

Department of Human Services as an accrediting body for homemaker agencies participating in the Medicaid program, as set forth in N.J.A.C. 10:60-1.2.

(c) Notwithstanding (b) above, a health care service firm that obtained its initial registration less than 12 months prior to renewal of registration shall not be required to submit evidence of accreditation when renewing registration for the first time.

(d) If a health care service firm is no longer accredited as required under (b) above, either because of failure to renew accreditation or through actions taken by the accrediting body, the health care service firm shall notify the Division within 10 days of losing accreditation.

13:45B-13.5A Audits

(a) Commencing (three years from the effective date of this rule), and every third year from that date, a health care service firm shall submit an audit to the Division that complies with the requirements of (b) below as part of the renewal of registration required under N.J.A.C. 13:45B-13.5.

(b) The audit required by (a) above shall:

1. Be conducted by a certified public accountant licensed in New Jersey and shall encompass an examination of the health care service firm's financial records, financial statements, the general management of its operations, and its internal control systems;

2. Include an audit report with an unqualified opinion and shall be accompanied by any management letters prepared by the auditor in connection with the audit commenting on the internal controls or management practices of the health care service firm; and

3. Be divided into two components of which:

i. One is a compliance component that evaluates the health care service firm's compliance with laws and rules governing health care service firms; and

ii. One is a financial component that includes an audit of the financial statements and accompanying notes, as specified in the Statements on Auditing Standards issued by the American Institute of Certified Public Accountants.

(a)

DIVISION OF CRIMINAL JUSTICE

Chemical Breath Testing

Proposed Amendments: N.J.A.C. 13:51-1.2, 1.5, 1.6, 1.9, 1.12, 2.2, 3.3, 3.5, and 4.3

Proposed Repeal: N.J.A.C. 13:51-3.6

Authorized By: Christopher S. Porrino, Attorney General,
Department of Law and Public Safety.

Authority: N.J.S.A. 39:4-50.3, 39:3-10.25, and 12:7-56.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2017-192.

Submit written comments by October 20, 2017, to:

Elie Honig, Director
Division of Criminal Justice
Attention: Public Comments-Chemical Breath Testing Regulations
Richard J. Hughes Justice Complex
PO Box 085
Trenton, NJ 08625-0085
or electronically at: Prosoplice@njdcj.org.

The agency proposal follows:

Summary

In accordance with N.J.S.A. 39:4-50.3, 39:3-10.25, and 12:7-56, N.J.A.C. 13:51 establishes the approved methods of chemical breath testing and approved instruments and methods of operation for chemical breath testing of arrested persons. N.J.A.C. 13:51 also establishes general maintenance of approved instruments and recordkeeping, and

establishes how and who can be certified as breath test operators and breath test coordinators/instructors for the chemical breath testing of persons arrested for violations of the driving while intoxicated (DWI) statutes. See N.J.S.A. 39:4-50 et seq., 39:3-10.13, 39:3-10.20, 39:3-10.24, 39:3-10.25, 12:7-46, 2A:4A-23, and 12:7-55 et seq.

The Attorney General is proposing amendments to N.J.A.C. 13:51 to revise the list of acceptable devices that can be used to measure a person's blood alcohol concentration. The proposed amendments introduce a new approved instrument, the Alcotest 9510, and removes antiquated instruments that are no longer manufactured or approved for use. The proposed amendments also address changes in the training requirements for Breath Test Operators and Coordinators/Instructors, and related changes concerning certification and documentation, with amendments to the controlling definitions.

N.J.A.C. 13:51-1.2 is proposed for amendment to add the new term, "breath alcohol concentration." The term uses the language previously included under the definition of "chemical analysis." For purposes of clarity, the breath alcohol concentration proposed definition details the actual scientific levels to determine the concentration of ethanol in the breath.

The definition of "calibrating unit" is updated to incorporate a new legal citation in the Federal Register and remove an outdated reference to "Model Specifications for Calibrating Units for Breath Alcohol Testers."

The definition of "chemical analysis" is further revised to cite current Federally approved devices for performing chemical analysis. These devices are approved pursuant to the National Highway Traffic Safety Administration's (NHTSA) Highway Safety Programs.

The definition of "electrochemical analysis" is revised to more accurately describe the scientific process that takes place during the analysis. This proposed amendment does not indicate a change in procedure or process. Rather, the revised definition more closely describes the science behind the analysis.

The definition of "law enforcement officer" is revised to expand the definition to those who have completed either the Basic Course for Police Officers or the Basic Course for Investigators.

The proposed revisions also remove the definitions of "photometric instrument" and "photometry" as these instruments and their replacement parts are no longer made by manufacturers. Removing these instruments from the list means the instruments are no longer approved devices or methods for measuring breath alcohol concentration.

The definition of "replica" and "alcohol influence report" are revised for clarity and to reflect actual practice.

N.J.A.C. 13:51-1.5 is proposed for amendment to allow the Division of State Police the flexibility to determine the method, whether in writing or electronically, by which breath test operator applicants shall submit their application for certification.

Proposed amendments to N.J.A.C. 13:51-1.6(a) include the deletion of paragraph (a)1. The deletion of this paragraph removes the initial operator training requirements to become a certified operator of the Breathalyzer and the Dominator Albreath, as these are no longer approved instruments. The proposed amendments also incorporate the new approved device, the Alcotest 9510, into the initial operator certification requirements. The amendments also increase the number of training days that must be completed from "a minimum of three days" that the regulation currently requires to become a Certified Alcotest Operator, to "a minimum of four days of training." The change reflects the current number of training days needed to become a Certified Alcotest Operator.

N.J.A.C. 13:51-1.6(a), (b), and (c) are proposed for amendment to remove reference to enumerated areas of training. These proposed revisions do not reflect an intention to remove any area of operator certification training that is currently performed. Rather, the proposed revisions remove training specifics that are more appropriately located in training curriculum documents or in a training manual.

The proposed amendments also add subsection (f), which requires the Division of State Police to track certifications either in paper or electronic format. The proposed amendment also codifies the current practice of issuing a paper certification known as a "replica" to operators.

N.J.A.C. 13:51-1.9(d) is proposed for amendment to add the Attorney General, or his or her designee, as a person authorized to initiate a recommendation for the removal of a breath test operator's certificate.

N.J.A.C. 13:51-1.12(b) is proposed for amendment to allow the Chief of Police or executive head of an organized police department the ability to appoint a designee to request replacement certificates for breath test operators. This subsection is also proposed for amendment to allow the Division of State Police the flexibility to determine the method, in the manner prescribed, by which a request for breath test operator replacement certificates shall be made. A proposed amendment to N.J.A.C. 13:51-1.12(c) will remove the requirement that a replica certification bear the operator's original certification date on the reverse side of the card. This change would allow flexibility in reformatting the replica. However, the proposed changes do not alter the requirement that the operator's initial certification date be included on the replica.

N.J.A.C. 13:51-2.2 is proposed for amendment to remove the requirement for Breath Test Coordinators/Instructors to receive training on the preparation and quality control of chemicals and other testing standards or materials used for testing. This function is no longer performed by Breath Test Coordinators/Instructors and thus, the need for such training no longer exists. The proposed amendments will recodify existing paragraphs (a)2 through 6 as (a)1 through 5.

N.J.A.C. 13:51-3.3 is proposed for amendment to replace the phrase "laboratory practice" with the more appropriate term "practical training." The proposed amendments also delete the phrase "with air passed through test solutions of alcohol." These proposed amendments do not reflect an intention to remove any area of training that is currently performed. Rather, the proposed amendments remove training specifics more appropriately located in training curriculum documents or in a training manual. Also, the word "computer" is replaced with "instrument" for consistent use of terminology.

The proposed amendments to N.J.A.C. 13:51-3.5 include the deletion of "methods of chemical breath testing and approved" from the heading of the section. N.J.A.C. 13:51-3.5 is also proposed for amendment to remove paragraph (a)1 because photometry is no longer an acceptable device or method for performing breath tests. The proposed amendments also remove subsection (a)2 of this section and recodify (a)2i as (a)1. Since the Alcotest 7110 MKIII and Alcotest 9510 are the only devices currently approved for breath testing and both utilize infrared analysis and electrochemical analysis in a single instrument as a dual system of chemical breath testing, the general language in paragraph (a)2 is no longer necessary. The proposed amendments include both approved Alcotest instruments and a description of each.

N.J.A.C. 13:51-3.6 is proposed for repeal. This section specified the methods of operation for the testing of a person's breath by chemical analysis using one of several approved instruments. The instruments detailed in subsection (a) and (b) are no longer approved as they are outdated. N.J.A.C. 13:51-3.6(c) is being deleted because the language regarding the operation of the device would be more appropriately located in training curriculum documents or in an instruction manual. These proposed amendments do not reflect changes to procedure that is currently performed.

N.J.A.C. 13:51-4.3 is proposed for amendment to delete subsection (a) because "photometry" is no longer an acceptable method for testing a person's breath by chemical analysis. Subsection (b) is recodified as subsection (a) and is proposed for amendment to add the new approved instrument, the Alcotest 9510, to the requirements for periodic inspection and calibration. The proposed amendments also clarify that calibration check records may be stored electronically in addition to, or instead of, paper format.

As the Division has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed amendments and repeal will have an obvious beneficial social impact. The apprehension, prosecution, and conviction of individuals operating vehicles or vessels while under the influence of intoxicating liquor or drugs, or with an alcohol concentration in their blood or breath at, or above, a specific legislatively determined level,

serve the overall public good. Continued scientific advancements allow for the use of improved scientific technology to better serve police departments to detect those driving under the influence and create a safer environment for the general public.

The proposed amendments and repeal most directly affect police and other law enforcement officers, police departments, and law enforcement agencies, and the heads of those agencies, including the Division of State Police. They will assist police and law enforcement in the efficient detection and administration of chemical breath testing of a person suspected of operating a motor vehicle or vessel while intoxicated.

Economic Impact

The proposed amendments and repeal will have limited economic impact upon the general public. Those individuals who choose to operate vehicles or vessels while under the influence of intoxicating liquor or drugs, or with an alcohol concentration in their blood or breath at, or above, a specific legislatively determined level may be economically impacted by costs and fines associated with their apprehension, prosecution, and conviction of violating the law. However, as noted above, the positive impact these proposed amendments and repeal will provide in protecting the health, safety, and welfare of the general public far outweighs any potential economic impact the offenders may experience.

An economic impact may be felt by State and local law enforcement entities choosing to purchase the newly approved instrument. The Division of State Police is expected to initially bear the primary costs associated with the proposed amendments and repeal through the additional acquisition of these new evidential chemical breath test instruments and establishment of related training and administrative procedures. The Attorney General, through the Division of Criminal Justice, and various County Prosecutor's Offices are also expected to be affected through their respective involvement in legal challenges.

Other law enforcement entities and prosecutors (municipal and county) that elect to purchase the new instrument may be affected. Law enforcement entities may elect to utilize funds held in accounts that allow for funds to be used for this purpose, or seek grants to purchase new chemical breath testing instruments. Any decision to purchase new chemical breath testing instruments is an elective decision, since other approved instruments currently in a department's possession are still approved for use.

Any economic impact on manufacturers or vendors of chemical breath testing instruments, under the provisions at N.J.A.C. 13:51-3.2, are costs associated with the marketing, testing, and selling of those instruments. Any materials that these proposed amendments and repeal may require manufacturers or vendors to produce are materials and documentation that those entities should already have readily available to them as part of any proposal to the State.

Federal Standards Statement

A Federal standards analysis is not required because the proposed amendments and repeal are not adopted 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 Federal law, Federal standards, or Federal requirements.

Jobs Impact

The proposed amendments and repeal will have little to no impact on jobs.

Agriculture Industry Impact

The proposed amendments have no impact on the agriculture industry in New Jersey.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required under N.J.S.A. 52:14B-19. The proposed amendments do not impose reporting, recordkeeping, or other compliance requirements on small businesses as that term is defined in the Regulatory Flexibility Act (Act), N.J.S.A. 52:14B-16 et seq. These proposed amendments only impose reporting, recordkeeping, or other compliance requirements and responsibilities upon the Attorney General, law enforcement agencies, and the Division

of State Police pursuant to N.J.S.A. 39:4-50.3, 39:3-10.25, and 12:7-56, which are not considered small businesses under the Act.

Housing Affordability Impact Analysis

The proposed amendments will not have any impact on the affordability of housing in New Jersey.

Smart Growth Development Impact Analysis

The proposed amendments will not have any impact on smart growth and will not evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey because the proposed amendments pertain to the types of devices allowed to measure a person’s blood alcohol concentration and the operator/coordinator certifications to use and maintain those devices.

Full text of the rule proposed for repeal may be found in the New Jersey Administrative Code at N.J.A.C. 13:51-3.6.

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

SUBCHAPTER 1. BREATH TESTING OPERATORS

13:51-1.2 Definitions

For the purpose of this chapter, [and subchapters 1, 2, 3 and 4 thereof,] the terms set forth herein are defined as follows:

“Alcohol Influence Report” [Form] and “check list” are interchangeable terms and] shall mean the record required, pursuant to N.J.S.A. 39:4-50.2(b), 39:3-[10.24b]**10.24.b**, or 12:7-[55b]**55.b**.

“**Breath alcohol concentration**” shall mean the percentage of ethyl alcohol by volume measured in grams of ethanol per 210 liters of breath, that is, 0.10 grams/210 liters equals 0.10 percent.

“Calibrating unit” shall mean “Calibrating Units for Breath Alcohol Testers” as that phrase appears on, and as currently listed in, the United States Department of Transportation, National Highway Traffic Safety Administration’s (NHTSA)[,] “Highway Safety Programs[.]; [“]Conforming Products List [(CPL)] of Calibrating Units for Breath Alcohol Testers,” [and “Model Specifications for Calibrating Units for Breath Alcohol Testers,” (62 Federal Register 43416-43424, August 13, 1997)] **77 Federal Register 64588-64590 (October 22, 2012), incorporated herein by reference, and as NHTSA may thereafter amend.**

“Chemical analysis” shall mean the determination of the concentration of [Ethanol] **ethanol** ([Ethyl Alcohol] **ethyl alcohol**) in the breath [wherein the concentration in grams of ethanol per 210 liters of breath will be reported as a percent, that is, 0.10 grams/210 liter equals 0.10 percent. Direct photometric measurement of ethanol, indirect photometric measurement of reaction products of ethanol and chemical reagents, chromatographic or electrochemical methods or a combination of these will all be considered “chemical analysis.”] **using an approved “Evidential Breath Alcohol Measurement Device” as currently listed on the United States Department of Transportation, National Highway Traffic Safety Administration’s (NHTSA), “Highway Safety Programs; Conforming Products List of Evidential Breath Alcohol Measurement Devices,” 77 Federal Register 35747-35751 (June 14, 2012), incorporated herein by reference, and as NHTSA may thereafter amend.**

“Electrochemical analysis” shall mean [the use of a] **the measurement of current (voltage/resistance) generated from the catalytic conversion of [Ethanol] ethanol ([Ethyl Alcohol] ethyl alcohol) in the breath into acetaldehyde, to acetic acid [or] with the final product being carbon dioxide [and the measurement of voltages generated in the reaction] and water.**

“Law enforcement officer” shall mean: a police or other law enforcement officer of the State of New Jersey who has completed the Basic Course for Police Officers **or Basic Course for Investigators** as approved by the Police Training Commission, pursuant to the provisions of N.J.S.A. 52:17B-67 et seq., and the regulations adopted thereto; all

sworn members of the Division of State Police; and law enforcement officers established by the laws of the United States of America.

“Photometric instrument” shall mean all approved instruments at N.J.A.C. 13:51-3.5(a).

“Photometry” shall mean the determination of the concentration of Ethanol (Ethyl Alcohol) in the breath by the measurement of the change in absorption of light of fixed wavelength by a solution of an oxidant which reacts with Ethanol from a fixed volume of breath.]

“Replica” shall mean a document [which] **that** is an operator’s certificate (as defined herein), [and] which shall bear the signatures or facsimile signatures of the Attorney General and the Superintendent of State Police, and where authorized by this chapter, the signature or initials of a Breath Test Coordinator/Instructor[, and which is of a size that permits it to be carried in the pocket, purse, wallet, etc., and includes replacements thereof] **A “replica” includes the initial Operator’s Certificate and any replacements thereof** as set forth at N.J.A.C. 13:51-1.12(c).

13:51-1.5 Application for certification

Application shall be made [in writing] **in a manner prescribed by the Division of State Police** to the Division of State Police by the Chief of Police or other executive head of the organized police department, **or his or her designee**, [of which the] **for** applicants [is a] **who are** sworn law enforcement officers.

13:51-1.6 Certification training requirements

(a) Initial operator certification requirements are as follows:

[1. Subject to the requirements at N.J.A.C. 13:51-1.4(a), initial certification of an applicant, to become an operator for breath test instruments approved at N.J.A.C. 13:51-3.5(a)1, requires satisfactory completion of a minimum of five days of training as prescribed and conducted by the Division of State Police. Such training shall include:

- i. Instruction in the metric system;
- ii. Instruction in mathematical calculations as required;
- iii. Statutory and case law;
- iv. Instruction and training in the operation of the approved instrument;
- v. Laboratory practice with air samples passed through test solutions of alcohol and air samples taken from human subjects;
- vi. Written examinations; and
- vii. Successful completion of a test for competency.]

[2.] **1.** Subject to the requirements at N.J.A.C. 13:51-1.4(a), initial certification of an applicant, to become an operator for breath test instruments approved at N.J.A.C. 13:51-[3.5(a)2] **3.4(a)1 and 2**, requires satisfactory completion of a minimum of [three] **four** days of training as prescribed and conducted by the Division of State Police. Such training shall include:

- [i. Statutory and case law;
- ii. Instruction and training in the operation of the approved instrument;
- iii. Laboratory practice with air samples passed through test solutions of alcohol and air samples taken from human subjects;]

Recodify existing iv.-v. as **i.-ii.** (No change in text.)

(b) Subject to the requirements at N.J.A.C. 13:51-1.4(c), certification of an operator, whose certification is valid, on an instrument approved at N.J.A.C. 13:51-3.5(a), other than the instrument upon which the operator was previously trained and certified, requires satisfactory completion of a minimum of one day of training as prescribed and conducted by the Division of State Police. Such training shall include:

- [1. Statutory and case law;
- 2. Instruction and training in the operation of the approved instrument;
- 3. Laboratory practice with air samples passed through test solutions of alcohol;]

Recodify existing 4.-5. as **1.-2.** (No change in text.)

(c) Subject to the requirements at N.J.A.C. 13:51-1.4(d), recertification of an operator, whose certification is valid, requires satisfactory completion of a minimum of one day of training as

prescribed and conducted by the Division of State Police. Such training shall include:

1. Statutory and case law;
2. Instruction and training in the operation of the approved instrument;
3. Laboratory practice with air samples passed through test solutions of alcohol;]

Recodify existing 4.-5. as 1.-2. (No change in text.)

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

(f) Certifications shall be tracked by the Division of State Police either in paper or electronic format. Certified operators shall also receive a paper “replica” of their certification.

13:51-1.9 Revocation of certificate

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

(d) The following persons are authorized to initiate a request or recommendation for revocation:

1. A Breath Test Coordinator/Instructor; [or]
2. Chief of Police of the organized police department of which the operator is a sworn member; [or]
3. Executive head of the organized police department of which the operator is a sworn member[.]; or

4. The Attorney General, or his or her designee.

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

13:51-1.12 Return, loss, and/or replacement of replica

(a) (No change.)

(b) If a replica has been lost, or is otherwise in need of replacement, the Chief of Police or other executive head of the organized police department, **or his or her designee**, of which the operator is a member, shall notify the Superintendent, in [writing] **a manner prescribed by the Division of State Police**, in care of the Alcohol/Drug Test Unit of the Division of State Police of such loss or need for a replacement. Lost replicas must be reported immediately.

(c) A replica will be replaced for an operator when the operator's replica has been lost and duly reported as lost, or is otherwise in need of replacement, pursuant to N.J.A.C. 13:51-1.12(b). The replacement replica will bear the date of issuance of the replacement and bear the signatures, or facsimile signatures, of the Attorney General and the Superintendent of State Police. The [reverse side of the replacement] replica will show the date of the operator's original initial certification under N.J.A.C. 13:51-1.6(a) and, if applicable, **under** N.J.A.C. 13:51-1.6(b), and the date of the operator's most recent recertification under N.J.A.C. 13:51-1.6(c), or reinstatement and recertification under N.J.A.C. 13:51-1.6(d).

(d) (No change.)

SUBCHAPTER 2. BREATH TEST COORDINATOR/ INSTRUCTORS

13:51-2.2 Training and functional qualifications

(a) A Breath Test Coordinator/Instructor shall have specialized training, as prescribed by the Division of State Police, and have the knowledge to properly perform the following functions:

1. Preparation and quality control of chemicals and other testing standards or materials used for testing;]

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

SUBCHAPTER 3. APPROVED CHEMICAL BREATH TESTING METHODS, INSTRUMENTS, AND METHODS OF OPERATION

13:51-3.3 Training Breath Test Coordinator/Instructors

(a) (No change.)

(b) The initial training course shall include: the history of the instrument; nomenclature of the operational controls; detailed operating instructions, including operation and maintenance of all related [computer] **instrument** software and hardware and any related equipment; nomenclature of all parts and their functions, maintenance, and repair of the instrument; and class participation in the operation of the instrument. Class participation shall include [laboratory practice]

practical training on the instrument[, with air passed through test solutions of alcohol. The values of the test solutions of alcohol shall be both known and unknown to the participants]. This training shall confer no ownership or licensing rights to any intellectual property or proprietary information or training materials on any participant unless set forth in an agreement between the relevant parties.

13:51-3.5 Approved [methods of chemical breath testing and approved] instruments for the testing of a person's breath by chemical analysis

(a) The Attorney General, pursuant to P.L. 1966, [c.142] c. 142, Sec. 3, as amended by P.L. 1971, [c.273] c. 273, Sec. 1 (N.J.S.A. 39:4-50.3), P.L. 1990, [c.103] c. 103, Sec. 17 (N.J.S.A. 39:3-10.25) and P.L. 1986, [c.39] c. 39, Sec. 8 (N.J.S.A. 12:7-56) and this subchapter, approves [the following methods of chemical breath testing and] the following instruments for use in the testing of a person's breath by chemical analysis[.]:

[1. Photometry is approved as a method of chemical breath testing.

i. The Breathalyzer, Model 900, is a Photometric instrument and is an approved instrument for use in the testing of a person's breath by chemical analysis.

ii. The Breathalyzer, Model 900A, is a Photometric instrument and is an approved instrument for use in the testing of a person's breath by chemical analysis.

iii. The Dominator Albreath is a Photometric instrument and is an approved instrument for use in the testing of a person's breath by chemical analysis.

2. Infrared analysis and electrochemical analysis, when utilized in a single approved instrument as a dual system of chemical breath testing, is approved as a method of chemical breath testing.]

[i.] 1. The Alcotest 7110 MKIII, is a chemical breath test instrument [which] **that** employs both infrared analysis and electrochemical analysis as a dual system of chemical breath testing and is an approved instrument for use in the testing of a person's breath by chemical analysis.

2. The Alcotest 9510 is a chemical breath test instrument that employs both infrared analysis and electrochemical analysis as a dual system of chemical breath testing and is an approved instrument for use in the testing of a person's breath by chemical analysis.

13:51-3.6 (Reserved)

SUBCHAPTER 4. BREATH TEST INSTRUMENT, GENERAL MAINTENANCE, AND ADMINISTRATIVE RECORDKEEPING

13:51-4.3 Periodic inspection or calibration check of approved instruments

[(a) The following concern the periodic inspection of approved photometric instruments:

1. All approved instruments which employ the photometry approved method of chemical breath testing, as set forth in N.J.A.C. 13:51-3.5(a)1, when used in this State in connection with taking of breath samples under the provisions of N.J.S.A. 39:4-50.2(b), 39:3-10.24b or 12:7-55b, or in connection with the prosecution of a person pursuant to the provisions of N.J.S.A. 39:4-50 et seq., 39:3-10.13, 39:3-10.20, 39:3-10.24, 12:7-46, 12:7-55 or 2A:4A-23, shall be periodically inspected.

2. The periodic inspections shall be performed by a Breath Test Coordinator/Instructor.

3. The results of each periodic inspection shall be recorded on forms provided by the Superintendent of the Division of State Police.

i. An original, duplicate original, or copy of each periodic inspection shall be maintained by the Division of State Police pursuant to N.J.A.C. 13:51-4.2(a)2.

ii. An original, duplicate original, or copy of each periodic inspection performed under this subsection, of an approved instrument under the custody and control of an organized police department, other than an approved instrument under the custody and control of the Division of State Police, shall be maintained by the organized police department having custody and control of the approved instrument.]

[(b)](a) The following concern the calibration check[infrared analysis and electrochemical analysis] of approved instruments:

1. All approved instruments [which] that employ the infrared analysis and electrochemical analysis approved method of chemical breath testing, as set forth in N.J.A.C. 13:51-3.5(a)1 or 2, when used in this State in connection with taking of breath samples under the provisions of N.J.S.A. 39:4-50.2(b), 39:3-[10.24b]10.24.b or 12:7-[55b]55.b, or in connection with the prosecution of a person pursuant to the provisions of N.J.S.A. 39:4-50 et seq., 39:3-10.13, 39:3-10.20, 39:3-10.24, 12:7-46, 12:7-55, or 2A:4A-23 shall be subject to a calibration check.

2. (No change.)

3. A calibration check shall be performed when an approved instrument:

i. ii. (No change.)

iii. Within 182 days after a calibration check conducted pursuant to [(b)3i] (a)3i or ii above; and

iv. Thereafter, within 182 days after any calibration check conducted pursuant to [(b)3i] (a)3i, ii, or iii above or after a discretionary calibration check conducted pursuant to [(b)4] (a)4 below.

4. (No change.)

5. The results of each calibration check shall be recorded on forms and in the manner specified by the Superintendent of the Division of State Police.

i. (No change.)

ii. An original, duplicate original, photocopy, or electronic copy of each calibration check, performed under this subsection, of an approved instrument under the custody and control of an organized police department, other than approved instruments under the custody and control of the Division of State Police, shall be maintained by the organized police department having custody and control of the approved instrument.

(a)

DIVISION OF STATE POLICE

Firearms and Weapons

Restrictions for Sale and Possession of Stun Guns

Proposed Amendments: N.J.A.C. 13:54-1.2 and 1.3

Proposed New Rule: N.J.A.C. 13:54-5.8

Authorized By: Colonel Joseph Fuentes, Superintendent, Division of State Police, with the approval of Christopher S. Porrino, Attorney General.

Authority: N.J.S.A. 2C:39-1 and 2C:58-1 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2017-198.

Submit comments by October 20, 2017, to:

Colonel Joseph R. Fuentes, Superintendent
Attn: Firearms Investigation Unit
New Jersey State Police
PO Box 7068
West Trenton, New Jersey 08638
or electronically to: LPPNJSPFIU@gw.njsp.org.

The agency proposal follows:

Summary

The Division of State Police is proposing to amend and supplement N.J.A.C. 13:54 to address regulatory issues related to the sale and possession of stun guns. In *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), the United States Supreme Court struck down a Massachusetts state law prohibiting possession of a stun gun, finding that the absolute ban on possession of a stun gun violated the Second Amendment’s protection of an individual right to keep and bear arms for self-protection. Since 1985, New Jersey law, N.J.S.A. 2C:39-3.h, similarly has established a strict prohibition on possession of a stun gun, regardless of the circumstances or location of the possession. In a

Consent Order entered in *New Jersey Second Amendment Society v. Porrino*, No. 16-4906 (USDC) (April 25, 2017), the United States District Court declared that “N.J. Stat. Ann. § 2C:39-3(h), to the extent this statute outright prohibits, under criminal penalty, individuals from possessing electronic arms, is declared unconstitutional in that it violates the Second Amendment to the United States Constitution and shall not be enforced.” The Consent Order further provided that N.J.S.A. 2C:39-9.d “shall not be enforced to the extent this statute prohibits, under criminal penalty, the sale or shipment of Tasers® or other electronic arms.” The Consent Order stayed proceedings to allow the implementation of any necessary revisions to controlling legal authorities and to establish limitations consistent with the public safety and the Second Amendment.

Accordingly, this notice of proposal is intended to address issues raised by the court invalidating the blanket prohibition on possession and sale of stun guns in New Jersey by maintaining the prohibition on sale and possession of stun guns to minors. Nothing in this rulemaking is intended to supplant or affect any time, place, and manner limitations on the possession, use, and ownership of stun guns established by New Jersey law, other than those set forth in N.J.S.A. 2C:39-3.h and 2C:39-9.d.

Recognizing that the outright statutory prohibition on sale and possession of stun guns has been declared unconstitutional and can no longer be enforced, the proposed amendments would in operative effect permit the sale to and possession of stun guns by persons age 18 and over, codifying in rule the continuing prohibition on the sale to and possession of stun guns by persons under the age of 18. The proposed amendments and new rule would also authorize law enforcement officers to confiscate from minors unlawfully possessed stun guns.

This notice of proposal is excepted from the rulemaking calendar requirement because the Division is providing a 60-day comment period pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed amendments and new rule will provide guidance to law enforcement, weapons dealers, and members of the public in understanding the lawful acquisition and possession and remaining restriction on the sale and possession of stun guns by minors in New Jersey, establishing limitations consistent with public safety and the Second Amendment.

Economic Impact

The proposed amendments and new rule will likely have a positive economic impact by authorizing the sale of stun guns to adults in New Jersey.

Federal Standards Statement

A Federal standards analysis is not required because the proposed amendments and new rule do not exceed Federal standards, and are not proposed under the authority of or in order to implement, comply with, or participate in any program established under Federal law or under State statutes that incorporates or refers to Federal law, Federal standards, or Federal requirements.

Jobs Impact

The proposed amendments and new rule are not expected to result in the generation or loss of jobs in New Jersey, although allowing the sale or transfer of stun guns to adults in New Jersey could have a positive impact on the job market.

Agriculture Industry Impact

The proposed amendments and new rule will not have any impact on the agriculture industry in New Jersey.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the proposed amendments and new rule do not impose any reporting, recordkeeping, or other compliance requirements on small businesses as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Housing Affordability Impact Analysis

The proposed amendments and new rule will not have any impact on the affordability of housing in New Jersey and there is an extreme