stopped. Rather, this $3 million and any additional money in the Clean Water Enforcement Fund should be reapplied by the Department toward the reduction of NJPDES permit fees. (John Alexander, Hoffmann-LaRoche)

RESPONSE: The proposed budget for FY93 of $23.4 million is funded with $16.1 million in fees and $7.3 million in penalties. The Department has chosen to apply an additional $2.5 million from the Clean Water Enforcement Fund to stabilize fees at the FY92 level and reduce fees for most permittees by five percent. This decision reduces the total fee assessments to $13.6 million from the budgeted NJPDES fee amount of $16.1 million. The Department further notes that the elimination of the $3 million general fund revenue anticipation is one of the recommendations contained in the NJPDES Fee Task Force report released on March 30, 1993.

6. COMMENT: An amount equivalent to approximately 30 percent of each NJPDES employee's salary is added in to the NJPDES budget to cover Department overhead. This represents an approximate $2.5 million charge to the NJPDES permit holders for general government costs which should be paid for out of general revenue funding. We submit that this enormous overhead burden should not be paid by individual permit holders but should rather be paid for by the public at large by means of appropriations by the Legislature. (John Alexander, Hoffman-LaRoche)

RESPONSE: The indirect cost rate is the mechanism by which the Department assesses all fee and Federal grant programs for cost incurred by the Department for a common or joint purpose benefiting more than one program objective and not readily assigned directly to a single program. To this extent, NJPDES fees are used to fund activities performed by such offices as the Commissioner's Office, the Division of Financial Management and General Services, and the Division of Personnel. These support services are necessary for the NJPDES program to operate and there are no other funding sources for the services at the present time.

7. COMMENT: The commenter objects to the charges included in the NJPDES budget for services of the Attorney General's Office as well as the Office of Administrative Law. Both of these charges exceed $750,000 and should not be charged to the overall regulated community. (John Alexander, Hoffman-LaRoche)

RESPONSE: The costs associated with the Attorney General's Office and Office of Administrative Law reflects estimated charges that the NJPDES program will receive from these offices. The Office of Administrative Law and the Division of Law in the Attorney General's Office are required to keep a cost accounting of their time as it relates to specific cases covered by the Surface Water program. Only legal support for regulatory program development and permit adjudications are paid through NJPDES fees. The cost associated with the Office of Adminis-

trative Law and the Attorney General's Office are paid by the permittees whose activities make the services necessary.

8. COMMENT: Although it is not clear whether there are any additional Treasury anticipation payments from the NJPDES account, the commenter would oppose all such payments. (John Alexander, Hoffmann-LaRoche)

RESPONSE: There is no Treasury anticipation for the fiscal year 1993 or fiscal year 1994 for the NJPDES Surface Water Program.

9. COMMENT: The Department pledged in its Response to Comments of 1991-1992 Annual Fee Report and Fee Schedule Adoption Notice that the minimum fees would be increased in fiscal year 1993. This has not been accomplished, and so for another year the high fee permit holders will be subsidizing the some 600 permit holders paying less than $1,000. (John Alexander, Hoffmann-LaRoche)

RESPONSE: The Department has instituted action to keep fees for operational wastewater dischargers at last year's level or reduce fees by approximately five percent by using available penalties from the Clean Water Enforcement Fund. The Department agrees with the commenter that the current minimum fee is too low. However, the Department decided not to propose increasing the minimum fees until after the NJPDES Fee Task Force Report was reviewed. The Department intends to act on the recommendations of the NJPDES Fee Task Force in a comprehensive manner for the FY94 NJPDES fee schedule.

10. COMMENT: Large volume dischargers are issued more comprehensive permits which contain more pollutant parameters. These additional parameters are included in the total pollutant loading for the particular facility. The repeal of the cube root factor was a critical move and has resulted in a disproportionate concentration of the permit fees toward a few permit holders. The 10 percent cap only helps those who have reached the level of its protection: those companies paying less than 10 percent of the program budget pay an enormously unequal amount for each unit of pollution. (John Alexander, Hoffmann-LaRoche)

RESPONSE: NJPDES fees are not based on the volume of wastewater discharged. The elimination of the cube root factor and then the square root factor beginning in 1990 served to distribute NJPDES program cost based on a linear environmental impact distribution. The fee schedule distributes the costs to those facilities with the greatest environmental impact. The maximum fee of 10 percent is used to ensure that no one facility is assessed a disproportionate share of the program cost while maintaining the distribution of the costs based upon environmental impact. In accordance with N.J.A.C. 7:14-1.8(a)9, the Department determines a rate for each discharge category and calculates the fee schedule. Facilities with calculated fees greater than 10 percent of the budget are assessed the maximum fee. The Department then recalculates the rate with a revised budget, to reflect the amount which will be paid by those permittees set at the maximum fee. The revised total environmental impact of the remaining facilities and the adjusted budget are used to determine the actual rate and fee schedule. This ensures that all permittees are paying a fee relative to their environmental impact.

11. COMMENT: Fees are not proportionately distributed among all surface water discharges. There is a great disparity in the way the fees are divided between the industrial and municipal programs. The aggregate environmental factor for all industrial dischargers is 9,723,018, which is only 45 percent of that for all municipal dischargers (19,266,728). Additional evidence of disparity between the industrial and municipal programs is the numerical rate applied to the facility environmental factor. The rate for industrial dischargers (1.6982) is 400 percent greater than the rate for municipal dischargers (0.421189). We can see no valid reason for this disparity and it seems the Department is internally inconsistent with its stated policy of the "Polluter Pays." If indeed each discharger were treated equally and the total program budget of $13,042,787 for industrial and municipal dischargers were allocated based on the total environmental factor (27,989,746), the per unit cost of environmental impact would be $0.466. If our fee were appropriately adjusted according to our actual environmental impact, taking into consideration the real impact of municipal dischargers, it would be less than one third of the proposed fee. (John Alexander, Hoffmann-LaRoche)

RESPONSE: The rate for each category of discharge is calculated based upon the total environmental impact for the category of discharge and the budget required to process, monitor and administer these similar types of NJPDES permits. Separate budgets for the Municipal, Industrial, Pretreatment and Groundwater programs have been established to better reflect the estimated costs of processing, monitoring, and administering NJPDES permits by discharge type. These estimated costs are distributed among NJPDES permittees based upon environmental impact as defined in the NJPDES regulations. The rate for each discharge category is determined using the formula at N.J.A.C. 7:14A-1.8(a)9. While the commenter is correct that the two categories are assessed fees at a different rate for each unit of environmental impact, the "polluter pays" concept is still functioning within the subset of NJPDES permits. Combining NJPDES category budgets is one of the options the Department plans to consider for next year's permit fees.

12. COMMENT: The commenter notes that the Department is not adhering to their stated philosophy of the "polluter pays." The largest municipal facility in the State discharges the greatest quantity of pollutants to the receiving waters of this State, but proportionately pays the minimum fee. The fee for this facility is the maximum fee assessment allowed of $540,686.99. This equates to less than 8.5 cents per unit. This figure is more attractive than an advanced treatment facility receives, and therefore obviously cannot be construed as equitable. The remaining municipal surface water dischargers are essentially subsidizing the four greatest contributors to surface water pollution. If the Department was not constrained by the 10 percent rule, the four major polluters would be paying an additional $2.7 million, thereby reducing the fees to the remaining permit holders. (Arnold Mitnaul, West New York Municipal Authority)

RESPONSE: The Department disagrees with the statement that the "polluter pays" concept is no longer in effect due to the maximum fee concept. The maximum fee of 10 percent is used to ensure that no one facility is assessed a disproportionate share of the program costs, while maintaining the distribution of the costs based upon environmental impact, and at the same time concurrently decreasing the proportional share of NJPDES costs paid by the permitted facilities with small and medium discharges. This distribution of costs among all dischargers allows the fee assessment methodology to distribute the costs based upon the quantity of pollutants discharged, the risk associated with the pollutants, the overall toxicity of the discharge and the impact on the receiving water effectively limiting a fee assessment based on volume.

13. COMMENT: 109 of the Surface Water Dischargers or 45 percent are being assessed fees of less than $1,000. Again the question must be posted, has the Department considered increasing the minimum fee? (Arnold Mitnaul, West New York MUA)

RESPONSE: An increase in the minimum fee schedule at N.J.A.C. 7:14A-1.8(h) is one of the major findings contained in the NJPDES Fees Task Force Report of Findings and one option the Department will consider for NJPDES fee schedule for FY94.

14. COMMENT: A cap of 10 percent of the Department's ground water program budget results in an excessive fee. (Michael Rosenberg, SmithKline Beecham)

RESPONSE: The 10 percent cap is established by current regulation at N.J.A.C. 7:14A-1.8(a)10 and cannot be changed for the FY93 budget. The Department has proposed in the April 5, 1993, edition of the New Jersey Register, 25 N.J.R. 1358(a), to amend the methodology for assessing NJPDES Ground Water permit fees for those facilities conducting site remediation. These proposed amendments would base ground water fees for site remediation on actual Department costs for facilities undergoing remediation and eliminate use of the 10 percent cap.

15. COMMENT: For facilities undergoing ground water remediation, fees should cover only the oversight and review cost incurred by the Department for the facility. (Michael Rosenberg, SmithKline Beecham)

RESPONSE: The Department has proposed a rule amendment, 25 N.J.R. 1358(a), that would base NJPDES fees for ground water remediation permits on the Department's costs for work on a particular facility. (See response to Comment 14)

16. COMMENT: Values for risk factors are the same for compounds with widely varying toxicity. (Michael Rosenberg, SmithKline Beecham)

RESPONSE: The FY93 NJPDES permit fees are based upon the assessment methodology found at N.J.A.C. 7:14A-1.8. The Department's Site Remediation Program has proposed a rule amendment at 25 N.J.R. 1358(a), that would base NJPDES Ground Water fees for site remediation on the Department's actual costs to oversee remedial activity at the facility. Risk factors would no longer be used as part of a fee formula for these types of NJPDES permits. The Department's Wastewater Facilities Regulation Program is also planning to propose a new fee assessment methodology and will evaluate this issue at that time.

17. COMMENT: The proposed fee schedule does not take into account current environmental impact as data from 1991 is used in the fee formula. (Michael Rosenberg, SmithKline Beecham)

RESPONSE: Current regulations, N.J.A.C. 7:14A-1.8(a)7, state that the data used for the fee calculation shall be the 12-month period for which data are available in the Department's computer. The 12-month period is that stated in the Annual Fee Schedule Report. This report sets the period as 1991. The Department's Site Remediation Program has already proposed a rule, 25 N.J.R. 1358(a), where environmental impact will not be used as a basis for fees at facilities undergoing remediation. The Wastewater Facilities Regulation Program also plans to propose a new fee assessment methodology for FY94 and will consider this comment at that time.

18. COMMENT: The proposed fee schedule should be issued much earlier in order to give companies adequate time to allocate funds in their budgets for fees. (Michael Rosenberg, SmithKline Beecham)

RESPONSE: The Department agrees and will try to propose the fee schedule earlier in future years. The Department's Site Remediation Program has proposed a rule, 25 N.J.R. 1358(a), whereby fees at facilities undergoing remediation will be based on actual Department costs. The Department intends to periodically send to permittees a summary of oversight costs for the period being charged. It is intended that the period be more frequent than once a year.

19. COMMENT: The permit fee should be based on the level of effort that the Department expends on the permit. (William Hamilton, Merck & Co., Inc.)

RESPONSE: The Department's Site Remediation Program has already proposed a rule, 25 N.J.R. 1358(a), whereby fees at facilities undergoing remediation will be based on the Department's actual cost for a specific facility. The NJPDES Fee Task Force recommends that NJPDES permit fees recognize the fact that certain fundamental functions are required by law regardless of the level of environmental impact. The Department's Wastewater Facilities Regulation Program will evaluate this comment as the new fee assessment methodology is developed for the FY94 fee schedule.

(a)

OFFICE OF LAND AND WATER PLANNING

Notice of Routine Program Implementation

Take notice that the Department of Environmental Protection and Energy ("Department"), pursuant to Federal regulation, 15 C.F.R. Sections 923.80-923.84, has received concurrence from the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), Office of Ocean and Coastal Resource Management, with the Department's determination that its rulemaking actions between July 1988 and June 1992 constituted Routine Program Implementation (RPI) of the New Jersey Coastal Management Program.

Notice of the Department's RPI determination was published in the New Jersey Register on March 1, 1993. See: 25 N.J.R. 1010(a). The Department received the concurrence from NOAA on March 23, 1993.

With NOAA's concurrence and publication of this notice, Federal consistency applies to the RPI changes as of the date of publication of this notice.

(b)

DIVISION OF ENVIRONMENTAL SAFETY, HEALTH AND ANALYTICAL PROGRAMS

Notice of Public Hearing

New Jersey Radiological Emergency Response Plan

Take notice that pursuant to the "Radiation Accident Response Act," N.J.S.A. 26:2D-37 et seq., the Department of Environmental Protection and Energy in cooperation with the Division of State Police will hold public hearings to determine the adequacy and effectiveness of the New Jersey Radiological Emergency Response Plan. The hearings will be held on the following dates:

Tuesday, July 27, 1993
7:00 P.M.
Fire Training Center
Cemetery Road, Mannington Township, New Jersey

Tuesday, July 13, 1993
7:00 P.M.
Greenwich Emergency Operations Center, Greenwich, New Jersey

Tuesday, July 20, 1993
7:00 P.M.
Ocean County Office of Emergency Services
Robert J. Miller Air Park, Route 530
Berkeley Township, New Jersey

In addition to accepting public comments, the following speakers will appear at the hearing: the Manager of the Bureau of Nuclear Engineering, Department of Environmental Protection and Energy, and the Director of the Office of Emergency Management, Division of State Police.

Copies of the New Jersey Radiological Emergency Response Plan are available for review at the following locations:

Office of Emergency Management
State Police Headquarters, West Trenton, New Jersey

Salem County Emergency Management Office
Cemetery Road, Mannington Township, New Jersey

Cumberland County Office of Emergency Management
Bridgeton Avenue, Bridgeton, New Jersey

Ocean County Office of Emergency Management
Robert J. Miller Air Park, Route 530
Berkeley Township, New Jersey

For additional information contact:

Department of Environmental Protection and Energy
c/o Patrick A. Mulligan, Bureau of Nuclear Engineering
CN 415, Princeton, New Jersey 08540
Telephone: (609) 987-2034

(c)

OFFICE OF LAND AND WATER PLANNING

Amendment to the Ocean County Water Quality Management Plan

Public Notice

Take notice that the New Jersey Department of Environmental Protection and Energy (NJDEPE) is seeking public comments on a proposed amendment to the Ocean County Water Quality Management (WQM) Plan. This amendment proposal was submitted by Mr. John Helbig of Adams, Rehmann and Heggan Associates, Incorporated, on behalf of the Plumsted Township Board of Education. This amendment designates the site of the proposed Middle School (Block 41, Lot 11.03) as the service area for an on site treatment facility with ground water discharge less than 20,000 gallons per day (gpd). The amendment will allow construction of a new Middle School facility with a functional capacity of 500 students and 60 professional staff. As a potential New Jersey Pollutant Discharge Elimination System (NJPDES) permitted facility, the project will be designed to meet all current water quality discharge regulations through pretreatment and discharge to ground water. The Board of Education intends to abandon their existing package treatment plant (NJPDES/Discharge to Surface Water #NJ0021407) at the existing Elementary School on Block 14, Lot 1 and connect via force main to the proposed treatment plant at the new Middle School site for treatment and discharge via ground water. Currently, the combined Elementary/Middle School generates a flow of approximately 3,000 gpd on an average school day (functional capacity of 825 students and 75 professional staff). Proposed Middle School treatment plant design will accommodate 10,000 gpd. Presently the site is designated in the Plumstead Township Wastewater Management Plan as served by individual subsurface sewage disposal systems.

This notice is being given to inform the public that a plan amendment has been proposed for the Ocean County WQM Plan. All information dealing with the aforesaid WQM Plan, and the proposed amendment is located at the Ocean County Planning Board, Court House Square, CN 2191, Toms River, New Jersey 08754; and the NJDEPE, Office of Land and Water Planning, 401 East State Street, CN423, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday.

Interested persons should submit written comments on the proposed amendment to Mr. Alan Avery, Ocean County Planning Board, at the address cited above. A copy of the comments should be sent to Dr.

Daniel J. Van Abs, Office of Land and Water Planning, at the NJDEPE address cited above. All comments must be submitted within ten working days of the date of this notice. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by NJDEPE with respect to the amendment request.

Any interested person may request in writing that NJDEPE hold a nonadversarial public hearing on the amendment or extend the public comment period in this notice up to 30 additional days. These requests must state the nature of the issues to be raised at the proposed hearing or state the reasons why the proposed extension is necessary. These requests must be submitted within 10 working days of this public notice to Dr. Van Abs at the NJDEPE address cited above. If a public hearing is held, the public comment period in this notice shall be extended 15 days after the close of the public hearing.

(a)

OFFICE OF LAND AND WATER PLANNING

Amendment to the Monmouth County Water Quality Management Plan

Public Notice

Take notice that on May 3, 1993, pursuant to the provisions of the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and the Statewide Water Quality Management Planning rules (N.J.A.C. 7:15-3.4), an amendment to the Monmouth County Water Quality Management Plan was adopted by the Department. This amendment adopts a Wastewater Management Plan (WMP) for the Manasquan River Regional Sewerage Authority (MRRSA). The WMP addresses wastewater management planning for the MRRSA district of Freehold and Farmingdale Boroughs, Howell Township, the majority of Freehold Township, and a portion of western Wall Township. The WMP delineates all of the planning area, with the exception of a portion of Wall Township, as existing and future sewer service area. The portion of Wall Township not included in the sewer service area is designated as being served by individual subsurface sewage disposal systems. The Wall Township WMP, adopted December 5, 1989, is incorporated by reference with the following changes: the site of the State of New Jersey Arthur Brisbane Child Treatment Center is removed from the individual subsurface sewage disposal area and included in the sewer service area to allow for the abandonment of the existing on-site wastewater treatment plant. Additionally, portions of Allaire State Park including the park office, maintenance facility, leased homes along Monmouth County Route 524, and the Spring Meadow Golf Course restaurant, office and maintenance facility are removed from the individual subsurface sewage disposal area and added to the sewer service area. Wall Township retains WMP responsibility for the entire Township.

The site in Freehold Township of La Mirage Diner is added to the MRRSA sewer service area and deleted from the service area of the Western Monmouth Utilities Authority (WMUA). The site remains in WMUA's WMP area.

The WMP modifies the planning area line between the Ocean County WMP area in the North Branch of the Metedeconk River drainage basin and the MRRSA WMP area within the MRRSA district in the Manasquan River drainage basin by means of a voluntary transfer. This modification will more closely follow roadway alignments rather than topographical divides.

Wastewater conveyance facilities are shown extended into Wall Township at two locations along Belmar Boulevard and Hurley Pond Road.

The WMP designates the site of the Lone Pine Landfill in Freehold Township as within the sewer service area (Operable Unit No. 1) and also as the service area for a treatment facility greater than 20,000 gallons per day discharging to ground water (Operable Unit No. 2). This second unit may ultimately discharge to the MRRSA.

A wastewater flow for the WMP area for the year 2010 of 12.727 million gallons per day (MGD) is projected. If the second unit at Lone Pine Landfill discharges to MRRSA this flow projection is increased to 12.871 MGD.

(b)

OFFICE OF LAND AND WATER PLANNING

Amendment to the Monmouth County Water Quality Management Plan

Public Notice

Take notice that the New Jersey Department of Environmental Protection and Energy (NJDEPE) is seeking public comments on a proposed amendment to the Monmouth County Water Quality Management (WQM) Plan. This amendment was submitted by Schoor DePalma & Canger Environmental Services, Inc. on behalf of the Millstone Township Board of Education (MTBOE). The MTBOE proposes to construct a new on-site wastewater disposal system to serve all of the flow generated by a new elementary school and the existing elementary school (which will be converted to a middle school). A total of 1200 students will be served at 15 gallons/student/day for a total wastewater flow of 18,000 gallons per day. The existing on-site wastewater disposal system will be abandoned.

This notice is being given to inform the public that a plan amendment has been proposed for the Monmouth County WQM Plan. All information related to the WQM Plan and the proposed amendment is located at the NJDEPE, Office of Land and Water Planning, CN 423, 401 East State Street, Trenton, New Jersey 08625. It is available for inspection between 8:30 A.M. and 4:00 P.M., Monday through Friday. An appointment to inspect the documents may be arranged by calling the Office of Land and Water Planning at (609) 633-1179.

Interested persons may submit written comments on the proposed amendment to Dr. Daniel J. Van Abs, Office of Land and Water Planning, at the NJDEPE address cited above with a copy sent to Anthony DiLodovico of Schoor DePalma & Canger Environmental Services, Inc. at P.O. Box 1149, Manalapan, N.J. 07726. All comments must be submitted within 10 working days of the date of this public notice. All comments submitted by interested persons in response to this notice, within the time limit, shall be considered by NJDEPE with respect to the amendment request.

Any interested person may request in writing that NJDEPE hold a nonadversarial public hearing on the amendment or extend the public comment period in this notice up to 30 additional days. These requests must state the nature of the issues to be raised at the proposed hearing or state the reasons why the proposed extension is necessary. These requests must be submitted within ten working days of this public notice to Dr. Daniel J. Van Abs at the NJDEPE address cited above. If a public hearing is held, the public comment period in this notice shall be extended to close 15 days after the public hearing.

HEALTH

(c)

THE COMMISSIONER

Invitation for Certificate of Need Applications

Take notice that in accordance with the provisions of N.J.A.C. 8:33-4.1(a), Bruce Siegel, M.D., M.P.H., Commissioner, New Jersey Department of Health, is inviting certificate of need applications for the following types of health care activities from all health care facilities except general acute care hospitals:

1. Any decrease in the number of licensed beds by licensure and/or health planning category where the reduction in licensed beds will result in a capital expenditure greater than $1,000,000, as referenced at N.J.A.C. 8:33-3.4.

2. Acquisition of a building, new construction and/or renovation of a health care facility which under generally accepted accounting principles results in a cumulative total project cost for all such projects within a fiscal year in excess of $1,000,000, per N.J.A.C. 8:33-3.6, providing that the acquisition of a building, new construction and/or renovation does not include the addition of any new health care services or the addition and/or conversion of beds.

Such certificate of need applications will be received in the Department of Health on the first day of any month in 1993 and will be processed in accordance with full review procedures as set forth in N.J.A.C. 8:33.

Geographic area to be served: Applications will be received from anywhere in the State of New Jersey.

Date application is due: Applications are to be received in the offices of the New Jersey Department of Health's Certificate of Need Program, Room 603, CN 360, Trenton, New Jersey 08625 on the first day of any month in 1993.

Date completeness review decision issued: Six weeks after submission of the application.

Date local advisory boards will review the applications and submit recommendations to the Commissioner and the State Health Planning Board: In accordance with the time-frames set forth in N.J.A.C. 8:33-4.

Date State Health Planning Board will review applications and submit recommendations to the Commissioner: In accordance with the time-frames set forth in N.J.A.C. 8:33-4.

Applications may be requested from and must be filed with:

Certificate of Need Program
New Jersey State Department of Health
CN 360
Trenton, New Jersey 08625-0360
Telephone: 609-292-6552

Applications must also be filed with: Local advisory board(s) serving the region of the subject health planning service or facility.

HUMAN SERVICES

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Notice of Availability of Grant Funds

Domestic Violence Core Services

Take notice that in compliance with N.J.S.A. 52:14-34.4, 34.5 and 34.6, the Department of Human Services announces the following availability of funds:

Name of grant program: Domestic Violence Core Services.

Purpose for which the grant program funds shall be used: This program is intended to enhance the provision and availability of core services to victims of domestic violence and their dependent children. Funds will be used to address the unmet needs of the target population by augmenting existing efforts to provide a full array of domestic violence core services on the local level through community social service agencies.

Amount of money in the grant program: Funding in the amount of $100,000 in State Grant-In-Aid funds is available for this program. Funds awarded to selected applicants shall be continuous, but shall not exceed an annualized amount of $60,000. There is no match requirement.

Organizations which may be eligible to apply for funding under this program: Currently operating private nonprofit community-based shelter/sheltering agencies within the State whose purpose is to provide core services to victims of domestic violence and their children are eligible to apply for funding under this program.

Qualifications needed by an Applicant to be considered for funding: In all cases, applicants must demonstrate compliance with the following provisions:

(1) The applicant must provide a majority of core services, as outlined in the domestic violence core services model, and which are targeted specifically to victims and their children;

(2) The applicant's shelter/sheltering site must have a Department of Community Affairs operating license and undergo periodic health and safety inspections, pursuant to N.J.S.A. 55:13C-5;

(3) The applicant's shelter/sheltering site must have a confidential location and adequate security measures in place;

(4) The applicant must have an affiliation agreement or memorandum of understanding that describes formal coordination and referral processes with the designated lead agency for the provision of domestic violence core services in each county;

(5) The applicant must not discriminate in providing services to eligible clients based on age, race, creed, national origin, sex, handicap condition, or financial status; and

(6) The applicant must not charge client fees or require client services in exchange for domestic violence program services.

Application Selection Criteria: Applications for funds shall be selected on the basis of demonstrated need and shall be evaluated and scored in accordance with the criteria listed below.

The maximum score for all proposals shall equal 100 points and shall be computed based on the following:

- The demonstration by the applicant that its purpose is to serve victims of spouse abuse or other forms of violence against women and their children. A maximum of 25 points shall be awarded to applicants that can demonstrate that least 90 percent of the current shelter population is composed of such victims and their children; a maximum of 10 points shall be awarded to applicants that can demonstrate that at least 67 percent of the shelter population are victims and their children; and a maximum of five points shall be awarded to applicants that can demonstrate that at least 51 percent of the shelter population are victims and their children;
- The completeness of the application and the clarity of statements within the proposal, including the availability and accuracy of all supporting documentation (maximum 10 points);
- The need justification. Specifically, the identification of gaps in the current provision and availability of domestic violence core services in the county served by the applicant, evidence of the unmet needs of the target population in relation to the Division's service priorities, and the applicant's capability to provide services that complement and complete the core services model (maximum 20 points);
- The compatibility of the applicant's goals and objectives with those of the Division and the NJCBW; and the program approach, including the accessibility of services; client eligibility requirements, and coordination with the Division's designated lead domestic violence agency in the county (maximum 15 points);
- The extent to which existing services will be augmented to provide a more comprehensive array of domestic violence core services in the county, including the adequacy and specificity of the outcome statements (maximum 15 points);
- The cost efficiency of the proposed budget as it relates to the anticipated service expansion (LOS) and its positive impact on victims of domestic violence, and if applicable, compliance with all terms and conditions of any current or previous contracts with the Department (maximum 10 points); and
- The feasibility of the timetable to implement the proposed services (maximum 5 points).

The Division will give special emphasis to the support of community-based projects of demonstrated effectiveness carried out by presently contracted agencies that provide a majority of domestic violence core services, and that are currently under-funded or otherwise unable to meet the needs of its current client population.

All proposals that identify and address the unmet needs of victims of domestic violence and their dependent children shall be considered.

Procedures for eligible organizations to apply: Agencies interested in applying for these funds may obtain a copy of the Request For Proposals from the Division of Youth and Family Services—CN 717—Trenton, NJ 08625-0717 or by calling Karen Beckmeyer at (609) 984-8201. A bidders conference is scheduled for:

Date: Monday, June 14, 1993
Time: 10:00 A.M.
Location: DYFS Central Office
50 East State Street, 5th Floor, Room 536
Trenton, New Jersey

Agencies interested in applying for these funds may also obtain a copy of the Request For Proposals by attending the bidders conference.

Address to which applications must be submitted: Agencies interested in applying for these funds should submit one signed original and 10 copies of the Request For Proposals and all required attachments comprising the proposal application package, to the Division of Youth and Family Services by 4:00 P.M. on Wednesday, July 7, 1993.

Proposals may be hand-delivered to:
Division of Youth and Family Services
Office of Policy, Planning, Budgeting and Accountability
Capital Center
50 East State Street—6th Floor
Trenton, NJ 08625-0717
Attention: Karen Beckmeyer

Proposals may be mailed to:
Division of Youth and Family Services
Office of Policy, Planning, Budgeting and Accountability
CN 717
Trenton, NJ 08625-0717
Attention: Karen Beckmeyer

Deadline by which applications must be submitted: The completed application and all supporting materials and copies must be received by 4:00 P.M. on Wednesday, July 7, 1993, at the Division of Youth and Family Services. Applications may be mailed or hand delivered. No late applications will be considered for funding, regardless of postmark.

Date by which applicants shall be notified of acceptance or rejection: August 16, 1993.

(a)

DIVISION OF YOUTH AND FAMILY SERVICES

Notice of Availability of Grant Funds

Facility Repairs and Renovations to Meet Child Care Center Physical Facility Requirements

Take notice that in compliance with N.J.S.A. 52:14-34.4, 34.5 and 34.6, the Department of Human Services announces the following availability of funds:

Name of grant program: Facility Repairs and Renovations to Meet Child Care Center Physical Facility Requirements.

Purpose for which the grant program funds shall be used: This program is intended to complete one-time repairs or minor renovations to, or to purchase equipment for, new or existing child care facilities, so that these facilities may comply with licensing physical facility regulations and applicable state and local building, fire and health codes.

Amount of money in the grant program: Funding in the amount of $185,000 in Federal funds under the Child Care and Development Block Grant is available for this program. The minimum for each grant awarded to licensed or prospective licensed child care centers is $2,500, the maximum is $25,000. There is no match requirement.

Organizations which may be eligible to apply for funding under this program: In response to this announcement, prospective operators and operators of licensed child care centers within the State, as defined in N.J.A.C. 10:122, Manual of Requirements for Child Care Centers, (N.J.S.A. 30:5B1 through 15) may submit proposals, specifically for one-time facility repairs, minor renovations and purchasing equipment necessary to meet licensing physical facility regulations and applicable State and local building and/or fire and health codes.

Ineligible Applicants: Licensed operators who have previously received funding within the last twelve months for life/safety equipment or remodeling/renovations through the Child Care and Development Block Grant or under the Capital Bond Funding Program are ineligible to apply for funds for the same center, but may apply for funds for other centers under their sponsorship.

Qualifications needed by an applicant to be considered for funding: Child care centers that are requesting funding for costs relative to meeting physical facility requirements for the licensing of a program site are expected to possess a temporary or regular certificate of occupancy for the building targeted for funding and must provide evidence that the requested repairs or renovations will permit the applicant to obtain a temporary or a regular license or to maintain a current license. In situations where the applicant does not possess a certificate of occupancy and requires the renovations or repairs to obtain one, the applicant must show evidence that the requested renovation or repair will result in the issuance of the same.

Applicants must comply with all Federal, Departmental and DYFS rules and regulations governing the purchase of services contract process, in addition to the terms and conditions set forth in this announcement. Additionally, selected grantees are required to comply with:

- Affirmative Action requirements of P.L. 1975 c.127 (N.J.A.C. 17:27); and
- Executive Order No. 189(1988) regarding conflict of interest as it pertains to N.J.A.C. 10:3.1, Debarment, Suspension and Disqualification of a Person(s). (See Attachment A: Executive Commission on Ethical Standards—Guidelines for Executive Order No. 189, pages A-3 and A-4.)

All proposals must include a statement of assurance, signed by the designated official of the applicant agency, agreeing to: not refuse to provide services to children who are under DYFS protective service supervision and who have been referred by a DYFS District Office for day care placement; and/or who are eligible for the *New Jersey Cares for Kids* child care certificate/voucher payment program, in accordance with the terms and conditions identified within the context of this document. This assurance shall indicate that the applicant agency shall not deny services to children should they be so referred, provided that there is space available at the time of the referral and that the applicant agency will accept payment on the basis of the maximum prevailing rates established by the New Jersey Department of Human Services and a co-payment from the parent for any remaining unpaid balance.

Application Selection Criteria: Applications for funds will be selected on the basis of demonstrated need and shall be evaluated and scored on the basis of the criteria listed below.

The maximum score for all criteria is 100 points and shall be computed in accordance with the following:

- Extent and seriousness of the problem in relation to the requirements specified in the State licensing law and regulations (Manual of Standards for Child Care Centers, N.J.A.C. 10:122) (for example, impact of the problem on the center's licensing status, as indicated in supporting documentation from the DYFS Bureau of Licensing). (maximum 40 points)
- Efficiency of the proposed budget in relation to the anticipated result (that is, unit cost) and, if applicable, factors such as: the number of years remaining on the applicant's building lease and/or agency non-compliance with all terms and conditions of previous contracts held with the Division. (maximum 20 points)
- Feasibility of the timetable for completing the project by the end of the liquidation period. (maximum 10 points)
- Completeness of the application, clarity of statements within the proposal, and availability and accuracy of all supporting documentation. (maximum 10 points)
- Community characteristics of the geographic areas served (specifically, the demonstrated need for child care services and the applicant's ability to provide services to address the needs of bilingual/bicultural families) and as justification for maintaining or expanding center-based child care services. (maximum 10 points)
- Compatibility of the applicant's goals and objectives in relation to the priorities identified by the Division (that is, services to infants and children under two and a half years of age) (maximum 10 points)

Procedures for eligible organizations to apply: Agencies or organizations interested in applying for these funds may obtain a copy of the Request For Proposals by contacting the appropriate DYFS Regional Office or by attending one of the regionally scheduled technical assistance (bidders) conferences, as indicated below. Additional requests for technical assistance or questions regarding the funding guidelines for child care facility improvement grants should be directed to the appropriate contact person in the DYFS Regional Office.

- For projects located in Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, and Salem Counties (for example, DYFS Southern Service Delivery Region), a technical assistance conference has been scheduled for:

  Date: Friday, June 18, 1993
  Time: 10:00 A.M.
  Location: DYFS Southern Regional Office
  392 North White Horse Pike
  Hammonton, New Jersey
  Contact Person: William Michner, Administrative Analyst
  Telephone: (609) 567-0010

- For projects located in Essex, Middlesex, and Union Counties (for example, DYFS Metropolitan Service Delivery Region), a technical assistance conference has been scheduled for:

  Date: Thursday, June 10, 1993
  Time: 10:00 A.M.
  Location: DYFS Metropolitan Regional Office
  153 Halsey Street
  3rd Floor Community Room
  Newark, New Jersey
  Contact Person: Joe Makowski, Regional Planner
  Telephone: (201) 648-4100

- For projects located in Hunterdon, Mercer, Monmouth, Ocean, and Somerset Counties (for example, DYFS Central Service Delivery Region), a technical assistance conference has been scheduled for:

  Date: Friday, June 11, 1993
  Time: 10:00 A.M.
  Location: DYFS Central Regional Office
  50 East State Street, 5th Floor, Room 536
  Trenton, New Jersey
  Contact Person: Gena Haranis, Regional Planner
  Telephone: (609) 777-2000

• For projects located in Bergen, Hudson, Morris, Passaic, Sussex, and Warren Counties (for example, DYFS Northern Service Delivery Region), a technical assistance conference has been scheduled for:

Date: Thursday, June 10, 1993
Time: 10:00 A.M.
Location: County of Passaic Administration Building
317 Pennsylvania Avenue, Room 101
Paterson, New Jersey
Contact Person: Linda Riley, Contract Supervisor
Telephone: (201) 977-4000

Address to which applications must be submitted: Operators of licensed child care facilities interested in applying for these funds should submit one signed original and five copies of the Request For Proposal and all attachments comprising the project proposal application package, must be received by 4:00 P.M., on July 6, 1993, to the appropriate DYFS Regional Administrator listed below:

• For projects located in Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, and Salem Counties (for example, DYFS Southern Service Delivery Region):

William Readel, Regional Administrator
DYFS Southern Regional Office
392 North White Horse Pike
P.O. Box 594
Hammonton, NJ 08037

• For projects located in Essex, Middlesex, and Union Counties (for example, DYFS Metropolitan Service Delivery Region):

Charles Venti, Regional Administrator
DYFS Metropolitan Regional Office
153 Halsey Street, 2nd Floor
P.O. Box 47010
Newark, NJ 07101

• For projects located in Hunterdon, Mercer, Monmouth, Ocean, and Somerset Counties (for example, DYFS Central Service Delivery Region):

William Cowherd, Regional Administrator
DYFS Central Regional Office
50 East State Street, 5th Floor
CN 717
Trenton, NJ 08625-0717

• For projects located in Bergen, Hudson, Morris, Passaic, Sussex, and Warren Counties (for example, DYFS Northern Service Delivery Region):

Jean Mendres, Regional Administrator
DYFS Northern Regional Office
100 Hamilton Plaza, Room 710
Paterson, NJ 07505

A sixth copy of the Request For Proposal and all attachments comprising the project proposal application package must be mailed to:

Richard Crane, Acting Chief
DYFS Bureau of Licensing
50 East State Street, 6th Floor
CN 717
Trenton, NJ 08625-0717

Deadline by which applications must be submitted: The completed application and all supporting materials and copies must be received by 4:00 P.M. on July 6, 1993, to the appropriate DYFS Regional Administrator and the Acting Chief of the DYFS Bureau of Licensing, as indicated above. Applications may be mailed or hand delivered. No late applications will be considered for funding, regardless of postmark.

Date by which applicants will be notified of acceptance or rejection: The Division will notify the respondents of outcome of the proposal review process by September 1, 1993.

EXECUTIVE ORDER NO. 66(1978) EXPIRATION DATES

Pursuant to Executive Order No. 66(1978), an administrative rule is assigned an expiration date not to exceed five years from the date of promulgation by a State agency, unless the rule is exempt from the provisions of the order. In the Administrative Code, a single expiration date is affixed at the chapter level and applies to the entire chapter. See N.J.A.C. 1:30-4.4 for an explanation of expiration date assignment.

The following table is a complete listing of established New Jersey Administrative Code expiration dates and exemptions, by Title and Chapter. Current expiration dates may also be found in the loose-leaf volumes of the Administrative Code as a part of the Title Table of Contents for each executive department or agency, on the Subtitle Page for each group of chapters in a Title, and at the beginning of each Chapter.

This listing is published quarterly, in March, June, September and December, in the first issue of the month.

OFFICE OF ADMINISTRATIVE LAW—TITLE 1

N.J.A.C.	Expiration Date
1:1	4/21/97
1:5	9/13/96
1:6	4/21/97
1:6A	3/19/95
1:7	4/21/97
1:10	4/21/97
1:10B	9/13/96
1:11	4/21/97
1:13	4/21/97
1:13A	4/3/94
1:14	7/15/96
1:20	4/21/97
1:21	4/21/97
1:30	1/25/96
1:31	4/21/97

AGRICULTURE—TITLE 2

N.J.A.C.	Expiration Date
2:1	11/19/95
2:1-4	Exempt (28 C.F.R. Part 35)
2:2	1/17/94
2:3	8/21/94
2:5	8/21/94
2:6	EXPIRED RULES
2:9	8/19/96
2:16	1/22/96
2:17	5/31/96
2:18	8/5/96
2:19	10/1/95
2:20	10/1/95
2:21	8/5/96
2:22	6/26/97
2:23	7/18/93
2:24	4/2/95
2:32	5/13/97
2:33	3/6/94
2:34	1/2/95
2:48	10/25/95
2:50	5/1/97
2:52	5/1/95
2:53	1/10/96
2:54	Exempt (7 U.S.C. 601 et seq., 7 C.F.R. 1004)
2:68	11/7/93
2:69	11/7/93
2:70	8/20/95
2:71	7/8/93
2:72	7/8/93
2:74	7/8/93
2:76	7/31/94
2:90	6/22/95

BANKING—TITLE 3

N.J.A.C.	Expiration Date
3:1	1/4/96
3:2	4/12/95
3:3	1/11/95
3:4	8/17/97
3:6	3/1/96
3:7	9/12/95
3:11	5/1/94
3:12	6/15/97
3:13	1/21/97
3:16	6/18/95
3:17	6/13/96
3:18	12/24/97
3:19	3/15/96
3:21	1/24/97
3:22	5/12/94
3:23	7/6/97
3:24	8/18/94
3:25	7/23/97
3:26	12/31/95
3:27	9/12/95
3:28	12/12/94
3:29	8/5/96
3:32	10/3/93
3:33	9/18/94
3:38	9/11/97
3:41	10/11/95
3:42	3/10/98

PERSONNEL—TITLE 4A

N.J.A.C.	Expiration Date
4A:1	9/22/97
4A:2	9/22/97
4A:3	9/6/93
4A:4	5/12/98
4A:5	9/22/97
4A:6	12/22/97
4A:7	9/22/97
4A:8	1/16/95
4A:9	9/22/97
4A:10	9/22/97

COMMUNITY AFFAIRS—TITLE 5

N.J.A.C.	Expiration Date
5:1	2/5/95
5:2	4/10/94
5:3	9/1/93
5:4	9/1/97
5:10	11/17/93
5:11	3/10/94
5:12	12/27/94
5:13	6/22/97
5:14	11/9/95
5:15	5/1/94
5:18	1/4/95
5:18A	1/4/95
5:18B	1/4/95
5:18C	2/5/95
5:19	1/15/98
5:20	9/3/96
5:22	2/5/95
5:23	2/3/98
5:24	7/10/95

N.J.A.C.	Expiration Date
5:25	2/19/96
5:25A	4/20/97
5:26	2/7/96
5:27	5/2/95
5:28	12/13/95
5:29	2/19/96
5:30	6/29/93
5:31	12/1/94
5:33	8/6/95
5:34	12/3/95
5:37	1/7/96
5:50	10/27/93
5:51	9/1/93
5:52	1/2/95
5:70	4/22/97
5:71	6/4/95
5:80	4/20/95
5:91	12/7/97
5:92	2/7/96
5:100	6/18/95

DEPARTMENT OF MILITARY AND VETERANS' AFFAIRS—TITLE 5A

N.J.A.C.	Expiration Date
5A:1	3/12/95
5A:2	5/17/95
5A:3	2/3/97
5A:4	2/3/97
5A:5	9/21/97

EDUCATION—TITLE 6

N.J.A.C.	Expiration Date
6:1	1/11/96
6:2	2/6/94
6:3	6/7/98
6:5	10/22/95
6:7	1/2/95
6:8	12/11/96
6:9	5/3/98
6:11	9/21/95
6:12	3/8/96
6:20	7/16/95
6:21	11/22/94
6:22	7/16/95
6:22A	12/19/93
6:24	1/11/96
6:26	8/3/97
6:28	4/10/94
6:29	2/8/95
6:30	5/11/94
6:31	11/16/94
6:39	8/14/94
6:43	8/10/95
6:46	4/10/94
6:51	8/5/96
6:53	4/10/97
6:64	9/14/97
6:68	2/26/95
6:70	10/17/94
6:78	11/7/93

ENVIRONMENTAL PROTECTION AND ENERGY—TITLE 7

N.J.A.C.	Expiration Date
7:1	8/15/95
7:1A	5/22/97
7:1C	6/15/95
7:1D	11/28/93
7:1E	9/3/96
7:1F	4/16/97
7:1G	9/29/94
7:1H	7/13/95
7:1I	7/18/93
7:1J	1/4/98
7:1K	3/1/98
7:2	10/7/96
7:3	3/21/93
7:4	8/17/97
7:4A	9/18/94
7:5	11/19/95
7:5A	6/24/93
7:5B	6/24/93
7:5C	1/16/95
7:6	6/9/94
7:7	5/12/94
7:7A	3/16/97
7:7E	7/24/95
7:7F	1/19/93
7:8	2/5/98
7:9	1/18/96
7:9A	8/21/94
7:10	9/1/94
7:11	5/3/98
7:12	11/24/97
7:13	7/14/94
7:14	4/27/94
7:14A	6/2/94
7:14B	11/18/97
7:15	10/2/94
7:18	7/3/96
7:19	2/26/95
7:19A	3/19/95
7:19B	3/19/95
7:20	5/2/95
7:20A	12/16/93
7:22	12/27/96
7:22A	2/5/95
7:23	6/9/94
7:24	4/22/96
7:25	2/15/96
7:25A	4/23/95
7:26	10/25/95
7:26A	11/18/96
7:26B	11/18/97
7:26C	5/17/98
7:26E	6/7/98
7:27	Exempt
7:27A	12/4/94
7:27B	Exempt
7:28	7/30/95
7:29	5/21/95
7:29B	2/1/93
7:30	11/24/97
7:31	6/20/93
7:36	11/21/93
7:38	9/18/95
7:45	2/6/94
7:50	Exempt
7:60	3/2/97
7:61	5/17/98

HEALTH—TITLE 8

N.J.A.C.	Expiration Date
8:7	9/14/95
8:8	4/12/94
8:9	2/14/96
8:13	9/8/97
8:18	11/6/94
8:19	5/11/95
8:20	3/2/95
8:21	10/23/95
8:21A	8/3/97
8:22	7/11/96
8:23	12/13/94
8:24	4/14/98
8:25	5/11/98

N.J.A.C.	Expiration Date
8:26	4/12/96
8:31	1/16/95
8:31A	2/20/95
8:31B	8/17/95
8:31C	4/20/97
8:33	7/27/95
8:33A	11/25/97
8:33B	7/27/95
8:33C	9/8/97
8:33E	EXPIRED RULES
8:33F	11/16/94
8:33H	9/8/97
8:33I	2/16/95
8:33J	4/24/94
8:33K	3/27/94
8:33L	11/16/92
8:33M	7/17/94
8:33N	5/15/94
8:33P	3/19/95
8:33Q	11/19/95
8:33R	12/11/94
8:34	11/15/93
8:35A	9/8/97
8:38	4/3/94
8:39	6/20/93
8:40	12/6/96
8:41	2/13/93
8:41A	2/18/97
8:42	8/17/97
8:42A	6/19/94
8:42B	7/18/93
8:43	11/19/94
8:43A	7/27/95
8:43F	2/20/95
8:43G	2/5/95
8:43H	8/21/94
8:44	11/2/93
8:45	2/7/95
8:51	9/17/95
8:52	12/11/96
8:57	4/20/95
8:57A	4/20/95
8:59	9/29/94
8:60	5/3/95
8:61	10/4/96
8:65	6/17/96
8:66	3/5/95
8:66A	3/5/95
8:70	8/19/93
8:71	2/17/94
8:80	4/6/97
8:100	7/20/97

HIGHER EDUCATION—TITLE 9

N.J.A.C.	Expiration Date
9:1	2/21/94
9:2	5/4/95
9:3	9/27/93
9:4	9/26/96
9:5	4/1/96
9:6	4/30/95
9:6A	3/15/98
9:7	11/6/97
9:8	10/15/95
9:9	10/3/93
9:11	4/17/94
9:12	4/17/94
9:14	4/11/95
9:15	8/21/94
9:16	1/19/98

HUMAN SERVICES—TITLE 10

N.J.A.C.	Expiration Date
10:1A	5/12/98
10:2	12/11/96
10:3	11/21/93
10:6	1/7/96
10:7	1/21/97
10:11	1/16/95
10:12	12/23/96
10:13	7/18/93
10:14	5/7/98
10:15	1/1/95
10:15A	1/1/95
10:15B	1/1/95
10:15C	1/1/95
10:16	12/21/97
10:31	6/5/94
10:35	9/21/97
10:36	12/29/97
10:37	11/2/95
10:38	4/29/96
10:39	5/7/95
10:40	5/11/94
10:41	3/20/94
10:42	8/19/96
10:43	8/21/94
10:44A	11/21/93
10:44B	7/16/95
10:45	2/20/95
10:46	9/17/95
10:47	11/2/95
10:48	12/19/95
10:49	8/17/97
10:50	2/27/96
10:51	10/9/95
10:52	2/8/95
10:53	4/27/95
10:53A	11/2/97
10:54	2/15/96
10:55	3/8/95
10:56	8/21/96
10:57	2/13/96
10:58	2/22/96
10:59	2/15/96
10:60	2/19/96
10:61	2/15/96
10:62	12/19/93
10:63	11/28/94
10:64	2/22/96
10:65	2/19/96
10:66	12/15/93
10:67	2/19/96
10:68	6/28/96
10:69	5/14/98
10:69A	3/26/98
10:69B	11/21/93
10:70	6/7/96
10:71	12/24/95
10:72	8/24/97
10:73	7/15/96
10:80	5/19/94
10:81	8/24/94
10:82	8/24/94
10:83	11/2/97
10:85	12/20/94
10:86	9/21/97
10:87	1/27/94
10:89	5/24/95
10:90	10/14/92
10:91	9/4/95
10:95	Exempt
10:97	5/15/94
10:99	6/4/95
10:109	2/4/96
10:120	7/9/96
10:121	7/16/95

N.J.A.C.	Expiration Date
10:121A	11/25/97
10:122	5/15/94
10:122A	Exempt
10:122B	1/4/98
10:122C	1/4/98
10:122D	1/4/98
10:122E	1/4/98
10:123	7/13/95
10:123A	8/17/97
10:124	11/4/97
10:125	6/4/95
10:126	11/7/93
10:126A	5/7/95
10:127	8/26/93
10:128	2/19/96
10:129	7/13/95
10:130	7/2/95
10:131	10/7/97
10:132	10/25/96
10:133	1/4/98
10:133A	1/4/98
10:133B	1/4/98
10:133C	1/4/98
10:141	2/7/94
10:150	10/22/97

CORRECTIONS—TITLE 10A

N.J.A.C.	Expiration Date
10A:1	6/1/97
10A:2	2/5/95
10A:3	9/16/96
10A:4	5/7/96
10A:5	6/17/96
10A:6	10/27/97
10A:8	8/19/97
10A:9	2/18/97
10A:10	7/9/97
10A:16	7/6/97
10A:17	2/3/97
10A:18	5/27/97
10A:19	8/21/94
10A:20	2/18/97
10A:21	2/4/96
10A:22	7/5/93
10A:23	7/6/97
10A:31	3/5/95
10A:32	4/16/95
10A:33	5/2/94
10A:34	4/6/97
10A:35	4/15/96
10A:70	Exempt
10A:71	2/5/95

INSURANCE—TITLE 11

N.J.A.C.	Expiration Date
11:1	1/31/96
11:2	11/30/95
11:3	1/4/96
11:4	11/30/95
11:5	10/28/93
11:7	9/25/97
11:10	7/12/95
11:12	9/27/96
11:13	11/10/97
11:15	10/26/94
11:16	1/31/96
11:17	4/15/98
11:17A	1/2/95
11:17B	1/2/95
11:17C	1/2/95
11:17D	1/2/95
11:18	12/18/94
11:19	2/1/98

LABOR—TITLE 12

N.J.A.C.	Expiration Date
12:3	12/19/93
12:5	9/19/93
12:6	10/17/93
12:15	7/30/95
12:16	3/23/95
12:17	1/4/96
12:18	3/5/98
12:19	7/2/95
12:20	8/14/94
12:35	7/16/95
12:40	2/5/95
12:41	1/17/94
12:45	5/2/93
12:51	11/22/96
12:55	12/16/96
12:56	9/26/95
12:57	9/26/95
12:58	9/26/95
12:60	3/19/98
12:61	12/16/96
12:90	12/15/94
12:100	9/22/94
12:102	5/21/95
12:105	1/11/96
12:110	1/8/98
12:112	9/6/93
12:120	5/3/95
12:175	11/28/93
12:190	2/1/98
12:195	6/24/93
12:196	8/6/95
12:200	8/3/95
12:210	12/16/96
12:235	5/3/96

COMMERCE AND ECONOMIC DEVELOPMENT—TITLE 12A

N.J.A.C.	Expiration Date
12A:9	3/7/93
12A:10-1	10/13/94
12A:11	4/30/98
12A:12	9/21/92
12A:31	7/16/95
12A:50	8/15/93
12A:54	8/15/93
12A:60	11/21/93
12A:80	7/2/95
12A:100	7/17/96
12A:120	9/6/93
12A:121	12/5/93

LAW AND PUBLIC SAFETY—TITLE 13

N.J.A.C.	Expiration Date
13:1	7/5/93
13:2	7/24/95
13:3	5/17/98
13:4	1/17/96
13:10	3/27/94
13:13	7/16/95
13:14	9/16/96
13:18	3/30/95
13:19	8/18/94
13:20	12/13/95
13:21	12/13/95
13:23	5/26/94
13:24	9/27/94
13:25	3/16/95
13:26	9/26/93
13:27	2/20/95
13:28	5/14/98
13:29	5/23/95

N.J.A.C.	Expiration Date
13:30	3/12/95
13:31	11/20/96
13:32	10/21/97
13:33	3/12/95
13:34	10/26/93
13:35	9/21/94
13:36	9/27/94
13:37	1/23/95
13:38	8/27/95
13:39	6/19/94
13:39A	6/21/96
13:40	8/3/95
13:40A	12/16/96
13:41	7/17/95
13:42	10/31/93
13:43	9/1/93
13:44	8/7/94
13:44B	11/2/97
13:44C	7/18/93
13:44D	8/7/94
13:44E	7/1/96
13:44F	6/15/97
13:44G	1/4/98
13:45A	11/9/95
13:45B	9/21/97
13:46	9/4/95
13:47	1/27/97
13:47A	10/2/97
13:47B	2/21/94
13:47C	6/9/94
13:47K	9/17/95
13:48	1/17/96
13:49	12/16/93
13:51	9/16/96
13:54	11/18/96
13:59	7/30/95
13:60	1/16/97
13:61	3/5/95
13:62	3/19/95
13:63	8/19/96
13:70	1/25/95
13:71	1/25/95
13:72	1/19/98
13:75	6/5/94
13:76	4/16/98
13:77	1/22/98
13:78	3/20/94
13:80	9/17/95
13:81	8/6/95

PUBLIC UTILITIES—TITLE 14

N.J.A.C.	Expiration Date
14:1	6/1/97
14:3	5/6/96
14:5	12/2/96
14:5A	1/4/98
14:6	9/3/96
14:9	4/1/96
14:10	9/6/96
14:11	3/1/98
14:12	11/4/96
14:17	4/24/94
14:18	7/26/95
14:25	3/5/95
14:29	3/4/96
14:30	2/19/96
14:32	1/22/96
14:38	4/1/96

ENERGY—TITLE 14A

N.J.A.C.	Expiration Date
14A:6	1/16/95
14A:8	1/16/95
14A:11	1/16/95
14A:13	EXPIRED RULES
14A:14	1/30/94

STATE—TITLE 15

N.J.A.C.	Expiration Date
15:2	4/12/98
15:3	8/19/96
15:5	7/6/97
15:10	4/15/96

PUBLIC ADVOCATE—TITLE 15A

N.J.A.C.	Expiration Date
15A:2	12/27/94

TRANSPORTATION—TITLE 16

N.J.A.C.	Expiration Date
16:1	10/1/95
16:1A	6/16/94
16:4	9/16/96
16:5	11/20/94
16:6	8/7/94
16:7	3/6/94
16:20A	2/20/95
16:20B	2/20/95
16:21	8/6/95
16:21A	11/20/94
16:21B	12/3/95
16:22	12/18/95
16:24	2/5/95
16:25	8/15/93
16:25A	5/13/98
16:26	9/5/94
16:27	4/8/96
16:28	5/7/98
16:28A	5/7/98
16:29	5/7/98
16:30	5/7/98
16:31	5/7/98
16:31A	5/7/98
16:32	2/8/95
16:38	10/15/95
16:41	9/8/97
16:41B	7/2/95
16:41C	5/4/97
16:43	5/10/95
16:44	5/25/93
16:45	9/18/94
16:46	11/6/94
16:47	4/20/97
16:49	2/8/95
16:51	2/14/97
16:53	7/17/94
16:53B	7/3/94
16:53C	5/13/98
16:53D	5/3/94
16:54	3/28/96
16:55	5/13/98
16:56	8/7/94
16:60	5/13/98
16:61	5/13/98
16:62	2/26/95
16:72	3/20/96
16:73	5/18/97
16:74	12/16/96
16:75	5/13/93
16:76	2/6/94
16:77	3/5/95
16:78	12/17/95
16:79	9/12/96
16:80	11/7/93

N.J.A.C.	Expiration Date
16:81	11/7/93
16:82	9/5/94
16:83	1/19/98

TREASURY-GENERAL—TITLE 17

N.J.A.C.	Expiration Date
17:1	5/6/93
17:2	11/8/94
17:3	8/15/93
17:4	6/8/95
17:5	11/30/95
17:6	11/22/93
17:7	12/19/93
17:8	10/15/95
17:9	10/3/93
17:10	5/6/93
17:12	10/13/94
17:13	10/13/94
17:14	10/13/94
17:16	5/2/96
17:19	3/8/95
17:20	9/26/93
17:25	5/26/94
17:27	10/7/93
17:28	8/17/95
17:29	9/26/95
17:30	3/11/97
17:32	3/19/98
17:33	4/17/94
17:40	11/19/95
17:41	4/1/96
17:42	9/8/97

TREASURY-TAXATION—TITLE 18

N.J.A.C.	Expiration Date
18:1	7/21/94
18:2	9/6/93
18:3	3/14/94
18:5	3/14/94
18:6	3/14/94
18:7	3/14/94
18:8	2/24/94
18:9	6/7/93
18:12	7/29/93
18:12A	7/29/93
18:14	7/29/93
18:15	7/29/93
18:16	7/29/93
18:17	7/29/93
18:18	3/14/94
18:18A	2/3/97
18:19	3/14/94
18:21	2/19/96
18:22	2/24/94
18:23	2/24/94
18:23A	9/4/95
18:24	6/7/93
18:25	2/19/96
18:26	6/7/93
18:35	6/7/93
18:36	3/19/95
18:37	7/23/95
18:38	2/1/98
18:39	9/8/92

OTHER AGENCIES—TITLE 19

N.J.A.C.	Expiration Date
19:3	3/29/98
19:3A	11/4/96
19:3B	3/29/98
19:4	3/29/98
19:4A	3/29/98
19:6	5/6/96
19:8	7/5/93
19:9	10/17/93
19:10	9/5/94
19:11	8/20/95
19:12	7/17/96
19:14	8/20/95
19:16	7/17/96
19:17	6/8/93
19:18	5/21/95
19:20	2/5/95
19:25	10/1/95
19:30	7/23/95
19:31	8/20/95
19:40	8/24/94
19:41	4/15/95
19:42	8/15/95
19:43	12/21/97
19:44	9/29/93
19:45	8/15/97
19:46	4/15/98
19:47	4/15/96
19:48	10/13/93
19:49	9/18/97
19:50	12/15/93
19:51	4/27/94
19:53	12/15/95
19:54	12/15/94
19:55	1/19/98
19:61	3/2/97
19:65	10/5/97
19:75	1/13/94

REGISTER INDEX OF RULE PROPOSALS AND ADOPTIONS

The research supplement to the New Jersey Administrative Code

A CUMULATIVE LISTING OF CURRENT PROPOSALS AND ADOPTIONS

The **Register Index of Rule Proposals and Adoptions** is a complete listing of all active rule proposals (with the exception of rule changes proposed in this Register) and all new rules and amendments promulgated since the most recent update to the Administrative Code. Rule proposals in this issue will be entered in the Index of the next issue of the Register. **Adoptions promulgated in this Register have already been noted in the Index by the addition of the Document Number and Adoption Notice N.J.R. Citation next to the appropriate proposal listing.**

Generally, the key to locating a particular rule change is to find, under the appropriate Administrative Code Title, the N.J.A.C. citation of the rule you are researching. If you do not know the exact citation, scan the column of rule descriptions for the subject of your research. To be sure that you have found all of the changes, either proposed or adopted, to a given rule, scan the citations above and below that rule to find any related entries.

At the bottom of the index listing for each Administrative Code Title is the Transmittal number and date of the latest looseleaf update to that Title. Updates are issued monthly and include the previous month's adoptions, which are subsequently deleted from the Index. To be certain that you have a copy of all recent promulgations not yet issued in a Code update, retain each Register beginning with the April 5, 1993 issue.

If you need to retain a copy of all currently proposed rules, you must save the last 12 months of Registers. A proposal may be adopted up to one year after its initial publication in the Register. Failure to adopt a proposed rule on a timely basis requires the proposing agency to resubmit the proposal and to comply with the notice and opportunity-to-be-heard requirements of the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq.), as implemented by the Rules for Agency Rulemaking (N.J.A.C. 1:30) of the Office of Administrative Law. If an agency allows a proposed rule to lapse, "Expired" will be inserted to the right of the Proposal Notice N.J.R. Citation in the next Register following expiration. Subsequently, the entire proposal entry will be deleted from the Index. See: N.J.A.C. 1:30-4.2(c).

Terms and abbreviations used in this Index:

N.J.A.C. Citation. The New Jersey Administrative Code numerical designation for each proposed or adopted rule entry.

Proposal Notice (N.J.R. Citation). The New Jersey Register page number and item identification for the publication notice and text of a proposed amendment or new rule.

Document Number. The Registry number for each adopted amendment or new rule on file at the Office of Administrative Law, designating the year of promulgation of the rule and its chronological ranking in the Registry. As an example, R.1993 d.1 means the first rule filed for 1993.

Adoption Notice (N.J.R. Citation). The New Jersey Register page number and item identification for the publication notice and text of an adopted amendment or new rule.

Transmittal. A series number and supplement date certifying the currency of rules found in each Title of the New Jersey Administrative Code: Rule adoptions published in the Register after the Transmittal date indicated do not yet appear in the loose-leaf volumes of the Code.

N.J.R. Citation Locator. An issue-by-issue listing of first and last pages of the previous 12 months of Registers. Use the locator to find the issue of publication of a rule proposal or adoption.

MOST RECENT UPDATE TO THE ADMINISTRATIVE CODE: SUPPLEMENT MARCH 15, 1993

NEXT UPDATE: SUPPLEMENT APRIL 19, 1993

Note: If no changes have occurred in a Title during the previous month, no update will be issued for that Title.

N.J.R. CITATION LOCATOR

If the N.J.R. citation is between:	Then the rule proposal or adoption appears in this issue of the Register	If the N.J.R. citation is between:	Then the rule proposal or adoption appears in this issue of the Register
24 N.J.R. 1933 and 2102	June 1, 1992	24 N.J.R. 4455 and 4606	December 21, 1992
24 N.J.R. 2103 and 2314	June 15, 1992	25 N.J.R. 1 and 218	January 4, 1993
24 N.J.R. 2315 and 2486	July 6, 1992	25 N.J.R. 219 and 388	January 19, 1993
24 N.J.R. 2487 and 2650	July 20, 1992	25 N.J.R. 389 and 616	February 1, 1993
24 N.J.R. 2651 and 2752	August 3, 1992	25 N.J.R. 619 and 736	February 16, 1993
24 N.J.R. 2753 and 2970	August 17, 1992	25 N.J.R. 737 and 1030	March 1, 1993
24 N.J.R. 2971 and 3202	September 8, 1992	25 N.J.R. 1031 and 1308	March 15, 1993
24 N.J.R. 3203 and 3454	September 21, 1992	25 N.J.R. 1309 and 1620	April 5, 1993
24 N.J.R. 3455 and 3578	October 5, 1992	25 N.J.R. 1621 and 1796	April 19, 1993
24 N.J.R. 3579 and 3784	October 19, 1992	25 N.J.R. 1797 and 1912	May 3, 1993
24 N.J.R. 3785 and 4144	November 2, 1992	25 N.J.R. 1913 and 2150	May 17, 1993
24 N.J.R. 4145 and 4306	November 16, 1992	25 N.J.R. 2151 and 2620	June 7, 1993
24 N.J.R. 4307 and 4454	December 7, 1992		

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
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1:13A-1.2, 18.1, 18.2	Lemon Law hearings: exceptions to initial decision	24 N.J.R. 1843(a)	R.1993 d.289	25 N.J.R. 2247(a)
Most recent update to Title 1: TRANSMITTAL 1992-5 (supplement November 16, 1992)				
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2:1-4	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1314(a)	R.1993 d.274	25 N.J.R. 2247(b)
2:6	Animal health: biological products for diagnostic or therapeutic purposes	24 N.J.R. 2974(a)		
2:6	Animal health: extension of comment period regarding biological products for diagnostic or therapeutic purposes	24 N.J.R. 3981(a)		
2:23	Gypsy moth suppression program	25 N.J.R. 1627(a)		
2:34-2.1, 2.2	Equine Advisory Board rules	25 N.J.R. 740(a)	R.1993 d.252	25 N.J.R. 2247(c)
2:71	Grades and standards	25 N.J.R. 1801(a)		
2:72	Bonding requirement of commission merchants, dealers, brokers, agents	25 N.J.R. 1802(a)		
2:74	Controlled atmosphere storage apples	25 N.J.R. 1803(a)		
2:76-2.1, 2.2, 2.3, 2.4	Recommendation of agricultural management practices	25 N.J.R. 622(a)	R.1993 d.223	25 N.J.R. 1963(a)
2:76-3.12, 4.11	Farmland preservation programs: deed restrictions on enrolled lands	25 N.J.R. 222(a)	R.1993 d.181	25 N.J.R. 1866(a)
2:76-6.2-6.11, 6.13, 6.16, 6.17	Farmland Preservation Program: acquisition of development easements	25 N.J.R. 1804(a)		
2:76-6.15	Agriculture Retention and Development Program: lands permanently deed restricted	25 N.J.R. 223(a)	R.1993 d.182	25 N.J.R. 1867(a)
2:76-10	Farmland Appraisal Handbook Standards	25 N.J.R. 1811(a)		
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3:2-1.4	Mortgage banker non-servicing	25 N.J.R. 1035(a)		
3:3-3	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1314(b)		
3:18-3.2, 5.1, 5.3, 8.1	Secondary mortgage loans	25 N.J.R. 1033(b)	R.1993 d.218	25 N.J.R. 1965(a)
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Most recent update to Title 3: TRANSMITTAL 1993-2 (supplement February 16, 1993)				
CIVIL SERVICE—TITLE 4				
Most recent update to Title 4: TRANSMITTAL 1992-1 (supplement September 21, 1992)				

N.J.A.C. CITATION		PROPOSAL NOTICE (N.J.R. CITATION)	DOCUMENT NUMBER	ADOPTION NOTICE (N.J.R. CITATION)
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4A:3	Classification, services and compensation	25 N.J.R. 1916(a)		
4A:4	Selection and appointment	25 N.J.R. 1085(b)	R.1993 d.270	25 N.J.R. 2509(a)
4A:4-6.4, 6.6	Selection and placement appeals	24 N.J.R. 4467(a)	R.1993 d.162	25 N.J.R. 1511(b)
	Most recent update to Title 4A: TRANSMITTAL 1993-2 (supplement February 16, 1993)			
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5:18-1.5, 2.4, 2.5, 2.7, 3.1–3.5, 3.7, 3.13, 3.17, 3.20, 3.30, App. 3A, 4.7, 4.9, 4.11, 4.12, 4.19	Uniform Fire Code	25 N.J.R. 393(a)	R.1993 d.197	25 N.J.R. 1868(a)
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5:18-3.3	Uniform Fire Code: administrative correction regarding general precautions in rooming and boarding houses	———	———	25 N.J.R. 2519(a)
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5:23	Uniform Construction Code: effective date of Model Codes	———	———	25 N.J.R. 1512(a)
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5:23-3.4, 4.4, 4.18, 4.20, 5.3, 5.5, 5.19A, 5.21, 5.22, 5.23, 5.25	Uniform Construction Code: mechanical inspector license and mechanical inspections	25 N.J.R. 624(a)	R.1993 d.187	25 N.J.R. 1875(a)
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5:25-2.5, 5.4	New home warranties and builders' registration: administrative corrections	———	———	25 N.J.R. 2545(a)
5:30	Local Finance Board rules	25 N.J.R. 1630(a)		
5:80-23	Housing and Mortgage Finance Agency: Housing Incentive Note Purchase Program	25 N.J.R. 1847(a)		
5:80-32	Housing and Mortgage Finance Agency: project cost certification	24 N.J.R. 2208(a)		
5:91-14	Council on Affordable Housing: interim procedures	25 N.J.R. 1118(a)		
5:92-1.1	Council on Affordable Housing: substantive rules	25 N.J.R. 1118(a)		
5:93	Council on Affordable Housin: substantive rules	25 N.J.R. 1118(a)		
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5A:7-1	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1317(a)		
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6:3	School districts	25 N.J.R. 1095(a)	R.1993 d.272	25 N.J.R. 2249(a)
6:3-9	School Ethics Commission	25 N.J.R. 1924(a)		
6:9	Educational programs for pupils in State facilities	25 N.J.R. 400(a)	R.1993 d.194	25 N.J.R. 1889(b)
6:11-3.2	Professional licensure and standards: fees	25 N.J.R. 1111(a)	R.1993 d.266	25 N.J.R. 2263(a)
6:21-12	Use of school buses	25 N.J.R. 1095(a)	R.1993 d.272	25 N.J.R. 2249(a)
6:28-1.1, 1.3, 2.3, 2.6, 2.7, 3.2, 3.7, 4.1–4.4, 7.5, 8.4, 9.2, 10.1, 10.2, 11.2, 11.4, 11.9	Special education	25 N.J.R. 1318(a)		
6:28-8.1, 8.3, 8.4	Educational programs for pupils in State facilities	25 N.J.R. 400(a)	R.1993 d.194	25 N.J.R. 1889(b)

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6:29-1.7, 9, 10	Eye protection in schools; reporting of child abuse allegations; safe and drug free schools	25 N.J.R. 1095(a)	R.1993 d.272	25 N.J.R. 2249(a)
6:30	Adult education programs	25 N.J.R. 1112(a)	R.1993 d.267	25 N.J.R. 2264(a)
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7:0	Well construction and sealing: request for public comment regarding comprehensive rules	24 N.J.R. 3286(a)		
7:0	Green glass marketing and recycling: request for public input on feasibility study	25 N.J.R. 1654(a)		
7:0	Regulated Medical Waste Management Plan: public hearing and opportunity for comment	25 N.J.R. 1654(b)		
7:1G-1–5, 7	Worker and Community Right to Know	25 N.J.R. 1631(a)		
7:1G-1.2, 6.1–6.11, 6.13-6.16	Worker and Community Right to Know Act: trade secrets and definitions	25 N.J.R. 858(a)		
7:1I	Processing of damage claims under Sanitary Landfill Facility Contingency Fund Act	25 N.J.R. 741(a)		
7:1K-1.5, 3.1, 3.4, 3.9-3.11, 4.3, 4.5, 4.7, 5.1, 5.2, 6.1, 6.2, 7.2, 7.3, 9.2-9.5, 9.7, 12.6-12.9	Pollution Prevention Program requirements	25 N.J.R. 1849(a)		
7:1K-6.1	Pollution Prevention Plan progress reporting: administrative correction	———	———	25 N.J.R. 1549(a)
7:1K-7.2	Priority industrial facilities and facility-wide permitting: administrative correction	———	———	25 N.J.R. 1876(a)
7:3	Bureau of Forestry rules	25 N.J.R. 1348(a)		
7:4B	Historic Preservation Revolving Loan Program	25 N.J.R. 748(a)		
7:5A	Natural Areas System	25 N.J.R. 1350(a)		
7:5B	Open lands management	25 N.J.R. 1354(a)		
7:6-1.45	Seven Presidents Park, Long Branch: boating restrictions within jetty areas	25 N.J.R. 57(a)	R.1993 d.158	25 N.J.R. 1516(a)
7:7A-1.4, 2.7	Freshwater Wetlands Protection Act rules: definition of project	25 N.J.R. 1642(a)		
7:7A-1.4, 2.7, 8.10	Freshwater wetlands protection: project permit exemptions; hearings on contested letters of interpretation	24 N.J.R. 912(b)	R.1993 d.159	25 N.J.R. 1755(b)
7:7E-7.4	Coastal zone management: Outer Continental Shelf oil and gas exploration and development	25 N.J.R. 5(a)		
7:7E-7.5	Alternative traffic reduction programs in Atlantic City	24 N.J.R. 1986(a)	R.1993 d.140	25 N.J.R. 1549(a)
7:9-4	Surface water quality standards: request for public comment on draft Practical Quantitation Levels	24 N.J.R. 4008(a)		
7:9-4 (7:9B)	Surface water quality standards; draft Practical Quantitation Levels; total phosphorus limitations and criteria: extension of comment periods and notice of roundtable discussion	25 N.J.R. 404(a)		
7:9-4 (7:9B-1), 6.3	Surface water quality standards	24 N.J.R. 3983(a)		
7:9-4.5, 4.14, 4.15	Surface water quality standards	25 N.J.R. 405(a)		
7:9-4.14 (7:9B-1.14)	NJPDES program and surface water quality standards: request for public comment regarding total phosphorous limitations and criteria	24 N.J.R. 4008(b)		
7:9-4.14, 4.15 (7:9B-1.14, 1.15)	Surface water quality standards: administrative corrections to proposal	24 N.J.R. 4471(a)		
7:9-6.4, 6.8, Table 1	Ground water quality standards: administrative corrections	———	———	25 N.J.R. 1552(a)
7:9A-1.1, 1.2, 1.6, 1.7, 2.1, 3.3, 3.4, 3.5, 3.7, 3.9, 3.10, 3.12, 3.14, 3.15, 5.8, 6.1, 8.2, 9.2, 9.3, 9.5, 9.6, 9.7, 10.2, 12.2–12.6, App. A, B	Individual subsurface sewage disposal systems	24 N.J.R. 1987(a)		
7:11	New Jersey Water Supply Authority: policies and procedures	25 N.J.R. 1036(a)	R.1993 d.239	25 N.J.R. 2267(a)
7:11-2.2, 2.3, 2.9	Delaware and Raritan Canal-Spruce Run/Round Valley Reservoir System: rates for sale of water	24 N.J.R. 4472(a)	R.1993 d.240	25 N.J.R. 2267(b)
7:11-4.3, 4.4, 4.9	Manasquan Reservoir Water Supply System: rates for sale of water	24 N.J.R. 4474(a)	R.1993 d.241	25 N.J.R. 2269(a)
7:13-7.1	Flood plain redelineation of Green Brook in Scotch Plains and Watchung	24 N.J.R. 4475(a)	R.1993 d.160	25 N.J.R. 1556(a)
7:14A	NJPDES Program: opportunity for interested party review of permitting system	25 N.J.R. 411(a)		

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7:14A	NJPDES Program: extension of comment period for interested party review of permitting system	25 N.J.R. 1863(a)		
7:14A-1.8	NJPDES Program fees	25 N.J.R. 1358(a)		
7:14A-1.9, 3.14	Surface water quality standards	24 N.J.R. 3983(a)		
7:14A-4.7	Handling of substances displaying the Toxicity Characteristic	25 N.J.R. 753(a)		
7:14B-1.6, 2.2, 2.6, 2.7, 2.8, 3.1–3.8	Underground Storage Tanks Program fees	25 N.J.R. 1363(a)		
7:22-3.4, 3.7, 3.8, 3.9, 3.11, 3.17, 3.20, 3.26, 3.27, 3.32, 3.34, 3.37, 4.4, 4.7, 4.8, 4.9, 4.11, 4.13, 4.17, 4.20, 4.26, 4.29, 4.32, 4.34, 4.37, 4.46, 5.4, 5.11, 5.12, 6.17, 6.27, 10.2, 10.3, 10.8, 10.9, 10.11, 10.12	Financial assistance programs for wastewater treatment facilities	24 N.J.R. 4310(b)	R.1993 d.242	25 N.J.R. 2271(a)
7:22-9.1, 9.2, 9.4, 9.11–9.15, 10.1, 10.2, 10.4, 10.5, 10.6	Sewage Infrastructure Improvement Act grants: interconnection and cross-connection abatement	25 N.J.R. 1643(a)		
7:22A-1.4, 1.5, 1.7, 1.12, 1.15, 1.16, 2.4, 2.5, 2.6, 2.8, 3.4, 4.2, 4.5, 4.8, 4.11, 6.1–6.9, 6.11, 6.12, 6.14, 6.15, 7	Sewage Infrastructure Improvement Act grants: interconnection and cross-connection abatement	25 N.J.R. 1643(a)		
7:25-1.5	Fish and Game Council: license, permit and stamp fees	25 N.J.R. 1928(a)		
7:25-5	1993-94 Game Code	25 N.J.R. 1930(a)		
7:25-5.13	1992-93 Game Code: administrative correction regarding migratory birds	———	———	25 N.J.R. 2001(c)
7:25-6.13	1993-94 Fish Code: harvest of largemouth and smallmouth bass	25 N.J.R. 224(a)	R.1993 d.139	25 N.J.R. 1556(b)
7:25-7.13, 14.1, 14.2, 14.4, 14.6, 14.7, 14.8, 14.11, 14.12, 14.13	Crab management	25 N.J.R. 1371(a)		
7:25-11	Introduction of imported or non-native shellfish or finfish into State's marine waters	24 N.J.R. 3660(a)		
7:25-18.12	Weakfish management: administrative changes	———	———	25 N.J.R. 2001(d)
7:25-18.12	Weakfish management: administrative correction	———	———	25 N.J.R. 2281(a)
7:25-18.16	Taking of horseshoe crabs	24 N.J.R. 2978(a)	R.1993 d.185	25 N.J.R. 1876(b)
7:25A-1.2, 1.4, 1.9, 4.3	Oyster management	25 N.J.R. 754(a)		
7:26-1.4, 9.3	Hazardous waste management: satellite accumulation areas	25 N.J.R. 1864(a)		
7:26-2.11, 2.13, 2B.9, 2B.10, 6.2, 6.8	Solid waste flow through transfer stations and materials recovery facilities	24 N.J.R. 3286(c)		
7:26-4A.6	Hazardous waste program fees: annual adjustment	24 N.J.R. 2001(a)		
7:26-6.6	Procedure for modification of waste flows	25 N.J.R. 991(a)		
7:26-7.6	Hazardous waste facility operator responsibilities: administrative correction	———	———	25 N.J.R. 1556(c)
7:26-8.8, 8.12, 8.19	Handling of substances displaying the Toxicity Characteristic	25 N.J.R. 753(a)		
7:26-8.13, 8.16, 8.19	Hazardous waste listings: F024 and F025	25 N.J.R. 755(a)		
7:26-8.20	Used motor oil recycling	24 N.J.R. 2383(a)		
7:26-12.3	Hazardous waste management: interim status facilities	24 N.J.R. 4253(a)		
7:26A-6	Used motor oil recycling	24 N.J.R. 2383(a)		
7:26B-1.3, 1.5, 1.6, 1.8, 1.9	Environmental Cleanup Responsibility Act rules	25 N.J.R. 100(a)	R.1993 d.137	25 N.J.R. 1557(a)
7:26B-1.3, 1.10, 1.11, 1.12	Environmental Cleanup Responsibility Act Program fees	25 N.J.R. 1375(a)		
7:26B-7, 9.3	Remediation of contaminated sites: Department oversight	24 N.J.R. 1281(b)	R.1993 d.186	25 N.J.R. 2002(a)
7:26C	Remediation of contaminated sites: Department oversight	24 N.J.R. 1281(b)	R.1993 d.186	25 N.J.R. 2002(a)
7:26E	Technical requirements for contaminated site remediation	24 N.J.R. 1695(a)	R.1993 d.245	25 N.J.R. 2281(b)
7:27-8.1, 8.3, 8.27	Air pollution control: requirements and exemptions under facility-wide permits	24 N.J.R. 4323(a)		
7:27-19	Control and prohibition of air pollution from oxides of nitrogen	25 N.J.R. 631(a)		

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7:27-26	Low Emissions Vehicle Program	25 N.J.R. 1381(a)		
7:27A-3.5, 3.10	Control and prohibition of air pollution from oxides of nitrogen: civil administrative penalties	25 N.J.R. 631(a)		
7:28-15, 16.2, 16.8	Medical diagnostic x-ray installations; dental radiographic installations	25 N.J.R. 7(a)		
7:28-15, 16.2, 16.8	Medical diagnostic x-ray installations; dental radiographic installations; extension of comment period	25 N.J.R. 1039(a)		
7:29-1.1, 1.2, 2	Determination of noise from stationary sources: extension of comment period	25 N.J.R. 1425(a)		
7:29-1.1, 1.5, 2	Determination of noise from stationary sources	25 N.J.R. 1040(a)		
7:31	Toxic Catastrophe Prevention Act Program	25 N.J.R. 1425(b)		
7:32	Energy conservation in State buildings	25 N.J.R. 1655(a)		
7:36	Green Acres Program: opportunity to review draft rule revisions	25 N.J.R. 1473(a)		
7:36-9	Green Acres Program: nonprofit land acquisition	24 N.J.R. 2405(a)	R.1993 d.265	25 N.J.R. 2472(a)
7:50-4.1, 4.70	Pinelands Comprehensive Management Plan: expiration of development approvals and waivers	25 N.J.R. 225(a)	R.1993 d.211	25 N.J.R. 2119(a)
7:61	Commissioners of Pilotage: licensure of Sandy Hook pilots	24 N.J.R. 3477(a)		
7:61-3	Board of Commissioners of Pilotage: Drug Free Workplace Program	25 N.J.R. 625(a)	R.1993 d.212	25 N.J.R. 2123(a)
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8:2	Creation of birth record	24 N.J.R. 4325(a)		
8:2	Creation of birth record: reopening of comment period	25 N.J.R. 660(a)		
8:21-3.13	Repeal (see 8:21-3A)	24 N.J.R. 3100(a)		
8:21-3A	Registration of manufacturers and wholesale distributors of non-prescription drugs, and manufacturers and wholesale distributors of devices	24 N.J.R. 3100(a)		
8:24	Packing of refrigerated foods in reduced oxygen packages by retail establishments: preproposal	25 N.J.R. 660(b)		
8:24	Retail food establishments and food and beverage vending machines	25 N.J.R. 662(a)	R.1993 d.201	25 N.J.R. 1965(b)
8:24-8, 9	Temporary and mobile retail food establishments and agricultural markets	25 N.J.R. 1965(b)		
8:25	Youth Camp Safety Act standards	25 N.J.R. 756(a)	R.1993 d.264	25 N.J.R. 2546(b)
8:31B-2, 3.70	Hospital reimbursement: bill-patient data submissions; revenue cap monitoring	25 N.J.R. 1660(a)		
8:33-3.11	Certificate of Need process for demonstration and research projects	24 N.J.R. 3104(a)		
8:33A-1.2, 1.16	Hospital Policy Manual: applicant preference; equity requirement	24 N.J.R. 4476(a)		
8:35A-1.2, 3.4, 3.6, 4.1, 5.3	Maternal and child health consortia: fiscal management and staffing	25 N.J.R. 1116(a)	R.1993 d.285	25 N.J.R. 2546(c)
8:39	Long-term care facilities: licensing standards	25 N.J.R. 1474(a)		
8:39-13.4, 27.1, 27.8, 29.4, 33.2, 45, 46	Long-term care facilities: use of restraints and psychoactive drugs; pharmacy supplies; Alzheimer's and dementia care services	24 N.J.R. 4228(a)	R.1993 d.230	25 N.J.R. 2548(a)
8:41	Mobile intensive care programs	24 N.J.R. 3255(b)		
8:43	Licensure of residential health care facilities	25 N.J.R. 25(a)		
8:43	Licensure of residential health care facilities: public hearing	25 N.J.R. 757(a)		
8:43A	Ambulatory care facilities: public meeting and request for comments regarding Manual of Standards for Licensure	24 N.J.R. 3603(a)		
8:43A	Licensure of ambulatory care facilities	25 N.J.R. 757(b)		
8:42B	Drug treatment facilities: standards for licensure	25 N.J.R. 1476(a)		
8:43G-5.10	Acute care hospital participation in New Jersey Poison Control Information and Education System	25 N.J.R. 792(a)	R.1993 d.229	25 N.J.R. 1969(a)
8:43G-5.10	Hospital payments to maternal and child health consortia	25 N.J.R. 1295(a)	R.1993 d.236	25 N.J.R. 2555(a)
8:43G-5.10, 19.1, 19.20	Hospital licensing standards: funding for regionalized services; obstetric services structural organization	25 N.J.R. 1117(a)	R.1993 d.286	25 N.J.R. 2554(a)
8:44-2.2, 3	Limited purpose laboratories	25 N.J.R. 668(a)	R.1993 d.200	25 N.J.R. 1969(b)
8:59-1, 2, 5, 6, 9, 11, 12	Worker and Community Right to Know Act rules	25 N.J.R. 864(a)		
8:59-3.1, 3.2, 3.3, 3.5-3.9, 3.11, 3.13-3.17	Worker and Community Right to Know Act: trade secrets and definitions	25 N.J.R. 858(a)		
8:59-App. A, B	Worker and Community Right to Know Act: preproposal concerning Hazardous Substance List and Special Health Hazard Substance List	25 N.J.R. 792(a)		

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8:70	List of Interchangeable Drug Products: evaluation and acceptance criteria	25 N.J.R. 1814(a)		
8:71	Interchangeable drug products (see 24 N.J.R. 2557(b), 3173(a), 4260(b); 25 N.J.R. 582(a))	24 N.J.R. 1674(a)	R.1993 d.226	25 N.J.R. 1970(b)
8:71	Interchangeable drug products (see 24 N.J.R. 3174(c), 3728(a), 4262(a))	24 N.J.R. 2414(b)	R.1993 d.67	25 N.J.R. 583(a)
8:71	Interchangeable drug products (see 24 N.J.R. 4261(a); 25 N.J.R. 582(b))	24 N.J.R. 2997(a)	R.1993 d.225	25 N.J.R. 1970(a)
8:71	Interchangeable drug products	24 N.J.R. 4009(a)	R.1993 d.64	25 N.J.R. 580(b)
8:71	Interchangeable drug products (see 25 N.J.R. 1221(a))	25 N.J.R. 55(a)	R.1993 d.228	25 N.J.R. 1969(c)
8:71	Interchangeable drug products	25 N.J.R. 875(a)	R.1993 d.227	25 N.J.R. 1970(c)
8:71	Interchangeable drug products	25 N.J.R. 1814(b)		
8:71	Interchangeable drug products	25 N.J.R. 1815(a)		
8:100	State Health Planning Board: public hearings on draft chapters of State Health Plan	24 N.J.R. 3788(a)		
8:100	State Health Plan: draft chapters	24 N.J.R. 3789(a)		
8:100	State Health Plan: draft chapters on AIDS, and preventive and primary care	24 N.J.R. 4151(a)		

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9:1-5.11	Regional accreditation of degree-granting proprietary institutions	24 N.J.R. 3207(a)		
9:2-11	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1323(a)		
9:4-1.12	County college construction projects	25 N.J.R. 668(b)	R.1993 d.224	25 N.J.R. 1971(a)
9:4-3.12	Noncredit courses at county colleges	25 N.J.R. 227(a)	R.1993 d.172	25 N.J.R. 1763(a)
9:7-1.2, 2.11, 4.2	Student Assistance Programs: administrative corrections	————	————	25 N.J.R. 1513(a)
9:7-2.6	Student assistance programs: independent student status	25 N.J.R. 1945(a)		
9:11-1.1, 1.2, 1.4, 1.6, 1.10, 1.22, 1.23	Educational Opportunity Fund: student eligibility for undergraduate grants	25 N.J.R. 1663(a)		
9:11-1.5	Educational Opportunity Fund Program: financial eligibility for undergraduate grants	25 N.J.R. 1946(a)		

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10:1-2	Public comments and petitions regarding Department rules (recodify as 10:1A)	25 N.J.R. 1042(a)	R.1993 d.271	25 N.J.R. 2557(a)
10:4	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1323(b)		
10:14	Statewide Respite Care Program Manual	25 N.J.R. 876(a)	R.1993 d.256	25 N.J.R. 2557(b)
10:15-1.2	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:15A-1.2	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:15B-1.2, 2.1	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:15C-1.1	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:31-1.4, 2.1, 2.2, 2.3, 8.1, 9.1	Screening and Screening Outreach Programs: mental health services	25 N.J.R. 1324(a)		
10:37-5.46–5.50, 12	Community mental health services: children's partial care programs	25 N.J.R. 669(a)		
10:38A	Pre-Placement Program for patients at State psychiatric facilities	24 N.J.R. 4326(a)		
10:41-2.3, 2.8, 2.9	Division of Developmental Disabilities: access to client records and record confidentiality	25 N.J.R. 432(a)		
10:51	Pharmaceutical Services Manual	24 N.J.R. 3053(a)		
10:51-1.1	Hospital services reimbursement methodology	25 N.J.R. 1582(a)	R.1993 d.263	25 N.J.R. 2560(a)
10:52-1.9, 1.13	Reimbursement methodology for distinct units in acute care hospitals and for private psychiatric hospitals	24 N.J.R. 4477(a)		
10:52-1.17	Out-of-state inpatient hospital services: administrative correction	————	————	25 N.J.R. 1513(b)
10:52-1.23	Inpatient hospital services: adjustments to Medicaid payer factors	24 N.J.R. 4478(a)		
10:52-5, 6, 7, 8, 9	Hospital services reimbursement methodology	25 N.J.R. 1582(a)	R.1993 d.263	25 N.J.R. 2560(a)
10:53-1.1	Reimbursement methodology for special hospitals	24 N.J.R. 4477(a)		
10:63-3.3, 3.8	Long-term care services: elimination of salary regions	25 N.J.R 433(a)		
10:69	Hearing Aid Assistance to the Aged and Disabled Eligibility Manual	25 N.J.R. 228(a)	R.1993 d.281	25 N.J.R. 2589(a)
10:69-5.8; 69A-5.4, 5.6, 6.12, 7.2; 69B-4.13	HAAAD, PAAD, and Lifeline programs: fair hearing requests, prescription reimbursement, benefits recovery	24 N.J.R. 4329(a)		

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10:69A	Pharmaceutical Assistance to the Aged and Disabled Eligibility Manual	24 N.J.R. 4479(a)	R.1993 d.175	25 N.J.R. 1764(a)
10:69A-2.1, 4.1–4.4, 5.3, 5.5	PAAD prescription copayment	24 N.J.R. 4328(a)	R.1993 d.155	25 N.J.R. 1514(a)
10:71-4.8, 5.4, 5.5, 5.6, 5.9	Medicaid Only: eligibility computation amounts	25 N.J.R. 1818(a)		
10:72-1.1, 4.1, 4.5	New Jersey Care—Special Medicaid Manual: specified low-income Medicare beneficiaries	25 N.J.R. 1042(b)		
10:81-11.4, 11.16A, 11.20	Public Assistance Manual: closing criteria for IV-D cases; application fee for non-AFDC applicants	25 N.J.R. 881(a)		
10:81-11.5, 11.7, 11.9, 11.20, 11.21	Public Assistance Manual: child support and paternity services	24 N.J.R. 2328(a)	R.1993 d.282	25 N.J.R. 2589(b)
10:81-14.18A	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:82-5.3	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:83-1.11	Supplemental Security Income (SSI) payment levels	25 N.J.R. 434(a)	R.1993 d.166	25 N.J.R. 1764(b)
10:84	Administration of public assistance programs: agency action on public hearing	24 N.J.R. 4480(a)		
10:84-1	Administration of public assistance programs	24 N.J.R. 4480(b)		
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10:86-10.2, 10.6	Child care services: payment rates and co-payment fees	25 N.J.R. 1692(a)		
10:121A-1.5, 2.7	Manual of Requirements for Adoption Agencies: administrative correction and changes	———	———	25 N.J.R. 2591(a)
10:122C-2.5	Approval of foster homes: administrative correction	———	———	25 N.J.R. 1514(b)
10:123-3.4	Personal needs allowance for eligible residents of residential health care facilities and boarding houses	24 N.J.R. 3088(a)		
10:123-3.4	Personal needs allowance for eligible residents of residential health care facilities and boarding houses: annual adjustment	25 N.J.R. 229(a)	R.1993 d.152	25 N.J.R. 1515(a)
10:124-5.1	Children's shelter facilities and homes: local government physical facility requirements	24 N.J.R. 4482(a)	R.1993 d.156	25 N.J.R. 1515(b)
10:127	Residential child care facilities: manual of requirements	25 N.J.R. 1716(a)		
10:133A-1.1	DYFS initial response: administrative correction	———	———	25 N.J.R. 1514(b)
10:133C-4	Division of Youth and Family Services: case goals	25 N.J.R. 1947(a)		
10:140	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1326(a)		

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10A:1-2.2	"Division of Operations", "indigent inmate" defined	25 N.J.R. 1043(a)	R.1993 d.246	25 N.J.R. 2591(b)
10A:1-3	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1326(b)		
10A:3-3.7	Use of chemical agents	25 N.J.R. 1044(a)	R.1993 d.219	25 N.J.R. 1971(b)
10A:31-5.1, 5.2, 5.3	Adult county correctional facilities: staff training	25 N.J.R. 1817(a)		
10A:71-3.2, 3.21	State Parole Board: calculation of parole eligibility terms	25 N.J.R. 1665(a)		
10A:71-3.47	Inmate parole hearings: victim testimony process	24 N.J.R. 4483(a)		
10A:71-6.4, 7.3	State Parole Board: conditions of parole	25 N.J.R. 435(a)		

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11:1-3	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1327(a)		
11:1-7	New Jersey Property-Liability Insurance Guaranty Association: plan of operation	25 N.J.R. 1045(a)		
11:1-31	Surplus lines insurer eligibility	25 N.J.R. 1819(a)		
11:1-32.4	Automobile insurance: limited assignment distribution servicing carriers	24 N.J.R. 519(a)	R.1992 d.371	24 N.J.R. 3414(a)
11:1-32.4	Workers' compensation self-insurance	24 N.J.R. 1944(a)	R.1993 d.157	25 N.J.R. 1526(a)
11:1-32.4	Workers' compensation self-insurance: extension of comment period	24 N.J.R. 2708(b)		
11:1-33	Public Advocate reimbursement disputes	24 N.J.R. 2706(a)	R.1993 d.179	25 N.J.R. 1764(c)
11:1-34	Surplus lines: exportable list procedures	24 N.J.R. 4331(a)		
11:2-33	Workers' compensation self-insurance	24 N.J.R. 1944(a)	R.1993 d.157	25 N.J.R. 1526(a)
11:2-33	Workers' compensation self-insurance: extension of comment period	24 N.J.R. 2708(b)		
11:2-33.3, 33.4	Workers' compensation self-insurance: administrative corrections	———	———	25 N.J.R. 1877(a)
11:2-34	Surplus lines: allocation of premium tax and surcharge	25 N.J.R. 1827(a)		
11:3-2.8, 33.2, 34.4, 44	Automobile insurance: provision of coverage to all applicants who qualify as eligible persons	25 N.J.R. 1290(a)	R.1993 d.238	25 N.J.R. 2479(a)
11:3-3	Limited assignment distribution servicing carriers	25 N.J.R. 1327(b)		

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11:3-16.7	Automobile insurance: rating programs for physical damage coverages	24 N.J.R. 3604(a)		
11:3-16.12	Automobile insurance: filings reflecting paid, apportioned MTF expenses and losses	24 N.J.R. 4486(a)	R.1993 d.148	25 N.J.R. 1543(a)
11:3-16.12	Automobile insurance: public hearing and extension of comment period regarding filings reflecting paid, apportioned MTF expenses and losses	25 N.J.R. 56(a)		
11:3-19.3, 34.3	Automobile insurance eligibility rating plans: incorporation of merit rating surcharge	24 N.J.R. 2332(a)		
11:3-20.5, 20A.1	Automobile insurers: reporting apportioned share of MTF losses in excess profits reports; ratio limiting the effect of negative excess investment income	25 N.J.R. 1829(a)		
11:3-28.8	Reimbursement of excess medical expense benefits paid by insurers	24 N.J.R. 3215(a)	R.1993 d.178	25 N.J.R. 1769(a)
11:3-29.2, 29.4, 29.6	Automobile insurance PIP coverage: medical fee schedules	25 N.J.R. 229(b)		
11:3-29.6	Automobile PIP coverage: physical therapy services	24 N.J.R. 2998(a)		
11:3-33.2	Appeals from denial of automobile insurance: failure to act timely on written application for coverage	24 N.J.R. 2128(b)		
11:3-35.5	Automobile insurance rating: eligibility points of principal driver	24 N.J.R. 2331(a)		
11:5-1.9	Real Estate Commission: transmittal of funds to lenders	24 N.J.R. 4268(a)		
11:5-1.23	Real Estate Commission: transmittal by licensees of written offers on property	24 N.J.R. 3486(a)		
11:5-1.36	Real Estate Guaranty Fund assessment	25 N.J.R. 56(b)	R.1993 d.153	25 N.J.R. 1548(a)
11:5-1.38	Real Estate Commission: pre-proposal regarding buyer-brokers	24 N.J.R. 3488(b)		
11:5-1.43	Real Estate Commission: licensee provision of Agency Information Statement	25 N.J.R. 1948(a)		
11:6-2	Workers' compensation managed care organizations	25 N.J.R. 1330(a)		
11:13-7.4, 7.5	Commercial lines: exclusions from coverage; refiling policy forms	25 N.J.R. 1053(a)		
11:13-8	Commercial lines: prospective loss costs filing procedures	25 N.J.R. 1047(a)		
11:15-3	Joint insurance funds for local government units providing group health and term life benefits	25 N.J.R. 436(a)		
11:17	Producer licensing	25 N.J.R. 883(a)	R.1993 d.206	25 N.J.R. 1972(a)
11:17-1.2, 2.3–2.15, 5.1–5.6	Insurance producer licensing	24 N.J.R. 3216(a)		
11:17A-1.2, 1.3, 1.4, 1.5, 4.6	Insurance producers and limited insurance representatives: licensure and registration	25 N.J.R. 446(a)	R.1993 d.199	25 N.J.R. 1878(a)
11:17A-1.2, 1.7	Appeals from denial of automobile insurance: failure to act timely on written application for coverage; premium quotation	24 N.J.R. 2128(b)		
11:17A-1.2, 1.7	Automobile insurance: provision of coverage to all applicants who qualify as eligible persons	25 N.J.R. 1290(a)	R.1993 d.238	25 N.J.R. 2479(a)
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12:7	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1334(a)		
12:18	Temporary Disability Benefits Program	25 N.J.R. 262(a)	R.1993 d.141	25 N.J.R. 1515(c)
12:18-1.1, 2.4, 2.27, 2.40, 2.43, 2.48, 3.1, 3.2, 3.3	Temporary Disability Benefits Program: extension of comment period	25 N.J.R. 1335(a)		
12:18-1.1, 2.4, 2.27, 2.40, 2.43, 2.48, 3.1, 3.2, 3.3	Temporary Disability Benefits Program	25 N.J.R. 1515(c)		
12:23	Workforce Development Partnership Program: application and review process for customized training services	25 N.J.R. 449(a)		
12:23-3	Workforce Development Partnership Program: application and review process for individual training grants	25 N.J.R. 884(a)		
12:23-4	Workforce Development Partnership Program: application and review process for approved training	25 N.J.R. 886(a)		
12:23-5	Workforce Development Partnership Program: application and review process for additional unemployment benefits during training	25 N.J.R. 887(a)		

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12:23-6	Workforce Development Partnership Program: application and review process for employment and training grants for services to disadvantaged workers	25 N.J.R. 1054(a)		
12:58-1.2	Child labor: student learner in cooperative vocational education program	25 N.J.R. 889(a)	R.1993 d.183	25 N.J.R. 1881(a)
12:60	Prevailing wages for public works	25 N.J.R. 453(a)	R.1993 d.164	25 N.J.R. 1771(a)
12:60-3.2, 4.2	Prevailing wages on public works contracts: telecommunications worker	24 N.J.R. 2689(a)		
12:60-3.2, 4.2	Prevailing wages on public works contracts: extension of comment period	24 N.J.R. 3015(b)		
12:60-3.2, 4.2	Prevailing wages for public works: extension of comment period	24 N.J.R. 3607(a)		
12:100-4.1, 4.2	Public employee safety and health: Process Safety Management of Highly Hazardous Chemicals; employer defined	25 N.J.R. 890(a)	R.1993 d.184	25 N.J.R. 1882(a)
12:100-4.2	Public employee safety and health: occupational exposure to bloodborne pathogens	24 N.J.R. 3607(b)		
12:100-4.2	Public employee safety and health: exposure to hazardous chemicals in laboratories	25 N.J.R. 453(b)		
12:100-4.2	Public employee safety and health: exposure to formaldehyde	25 N.J.R. 455(a)	R.1993 d.171	25 N.J.R. 1771(b)
12:195	Carnival-amusement rides safety	25 N.J.R. 1832(a)		
12:195-2.1, 3.22, 6.1, 7	Carnival and amusement rides: bungee jumping	Emergency (expires 7-2-93)	R.1993 d.244	25 N.J.R. 2128(a)
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12A:1	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1335(b)		
12A:9	Development of small businesses and women and minority businesses: waiver of sunset provision of Executive Order No. 66(1978)	25 N.J.R. 1335(c)		
12A:9	Development of small businesses and women and minority businesses	25 N.J.R. 1752(a)		
12A:11	Certification of women-owned and minority-owned businesses	25 N.J.R. 1056(a)	R.1993 d.237	25 N.J.R. 2484(a)
12A:11	Certification of women-owned and minority-owned businesses: extension of comment period	25 N.J.R. 1753(a)		
12A:31-1.4	New Jersey Development Authority: interest rate on direct loans	25 N.J.R. 891(a)	R.1993 d.243	25 N.J.R. 2484(b)
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13:1	Police Training Commission rules	25 N.J.R. 1336(a)		
13:1C	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1338(a)		
13:2-14.2, 14.7, 20.6, 21.4	Alcoholic beverage control: permits, insignia, and fees	25 N.J.R. 1340(a)	R.1993 d.288	25 N.J.R. 2485(a)
13:3	Amusement games control	25 N.J.R. 891(b)	R.1993 d.233	25 N.J.R. 1987(a)
13:19-1.1, 1.7	Driver Control Service: administrative hearings applicability	25 N.J.R. 893(a)		
13:20-37	Motor vehicles with modified chassis height	24 N.J.R. 3662(a)		
13:20-37	Motor vehicles with modified chassis height: extension of comment period	24 N.J.R. 4333(b)		
13:20-38	Dimensional standards for automobile transporters	25 N.J.R. 1342(a)		
13:26	Transportation of bulk commodities	25 N.J.R. 1343(a)		
13:27-2.2 through 13:45A-26.4	Division of Consumer Affairs: administrative changes to various licensing board and committee rules	———	———	25 N.J.R. 1516(b)
13:28	Board of Cosmetology and Hairstyling rules	25 N.J.R. 893(b)	R.1993 d.287	25 N.J.R. 2485(b)
13:29-1.13	Board of Accountancy: biennial renewal fee for inactive or retired licensees	25 N.J.R. 1665(b)		
13:30-8.5	Board of Dentistry: complaint review procedures	24 N.J.R. 2800(a)		
13:30-8.6	Board of Dentistry: professional advertising	24 N.J.R. 2801(a)		
13:30-8.7	Board of Dentistry: patient records	25 N.J.R. 1833(a)		
13:30-8.18	Continuing dental education	25 N.J.R. 1344(a)		
13:33-1.35, 1.36	Ophthalmic dispensers and technicians: referrals; space rental agreements	24 N.JR. 4010(a)		
13:33-1.41, 1.43	Licensed ophthalmic dispensers: continuing education	25 N.J.R. 57(b)	R.1993 d.173	25 N.J.R. 1771(c)
13:35-6.13, 9	Acupuncture Examining Board: practice of acupuncture	24 N.J.R. 4013(a)		
13:35-6.13, 10.9	Board of Medical Examiners: fee schedule; athletic trainer registration fee	25 N.J.R. 1058(a)	R.1993 d.260	25 N.J.R. 2487(a)

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13:35-10	Practice of athletic trainers	25 N.J.R. 265(a)		
13:37	Board of Nursing rules	25 N.J.R. 455(b)		
13:37-12.1, 14	Board of Nursing: certification of homemaker-home health aides	25 N.J.R. 1950(a)		
13:37-13.1, 13.2	Nurse anesthetist: conditions for practice	24 N.J.R. 4020(a)		
13:38-1.2, 1.3, 2.5	Practice of optometry: permissible advertising	24 N.J.R. 4237(a)		
13:39-1.3	Board of Pharmacy: fee schedule	25 N.J.R. 1666(a)		
13:39-5.2	Board of Pharmacy: information on prescription labels	25 N.J.R. 1667(a)		
13:39-7.14	Board of Pharmacy: patient profile record system and patient counseling by pharmacist	25 N.J.R. 266(a)		
13:40A-6.1, 7	Board of Real Estate Appraisers: apprentice program	25 N.J.R. 267(a)	R.1993 d.177	25 N.J.R. 1773(a)
13:41-2.1	Board of Professional Planners: professional misconduct	24 N.J.R. 3221(a)		
13:44C	Audio and Speech-Language Pathology Advisory Committee rules	25 N.J.R. 1668(a)		
13:45A-24	Toy and bicycle safety	24 N.J.R. 3019(b)		
13:45A-24	Toy and bicycle safety: extension of comment period	24 N.J.R. 3666(a)		
13:46-23.5, 23A	State Athletic Control Board: standards of ethical conduct	24 N.J.R. 4489(a)		
13:70-12.4	Thoroughbred racing: claimed horse	25 N.J.R. 1059(a)		
13:70-14A.8	Thoroughbred racing: possession of drugs or drug instruments	25 N.J.R. 1060(a)	R.1993 d.262	25 N.J.R. 2488(a)
13:70-29.50	Thoroughbred racing: daily triple payoff in dead heat for win	25 N.J.R. 1671(a)		
13:71-23.3A	Harness racing: pre-race blood gas analyzing machine testing program	25 N.J.R. 269(a)	R.1993 d.174	25 N.J.R. 1775(a)
13:71-23.9	Harness racing: possession of drugs or drug instruments	25 N.J.R. 1061(a)	R.1993 d.261	25 N.J.R. 2488(b)
13:75-1.7	Violent Crimes Compensation Board: reimbursement for funeral expenses	25 N.J.R. 674(a)	R.1993 d.250	25 N.J.R. 2488(c)
13:75-1.12	Violent Crimes Compensation Board: attorney's fees requiring affidavit of service	25 N.J.R. 674(b)	R.1993 d.251	25 N.J.R. 2489(a)
13:76	Arson investigators: training and certification	25 N.J.R. 896(a)	R.1993 d.208	25 N.J.R. 1987(b)
13:81-1.2, 2.1	Statewide 9-1-1 emergency telecommunications system	24 N.J.R. 4493(a)	R.1993 d.209	25 N.J.R. 1987(c)

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14:3-3.6	Discontinuance of service to multi-family dwellings	25 N.J.R. 1346(a)		
14:3-5.1	Relocation or closing of utility office	24 N.J.R. 2132(a)		
14:3-6.5	Public records	24 N.J.R. 1966(a)	R.1993 d.273	25 N.J.R. 2489(b)
14:3-7.15	Discontinuance of services to customers: notification of municipalities and others	24 N.J.R. 3023(a)		
14:3-10.15	Solid waste collection: customer lists	24 N.J.R. 3286(c)		
14:6-5	Natural gas service: inspection and operation of master meter systems	24 N.J.R. 4494(a)	R.1993 d.247	25 N.J.R. 2490(a)
14:9B	Private domestic wastewater treatment facilities	24 N.J.R. 1863(a)	Expired	
14:10-5	Competitive telecommunications services	24 N.J.R. 1868(a)	R.1993 d.248	25 N.J.R. 2492(a)
14:10-7	Telephone access to adult-oriented information	24 N.J.R. 1238(a)	R.1993 d.180	25 N.J.R. 1882(b)
14:11-7.10	Solid waste disposal facilities: initial tariff for special in lieu payment	24 N.J.R. 3286(c)		
14:11-8	Natural gas pipelines	25 N.J.R. 897(a)		
14:18-2.11	Cable television: pre-proposal regarding disposition of on-premises wiring	24 N.J.R. 4496(a)		
14:18-2.11	Cable television: change in hearing date and comment period for pre-proposal regarding disposition of on-premises wiring	25 N.J.R. 270(a)		
14:18-9.2, 10.1-10.5	Cable television: testing of service and technical standards for system operation	24 N.J.R. 4497(a)		

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15:1	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1347(a)		
15:2	Commercial recording filing and expedited service	25 N.J.R. 901(a)	R.1993 d.193	25 N.J.R. 1884(a)

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PUBLIC ADVOCATE—TITLE 15A

Most recent update to Title 15A: TRANSMITTAL 1990-3 (supplement August 20, 1990)

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16:1B	Disability discrimination grievance procedure regarding compliance with Americans with Disabilities Act (ADA)	25 N.J.R. 1478(a)		
16:13	Rural Secondary Road Systems Aid: repealed	25 N.J.R. 59(b)	R.1993 d.149	25 N.J.R. 1517(a)
16:20	Federal Aid Urban Systems: repealed	25 N.J.R. 60(a)	R.1993 d.150	25 N.J.R. 1517(b)
16:25A	Soil erosion and sediment control standards	25 N.J.R. 1479(a)	R.1993 d.276	25 N.J.R. 2496(a)
16:28	Speed limits for State highways	25 N.J.R. 1479(b)	R.1993 d.257	25 N.J.R. 2496(b)
16:28-1.41	Speed limit zones along U.S. 9 in Berkeley Township and Pine Beach Borough	25 N.J.R. 1834(a)		
16:28-1.108	School zone along Route 82 in Union Township	25 N.J.R. 1061(b)	R.1993 d.214	25 N.J.R. 1988(a)
16:28A	Restricted parking and stopping	25 N.J.R. 1479(b)	R.1993 d.257	25 N.J.R. 2496(b)
16:28A-1.6, 1.9, 1.38	Restricted parking along Route 7 in Belleville, Route 17 in North Arlington, and Route 71 in Bradley Beach	25 N.J.R. 1062(a)	R.1993 d.213	25 N.J.R. 1988(b)
16:28A-1.18, 1.65	Parking restrictions along Route 27 in Linden and Route 15 in Dover	25 N.J.R. 675(a)	R.1993 d.168	25 N.J.R. 1776(a)
16:28A-1.19, 1.98	Parking restrictions along Route 28 in Somerville and Route 56 in Pittsgrove Township	25 N.J.R. 1836(a)		
16:28A-1.36, 1.41	Parking restrictions along Route 57 in Warren County and Route 77 in Bridgeton	25 N.J.R. 1835(a)		
16:28A-1.41	No stopping or standing zones along Route 77 in Bridgeton	25 N.J.R. 1063(a)	R.1993 d.216	25 N.J.R. 1989(a)
16:29	No passing	25 N.J.R. 1479(b)	R.1993 d.257	25 N.J.R. 2496(b)
16:30	Miscellaneous traffic rules	25 N.J.R. 1479(b)	R.1993 d.257	25 N.J.R. 2496(b)
16:30-6.3	Weight limit restriction for trucks using Route 173 in Bloomsbury, Hunterdon County	25 N.J.R. 1838(a)		
16:30-10.1	Midblock crosswalk on Route 28 in Somerville	25 N.J.R. 1838(b)		
16:31	Turns	25 N.J.R. 1479(b)	R.1993 d.257	25 N.J.R. 2496(b)
16:31-1.31	Turning restrictions along U.S. 1 Business in Lawrence Township	25 N.J.R. 1064(a)	R.1993 d.215	25 N.J.R. 1989(b)
16:31A	Prohibited right turns on red	25 N.J.R. 1479(b)	R.1993 d.257	25 N.J.R. 2496(b)
16:44	Construction services	25 N.J.R. 1954(a)		
16:47-3.8, 3.16, 4.3, 4.6, 4.7, 4.13-4.16, 4.19, 4.27, 4.30, 4.33, 4.41, 5.2, App. B, C, D, E, N, N-1, N-2	State Highway Access Management Code: access standards; permits	25 N.J.R. 903(a)	R.1993 d.210	25 N.J.R. 1990(a)
16:49-1.3, 1.5, 2.1, App.	Transportation of hazardous materials	25 N.J.R. 1065(a)	R.1993 d.235	25 N.J.R. 2497(a)
16:53-3.2	Autobus dimensions	25 N.J.R. 459(a)	R.1993 d.190	25 N.J.R. 1885(a)
16:53-7.25, 7.26, 7.27	Autobus trolleys: safety standards	24 N.J.R. 4500(a)	R.1993 d.191	25 N.J.R. 1885(b)
16:53C	Rail freight program	25 N.J.R. 1481(a)	R.1993 d.277	25 N.J.R. 2503(a)
16:54	Licensing of aeronautical and aerospace facilities	24 N.J.R. 2542(a)		
16:54	Licensing of aeronautical and aerospace facilities: extension of comment period	24 N.J.R. 3026(a)		
16:54	Licensing of aeronautical and aerospace facilities: extension of comment period	24 N.J.R. 4025(a)		
16:55	Licensing of aeronautical activities	25 N.J.R. 1483(a)	R.1993 d.278	25 N.J.R. 2505(a)
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