

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

## **ENVIRONMENTAL PROTECTION**

## **ENVIRONMENTAL MANAGEMENT**

## **DIVISION OF ENVIRONMENTAL SAFETY AND HEALTH**

### **Regulations Governing the Certification of Laboratories and Environmental**

### **Measurements**

**Adopted New Rule: N.J.A.C. 7:18-2.9A**

**Adopted Amendments: N.J.A.C. 7:18-1.4 through 1.7, 2.4, 2.5, 2.6, 2.9, 2.10, 2.13, 2.15, 2.20, 4.1, 4.3, 4.5, 5.1, 5.3, 5.4, 5.5, 6.1, 6.4, 7.1, 8, 9.3, 9.4, and 10.4**

Proposed: November 17, 2014, at 46 N.J.R. 2234(a)

Adopted: March 26, 2015 by Bob Martin, Commissioner, Department of Environmental Protection

Filed: March 27, 2015 as R.2015 d.068, **with non-substantial changes** not requiring additional public notice and comments (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 13:1D-9 et seq., 13:1E-1 et seq., 13:1K-6 et seq., 26:2C-1 et seq., 26:2D-70 et seq., 58:10-23.11 et seq., 58:10A-1 et seq., 58:12A-1 et seq. and 58:12A-26 et seq.

DEP Docket Number: 08-14-10

Effective Date: April 20, 2015

Expiration Date: October 23, 2020

This rule adoption can also be viewed or downloaded from the Department's website at [www.nj.gov/dep/rules](http://www.nj.gov/dep/rules).

N.J.A.C. 7:18, Regulations Governing the Certification of Laboratories and Environmental Measurements, (Laboratory Certification rules), governs the certification of and

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

the procedures used by laboratories that conduct analytical testing in response to many of the Department's regulatory programs. The Department's drinking water, groundwater, wastewater, air, soils, solid waste, hazardous waste, and sludge rules require regulated entities to conduct sampling to ensure compliance with the relevant rules. Laboratories then test the samples and the results of those tests are provided to the Department to demonstrate that the regulated entity is in compliance with the applicable regulatory standards.

In order that the Department is certain that it can rely upon the test results, it requires that tests be conducted only by laboratories that are certified under the Laboratory Certification rules. To obtain and maintain its certification, a laboratory must apply for certification and meet the standards set forth in the Laboratory Certification rules. The Department offers laboratories a choice of certification through the New Jersey Environmental Laboratory Certification Program (NJ-ELCP) pursuant to N.J.A.C. 7:18, or accreditation under the National Environmental Laboratory Accreditation Program (NELAP). The New Jersey accreditation under NELAP is referred to as NJ-NELAP. NJ-ELCP is the New Jersey-specific program, and NJ-NELAP is a national program; both are voluntary. A laboratory is "certified" under NJ-ELCP, and "accredited" under NJ-NELAP. For purposes of this document, in most instances the Department refers to both as "certified."

The adopted amendments substitute the national standards of The NELAC Institute (TNI) for those of the National Environmental Laboratory Accreditation Conference (NELAC). The adopted amendments also address the replacement of the USEPA-conducted performance evaluations with proficiency testing from approved providers, and require laboratories to

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

investigate and take corrective action when a laboratory's analysis of a performance testing sample does not match the results that the sample provider prescribes.

The most substantial amendments pertain to fees. The adopted amendments and new rule restructure the program categories and fees to more accurately reflect the time and effort the Department spends performing the required certification activities, impose a supplemental fee on laboratories that apply for NJ-NELAP certification, and establish a mechanism by which the Department will, through publication in the New Jersey Register of a notice of fee report and administrative changes, adjust the fees.

**Summary of Public Comments and Agency Responses:**

1. Dale Hoover, AXYS Analytical Services Ltd.
2. Joe Jackson, AirNova, Inc.
3. Beverly Preast Carmichael, pCi/Labs, Inc.
4. Wayne Stollings, Triangle Environmental Services, Inc.

The comments received and the Department's responses are summarized below. The number(s) in parentheses after each comment identify the respective commenter(s) listed above.

**Laboratory Developed and/or Non-Standard Methods**

1. COMMENT: If the Department has certified a laboratory to use a particular Alternate Test Procedure (ATP) under the prior rules, will the Department require a reevaluation of that ATP under the adopted rules? (1)

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

RESPONSE: If a laboratory is certified to use a particular laboratory-developed and/or non-standard method, then the Department will not reevaluate that method under the adopted rules. The requested ATP will fall within one or more of the adopted laboratory-developed and/or non-standard methods categories; the Department will assess the fee for the category or categories.

2. COMMENT: If a laboratory has been certified by an accreditation body other than the Department to use a particular ATP, will the Department require the laboratory to undergo the ATP evaluation for certification from the Department before it will grant NELAP secondary accreditation? What fees will apply? (1)

RESPONSE: By way of background, when a laboratory participates in NELAP it is certified by an accreditation body, such as the Department under NJ-NELAP. The laboratory chooses the accreditation body. The accreditation body that performs the on-site assessment and reviews required documentation for certification is considered the primary accreditation body. The primary accreditation body grants the laboratory primary accreditation. Once a primary accreditation body grants a laboratory NELAP accreditation, the laboratory may then apply to other participating NELAP accreditation bodies for secondary accreditation. This could be necessary, for example, if the laboratory has primary NELAP accreditation from the Florida Department of Health, which is NELAP recognized accreditation body, but requires a New Jersey-specific certification to submit data to the Department. The laboratory may seek secondary accreditation under NJ-NELAP. A NELAP accreditation body that grants accreditation based on another accreditation body's evaluation and approval is considered a secondary accreditation body. Any NELAP accreditation body can be primary or secondary. If

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

the laboratory is providing data to the Department, it must have primary or secondary accreditation under NJ-NELAP, or it must participate in the NJ-ELCP program.

Not all ATPs approved by an accreditation body other than the Department will meet the Department's requirements. Therefore, if the laboratory wants to use the ATP as the basis for data that it will report to the Department, then the Department may need to further evaluate the ATP to ensure consistency with Department program requirements. In that case, the ATP evaluation fee will be assessed. The laboratory-developed and/or non-standard methods category fee(s) will be assessed in all instances.

3. COMMENT: Will the Department continue to offer laboratory-developed methods for the drinking water matrix? If so, under what category and will the process for obtaining an ATP approval at N.J.A.C. 7:18-2.20 apply? (1)

RESPONSE: The Department has established a laboratory-developed and/or non-standard methods category under the drinking water matrix, DW13. All previously approved ATPs will apply, as discussed in the Responses to Comments 1 and 2. Although the ATP is available under the drinking water matrix, only the methods identified in the National Primary Drinking Water Regulations (40 CFR Part 141), and National Primary Drinking Water Regulations Implementation (40 CFR Part 142) may be used for drinking water compliance testing unless approval has been obtained in accordance with 40 CFR 141.27. The Federal rule allows an ATP to be used if the laboratory has the written permission of the state, and the concurrence of the Administrator of the U.S. Environmental Protection Agency (USEPA). If a laboratory requests certification under NJ-ELCP or NJ-NELAP (with the intent to report data to

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

the Department) for an ATP in drinking water, the Department will certify the ATP only if the required approval has been obtained.

If a laboratory is requesting NJ-NELAP primary accreditation from the Department because it wishes to obtain NELAP secondary accreditation from another accreditation body, the Department may grant certification for an ATP for which approval under 40 CFR 141.27 has not been obtained; however, the laboratory cannot use the ATP for drinking water data to be submitted to the Department.

#### **NELAP Supplemental Fee**

4. COMMENT: The Department states in the proposal Summary that it spends more resources on the 250 NJ-NELAP laboratories than on the 600 NJ-ELCP laboratories (46 N.J.R. at 2238). According to the Department, the number of staff that is needed to administer the NJ-NELAP and the amount of time needed for each of these staff exceed those needed to administer the NJ-ELCP. To account for these differences the Department is proposing to assess a NELAP Supplemental Fee of \$3,500 for each laboratory requesting NJ-NELAP accreditation. Based on the information presented in the table in the Economic Impact (46 N.J.R. at 2240), the Department has calculated the supplemental fee incorrectly. The table shows that there are 850 total labs, but only 150 are accredited under NJ-NELAP. If there are 850 laboratories and 250 are accredited under NJ-NELAP, then the supplemental fee per laboratory should be \$2,100, not \$3,500. (2)

RESPONSE: The proposal Summary (46 N.J.R. at 2238), which states that there are 250 NJ-NELAP laboratories, is incorrect. The correct number is 150, as set forth in the Economic

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

Impact (46 N.J.R. at 2240), which number was used to calculate the appropriate fee. The proposal Summary (46 N.J.R. at 2238) also incorrectly states that there are 600 NJ-ELCP laboratories. There are 700 NJ-ELCP laboratories. Although the Summary is incorrect, the Department used the correct figures when calculating the supplemental fee.

5. COMMENT: The NELAP supplemental fee will discourage laboratories from participating in NELAP and is punitive to the laboratories who seek to meet the highest accreditation requirements. The Department is assessing the fee to all NELAP laboratories, regardless of whether they possess primary or secondary accreditation with New Jersey. This discourages laboratories that do not conduct New Jersey compliance testing from participating in the NJ-NELAP. (2, 3)

6. COMMENT: Although the State's laboratory certification program was created with a two tier accreditation process, the impact of the supplemental fee for NELAP certification on any laboratory wishing to exercise a secondary accreditation seems to be excessive. The justification given for the surcharge for the NELAP accreditation is the extra reviews it requires. However, in the case of a laboratory seeking secondary accreditation, the extra reviews are not necessary. The primary accreditation entity is supposed to handle all of that responsibility, while the secondary accreditation entity reviews the primary certificate. Nevertheless, the Department does not charge a lower fee for secondary accreditation. The same charge for any level of NELAP accreditation seems to indicate that the NELAP program and associated surcharge are a cash stream, rather than participation in a national accreditation program. (4)

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

RESPONSE TO COMMENTS 5 AND 6: The Department calculated the NELAP supplemental fee based upon the cost of implementing NJ-NELAP as a whole, rather than on a laboratory by laboratory basis. As it stated in the proposal Summary, New Jersey uses substantially more resources to implement the NELAP program for the 150 participating NELAP laboratories than it does to administer the entire NJ-ELCP program to the 700 participating laboratories.

New Jersey has historically been one of the less expensive sources for accreditation; accordingly, out-of-State laboratories have found NJ-NELAP accreditation to be a particularly cost effective means of obtaining the national accreditation, even if the laboratories do not submit data to the Department. The taxpayers of New Jersey have heretofore subsidized the accreditation of these out-of-State laboratories. The adopted rules are intended to do away with that subsidy.

New Jersey participates in the NELAP program so that it can offer NJ-NELAP certification to laboratories that provide data to the Department and to facilitate greater cooperation among states that participate in NELAP, allowing reciprocity of accreditation between participating accreditation bodies. By offering an alternative to the NJ-ELCP, the Department's Laboratory Certification rules allow a laboratory that provides data to the Department and elsewhere to maintain certification within a single program that is recognized in multiple states. Participation in the NJ-NELAP reduces the certification costs to participating laboratories by reducing the number of individual state program audits the laboratory needs to fund.



NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

A laboratory that requires both New Jersey and national certification can reduce its costs by choosing whether to participate in only the national NELAP program, or to combine NELAP and NJ-ELCP. One option is to obtain primary NELAP accreditation from a accreditation body other than New Jersey, and secondary accreditation under NJ-NELAP. If accreditation under NJ-NELAP is secondary, the laboratory would be subject to the supplemental fee, but would pay the on-site laboratory assessment costs, such as travel costs, only for the team of inspectors from the primary accreditation body. An alternative is to apply for primary accreditation under a NELAP from an accreditation body other than New Jersey, and apply for New Jersey certification under NJ-ELCP. Although the laboratory would save the adopted supplemental fee, it would pay the on-site laboratory assessment costs of both the NELAP accreditation body and the Department. Whether there is a savings to the laboratory would depend on whether the cost of the NJ-ELCP on-site inspection, usually conducted every three or four years, is less than the annual supplemental fee for participation in NJ-NELAP.

A laboratory that provides data only to the Department and obtains the NJ-ELCP certification instead of accreditation under NJ-NELAP would not be subject to the supplemental fee; however, it would still be required to reimburse the Department for the cost of the on-site evaluation. Although there may be some cost savings for the NJ-ELCP laboratory, the laboratory would not have the benefit of national certification and the reciprocal agreements that accreditation under NJ-NELAP provides. Which certification or combination of certifications is appropriate for a particular laboratory is a business decision that the laboratory will make.

7. COMMENT: The Department has based the supplemental fee of \$3,500 by dividing the cost of the program by the number of NJ-NELAP laboratories. When small laboratories

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

withdraw from the NJ-NELAP program because of the fee, will the Department divide the funding from the NELAP supplemental fee among the few large laboratories that remain in the NJ-NELAP program? Program costs will be reduced. Calculations to fund the administrative costs based solely on the number of laboratories seems flawed. (2)

RESPONSE: The NELAP supplemental fee will not be adjusted if laboratories choose not to participate in NJ-NELAP. As discussed in the proposal Summary, the supplemental fee is based on the number of hours the Department spends to administer the NJ-NELAP program. The cost of the NJ-NELAP program is divided among all NJ-NELAP participants in the form of the supplemental fee. If, as the commenter suggests, some laboratories withdraw from the NJ-NELAP program, program costs will decline. However, as laboratories withdraw, they will not pay the supplemental fee, causing revenues to also decline. The Department anticipates that the surcharge will continue to be necessary to offset the cost of the NJ-NELAP program, even if fewer laboratories participate in the program.

### **Fee Increases Generally**

8. COMMENT: The increased fees will have a negative impact on small laboratories. In order to absorb the increased costs associated with these higher fees, laboratories will need to pass the increase onto their customers or reduce laboratory costs by performing only the performance testing that is required under the accreditation program. Performance testing improves laboratory results by providing independent verification of testing methods. If laboratories do not participate in the performance testing, overall laboratory results outside of the NELAP program will suffer. (2)

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

9. COMMENT: The fee schedule in the existing rules already penalizes smaller laboratories. The proposed fee increases will have a negative impact on laboratories that submit data to states in addition to New Jersey. A laboratory has the choice of absorbing the cost of the increased fees and not passing them to clients, which would have a significant economic impact on the laboratory and its owners and employees, or it could increase its prices to pass the costs to its clients. Only a large laboratory can absorb the increased fees. A laboratory that increases its fees could find itself priced out of some markets, particularly if its competitors are not subject to New Jersey's increased fees. Even if the laboratory increased its prices only for data submitted to New Jersey, the laboratory would incur the cost of developing and tracking a separate billing system. (4)

RESPONSE TO COMMENTS 8 AND 9: The Department acknowledges that the adopted fees will have an impact on laboratories. Fees for the laboratory certification program have remained the same since 1996. Since that time, the Department's costs to implement the laboratory certification program have risen, in part due to inflation and in part due to the increase in the number of certifications offered by the Department. Since 1996, the Department has added certifications for air and emissions, and private well testing, and has added NJ-NELAP accreditation. Accordingly, the Department has required additional resources to implement the laboratory certification program. Because the fees have not changed, the added cost of the program has fallen primarily on New Jersey taxpayers, instead of the participating laboratories. The adopted fees are intended to place the cost of the program back on the participating laboratories.

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

Laboratories are paid by clients to perform the analyses for which they are certified.

How a laboratory chooses to respond to the adopted fees is a business decision that is up to the laboratory. For example, a laboratory may choose, as the commenter suggests, to discontinue performance tests that are not mandatory. Insofar as accreditation under NJ-NELAP and NJ-ELCP are concerned, the laboratory may take whatever measures it deems appropriate, provided that the programs' requirements are met. See also the Responses to Comments 5 and 6, and 12 for a discussion of potential cost savings to laboratories.

10. COMMENT: The increased fees will cause laboratories to abandon the New Jersey market, which will have multiple effects on the State. If there is limited competition, there is less market impact on pricing, which can negatively impact the clients in New Jersey. The concept seems to be that such an impact only falls on the industry being regulated, but that is not the case. The loss of competition becomes a greater concern when there is but a sole source available. At such a point it may become a legal issue, as any regulation requiring sampling would be requiring the use of that single entity. The Federal regulations, which New Jersey enforcement follows, do not have the limiting requirement of accreditation within a certain region. Thus, enforcement could be placed in a position where there were one or fewer options due to accreditation limitations. The costs of any resulting litigation or environmental impacts would be borne by the residents of the State. An option to allow unaccredited laboratories to mitigate this potential would seem to be an alternative, but not a positive one for the accreditation process. (4)

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

RESPONSE: As discussed above in the Response to Comments 8 and 9, the Department acknowledges that the adopted fees will have an impact on laboratories. Some laboratories may decide to withdraw from the laboratory certification program as a result of the increased fees, which could result in fewer laboratories certified to submit data to the Department. The Department certifies 700 laboratories under the NJ-ELCP program. Even if no laboratories participate in the NJ-NELAP program as a result of the supplemental fee, the Department does not anticipate that the reduction in laboratories certified under NJ-ELCP will be so extensive as to cause the consequences that the commenter suggests.

Under the Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq., Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., Radiation Protection Act, N.J.S.A. 26:2D-70 et seq. (for radon and radon progeny), Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., Private Well Testing Act, N.J.S.A. 58:12A-26 et seq., and Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., a laboratory must be certified under the Laboratory Certification rules in order to submit data to the Department. Similarly, the National Primary Drinking Water Regulations (40 CFR Part 141.28) and National Primary Drinking Water Regulations Implementation (40 CFR Part 142.10) require the analysis of drinking water to be conducted by certified laboratories. Accordingly, there is and will continue to be a market for New Jersey-certified laboratories. If laboratories leave the New Jersey market, the remaining laboratories will see an increase in work, and a potential increase in revenue. The increase in revenue could, in turn, lead to laboratories returning to the market. The Department does not believe that the reduction in laboratories will be so severe that it results in only one laboratory remaining to meet

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

the analytical testing needs of the entities submitting results under the Department's various regulatory programs. Accordingly, the Department does not believe it will be necessary for the Department to resort to allowing testing by unaccredited laboratories.

The commenter mentions litigation and environmental impacts, the cost of which would be borne by State residents. Without more information about the litigation and environmental impacts to which the commenter refers, the Department is unable to respond.

11. COMMENT: The Department states that it anticipates the increased fees will have a modest economic impact on the regulated community, and that the higher fees will be assessed on proportionately larger laboratories that will be able to absorb the increase in fees. These statements are general and made without any supporting data. (2)

RESPONSE: The adopted fees reflect the time and effort spent by the Department to certify a laboratory in the various matrices. Fees are lower for the less complex categories within a particular matrix, as those require fewer Department resources. Similarly, the fees are higher for the more complex categories. The Department determined the technical complexity of each individual category based on the time and effort needed to complete the certification activities for that category and matrix, and established the fees accordingly.

Based upon decades of administering the laboratory certification program, the Department has found that smaller laboratories that perform less complex analyses within only a few matrices will incur lower fees than larger full-service laboratories that maintain certification within several matrices. Although both large and small laboratories will need to address their increased costs, large, full-service laboratories that are certified in more matrices and categories

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

are likely more able to absorb the increased costs that the adopted fees represent, since they have a larger client base and conduct more analyses over which they can spread the costs.

12. COMMENT: The proposal discusses the accreditation of on-site brick and mortar laboratories and does not clearly indicate that the rules also apply to mobile laboratories. These laboratories are common for the categories in the air and emissions matrix. The rules will create an incentive for more companies to use mobile analyzers to save costs. (4)

RESPONSE: Both fixed and mobile laboratories are required to be certified in New Jersey if they submit data to the Department. The rules do not distinguish between fixed and mobile laboratories because each must be certified in the categories for which it submits data to the Department. The fee for certification in a particular category applies whether a laboratory is fixed or mobile. A full-service fixed laboratory that is certified in New Jersey and elsewhere, but that submits only air and emissions data to the Department may find it cost effective to obtain the less expensive NJ-ELCP certification for its required Department certification, as discussed in the Response to Comments 5 and 6 above. Similarly, a mobile laboratory that submits air and emissions data only to the Department may also choose certification under NJ-ELCP.

13. COMMENT: The Department's statement that it is "not feasible" to worry about how the rules will affect small businesses is troublesome. Moreover, job retention will be significantly impacted, contrary to the statements in the proposal's Jobs Impact statement. When the housing market and the job market declined in 2007, many small businesses were unable to continue operations. The reduction in the volume of work has already impacted New Jersey with at least one laboratory closing due to fraud allegations and another being charged with illegal dumping

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

of hazardous waste. New Jersey still has one of the highest unemployment rates in the United States. This is not the time to further burden small businesses operating under New Jersey laboratory certification. (3)

RESPONSE: The Department's statement regarding the feasibility of considering the impact of the rules on small businesses was made in the context of the Regulatory Flexibility Analysis (46 N.J.R. at 2243). The New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., requires the Department to, in part, indicate how the rule is designed to minimize any adverse economic impact on small businesses (N.J.S.A. 52:14B-19d). The statute directs the Department to use approaches such as differing compliance or reporting requirements or timetables, performance rather than design standards, and an exemption from coverage under the rule to minimize the economic impact on small businesses, to the extent that the approaches are consistent with the objectives of the applicable statutes.

The Department would be unable to maintain the integrity of the laboratory certification program if it provided small businesses with different compliance standards or requirements, or if it exempted small laboratories from the rules. As stated in the Regulatory Flexibility Analysis, "the proposed amendments and new rule relating to fees were designed to minimize adverse economic impacts on all affected laboratories, particularly small businesses, while continuing to meet the need for accurate, precise, and reliable data. *It is not feasible for the Department to make further accommodation to small businesses*, because to do so would impair the ability of the Department to ensure that all laboratories, including small businesses, are operating in a manner that ensures the accuracy of results" (emphasis added). The Department did consider the economic impact of the fees on small businesses, and provides laboratories with the option of



NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

either the State-specific accreditation under the NJ-ELCP, or a national certification under NJ-NELAP, subject to a surcharge. Within each certification program, a laboratory may choose certification in as many or as few matrices or categories as it needs. Except for the surcharge for the national accreditation, the fees are directly related to the categories for which a laboratory seeks certification.

If the Department were to provide separate fee schedules based upon the size of the laboratory, it would still need to cover the cost of operating the laboratory certification program. If fees for smaller laboratories were reduced, fees for larger laboratories would be increased, disproportionately impacting larger laboratories. The adopted fees ensure that the cost of the program is shared by all laboratories, in direct proportion to the services that each laboratory receives.

The commenter provides two examples of the reduction in jobs as a result of the closure of laboratories in New Jersey. The first example is a laboratory that closed as a result of fraud allegations, the second example is a laboratory that was charged with illegal dumping of hazardous waste. Neither example is relevant to whether the adopted rules will impact the creation or retention of jobs in the State.

14. COMMENT: The proposed radiochemistry fees outlined are not consistent with the state of the economy in general, and in New Jersey, specifically. Laboratories charge an average of \$65.00 for a radiological analysis (gross alpha, 48hr test). In order to be certified to submit the data to the Department, the laboratory must pay a fee of nearly \$6,000 per year, increased from \$1,200 under the existing rules. The proposed fee is burdensome and onerous and will severely impact laboratories. Analytical fees will have to increase, or laboratories will have to reduce

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

labor, thus reducing the payroll tax and other revenues to the State. In general, this scenario has the possibility of short cuts in quality and data integrity. (3)

RESPONSE: As discussed above in the Responses to Comments 5 through 9 and 11, the adopted fees are based upon the Department's cost to provide the services to the laboratories. The laboratory certification program's fees have not increased since 1996, resulting in the State's taxpayers subsidizing the participating laboratories through appropriations from the State's general fund to make up the difference between fee revenue and program costs. The Department acknowledges, as stated above in the Responses to Comments 8 and 9, and 10, that the fees will have an impact on laboratories; however, it is appropriate that the laboratories pay the cost of the services that the Department provides to them, which is the basis for the adopted fees. See the proposal's Jobs Impact (46 N.J.R. at 2242) regarding the effect that the Department anticipates the adopted rules will have on job creation and retention.

15. COMMENT: The comparisons between other states' fees are not relevant since the proposed fees are based on the Department's funding needs. (3)

RESPONSE: In the proposal's Economic Impact, the Department provided tables of fees from other states in order to demonstrate that certification fees that New Jersey charged under the prior rules were among the lowest in the country (46 N.J.R. at 2241-2242). The tables also show that the adopted fees are comparable to fees charged by other states with similar laboratory certification programs. As the commenter states, and as is set forth in the within responses to comments, the adopted fees reflect the Department's cost to provide the services to the laboratories. The Department did not base the adopted fees on the fees that other states charge.

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

**Summary of Agency-Initiated Changes:**

On adoption, the Department is modifying N.J.A.C. 7:18-2.9(f)1iii, which requires a laboratory to reimburse a certification inspector for costs the inspector incurs, including meals. As proposed, the rule states that the Department's certification inspector must present the laboratory with receipts or other evidence of the costs incurred. However, as indicated at N.J.A.C. 7:18-2.9(f)2, the costs to be paid by the laboratory are only those incurred in accordance with State and Federal travel policies. Section X.D.4 of the State of New Jersey Department of the Treasury circular No. 12-14-OMB states that meal expenses that are less than the Federal per diem allowance limits do not require receipts. A copy of the circular is available at [www.nj.gov/infobank/circular/circindx.htm](http://www.nj.gov/infobank/circular/circindx.htm). The Department is modifying the rule on adoption to clarify that the certification inspector does not need to present receipts or other evidence of meal costs. Instead, the Federal per diem allowance will apply.

The scope of the radiochemical testing procedures at proposed N.J.A.C. 7:18-6.1(a)3 omits category AE06, Air – Laboratory Developed and/or Non-standard Methods, under the air and emissions matrix. The category is included among the categories for certification at N.J.A.C. 7:18-2.4(h)6, and it is included in the fee table at N.J.A.C. 7:18-2.9(b). It is also referred to in organization of subchapters at Table 2.1 at N.J.A.C. 7:18-2.4(i) as being addressed in Subchapter 6. The Department is modifying N.J.A.C. 7:18-6.1(a)3 on adoption to include category AE06.

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

### **Federal Standards Statement**

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require that administrative agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements include in the rulemaking document a comparison with Federal law. Although the chapter does incorporate regulations promulgated by the USEPA, the amendments and new rule are not promulgated under the authority of or in order to implement, comply with or participate in any program established under Federal Law, or under a State statute that incorporates or refers to a Federal Law, Federal standards or Federal requirements. The Federal government does not administer a corresponding program, and has no standards or requirements for laboratory certification. Accordingly, the amendments and new rule do not exceed Federal standards or requirements. Accordingly, further analysis is not required.

**Full text** of the adoption follows (additions to proposal indicated in boldface with asterisks

**\*thus\***; deletions from the proposal indicated in brackets with asterisks \*[thus]\*):

7:18-2.9 Fees

(a) – (e) (No change from proposal.)

(f) If the Department conducts an on-site audit of an out-of-State environmental laboratory, the laboratory shall be responsible for payment of the costs incurred by the certification inspector, in accordance with the following:

1. The direct cost of overnight accommodations, transportation, meals, miscellaneous expenses, and, if the laboratory is located outside the United States, expenses resulting from foreign currency exchanges, as follows:

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

i – ii (No change from proposal.)

iii. If the certification inspector pays the costs identified in (f)1 above, the laboratory shall reimburse the certification inspector directly, within 30 calendar days after the date the certification inspector presents the laboratory with receipts or other evidence of costs incurred. **\*A receipt or other evidence of costs incurred shall not be required for meals. The laboratory shall reimburse the certification inspector for meals in accordance with the applicable Federal per diem rates.\***

2.-3. (No change from proposal.)

(g) (No change from proposal.)

SUBCHAPTER 6 RADIOCHEMICAL TESTING PROCEDURES INCLUDING RADON  
GAS/RADON PROGENY

7:18-6.1 Scope

(a) This subchapter applies to certified environmental laboratories when performing radiochemical testing or radon/radon progeny-in-air testing on regulatory samples, and to laboratories performing radiochemical testing or radon/radon progeny-in-air testing on PT samples or two cross check samples to become certified. This subchapter also applies to laboratories performing the 48-Hour Rapid Gross Alpha Test for compliance with the PWTA. This subchapter applies to radiochemical testing and radon/radon progeny-in-air testing for parameters in the following categories

1.-2. (No change from proposal.)

3. Air and Emissions Matrix:

i. (No change from proposal)

NOTE: THIS IS A COURTESY COPY OF THIS RULE ADOPTION. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE APRIL 20, 2015 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE ADOPTION, THE OFFICIAL VERSION WILL GOVERN.

**\*ii. Category AE06, Air – Laboratory Developed and/or Non-Standard**

**Methods;\***

Recodify proposed ii. and iii. as **\*iii. and iv.\*** (No change in text from proposal.)

(b) (No change.)