

41 N.J.R. 3202(a)

1 of 6 DOCUMENTS

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**RULE PROPOSALS**

**LAW AND PUBLIC SAFETY  
ATTORNEY GENERAL**

*41 N.J.R. 3202(a)*

**Proposed Readoption with Amendments: N.J.A.C. 13:51**

[Click here to view Interested Persons Statement](#)

**Chemical Breath Testing**

Authorized By: Anne Milgram, Attorney General.

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

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

Proposal Number: PRN 2009-261.

Interested persons may submit written comments by November 7, 2009, via overnight or regular mail **only** to:

John Dell'Aquilo, Deputy Attorney General  
Division of Criminal Justice  
Prosecutors Supervision & Coordination Bureau  
5 Executive Campus, Suite 200  
Cherry Hill, NJ 08002  
Attn: Public Comments - Proposed Amendment to Chemical Breath Testing Rules

No submissions via electronic mail will be accepted.

The agency proposal follows:

**Summary**

Pursuant to the provisions of N.J.S.A. 52:14B-5.1c, this chapter expires on January 18, 2010. The Attorney General of the State of New Jersey, as the person responsible for the proposal, adoption and promulgation of these rules, has reviewed these rules and found them to be necessary, reasonable and proper for the purpose for which they were originally promulgated. Accordingly, the Attorney General proposes to readopt this chapter with amendments to address changes in law and procedure.

*N.J.S.A. 39:4-50.3* authorizes the Attorney General to approve methods of chemical breath testing and to certify persons to perform these tests. The Attorney General is further authorized to approve satisfactory techniques or methods to ascertain the qualifications and competence of individuals to conduct these analyses.

Amendments are being proposed and are discussed in more detail in this Summary.

The proposed amendments focus primarily on clarifying the certification process and duration for Breath Test Operators and the inspections and calibrations of breath test instruments.

The Attorney General now proposes to readopt the existing rules with amendments.

A summary of each section of the chapter proposed for readoption and a summary of the proposed amendments follow:

Subchapter 1, Breath Test Operators, N.J.A.C. 13:51-1, is described below.

*N.J.A.C. 13:51-1.1* sets forth the purpose of the subchapter, pursuant to the various authorizing statutory authorities.

*N.J.A.C. 13:51-1.2* contains the definitions for the terms employed throughout the entire body of the Chemical Breath Testing regulatory scheme.

*N.J.A.C. 13:51-1.3* sets forth that a Breath Test Operator must be certified to conduct a breath test on a subject and the certification requirements and form of a certificate and a replica certificate.

*N.J.A.C. 13:51-1.4* describes the prerequisites for a law enforcement officer to become certified as a Breath Test Operator.

An amendment is proposed to clarify the prerequisites for additional certifications. *N.J.A.C. 13:51-1.4(c)* sets forth the prerequisites when a Certified Breath Test Operator is seeking certification pursuant to *N.J.A.C. 13:51-1.6(b)*, on a different approved instrument. Pursuant to paragraph (c)2, in order to receive a certification on a different approved instrument, the prior certification must be valid at the time of the subsequent certification. This is a prerequisite only. The certification, which the operator currently possesses on an instrument, needs to be valid only at the time of the subsequent training and certification pursuant to *N.J.A.C. 13:51-1.6(b)*. Once the operator receives a certification on another instrument, the operator is not required to maintain certification on the former instrument in order for the new instrument certification to remain valid.

For example, an operator who is presently certified on a Breathalyzer, which certification expires on December 31, 2009, can be certified on an Alcotest 7110 MKIII-C on December 15, 2009, under *N.J.A.C. 13:51-1.6(b)*. The fact that the Breathalyzer certification expires subsequent to the certification on the Alcotest 7110 MKIII-C shall have no effect on the continuing validity of the Alcotest certification.

*N.J.A.C. 13:51-1.5* specifies that applications must be in writing by the Chief Law Enforcement Officer or other executive head of the applicant's agency.

*N.J.A.C. 13:51-1.6* governs certification training requirements to become a Breath Test Operator, to maintain that status, to be trained on new chemical breath testing methods and technologies.

*N.J.A.C. 13:51-1.7* sets forth the validation and duration of a certification. A Breath Test Operator certification is valid for the remainder of the calendar year in which the certification is issued and for the next two calendar years. An amendment to subsection (e) is proposed to clarify that a certification issued under *N.J.A.C. 13:51-1.6(b)* is valid for the remainder of the calendar year in which the certification is issued and for the next two calendar years. As discussed above for *N.J.A.C. 13:51-1.4*, a Breath Test Operator's certification for one instrument can expire after receiving certification on another instrument with no effect on the validity of the subsequent certification. For example, if an operator is certified on a Breathalyzer 900 on July 1, 2007, and then was certified on an Alcotest 7110 MKIII-C on July 1, 2008 pursuant to *N.J.A.C. 13:51-1.6(b)*, when the Breathalyzer certification expires on December 31, 2009, the Alcotest certification shall remain valid until its expiration on [page=3203] December 31, 2010. In this example, the expiration of the Breathalyzer certification on December 31, 2009, shall have no effect on the Alcotest certification, which will expire on December 31, 2010 or subsequent certifications.

*N.J.A.C. 13:51-1.8* contains the requirements to reinstate an expired or lapsed certification.

*N.J.A.C. 13:51-1.9* specifies how a certification may be revoked.

*N.J.A.C. 13:51-1.10* describes revocation hearings, when requested.

*N.J.A.C. 13:51-1.11* permits the Attorney General to restore a revoked certification once the Attorney General is satisfied that the cause for revocation has been removed.

*N.J.A.C. 13:51-1.12* sets forth the procedures when certification of a Breath Test Operator is revoked or suspended. This section also provides a mechanism for the replacement of lost certification or replica documents at *N.J.A.C. 13:51-1.12(c)*.

*N.J.A.C. 13:51-1.13* is reserved.

*N.J.A.C. 13:51-1.14* establishes that the Attorney General determines the status of a Breath Test Operator, based upon the records maintained by the Division of State Police. This determination is deemed prima facie evidence of the status of a Breath Test Operator. Therefore, any questions regarding the legal or factual status of a person certified under this chapter is reserved exclusively by the Attorney General. This underscores the great deference given to an agency's interpretation and implementation of its rules. See, for example, *St. Peter's Univ. Hosp. v. Lacy*, 185 N.J. 1, 13 (2005).

Subchapter 2, Breath Test Coordinator/Instructors, N.J.A.C. 13:51-2, is described below.

*N.J.A.C. 13:51-2.1* describes the eligibility requirements for a member of the New Jersey Division of State Police to become a Breath Test Coordinator/Instructor. It also specifies the manner in which the Attorney General approves such an appointment.

*N.J.A.C. 13:51-2.2* sets forth the training and functional qualifications for a member of the New Jersey Division of State Police to become a Breath Test Coordinator/Instructor. Amendments are proposed to require the knowledge to perform the tasks of quality control and repair and calibration of instruments.

Subchapter 3, Approved Chemical Breath Testing Methods, Instruments and Methods of Operation, N.J.A.C. 13:51-3, is described below.

*N.J.A.C. 13:51-3.1* sets forth the purpose of this subchapter, consistent with the various statutory authorities.

*N.J.A.C. 13:51-3.2* describes the process for obtaining the Attorney General's approval for a method of chemical breath testing and an instrument employing that method of chemical breath testing.

*N.J.A.C. 13:51-3.3* describes how a manufacturer of an approved new method of chemical breath testing and an instrument train Breath Test Coordinators/Instructors. An amendment is proposed to clarify that this training will not confer any ownership or licensing rights to any person or entity receiving training of intellectual property or proprietary information except as provided by agreement between the relevant parties.

*N.J.A.C. 13:51-3.4* is reserved.

*N.J.A.C. 13:51-3.5* contains the methods of chemical breath testing approved by the Attorney General, pursuant to the authorizing statutes. Those methods include Photometry and Infrared analysis and electrochemical analysis, when utilized in a single approved instrument as a dual system of chemical breath testing. Approved instruments, employing these approved methods of chemical breath testing are: Photometry, utilizing the Breathalyzer Model 900 or Model 900A or the Dominator Albreath; and Infrared analysis and electrochemical analysis, utilizing the Alcotest 7110 MK III.

*N.J.A.C. 13:51-3.6* describes the approved methods of operation for the testing of a person's breath using approved instruments.

Subchapter 4, Breath Test Instrument, General Maintenance and Administrative Recordkeeping, *N.J.A.C. 13:51-4*, is described below.

*N.J.A.C. 13:51-4.1* sets forth the purpose of this subchapter.

*N.J.A.C. 13:51-4.2* addresses the maintenance of administrative files by the Division of State Police on behalf of the Attorney General. It also provides a mechanism for public access to records.

*N.J.A.C. 13:51-4.3* governs periodic inspection and calibration of breath test instruments. An amendment is proposed to paragraph (b)3 to reduce the period between calibrations from 365 days to 182 days to comport with the New Jersey Supreme Court's Order in *State v. Chun*, 194 N.J. 54, cert. denied, 129 S.Ct. 158, 172 L.Ed. 2d 41(2008). The Court ordered the State to commence inspection and recalibration of the Alcotest(R) instruments every six months.

*N.J.A.C. 13:51* Appendix contains the Alcohol Influence Report Form, Breathalyzer Check List

As the Division has provided a 60-day comment period on 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 rules proposed for readoption with amendments will benefit persons in the State of New Jersey. The rules provide a uniform, reliable and dependable system of chemical breath testing. The proposed amendments to *N.J.A.C. 13:51-1.4* and *1.7* clarify the requirements for Breath Test Operator certification. The proposed amendment to *N.J.A.C. 13:51-1.7* clarifies the duration of the period of certification for Breath Test Operators. Together these proposed amendments provide the public with a clear understanding of the requirements and duration of Breath Test Operator certification. The amendments also provide for uniform records management regarding that position. The proposed amendment to *N.J.A.C. 13:51-4.2* changes the periodic inspection and calibration requirements for instruments employing infrared and electrochemical analysis from 365 to 182 days. This change conforms the rule to the admissibility requirements established by the New Jersey Supreme Court in *State v. Chun, 194 N.J. 54 (2008)*. Together, the rules proposed for readoption with amendments provide the general public with a reliable and uniform chemical breath testing program, which maintains limited, but necessary flexibility and limits the necessity of litigation interpreting the purpose of these rules.

The rules proposed for readoption with amendments serve the public good by assisting with the apprehension, prosecution and conviction of individuals who 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.

### **Economic Impact**

The rules proposed for readoption with amendments will have no economic impact upon the general public or upon the law enforcement agencies affected by its provisions. The Division of State Police is expected to bear the costs associated with the proposed rule amendments requiring additional court imposed inspections and calibrations of evidential breath test instruments.

Other law enforcement entities and prosecutors (municipal and county) may be affected. However, any decision to purchase new chemical breath testing instruments is an elective decision, since there is no requirement in these rules that existing chemical breath testing methods or instruments be abandoned. A decision to acquire any new chemical breath testing technology is a decision made at the discretion of the Chief of Police or other law enforcement executive, subject to approval and appropriation of funds by the appropriate authorities of the local government unit. However, it is anticipated that many law enforcement entities may elect to utilize funds being held in their Drunk Driving Enforcement Fund account (*N.J.S.A. 39:4-50.8*), or seek grants to purchase new chemical breath testing instruments.

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.

### **Federal Standards Statement**

A Federal standards analysis is not required because the rules proposed for readoption with amendments are not issued: (1) under the authority of any Federal law or State statute that incorporates or refers to Federal law, Federal standards or Federal requirements; or (2) 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.

### **[page=3204] Jobs Impact**

The Attorney General anticipates that the rules proposed for readoption with amendments will not result in the creation of new jobs or cause the loss of existing jobs.

### **Agriculture Industry Impact**

The rules proposed for readoption with amendments will not have any impact on the agriculture industry in New Jersey or elsewhere.

### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not required under the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq., because the rules proposed for readoption with amendments do not impose reporting, recordkeeping or other compliance requirements on small businesses as defined in the statute. To the extent that these rules proposed for readoption with amendments impact manufacturers or vendors of evidential chemical breath test instruments and related supplies and equipment, these businesses are not "small businesses" within the meaning of the Regulatory Flexibility Act because they are not resident in this State. The rules impose duties 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*.

### Smart Growth Impact

The rules proposed for readoption with amendments will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

### Housing Affordability Impact

The rules proposed for readoption with amendments will have no impact on affordable housing in New Jersey and there is an extreme unlikelihood that the rules would evoke a change in the average costs associated with housing because the proposed rules concern chemical breath testing.

### Smart Growth Development Impact

The rules proposed for readoption with amendments will have no impact on smart growth and it is extremely unlikely that the rules would impact housing production in Planning Areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan because the proposed rules concern chemical breath testing.

**Full text** of the rules proposed for readoption may be found in the New Jersey Administrative Code at *N.J.A.C. 13:51*.

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

## SUBCHAPTER 1. BREATH TESTING OPERATORS

### 13:51-1.4 Prerequisites for certification

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

(c) For certification as a Breath Test Operator, under the provisions of *N.J.A.C. 13:51-1.6(b)*, 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, an applicant shall satisfy the following prerequisites:

1. (No change.)

2. Be a Breath Test Operator, whose **current** certification is valid **at the time of certification pursuant to this subsection** for an instrument approved at *N.J.A.C. 13:51-3.5(a)*.

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

### 13:51-1.7 Validity and duration of certification

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

(e) Certification of an operator with a valid certification for 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, [will] **shall** be [deemed as] valid upon satisfactory completion of training, as described at *N.J.A.C. 13:51-1.6(b)*, [and shall remain valid for the term of the original and current valid certification] **from the date of the completion of the training for the remainder of that calendar year and for the next two calendar years.**

## SUBCHAPTER 2. BREATH TEST COORDINATOR/INSTRUCTORS

## 13:51-2.2 Training and functional qualifications

(a) A Breath Test Coordinator/Instructor [will] **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 [checking] **quality control** of chemicals and other testing standards or materials used for testing;
2. (No change.)
3. Inspection [and], maintenance, **repair and calibration** of approved instruments;
- 4.-6. (No change.)

## 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 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 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.**

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

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

(a) (No change.)

(b) The following concern the calibration check, infrared analysis and electrochemical analysis instruments:

1.-2. (No change.)

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

i.-ii. (No change.)

iii. Within [365] **182** days after a calibration check conducted pursuant to (b)3i or ii above; and

iv. Thereafter, within [365] **182** days after any calibration check conducted pursuant to (b)3i, ii, or iii above or after a discretionary calibration check conducted pursuant to (b)4 below.

4.-5. (No change.)