

Smoke-Free Air Act (N.J.A.C. 8:6)

Adopted New Rules

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Smoke-Free Air Rules

Adopted: March 29, 2007 by Fred M. Jacobs, M.D., J.D., Commissioner, Department of Health and Senior Services.

Filed: April 27, 2007 as R.2007 d.170, **with substantial and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

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THE COMMISSIONER
SMOKE-FREE AIR RULES

Adopted New Rules: N.J.A.C. 8:6

Proposed: May 15, 2006 at 38 N.J.R. 1925(a) (see also 38 N.J.R. 3095(a))

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Authority: [N.J.S.A. 26:1A-15](#) and 16 through 19 and [26:3D-55](#) et seq., particularly 26:3D-64.

Effective Date: May 21, 2007.

Expiration Date: May 21, 2012.

Summary of Hearing Officer's Recommendations and Agency Response:

On June 2, 2006, the Department convened a public hearing on the proposed new rules. Geneviève Raganelli, Regulatory Officer, Office of Legal and Regulatory Affairs, Office of the Commissioner, served as hearing officer. Eleven persons provided comments at the hearing. The hearing officer recommended that the agency proceed to adoption with the new rules as changed upon adoption.

The record of the public hearing is available for review by contacting Ms. Stark, Office of Legal and Regulatory Affairs, Office of the Commissioner, **New Jersey** Department of Health and Senior Services, PO Box 360, Trenton, NJ 08625-0360.

Summary of Public Comments and Agency Responses:

The Department received comments from the following individuals:

1. Ms. Lois Angelozzi, Mays Landing, NJ;
2. Anonymous, Cape May, NJ;
3. Ms. Mary Ann Bahn, Runnemede, NJ;
4. The Right Reverend Monsignor Charles Barth, Saint Anthony of Padua Parish,

Hammonton, NJ;

5. Mr. Don Benedik, Turnersville, NJ;
6. Karen Blumenfeld, Esq., Director, Tobacco Control Policy and Legal Resource Center, **New Jersey** Group Against Smoking Pollution, Summit, NJ;
7. Ms. Jean Buckner, Margate City, NJ;
8. Regina Carlson, Executive Director, **New Jersey** Group Against Smoking Pollution, Summit, NJ;
9. Carol Chamberlain, Health Officer, Tobacco Subcommittee Member, representing the Executive Committee of the **New Jersey** Health Officers Association, Lawrenceville, NJ;
10. Mr. Peter M. Chirichella, Woodbine, NJ;
11. Patty Chisano, RN, Hamilton Square, NJ;
12. Mr. and Mrs. Robert and Ellie Cirillo, Galloway, NJ;
13. Ms. Anna May Clark, Blackwood, NJ;
14. Ms. Anne Cominskie, Deptford, NJ;
15. Ms. Ann J. Dafaryz, Atco, NJ;
16. The Reverend Neal F. Dante, Pastor, Most Holy Redeemer Parish, Westville Grove, NJ;
17. Ms. Myrtle Di Berardino, Audubon, NJ;
18. Mr. Nick Di Tullio, Somerdale, NJ;
19. The Reverend Alvaro Diaz, St. Peter Roman Catholic Church, Pleasantville, NJ;
20. Clare M. Diemer, Esq., McKernan, McKernan and Godino, Camden, NJ, on behalf of the **New Jersey** Catholic Conference, Trenton, NJ;
21. George T. DiFerdinando, M.D., Chairman, NJ Breathes Coalition;
22. The Right Reverend Monsignor Joseph V. DiMauro, Pastor, Saint Patrick's Church, Woodbury, NJ;
23. Mr. Van Dinh, Atlantic City, NJ;
24. Mr. Dominic Donato, Egg Harbor Township, NJ;

25. Ms. Shirley J. Dougherty, Barrington, NJ;
26. Deborah Dowdell, President, **New Jersey** Restaurant Association, Trenton, NJ;
27. Ms. Marilyn Eastwick, Turnersville, NJ;
28. Rob Eccles, MBA, MHP, Director of Systems Collaborations, State Director, Worksite Tobacco Initiative, Eastern Division, American Cancer Society, North Brunswick, NJ;
29. Curtis D. Edmonds, Esq., Senior Staff Attorney, **New Jersey** Protection and Advocacy, Inc., Trenton, NJ;
30. Mr. Randolph Edmonds, Englewood, NJ;
31. Barbara Fenton, RN, Senior Medical Investigator (Retired), Egg Harbor Township, NJ;
32. The Right Reverend Monsignor Thomas B. Fitzsimmons, Pastor, St. Ann's Church, Wildwood, NJ;
33. Ms. Janine Gerety, Mays Landing, NJ;
34. The Reverend Raymond P. Gormley, Pastor, St. Teresa of the Infant Jesus Church, Runnemede, NJ;
35. Ms. Lillian I. Hall, Deptford, NJ;
36. Ms. Marie Harmer, Somerdale, NJ;
37. James T. Hill President, **New Jersey** Licensed Beverage Association, Inc. Trenton, NJ;
38. Ms. Janice Hoffman, Woodbury Heights, NJ;
39. The Reverend Kenneth J. Johnston, Pastor, The Parish Family of Saint Mary, Williamstown, NJ;
40. Ms. Annette Jones, Deptford, NJ;
41. Andrew Kerstein, President, Smoker's Haven; Vice-President, Board of Directors, National Association of Tobacco Outlets; and Vice-President, Association of Retail Tobacco Stores of **New Jersey**, Sea Bright, NJ;
42. Lisa Kochan, Chair, Government Affairs Committee, Building Owners and Managers Association of **New Jersey** Kearny, NJ;
43. Ms. Ruth Kravet, Marlton, NJ;

44. Mr. Anthony LaMarco, Little Egg Harbor, NJ;
45. Paul R. Langevin, President, Health Care Association of **New Jersey**, Hamilton, NJ;
46. The Reverend Frederick G. Link, Pastor, Saint Anne Church, Westville, NJ;
47. The Reverend Richard J. Lodge, Church of the Transfiguration, West Collingswood, NJ;
48. Ms. Mary Mahan, Camden, NJ;
49. The Reverend Gerard P. Marable, Pastor, St. Bartholomew Church, Camden, NJ;
50. Mr. Les Martin, Bridgeton, NJ;
51. The Reverend Michael J. Matveencko, Pastor, Church of the Assumption, Pomona, NJ;
52. Mr. John J. Montague, Montclair, NJ;
53. Mr. Alan W. Montgomery, Blackwood, NJ;
54. Ms. Ann Montgomery, Blackwood, NJ;
55. Ms. Cynthia Montgomery, Glassboro, NJ;
56. Shiela Naticchione, Office Manager, St. Peter Roman Catholic Church, Pleasantville, NJ;
57. Ms. Debra Ogle, Egg Harbor Township, NJ;
58. Mr. Eric Russo, Brigantine, NJ;
59. Mark H. Sandson, Esq., Sandson and DeLucry, LLC, Atlantic City, NJ, on behalf of the Casino Association of **New Jersey**;
60. Mr. Anthony J. Scalise, Blackwood, NJ;
61. Ms. Kimberly A. Scalise, Blackwood, NJ;
62. Mr. Tom Schmierer, Member, Board of Directors, **New Jersey** Restaurant Association, Trenton, NJ;
63. Ms. Evelyn Scholl, Woodbury Heights, NJ;
64. Vincent F. Serpico, CPA, Serpico and Serpico, LLC, Red Bank, NJ;
65. Mr. Harry W. Shuster, Blackwood, NJ;

66. Mr. and Mrs. Gordon and Judy Sickel, Eatontown, NJ;
67. Mr. Nashid A. Siddiq, Inmate, East Jersey State Prison, Rahway, NJ;
68. Mr. Dave Somers, Absecon, NJ;
69. Mr. William Swick, a **New Jersey** Registered Professional Engineer;
70. Ms. Mary Lou Tarby, Toms River, NJ;
71. Frank Toscano, President, Associated Retail Tobacco Stores of **New Jersey**, and Owner of Cigars Plus, Brick Township and Red Bank, NJ;
72. Ms. Dolores Vitale, Verona, NJ;
73. The Reverend Joseph D. Wallace, Pastor, Christ the King Parish, Haddonfield, NJ;
74. Ms. Audrey Welsh, Ventnor, NJ;
75. Robin Williams, **New Jersey** Director of Advocacy, American Heart Association North Brunswick, NJ;
76. Mr. Barry Wizov, Egg Harbor Township, NJ; and
77. Mr. Joseph W. Yaniak, Jr., Cherry Hill, NJ.

Quoted, summarized, and/or paraphrased below, are the comments and the Department's responses. The numbers in parentheses following the comments below correspond to the commenter numbers above.

General Opposition

1. COMMENT: "I am 80 years old and have been smoking for 62 years. Chest x-rays normal. Married 55 years. My husband doesn't smoke and chest x-rays normal. I don't believe in passive smoking except when children are around. Blanket no smoking is wrong!!! Some bars and restaurants--no smoking and some smoking. Please!!! I don't buy my cigs in NJ. I visit my relatives in PA and GA and buy my cigarettes there \$35 a carton and no toll roads. \$65 or more in NJ. SHAME." (72)

RESPONSE: The Department acknowledges the commenter's statement of normal chest x-rays. Many smokers and passive smokers are not so fortunate.

On June 27, 2006, the U.S. Surgeon General issued a comprehensive scientific report, The Health Consequences of Involuntary Exposure to Tobacco Smoke, "which concluded that there is no risk-free level of exposure to secondhand smoke. Nonsmokers exposed to secondhand smoke at home or work increase their risk of developing heart disease by 25 to 30 percent and lung cancer by 20 to 30 percent ... The report says that the only way to protect nonsmokers from the dangerous chemicals in secondhand smoke is to eliminate smoking indoors ...

Secondhand smoke exposure can cause heart disease and lung cancer in nonsmoking adults and is a known cause of sudden infant death syndrome (SIDS), respiratory problems, ear infections, and asthma attacks in infants and children, the report finds. 'The health effects of secondhand smoke exposure are more pervasive than we previously thought,' said Surgeon General Carmona, vice admiral of the U.S. Public Health Service. 'The scientific evidence is now indisputable: secondhand smoke is not a mere annoyance. It is a serious health hazard that can lead to disease and premature death in children and nonsmoking adults.' Secondhand smoke contains more than 50 cancer-causing chemicals, and is itself a known human carcinogen. Nonsmokers who are exposed to secondhand smoke inhale many of the same toxins as smokers. Even brief exposure to secondhand smoke has immediate adverse effects on the cardiovascular system and increases risk for heart disease and lung cancer, the report says. In addition, the report notes that because the bodies of infants and children are still developing, they are especially vulnerable to the poisons in secondhand smoke. 'The good news is that, unlike some public health hazards, secondhand smoke exposure is easily prevented,' Surgeon General Carmona said. 'Smoke-free indoor environments are proven, simple approaches that prevent exposure and harm.' The report finds that even the most sophisticated ventilation systems cannot completely eliminate secondhand smoke exposure and that only smoke-free environments afford full protection." U.S. Department of Health and Human Services News Release, June 27, 2006, available at <http://www.hhs.gov/news/press/2006pres/20060627.html>. The report of the Surgeon General (hereinafter referred to as the "Surgeon General's Report") and related materials are available on the Surgeon General's web site at www.surgeongeneral.gov/library/secondhandsmoke.

The Surgeon General's Report states: "With regard to the involuntary exposure of nonsmokers to tobacco smoke, the scientific evidence now supports the following major conclusions:

1. Secondhand smoke causes premature death and disease in children and in adults who do not smoke.
2. Children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, and more severe asthma. Smoking by parents causes respiratory symptoms and slows lung growth in their children.
3. Exposure of adults to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer.
4. The scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke.
5. Many millions of Americans, both children and adults, are still exposed to secondhand smoke in their homes and workplaces despite substantial progress in tobacco control.
6. Eliminating smoking in indoor spaces fully protects nonsmokers from exposure to secondhand smoke. Separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposures of nonsmokers to secondhand smoke." Surgeon General's Report at 11; Executive Summary of Surgeon

General's Report at 9.

The proposed new rules implement the Smoke-Free Air Act, which prohibits smoking in indoor public places, workplaces, and school buildings, and on school grounds. [N.J.S.A. 26:3D-58](#). The Department is without authority to provide for smoking in places at which the Act prohibits smoking, except in the specific locations the Act exempts pursuant to [N.J.S.A. 26:3D-59](#). [N.J.S.A. 26:3D-57](#) defines "indoor public place" to include bars, restaurants, and "other establishment[s] where the principal business is the sale of food for consumption on the premises." [N.J.S.A. 26:3D-57](#) defines "workplace" to mean "a structurally enclosed location or portion thereof at which a person performs any type of service or labor." Bars and restaurants are also workplaces. Inasmuch as bars and restaurants are indoor public places and workplaces, the Department is without authority to permit smoking therein as requested by the commenter.

The Department has no control or jurisdiction over the price of cigarettes or the tolls imposed on **New Jersey** roads and bridges and makes no response to this portion of the comment.

2. COMMENT: "I enjoy a smoke and a drink. But because of the smoking law I go out less. I think there should be an area for smokers." (30)

RESPONSE: As stated in response to the previous comment, the proposed new rules implement the Smoke-Free Air Act, which prohibits smoking in indoor public places, workplaces, and school buildings, and on school grounds. [N.J.S.A. 26:3D-58](#). Except in the specific locations the Act exempts pursuant to [N.J.S.A. 26:3D-59](#), the Department is without authority to provide for smoking areas in places where the Act prohibits smoking. [N.J.S.A. 26:3D-57](#) defines "indoor public place" to include bars, restaurants, and "other establishment[s] where the principal business is the sale of food for consumption on the premises.'

The available scientific evidence mandates against the commenter's suggestion that the establishment of smoking areas within indoor public places would adequately protect nonsmokers from the hazards of secondhand smoke. Among the major conclusions of the Surgeon General's Report is that available scientific evidence supports the conclusion that, "Separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposures of nonsmokers to secondhand smoke." Surgeon General's Report at 115, ("Current heating, ventilating, and air conditioning systems alone cannot control exposure to secondhand smoke ... The operation of a heating, ventilating, and air conditioning system can distribute secondhand smoke throughout a building.") and 649 ("Exposures of nonsmokers to secondhand smoke cannot be controlled by air cleaning or mechanical air exchange."); see also Executive Summary to the Surgeon General's Report at 9.

Likewise, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) concludes that restaurants and bars with smoking and non-smoking areas "may reduce [environmental tobacco smoke] exposure in nonsmoking areas but limited evidence is available on their effectiveness. Movement of people between non-smoking and smoking areas may disrupt intended airflow patterns, degrading the effectiveness of exposure reduction for the non-smoking

occupants (including workers) ... If smoking is allowed throughout a space or a collection of spaces served by the same air handler, with no effort to isolate or separate the smokers and nonsmokers, there is no currently available or reasonably anticipated ventilation or air cleaning system that can adequately control or significantly reduce the health risks of ETS. For example, this situation includes unrestricted smoking in homes, dormitories, casinos, bingo parlors, small workplaces, and open plan office spaces. Air cleaning, ordinary dilution ventilation and displacement ventilation can provide some reduction in exposure but they cannot minimize adverse health effects, nor odor and sensory irritation for nonsmokers in general ... No other engineering approaches, including current and advanced dilution ventilation, 'air curtains' or air cleaning technologies, have been demonstrated or should be relied upon to control health risks from ETS exposure in spaces where smoking occurs, though some approaches may reduce that exposure and address odor and some forms of irritation." Environmental Tobacco Smoke: Position Document. Atlanta: American Society of Heating, Refrigerating and Air-Conditioning Engineers, 2005, available at <http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20058211239347.pdf> (hereinafter referred to as "ASRAE Position Document").

The Department invites the commenter to take advantage of the smoking cessation programs the Department offers, listed on the website of its Comprehensive Tobacco Control Program at <http://nj.gov/health/as/ctcp/helping.htm>. These programs include the NJ Quitnet (www.nj.quitnet.com); NJ Quit2Win (<http://www.njquit2win.com>); the NJ Quitline (1-866-NJ-STOPS); and the **New Jersey** Quitcenters listed at <http://www.nj.quitnet.com/library/quit-centers.jtml>.

3. COMMENT: "I am a consulting [Registered Professional] Engineer in the State of **New Jersey**. I have some disagreements with the way the law has been structured ...

I propose that the tavern owner ... should be allowed to make the decision of whether his customers can smoke inside the building or whether they have to leave the building. The law now says that they must leave the building.

Now, in the event that the owner was allowed to make this decision himself, the second point is that he must put in, mandated to put in a ventilation system that would exhaust all of the air of all of the people in the room and put the air outside ...

We know enough about the technology that for any given size room there is a floor loading allowable. It's my opinion that the floor loading, lets assume, would allow 30 people in the room, maximum; 30 people will breathe in and out 17 times a minute. Each of those exhales would be multiplies by one and a half and that volume be exhausted from the building ...

Let us assume that he elects to allow smoking in his establishment, then he should be mandated to provide a ventilation system that would take all of the smoky air out of the building to a suitable vertical stack so that it could no way go back into the building to go effect any diners ...

Now, if you take the number of people allowed in a building and multiply it by one-and-a-half - that's a big safety factor - and then take assuming that each

of those people are all the time smoking, the fan system would be put in to handle the worse possible scenario continually.

The fan system is an isokinetic machine. It has only one speed to run by. If that speed takes into account everybody in the room and their exhausted air and gets it out of the building, then this modification should be added to the Clean Air Act.

I request this because I am a bar attendee and I do smoke and I feel the ... intent of the law is to get the smoke out of the building not get the smoker out of the building. The smoker is in direct contact with his friends and he has to leave and go outside. He feels like a third-class citizen. I think that is not the purpose of the law." (69)

RESPONSE: The purpose of the Act was to protect nonsmoking patrons and workers at indoor public places and workplaces from the "substantial health hazard" that tobacco smoke poses to nonsmokers. [N.J.S.A. 26:3D-56](#).

It is beyond the scope of the Department's rulemaking authority to establish an exemption for establishments that put in place ventilation or air cleaning systems. Moreover, as stated in response to a previous comment, there is no currently available or reasonably anticipated ventilation or air cleaning system that can adequately control or significantly reduce the health risks of ETS. ASHRAE Position Document, supra. Therefore, the Department will not make a change upon adoption in response to the commenter's suggestion.

4. COMMENT: "I would like to express my deepest opposition to what I consider is a law which invades my rights. I [am a sexagenarian] and have been a smoker for over 50 years. As a resident of NJ since the date of my birth, I have paid taxes within and to this date to the State of NJ. As best I can recall for the over 50 years as a smoker cigarettes have been taxed and I have paid this tax. If the State is going to regulate use and then no tax should be charged.

I used to spend a lot of time in New York City but have not been there since they instituted a similar ban. Therefore as I have previously in New York I will not frequent bars and restaurants in this State so no sales tax can be obtained on my purchases.

In the same regard I vehemently oppose any sales tax increase. How about the politicians taking an across the board 10 percent reduction in their salaries and those that are double dipping should only receive one salary, whichever they choose. If I could vote in every election in the State I would vote against any candidate who supports the smoking ban or has supported it." (52)

RESPONSE: The proposed new rules would implement the Legislature's finding and declaration that: "tobacco is the leading cause of preventable disease and death in the State and the nation, and tobacco smoke constitutes a substantial health hazard to the nonsmoking majority of the public; the separation of smoking and nonsmoking areas in indoor public places and workplaces does not eliminate the hazard to nonsmokers if these areas share a common ventilation system; and therefore, subject to certain specified exceptions, it is clearly in the public interest to prohibit smoking in all enclosed indoor places of

public access and workplaces."

The Department disagrees with the commenter's assertion that the payment of a sales tax for the purchase of a product negates the authority of the State to regulate the authorized locations in which that product may be used. The State exercises jurisdiction as to authorized locations of use over many other products that are subject to sales tax, in the interest of protecting health and safety. Examples of these products include motor vehicles and motorized vehicles, firearms, alcohol, chemicals, explosives, flammable materials, and toxic substances.

The Department does not believe the Act and the proposed new rules would impinge upon any articulable right the commenter may have. The commenter is free to smoke, provided he does so in places other than in indoor public places, workplaces, and school buildings, and on school grounds.

The Commissioner has no jurisdiction or control over the amount of sales tax imposed on cigarettes, and makes no response to this aspect of the comment as it is beyond the scope of the proposal, except to note that the proposed new rules are consistent with the Commissioner's rulemaking authority and mandate under the Act, and that the commenter's recourse with respect to his opposition to the Act is with the Legislature.

General Support

5. COMMENT: "The **New Jersey** Health Officers Association is very supportive of the Smoke-Free Air rules as we feel they are an important step forward in protecting the public's health by reducing exposure to second-hand smoke ... We ... would like to thank the ... Department for the Smoke-Free Air ... rules as they serve an important tool in preventing unnecessary illness and death caused by the inhalation of tobacco smoke." (9)

RESPONSE: The Department thanks the commenter for its support of the proposed new rules and for its input in helping the Department to develop the proposed new rules.

6. COMMENT: "On behalf of the thousands of volunteers of the American Heart Association [(AHA)], it is indeed our honor and privilege to offer a few thoughts on the proposed regulations regarding the establishment of Smoke-Free Air Rules in **New Jersey**."

Let me begin by congratulating you on your tremendous effort thus far. The pursuit of a smoke-free **New Jersey**, while fully embraced by the public health community, was not always received warmly by other sectors of our society. The assistance of the **New Jersey** Department of Health and Senior Services, particularly over the past several months, has been integral to the accomplishment of a healthier State.

A compelling study completed in Helena, Montana found that hospital admissions for heart attacks in this city fell by 40 percent during the six months that a smoke-free workplaces law was implemented. After the law was reversed, the number quickly returned to its former level. Similar findings have more recently been replicated in Pueblo, Colorado where the incidence of heart

attacks fell by 27 percent in that community after the implementation of their smoke-free workplaces regulation. It is the hope of the [AHA] that we will witness similar decreases of heart disease now that **New Jersey** is nearly smoke-free as well ...

[AHA] research indicates that the limitation of nonsmoker exposure to second hand smoke will directly reduce incidence of cardiovascular disease. Cardiovascular disease maintains its unfortunate status as the number one cause of death in the United States and **New Jersey**. It accounts for more than 930,000 deaths each year in the United States, including an estimated 37,000 to 40,000 heart disease deaths caused by secondhand smoke. With the approval of a comprehensive smoking ban regulation, I sincerely hope we will begin to see a reversal of this alarming statistic." (75)

RESPONSE: The Department thanks the commenter for its support of the Smoke-Free Air initiative and the proposed new rules and for its input in helping the Department to develop the proposed new rules.

7. COMMENT: We at the American Cancer Society [(ACS)] are pleased to address "this incredibly important public health initiative that **New Jersey** has taken. We at the [ACS] worked very hard to get this law passed, as did thousands of volunteers and citizens and organizations all across this State, so we are delighted that the implementation is going so smoothly to date. Basically, the public overwhelmingly supports a smoke-free **New Jersey**, understands why it is important, and wants this law to work.

We also want to compliment the Department ... for [its] commitment to smoothly and effectively implementing this law. The regulations are a part of that effort, and overall, we are pleased ... The [ACS] is committed to helping you make this law work to the benefit of all citizens of **New Jersey**." (28)

RESPONSE: The Department thanks the commenter for its support of the Act and the proposed new rules and for its input in helping the Department to develop the proposed new rules.

8. COMMENT: "**New Jersey** Breathes, a coalition of about 50 tobacco control advocates in **New Jersey**, commends the Department, Commissioner Fred Jacobs, the Codey and Corzine Administrations, and the Legislature, for their support of the Act. We believe that the Act and the proposed new rules will protect workers, patrons, and the public from the detrimental and life-threatening effects of secondhand smoke. As recognized by the Legislature and the Governor when the Act became law, secondhand smoke contains more than 200 poisons. Research has found that secondhand smoke has led to 3,000 lung cancer deaths and between 35,000 and 62,000 deaths from heart disease in non-smokers annually in the United States.

The Act and the proposed new rules will go a long way in preventing such deaths among our workforce and among those residents exposed to secondhand smoke. The NJ Breathes Coalition supports the Department's continued efforts to implement appropriate rules to support the Act." (21)

RESPONSE: The Department thanks the commenter for its support of the Act and

the proposed new rules and for its input in helping the Department to develop the proposed new rules.

9. COMMENT: "The Building Owners and Managers Association of **New Jersey** (BOMA-NJ), a commercial real estate trade organization representing **New Jersey's** leading building owners, managers and corporate facility managers, applauds **New Jersey's** prohibition against indoor workplace smoking and supports the ... proposed [new rules] to implement the [Act]. Until now, there has been no legal means of requiring building occupants to stop smoking, even when their actions were the cause of complaints from other building occupants. With violators of the indoor smoking ban now subject to fines, members of BOMA-NJ report that such complaints have been virtually eliminated. Individuals who would rather not be exposed to the dangers of second hand smoke are finally assured a smoke-free environment in which to work.

In particular, BOMA-NJ supports various provisions in the proposed regulations that we believe, clarify the scope and substance of the Act, especially as it relates to office buildings. One is the Department's proposed definition of "establishment" in [N.J.A.C. 8:6-1.2\(b\)](#), which we believe better captures the intended scope of locations to which the indoor ban on smoking applies. Specifically, the Act's inclusion of "generally accessible to the public" in its definition of "indoor public place" could be construed by some as an exemption for office space used only by the employees of an individual company and not frequented by the public. Although the Act does explicitly note that commercial and other office buildings are covered by the ban, BOMA-NJ believes that leaving out reference to "generally accessible to the public" in the definition of "establishment" offers needed clarification while remaining consistent with the intent of the Act." (42)

RESPONSE: The Department thanks the commenter for its support of the Act and the proposed new rules.

The Department believes that the commenter misapprehends the Department's intention with respect to the definition of "establishment" at [N.J.A.C. 8:6-1.2\(b\)](#). An "establishment" is subject to the Act if it is an "indoor public place" or a "workplace." The Act defines these latter two terms at [N.J.S.A. 26:3D-57](#). Not all establishments are subject to the Act's prohibition against smoking, such as establishments that have a bona fide exemption from the applicability of the Act pursuant to [N.J.S.A. 26:3D-59](#), such as tobacco retail establishments. The Department proposed to define the term "establishment" for use as a convenient general term for a place that may be an indoor public place or a workplace subject to the Act. See proposal Summary at 38 N.J.R. 1925(a) at 1925 ("The Department proposes to define the term 'establishment' ... for use as a generic term for a location or a place that is potentially subject to the prohibition against smoking."). The applicability of the Act to a particular establishment, or place, would depend on the context in which the word appears in the proposed new rules and the particular features of the place under consideration. Neither the Act nor the proposed new rules would exempt office space used only by a company's employees and not otherwise frequented by the public. Such a place would be both a workplace and an indoor public place at which the Act prohibits smoking.

10. COMMENT: "Proposed new rule [N.J.A.C. 8:6-2.2\(a\)](#) is another welcome

improvement put forth by the Department. Secondhand smoke does linger and therefore it should not matter when workers or members of the public are present in an establishment. The prohibition against smoking should not be limited to what some might consider normal working hours. This is especially true in multi-tenant office buildings where secondhand smoke would otherwise travel through common ventilation systems reaching someone occupying another office and working beyond their normal workday or whose hours may be different than other building occupants. For many BOMA-NJ members, this 'after hours' smoking was a problem in the past. We therefore appreciate the clarification that smoking is prohibited within an establishment no matter when it is occupied by workers or members of the public." (42)

RESPONSE: The Department thanks the commenter for its support of proposed new [N.J.A.C. 8:6-2.2\(a\)](#), with the clarification that smoking is prohibited within an establishment that is an indoor public place or a workplace to which no bona fide exemption is applicable, no matter when it is occupied by workers or members of the public.

Health Care Facilities

11. COMMENT: "On behalf of the nursing facilities, assisted living facilities, comprehensive personal care homes and residential health care facilities represented by the Health Care Association of NJ ... I would like to commend the Department of Health and Senior Services for its leadership in the anti-smoking effort. Congratulations on achieving a smoke-free environment in all licensed health care facilities. It will no doubt improve the overall health of our residents and staff. We appreciate the opportunity to have input into these regulations and look forward to working with you on future public health initiatives." (45)

RESPONSE: The Department thanks the commenter for its support of the Act and the proposed new rules.

12. COMMENT: "I request that before this rule becomes final, the Department take into account residents who live in Long Term Care facilities, Assisted Living, Residential Health Care and Boarding Homes and list these facilities under 'Exceptions' to these rules.

Some admission agreements up until this proposed rule, may have allowed smoking. A resident may have accepted residence, based on the availability of this practice. This facility is now their home. Smoking is a personal choice. My intention is to ensure that the individual rights of these residents are taken into consideration, prior to the rules becoming final." (11)

RESPONSE: The facilities to which the commenter refers are health care facilities licensed by the Department, except for boarding homes, which are not health care facilities and which are subject to the jurisdiction of the Department of Community Affairs. See [N.J.S.A. 55:13B-1](#) et seq. and N.J.A.C. 5:27.

[N.J.S.A. 26:3D-57](#) defines an "indoor public place" at which smoking is prohibited to include a "health care facility licensed pursuant to P.L. 1971, c. 136 ([\[N.J.S.A.\] 26:2H-1](#) et seq.)." Licensed health care facilities are also "workplaces" at which the Act prohibits smoking. The Department is without

authority to establish by rule an exception from the applicability of the Act to licensed health care facilities as requested by the commenter. While the provisions of admission agreements entered into prior to the effective date of the Act permitting smoking in these facilities may have been lawful at the time of execution, such provisions became unlawful and unenforceable as of the effective date of the Act, April 15, 2006.

The nature and characteristics of boarding homes are subject to the rules of the Department of Community Affairs. The applicability of the Act's prohibition against smoking to these facilities depends on a fact-sensitive evaluation on a case-by-case basis as to whether they are indoor public places and/or workplaces, in which case the Act would prohibit smoking therein, or whether they qualify for an exemption from the Act's prohibition against smoking, such as the exemption for private residences at [N.J.S.A. 26:3D-59](#). In evaluating a particular facility, it would be relevant to consider that [N.J.S.A. 26:3D-57](#) includes within the definition of an "indoor public place," at which the Act prohibits smoking, a "hotel, motel or other lodging establishment; apartment building lobby or other public area in an otherwise private building; or a passenger elevator in a building other than a single family dwelling." Given that a particular facility may have one or more of the characteristics that matter in determining the applicability of the Act's prohibition against smoking, it would be inappropriate for the Department to establish a blanket exemption for boarding homes, as requested by the commenter, and the Department declines to do so.

13. COMMENT: "The following comments on the Department of Health and Senior Services' proposed amendments to the **New Jersey** Administrative Code implementing the **New Jersey** Smoke-Free Air Act, [N.J.S.A. 26:3D-55](#) et seq., are submitted by **New Jersey** Protection and Advocacy, Inc. [(NJPA),] the designated protection and advocacy system for individuals with disabilities in **New Jersey**, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, [42 U.S.C. §§5041](#) to [15045](#); the Protection and Advocacy for Mentally III Individuals Act, [42 U.S.C. §§10801](#) to [10807](#); the Client Assistance Program of the Rehabilitation Act, [29 U.S.C. §732](#); the Protection and Advocacy for Individual Rights Program of the Rehabilitation Act, [29 U.S.C. §794e](#); and the Technology[-]Related Assistance for Individuals with Disabilities [Act], [29 U.S.C. §3004](#).

[(NJPA)] requests that [(the Department)] include provisions in [(the proposed new rules)] to permit smoking by patients at State and county-operated psychiatric hospitals. These hospitals may be considered as 'workplaces' under the ... Act ... and, therefore, subject to its provisions. However, publicly operated psychiatric hospitals are also residential facilities, and the smoking habits of patients at these facilities are complex and should be addressed through comprehensive programs. Journal articles periodically suggest a relationship between smoking and relief of negative symptoms of psychiatric illness. A simple ban on smoking by residents at these facilities will eliminate any incentive to address these more difficult issues. The [(proposed)] new [(rules)] should address the needs of these patients.

While [(NJPA)] is concerned about the health dangers of cigarettes, and supports programs to assist individuals with voluntarily ceasing to smoke, we are concerned that some State psychiatric hospitals may use the ... Act to ban all

smoking by patients at State psychiatric hospitals. Regulations could be written that accommodate the right of patients to smoke in such a way that it does not intrude on those who wish to be in a smoke-free environment.

Patients at State psychiatric hospitals do not have the freedom to leave these hospitals. Unlike most **New Jersey** residents, they are not free to smoke in cigar bars, casinos, or in their homes. At least one **New Jersey** psychiatric hospital has announced its intentions to ban smoking outright, even in outside areas, and to ban all tobacco products from its premises. [NJPA] believes that such actions go beyond the terms of the [Act] and may also violate civil rights laws that protect people with disabilities.

[NJPA] calls on [the Department<<- to specifically exempt publicly-operated psychiatric hospitals from the [proposed] new [rules]. This could be accomplished by applying the proposed regulations that cover residential areas within workplaces, such as convents and rectories, to publicly-operated psychiatric hospitals as well. [NJPA] would be happy to discuss other options for drafting such [rules].->>

[NJPA] is committed to protecting the rights of patients at State psychiatric hospitals in **New Jersey**. Thank you for the opportunity to comment on this matter." (29)

RESPONSE: [N.J.S.A. 26:3D-57](#) defines an "indoor public place" at which smoking is prohibited as "a structurally enclosed place[s] of business, commerce or other service related activity, whether public or privately owned or operated on a for profit or nonprofit basis, which is generally accessible to the public ..." The term includes, among other examples, an "office or building owned, leased or rented by the State or by a county or municipal government." A State psychiatric hospital would fall within this example, and may fall within other examples listed in the definition. As the commenter acknowledges, a State psychiatric hospital is also a "workplace" at which the Act prohibits smoking. The Department is without authority to establish by rule an exception from the applicability of the Act.

The commenter is free to suggest rule text for the Department's consideration that would achieve the commenter's goal while remaining within the rulemaking authority of the Commissioner.

The Department takes no position with respect to the authority of a State psychiatric hospital to regulate the possession or use of smoking materials on its premises, other than to note that to the extent that it is within the authority of a State psychiatric hospital to regulate its premises as described by the commenter, proposed new [N.J.A.C. 8:6-2.1\(c\)](#) would provide that the proposed new rules are not to "be construed to limit the ability of an owner or operator of an establishment from establishing restrictions on or prohibitions against smoking at the establishment that are greater than those provided in the Act or the chapter."

The Department will refer the comment to appropriate representatives of the **New Jersey** Department of Human Services, which has jurisdiction over State psychiatric hospitals, for that Department's information and consideration.

Correctional Facilities

14. COMMENT: The commenter is an inmate in a **New Jersey** State correctional facility. The commenter objects to the sale and use of cigarettes in State correctional facilities and asserts that the Department of Corrections has failed or refused to implement a program to assist inmates to quit smoking. The commenter notes that taxpayers bear the costs of healthcare to address inmate and correctional facility employee illness resulting from smoking and exposure to secondhand smoke. The commenter submits an outline of a suggested smoking cessation program for correctional facilities. (67)

RESPONSE: To the extent a correctional facility is an indoor public place or a workplace within the meaning of the Act, the Act prohibits smoking therein. The Act specifically includes within the definition of an "indoor public place" an "office or building owned, leased or rented by the State or by a county or municipal government." The rules of the Department of Corrections prohibit smoking in correctional facility buildings and vehicles, except in designated outdoor smoking areas established by a correctional facility administrator. [N.J.A.C. 10A:14-2.6](#); see also 38 N.J.R. 5306(a) (December 18, 2006) (proposal to amend [N.J.A.C. 10A:14-2.6](#) to establish a cross-reference to the Act). Proposed [N.J.A.C. 8:6-2.3\(b\)](#) would recognize this exception.

The Department of Corrections advises that a Department-wide policy exists that prohibits smoking in "all indoor areas of any institution, departmental office building, organizational unit or work area." In addition, the Department of Corrections advises that each correctional facility has established an "institutional smoking policy" that prohibits smoking therein by employees, consultants, volunteers, visitors and inmates. The Department of Corrections advises that internal management procedures may further restrict the ability of a particular inmate to smoke based on his or her placement in a particular program or unit. The Department of Corrections further advises that inmates who violate either the Department's rules or the internal management procedures of a particular facility or unit with respect to smoking activity are subject to discipline in accordance with N.J.A.C. 10A:4.

The commenter's suggestions with respect to the sale of cigarettes and the development of smoking cessation courses in correctional facilities are outside the scope of the proposed rulemaking. The Department will refer the commenter's suggestions to the Department of Corrections for further consideration and handling.

Outdoor Smoking that Migrates, Seeps, or Recirculates to Indoor Public Places and Workplaces

15. COMMENT: "BOMA-NJ strongly supports proposed new [N.J.A.C. 8:6-2.3](#), which prohibits smoking at an exterior area if smoke from that area would migrate, seep, or recirculate into an establishment where smoking is prohibited and likewise proposed new [N.J.A.C. 8:6-1.2](#), which defines and properly recognizes 'openings' that would allow for an exchange of air between the exterior and the interior of a building. The Department must be commended for recognizing the likelihood that smoke would otherwise enter into the workplace and for including these provisions in an effort to ensure that the objectives of the Act are fully realized.

Persons congregating around the entrances of office buildings to smoke have long drawn complaints. Other building occupants and visiting members of the public had to endure secondhand smoke not only as they approached the doorway, but also often in the area immediately inside buildings in which smoking was otherwise prohibited.

BOMA-NJ was pleased when the Department initially proposed a prohibition against smoking within a 25-foot setback from building openings. However, we recognize that an arbitrary number might not have withstood a challenge that the Act provided no basis for such a smoke-free outdoor buffer. BOMA-NJ does believe that it is within the authority of the Department and in keeping with the intent of the legislation to allow building owners and managers the discretion to determine where smoking must be prohibited outdoors in order to prevent smoke from entering into establishments within which smoking is now prohibited. It is a reasonable accommodation extended to those entertainment and recreation-oriented interests who felt a specific smoke-free outdoor buffer too harsh an imposition and one that recognizes the legitimate need to prevent smoke from entering into what are now supposed to be smoke-free indoor work environments.

BOMA-NJ is grateful for this opportunity to offer its support for the proposed new rules to implement the **New Jersey Smoke Free Air Act.**" (42)

16. COMMENT: "It is wonderful to be able to go to public places and not stink when I leave. It is so nice to be in a restaurant without all the dreadful smoke. Of course, there is abuse right off the bat. Most of the larger establishments are pretty good because of their size. The entrance is distant from where I plan on being. Once I cross the wall of smokers, I am usually ok. However, the smaller places allow smokers at the door, and if there is cross ventilation, of course the smoke crosses with the fresh air defeating the purpose of the new rules. The room, or building, fills with the smoke, first and second hand. In some instances, the smokers are only sort of outside and of course, that is terrible. So I hope there is a plan to establish a zone of twenty or thirty feet from the actual entrance to solve this particular part of the problem." (50)

RESPONSE TO COMMENTS 15 AND 16: The Department thanks the commenters for their support of the Smoke-Free Air initiative and the proposed new rules.

The Department intends proposed new [N.J.A.C. 8:6-2.3\(a\)](#) to address the situation described by the commenters, in which persons inside an indoor public place or a workplace at which smoking is prohibited are exposed to secondhand smoke from persons smoking outside near an opening, such as a door or a window, to an indoor public place or workplace. Proposed new [N.J.A.C. 8:6-2.3\(a\)](#) would oblige the owner or operator of the indoor public place or workplace at which smoking is prohibited to protect persons inside the establishment from this secondhand smoke by requiring the outdoor smokers to move away from the opening, to a distance that does not result in the migration, seepage, or recirculation of smoke into the establishment. Failure of the owner or operator to enforce this requirement would be a violation of the Act and the proposed new rules.

17. COMMENT: Proposed new [N.J.A.C. 8:6-2.3](#), which deals with the exterior

area of indoor public place or workplace, should include "dining area" in the section heading. We feel an outdoor dining area of a food establishment or a workplace is an extension of the establishment and should be covered under the rules. We recommend amending proposed new [N.J.A.C. 8:6-2.3\(a\)](#) and 9.1 through 9.3 to include smoking as prohibited in exterior areas of a food establishment or workplace where food is consumed. (9)

RESPONSE: The Department declines to amend proposed new [N.J.A.C. 8:6-2.3\(a\)](#) and 9.1 through 9.3 as suggested by the commenter. If a location is either not structurally enclosed or not among the types of establishment specifically listed within the definition of an "indoor public place" at [N.J.S.A. 26:3D-57](#), the Act does not, and the proposed new rules would not, apply to prohibit smoking at the location, unless smoking at the location results in smoky air being used as supply air for an indoor public place or workplace. Inasmuch as the Department is declining to change [N.J.A.C. 8:6-2.3\(a\)](#) also as suggested by the commenter, the Department declines to revise the section heading.

18. COMMENT: "The proposed [new rules] contain a detailed and potentially confusing standard and definition for outdoor seating areas at restaurants.

The rule apparently requires the owner and then the local health officer to measure the perimeter of the outdoor space to determine whether the uncovered area is at least 40 percent of the whole area. If it is, then the entire section is exempt from the law and smoking can be permitted. This can subject patrons and employees to secondhand smoke in a partially enclosed area that may indeed concentrate smoke in a way that makes smoke-free dining impossible. It also may lead to confusion and enforcement problems for public health officials who end up in a square-footage debate with business owners.

It would be easier to simply say that any covered area outside is also covered by the law, and is a no-smoking area. Uncovered areas can be smoking. We do appreciate that the <<-proposed new rules->> state outdoor smoking will not be permitted if that has the effect of contaminating indoor areas. And we urge you to let businesses and employers know that you will aggressively enforce that requirement for site-specific plans that prevent smoke from contaminating indoor locations." (28)

RESPONSE: The Department declines to revise proposed [N.J.A.C. 8:6-2.3\(a\)](#) and the definition of "not structurally enclosed" at proposed [N.J.A.C. 8:6-1.2\(b\)](#) as suggested by the commenter. The proposed standard would provide owners and operators of establishments, in addition to authorities charged with enforcing the Act and the proposed new rules, with a measurable formula by which to ascertain whether a location is in compliance. The standard also helps to ensure that establishments that permit smoking in such areas have adequate cross-ventilation.

The Department does not believe the revision suggested by the commenter provides greater clarity or ease of compliance and enforcement than would the proposed standard, because it could raise fact-sensitive enforcement issues, such as whether a "covering" were fully or partially in place at the time of an alleged violation if a retractable awning covers an outdoor area. Therefore, the Department will make no change on adoption in response to the comment.

The Department and local health agencies will enforce all aspects of the Act and the proposed new rules. Characterizing the nature of that enforcement as "aggressive" or otherwise is unnecessary to the effecuation of that enforcement.

19. COMMENT: "The law should create a small buffer zone, about 5 to 10 feet, away from the entrance to all public buildings. As a non-smoker, I don't like to go through a thick cloud of malignant mist to get inside a store, restaurant or office. The 25-foot buffer that was first proposed is too much, just 5 or 10 feet around the doors will do." (74)

20. COMMENT: "Upon my review, the proposed rules are quite appropriate for the intentions of the legislation. However, there are areas where clarification or slight alterations could serve to better enhance these regulations.

Primarily, the omission of a barrier distance between the smoke-free facility and the outside, smoking-permitted area is problematic. More guidelines are necessary in order to ensure that there is no back-streaming effect where smokers outside inadvertently pollute the air indoors. Requiring the owners of each facility to determine their own site-specific needs in order to stem this concern is insufficient. The [AHA] supports a uniform, Statewide regulation that addresses the airflow from the outdoor region to inside a facility, or at least greater guidance from the **New Jersey** Department of Health and Senior Services to the owners of these facilities." (75)

RESPONSE TO COMMENTS 19 AND 20: The Department disagrees with the commenter's suggestion that the Department has omitted to provide "a barrier distance between the smoke-free facility and the outside, smoking-permitted area." Proposed [N.J.A.C. 8:6-2.3\(a\)](#) would prohibit smoking "at an exterior area if smoking in the exterior area results in migration, seepage, or recirculation of smoke to an indoor public place or a workplace at which smoking is prohibited." This prohibition would make smoking unlawful outdoors if smoke at the outdoor location moves into, that is, serves as supply air, to an establishment at which smoking is prohibited, regardless of the distance of a smoker from the establishment. This is consistent with the Legislature's finding and declaration at N.J.A.C. 26:3D-56 that "the separation of smoking and nonsmoking areas in indoor public places and workplaces does not eliminate the hazard to nonsmokers if these areas share a common ventilation system."

The Department originally considered establishing a specific minimum setback of 25 feet from all such openings. Upon reassessment, the Department determined that owners and operators are responsible to enforce this provision and to exercise discretion in establishing conditions for smoking in exterior areas to ensure that smoke does not enter nonsmoking areas of establishments at which the Act prohibits smoking. Local governments retain authority pursuant to [N.J.S.A. 26:3D-63](#) to articulate conditions for smoking exterior areas, such as minimum distance setbacks or "buffer zones," provided those conditions "provide restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under" the Act and the proposed new rules. [N.J.S.A. 26:3D-63](#).

The Department declines to prohibit smoking at a particular distance from

nonsmoking establishments, to take into account the geographic diversity of **New Jersey**. Proposed new [N.J.A.C. 8:6-2.3\(a\)](#) would enable owners and operators of establishments to protect their workers and patrons from smoke from outdoors within the particular site-specific circumstances of their establishments. Thus, if a patron or worker in an establishment detects smoke from outdoors, as may occur when smokers congregate near a door or window to an establishment, an owner or operator must disperse the smokers and/or require them to move further from the establishment. Failure of an owner or operator to enforce this requirement would make them subject to enforcement proceedings.

The Department is gathering information on mandates in other jurisdictions that establish specific smoking distances from establishments and will reevaluate proposed new [N.J.A.C. 8:6-2.3\(a\)](#) as data become available. In the meantime, given **New Jersey's** geographic diversity, it is appropriate for local governments to consider the promulgation of minimum smoking distance setbacks or "buffer zones" to protect workers and patrons at establishments within their respective jurisdictions, provided any such legislation "provides restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under" the Act and the proposed new rules, pursuant to [N.J.S.A. 26:3D-63](#).

21. COMMENT: "My husband and I are deeply concerned about the distance that smokers are allowed to smoke near the entrances of businesses, especially the entrances of restaurants and bars. Since the first draft of the [proposed new rules] was downgraded from '25-feet of any entrance' to 'smoking is allowed within a reasonable distance from any entrance to be determined by the owners and local authorities,' we've noticed that smokers frequently smoke right in front of or next to entrances. Consequently in many instances, families with young children have to walk through clouds of toxic cigarette smoke to enter the restaurants. Additionally, many business, including our own Municipal Building, have attached cigarette butt disposal holders to the wall of their buildings right next [to] their entrances. Again, we need to walk right by the smoker and through their poisonous secondhand smoke to enter the building."
(63)

RESPONSE: The commenter inaccurately represents the actual text of proposed new [N.J.A.C. 8:6-2.3\(a\)](#). The rule would not provide that smoking is permitted within a "reasonable distance." Proposed new [N.J.A.C. 8:6-2.3\(a\)](#) would prohibit smoking in exterior areas if smoking at the exterior area results in the migration of smoke to interior areas at which the Act prohibits smoking.

22. COMMENT: "Through this process the **New Jersey** Restaurant Association hopes to help establish some uniformity and clarity with rules to ensure compliance, a level playing field to assure fair competition even with a law that is patently unfair, and to provide for evenhanded enforcement that does not single out restaurants in particular, or cause more burden to restaurants, bars, taverns and other facilities from one town to the next. Accordingly, we are today commenting on [N.J.A.C. 8:6-2.3\(a\)](#), which concerns smoking in exterior areas of a workplace or that is part of an indoor public place. Many restaurants, bars, taverns, country clubs and other eating and drinking venues in anticipation of the smoking ban invested thousands of dollars constructing outdoor areas in order to continue to accommodate their clientele and to be in

compliance with the law. Even this rule, while eliminating the totally unreasonable and blind-siding 25-foot rule, is problematic to the industry and to the public. NJRA contends that this site-specific rule is unreasonable and will create different standards, cause confusion, and produce uneven enforcement. The rules for all establishments should be uniform across the State. There are due process concerns relative to local ordinances creating potentially 500-plus different ordinances that will create unfair advantages between establishments in different towns; this will cause confusion with the public; and an unachievable assessment of the risk of smoking entering the interior of an establishment from a door, window, or vent. As a matter of priority, we support a clear law that provides for a level playing field. Let's get the rules for the whole State in order before regulating smoking outdoors." (26)

23. COMMENT: With respect to proposed new [N.J.A.C. 8:6-2.3\(a\)](#), the Department "is attempting to regulate 'outdoor' smoking without legislative authority." The commenter "strongly opposes this language, and believes that it is unenforceable." (37)

24. COMMENT: "We are concerned about the provision for local definition of being away from a building, smoke oozing into the building and so forth. We feel that that will create an uneven playing field, which is what we were against the whole time. Some areas will be very strict about it; some will not. And we think it's a bit nebulous and it should be more defined and more uniform." (62)

RESPONSE TO COMMENTS 22 THROUGH 24: As stated above in response to a previous comment, the Legislative findings and declarations support the necessity of proposed new [N.J.A.C. 8:6-2.3\(a\)](#), to ensure that smoky air is not used as supply air for indoor public places and workplaces at which smoking is prohibited. The Department disagrees with the suggestion that proposed new [N.J.A.C. 8:6-2.3\(a\)](#) is unenforceable. Some of the previous comments on this topic suggest that there are persons ready to file complaints as to the intrusion of smoke in indoor public places and workplaces because of the failure of owners and operators to prohibit smoking in proximity to their establishments.

The Department's original proposition of a 25-foot minimum setback would have provided uniformity and addressed the commenter's concern that allowing owners and operators to establish site-specific setbacks would result in "different standards ... confusion, and ... uneven enforcement," yet the commenter rejects that alternative as being "unreasonable and blind-siding," despite it having been successfully implemented in the State of Washington and through local ordinances throughout the country. As stated above in response to a previous comment, the ability of local governments to establish restrictions on smoking greater than those established in the Act and the proposed rules is created by the Act at [N.J.S.A. 26:3D-63](#). The Department is without authority to limit the powers the Act grants to local governments.

25. COMMENT: With respect to the discussion of [N.J.A.C. 8:6-2.3\(a\)](#), the commenter requests that the Department delete the word "responsibility" from the fourth sentence of the proposal Social Impact, stating that "it appears the Department is trying to regulate the outdoors without legislative authority.

Also an owner does not have a 'responsibility' to establish an exterior smoking area. It is the owner's property and if they don't want anyone smoking on their property, they have no responsibility to do otherwise." (37)

RESPONSE: The commenter is correct in stating that owners of property have the authority to prohibit entirely smoking on their premises. Proposed new [N.J.A.C. 8:6-2.1\(c\)](#) would reflect that authority. However, as stated above in response to previous comments, proposed new [N.J.A.C. 8:6-2.3\(a\)](#) would require owners and operators of establishments subject to the Act to enforce the prohibition against smoking in exterior areas if smoking in the exterior areas results in the migration, seepage, or recirculation of smoke to areas of their establishments at which smoking is prohibited. The Department discusses its authority to establish this requirement in response to previous comments, above.

Inasmuch as the Social Impact is final upon publication of the notice of the proposal, the Department will make no change on adoption in response to the comment.

26. COMMENT: A commenter asserts that: "People in **New Jersey** are being affected by secondhand smoke in places that the Act requires to be smokefree, and in areas they must pass through to enter smokefree places."

The commenter suggests measures to prevent infiltration of smoke from smoking-permitted areas into smoke-free areas.

The commenter recommends that outdoors, near workplaces and public places, the rules should discourage stationary and multiple people smoking near entrances, windows, other air-exchange apertures; should require the situation of designated smoking areas away from entrances, windows, other air-exchange apertures; should require the placement of tobacco-debris receptacles away from entrances, windows, other air-exchange apertures; and should require the use of signs that say "to protect our indoor smokefree environment, please refrain from smoking near this entrance." The commenter notes that proprietors already evidence interest in, and take responsibility for, public sidewalks outside their establishments; they remove litter, remove snow, apply de-icer, remove dangerous debris, and report hazardous conditions.

The commenter states that with respect to the non-exempt areas of casino hotels, the rules should require enclosure and separate ventilation, comparable to the requirements the Act imposes on cigar bars, cigar lounges, and tobacco retail establishments.

The commenter supplies information on a recent scientific study that links secondhand smoke in casinos with DNA damage.

The commenter states that it conducted air tests for tobacco smoke pollution in June and July 2006, and asserts that that testing "documents that the <<- Act->> has resulted in dramatic improvement in indoor air quality. Formerly smoking-permitted restaurants, bars, and bowling alleys" that "were all above EPA limits for employee exposure to air pollution, are now well below EPA limits (except for one restaurant-bar with an anomalously high reading)." The

commenter provides charts showing the results of its testing.

The commenter states, "New Jerseyans are being affected by secondhand smoke in places that should be smokefree under the [Act]. Casino hotel lobbies, shops, restaurants, bars, hallways, escalators, and other publicly accessible areas, where smoking is prohibited by the Act, are significantly polluted with tobacco smoke drifting from the gaming areas. Preliminary analysis of our June and July 2006 testing data reveals that these non-gaming areas had [respirable particle] levels ranging from 31 percent to 76 percent as high as the <<-respirable particle->> levels in the gaming areas, with an average of 54 percent. In all non-gaming areas, employees were exposed to levels beyond the EPA limit for employee exposure to air pollution.

The commenter states that it has observed "significant non-compliance in the non-gaming areas: signs were absent or poorly designed or poorly placed; ashtrays were provided; smoking was observed; casino staff did not intervene when people were smoking in their vicinity; smoking debris was observed."

The commenter states that "During the State Government shutdown in early July [2006], when casino gaming areas were closed," the commenter "tested the non-gaming areas" and "documented that, absent smoking in the gaming areas, the non-gaming areas were within EPA limits for employee exposure. Therefore, in order to effect the Legislature's intent that these public places and workplaces be smokefree, as are similar areas that are not in casinos," the commenter recommends that the Department promulgate rules that "require that smoking-permitted areas of casino [hotels] be separately enclosed and separately ventilated." The commenter recommends, alternatively, that "smoking ... be prohibited in casino gaming areas. This is the simplest and cheapest solution for casinos and the most effective for public health, especially in light of new studies showing DNA damage to casino workers."

The commenter states "New Jerseyans are experiencing interference with accessing nonsmoking workplaces and public places because of smoking outdoors" by having "to pass through a gauntlet of smokers" to get to areas the Act requires to be smokefree.

The commenter asserts that: "Testing smoking outdoors is a new area of scientific research ..." The commenter cites to two studies that show that respirable particle levels "can reach significant values outdoors where smoking is present" and that "passive smoking influences both outdoor and indoor air quality." The commenter has conducted "testing [of] outdoor air where smoking is present" that "showed high levels of pollution." The commenter objects to proposed [N.J.A.C. 8:6-2.3\(a\)](#) because it "leaves smoking outdoors near smoking-prohibited indoor sites to the discretion of the proprietor" and these "are the same proprietors whose failure to address the problem of secondhand smoke necessitated the" promulgation of the Act.

The commenter recommends that the Department prohibit outdoor smoking, "especially by stationary and multiple people (as opposed to passers-by on a public sidewalk) ... near entrances, windows, and other air-exchange apertures"; that the Department require "outdoor smoking-permitted seating areas (benches, cafes, employee break areas)" to "have nonsmoking sections and ... not be placed near entrances, windows, and other air exchange

apertures"; that because "tobacco-debris receptacles" ... act like magnets for smokers," the Department should require them to "be placed away from entrances, windows, and other air-exchange apertures"; and that the Department should require signs that say "to protect our indoor smoke free environment, please refrain from smoking near this entrance/in this area."

The commenter identifies laws in other jurisdictions and in **New Jersey** counties and municipalities that establish smoking setbacks from entrances and other restrictions on outdoor smoking. (8)

RESPONSE: The Department declines to mandate that owners or operators of indoor public places and workplaces take the measures suggested by the commenter to prevent the migration, seepage, or recirculation of smoke to areas at which the Act prohibits smoking. Owners and operators are free to implement voluntarily those aspects of the commenter's suggestions that the Act and/or the proposed rules do not mandate.

Proposed [N.J.A.C. 8:6-2.3\(a\)](#) would mandate that owners and operators prohibit smoking in exterior areas if smoking in the exterior area results in the migration, seepage, or recirculation of smoke to areas at which the Act prohibits smoking. These owners and operators would not have discretion to fail or refuse to comply with this requirement. As stated in the Social Impact, the only discretion they would have is as to how they would ensure that their establishments remain smoke-free, taking into account the particular site-specific conditions of their establishments. The Department believes the complaint and fine process would serve to deter owners and operators from failing to implement their responsibility under proposed [N.J.A.C. 8:6-2.3\(a\)](#). Moreover, [N.J.S.A. 26:3D-63](#) authorizes local governments to enact protections against smoking in establishments in their jurisdictions that are more stringent than the Act and the proposed new rules.

The drafters of the Act were aware that exempt gaming areas necessarily would be located within casino hotels, that is, adjacent to or abutting on locations at which the Act would prohibit smoking. The drafters did not establish as a condition of that exemption the structural and ventilation requirements that it specifically established as a condition of the exemption it provided for the cigar bars and cigar lounges located in larger nonsmoking establishments. The Department declines to establish by rule a requirement addressing a situation of which the drafters were aware and declined to establish by statute. Therefore, the Department will not require exempt (smoking) areas in casino hotels to implement separate enclosure and ventilation requirements.

The Department is aware that pursuant to [N.J.S.A. 26:3D-63](#), the City of Atlantic City enacted an ordinance that would limit smoking in casino hotels to a more limited percentage of the gaming floor than the Act exempts, and would require these smoking areas to have separate enclosures and ventilation systems. City of Atlantic City Ordinance No. 86-2006 (approved February 15, 2007; effective April 15, 2007).

The Department thanks the commenter for providing the results of its research as to the effectiveness of the Act in reducing secondhand smoke. The Department thanks the commenter for the additional research results the commenter provides.

27. COMMENT: The commenter requests that the Department "more explicitly address the 'backstream' issues unanswered by the proposed regulations. While the proposed new rules would require owners and operators to establish site-specific conditions for smoking in exterior areas of their establishments to ensure that smoke does not enter non-smoking areas, it offers insufficient guidance on how this is to be accomplished. Owners and operators should not be asked to create such conditions on their own without knowing if such plans will ensure compliance." (21)

RESPONSE: The Department disagrees. Owners and operators would know if they have sufficiently enforced the prohibition against smoking in exterior areas if smoke does not migrate, seep, or recirculate to interior areas at which the Act prohibits smoking. The burden would be on the owner or operator to ensure that this does not occur.

28. COMMENT: The "notice of proposal notes that local, municipal and county governments retain authority pursuant to [N.J.S.A. 26:3D-63](#) to articulate conditions for buffer zones. Local health departments, however, should not be in a position of having to create regulations that will change from street to street as they would in Princeton Town and Princeton Borough. This is really an unfair burden to local health departments and an unfair burden to business. Therefore, we think to address these ambiguities the Commissioner should create an expert panel to look at these issues and provide a written scientific guidance to both owners and to local health departments as soon as is practical on the definition of these buffer zones and allowing local authorities to create information on this subject." (21)

RESPONSE: The commenter is free to convene an expert panel to study this issue, provide additional scientific guidance, and make recommendations. However, the Surgeon General's Report collects the available scientific research on secondhand smoke and its effects, and concludes that it is hazardous to all people at all times in any amount. In the end, additional recommendations would be just that, recommendations. The Department does not believe additional scientific guidance as to the hazards of secondhand smoke would resolve the issues raised by the unique geographic distinctions among **New Jersey** municipalities, which suggest that one standard for a "buffer zone" may not be appropriate for all places.

Proposed [N.J.A.C. 8:6-2.3\(a\)](#) would require indoor areas under the Commissioner's jurisdiction to be smoke-free, and would sanction violations of that standard. Businesses that would fail to ensure that smoke from outdoor smoking does not enter indoor spaces at which the Act prohibits smoking would risk fines, penalties, and loss of patronage.

[N.J.S.A. 26:3D-63](#) authorizes local governing bodies charged with protection of the health and welfare of residents to take additional measures that they deem to be appropriate and right for their communities. Proposed [N.J.A.C. 8:6-2.3\(a\)](#) would fulfill the Commissioner's mandate while respecting local governing bodies' ability, authority, and expertise in the local and unique distinctions of their communities to establish additional requirements to implement this mandate, subject to public input and participation in local legislative processes.

Based on the foregoing, the Department declines to convene an expert panel to study "buffer zones" as suggested by the commenter.

Common Areas in Multi-Unit Housing

29. COMMENT: A commenter states that the Act addresses common or shared areas, "such as hallways, stairwells, foyers, laundry rooms, party rooms for residents in its definition [of 'indoor public place' at [N.J.S.A. 26:3D-57](#) to mean]: 'apartment building lobby or other public area in an otherwise private building.' Just as the shared hallways and common rooms adjacent to hotel guest rooms are now required to be smokefree for its temporary residents, the <<-proposed new rules->> should require that the shared hallways and common areas of multi-unit housing buildings be smokefree. Many hotels now require key or card access to use the elevators, so that only guests, who are short-term residents, staying at the hotel have access to the guest room floors. According to the [Act], these common areas in these access-only hotel floors are still required to be smokefree, and this situation is analogous to that in an apartment building. Furthermore, in 2005, the **New Jersey** legislature voted in favor of smokefree multi-unit college dormitories for all private and public institutions of higher education, which covers not only the shared spaces, but also the dormitory rooms themselves. The legislature has spoken on the need for smoke free common areas, whether it relates to the [Act], or to the smokefree college dormitory statute.

We believe that it was just an oversight that only the word 'lobbies' was used in the definition section of the [Act], and that the Legislature intended to protect all residents from drifting secondhand smoke in common areas, not just short-term residents of hotels, but residents of multi-unit dwellings. The [proposed new rules] should clearly specify that all common, shared spaces need to be smokefree, whether in a hotel or a multi-unit residential building.

[Proposed [N.J.A.C. 8:6-1.2](#)] clarifies definitions of the [Act], and should require that all common areas of multi-unit housing buildings be smokefree at all times, and give a non-exhaustive list of examples of such common areas, like lobbies, stairwells, hallways, laundry rooms, party rooms, etc.

In addition, the word 'apartment,' which is in the [Act]'s definition of an 'indoor public place' should be clarified in [proposed [N.J.A.C. 8:6-1.2](#)] to include any multi-unit dwelling, since condominiums, [co-ops], etc. may not be perceived to be an apartment building, but should be covered." (6)

RESPONSE: The Department declines to revise proposed [N.J.A.C. 8:6-1.2](#) upon adoption as suggested by the commenter. The clarification suggested by the commenter is unnecessary. The definition of "indoor public place" at [N.J.S.A. 26:3D-57](#) includes any "structurally enclosed" place that is "generally accessible to the public" and identifies, as an example of such a place, a "public area in an otherwise private building; or a passenger elevator in a building other than a single-family dwelling." Based on this express statutory language, the Department construes the definition to include common or shared areas of otherwise private buildings as places at which smoking the Act prohibits smoking.

Secondhand Smoke as Nuisance

30. COMMENT: "In light of the overwhelming evidence of the harmful effects of secondhand smoke that are expressed in the preamble, and in the legislative record of the Act," the commenter "strongly encourage[s] that the regulations specifically classify secondhand smoke, a Class A carcinogen, as a 'nuisance' both private and public.

People who continue to be injured by secondhand smoke in **New Jersey** would no longer have to get a court determination that secondhand smoke is a nuisance. This will make enforcement easier for health departments, and affords people the unquestioned benefit of using the nuisance codes as another option for protection. The ... Surgeon General's Report, Chapter 10, reports that nuisance claims can be applied in secondhand smoke matters[;] refers to housing policies that encourage smokefree common spaces, as well as to a regulation in California[; and] states that 'the home remains the most serious venue for secondhand smoke exposure ..."

The commenter states that a municipality in "California is in the process of declaring secondhand smoke a public nuisance, so that a resident would only need to prove that secondhand smoke is drifting into the common space or their property, rather than first having to get a determination that secondhand smoke is a nuisance."

The commenter states that "the common areas of residences, whether they are temporary like in a hotel guest room hallway, or permanent like an apartment hallway, are shared space, and as such, the [Act] should afford equal protection to both, and define secondhand smoke as both a public and private nuisance." (6)

RESPONSE: [N.J.S.A. 26:3D-64](#) obliges the Department to promulgate rules to implement the Act. It is unnecessary to the Department's effort to fulfill that mandate for the Department to characterize the nature of secondhand smoke. The Legislature already characterized the nature of secondhand smoke in its findings and declarations in stating, "tobacco smoke constitutes a substantial health hazard to the nonsmoking majority of the public." [N.J.S.A. 26:3D-56](#). Contrary to the commenter's assertion, further characterization of the nature of secondhand smoke would not have any effect on the ability of enforcing agencies to enforce the Act in housing and common spaces.

The Act prohibits smoking in indoor public places and workplaces, and includes within the definition of an indoor public place an "apartment building lobby or other public area in an otherwise private building; or a passenger elevator in a building other than a single family dwelling." [N.J.S.A. 26:3D-57](#). The Act specifically exempts private homes and private residences from the prohibition against smoking. [N.J.S.A. 26:3D-59](#).

Declaring secondhand smoke to be a nuisance would not change the applicability to housing and common spaces of either the Act's prohibition against smoking or the Act's exemptions. A location is either exempt or it is not. If it is not exempt, the Act prohibits smoking thereat and health agencies can issue appropriate citations and recover fines against violators of the Act, regardless of whether the Department declares smoking to be a nuisance.

Therefore, the Department will make no change on adoption in response to the

comment.

Smoking in Foster Homes and DYFS Workplaces

31. COMMENT: A commenter states that the Act should not supersede "any current or future regulations or legislation making foster care homes smokefree. Five states have regulations or legislation that restrict smoking in a foster care home while the children are present, and some states restrict smoking in private vehicles that transport foster children. A similar regulation or bill is expected to be considered in autumn 2006 in **New Jersey**. The [proposed new rules] need to express that since foster children are wards of the [State], the [State] is charged with maintaining the best interest of these children. As such, any current or future rules, regulation and legislation that will or can restrict smoking in a foster care home or vehicle is permissible, and should not to be barred by the [Act].

Chapter 10 of the ... Surgeon General's report emphasized ... that: 'The home remains the most serious venue for secondhand smoke exposure.' "

The commenter states that outdoor "porches of [Division of Youth and Family Services (DYFS)] workplaces need to be smokefree." The commenter states that DYFS workers have reported "that supervised parent-child visits take place on the porch of the DYFS office, with the parent smoking while holding their child or infant. There is no excuse to permit smoking on a porch, with an overhang, that is a meeting place for child visitation. The [proposed new rules] should specify that, in this circumstance, no smoking is permitted on any such porches at any time." (6)

RESPONSE: The Department disagrees. The Act is specific as to preexisting laws that it repeals, see P.L. 2005, c. 383, §11, and provides no basis for the inference that it impliedly would preempt other existing or future more stringent laws addressing smoking. Therefore, the Department will make no change on adoption in response to the comment.

An existing rule of the Department of Children and Families prohibits smoking in foster homes and in private automobiles transporting foster children. See [N.J.A.C. 10:122C-7.2](#). For a fuller discussion of this issue, see the Notice of Receipt of Petition for Rulemaking: Smoking in the Presence of Children in Foster Care, 39 N.J.R. 261(a) (January 16, 2007); and the Notice of Action on Petition for Rulemaking: Smoking in the Presence of Children in Foster Care, 39 N.J.R. 701(a) (February 20, 2007).

The Act prohibits smoking in exterior areas that are school grounds. The Department is satisfied that its rulemaking authority also authorizes the Department to prohibit outdoor smoking to the extent outdoor smoking results in the migration, seepage, or recirculation of smoke to indoor public places and workplaces at which the Act prohibits smoking. The Department declines to engage in rulemaking to address other outdoor smoking.

The specific rule the commenter requests with respect to outdoor smoking in the presence of foster children already exists. [N.J.A.C. 10:122C-7.2\(a\)](#) states: "The resource family parent may permit smoking outdoors when no child in placement is present." The Department of Children and Families has jurisdiction to enforce this rule.

Fraternal Organizations

32. COMMENT: A commenter states that the proposed new rules "allow for fraternal membership organizations to be exempt from the law. We recognize that the definition is very narrowly drawn, but I would point out that this exemption was considered in earlier drafts of the [legislative bill that became the Act], and then dropped by the legislative sponsors. That legislative history argues against including a similar exemption by regulation." (28)

RESPONSE: The commenter is incorrect. The proposed new rules would not establish a blanket exemption from the prohibition against smoking for fraternal organizations. Every establishment that is an "indoor public place" or a "workplace," as the Act defines those terms at [N.J.S.A. 26:3D-57](#), is subject to the prohibition against smoking, unless one of the exceptions at [N.J.S.A. 26:3D-59](#) applies.

Structural Enclosure

33. COMMENT: "There is a formula in [proposed new [N.J.A.C. 8:6-1.2](#)] that would give a formula for 40 percent of an open wall, or a wall opening to be open. It seems a bit nebulous and we would like to see that a bit more uniform and regulated." (62)

RESPONSE: The Department disagrees. Proposed new [N.J.A.C. 8:6-1.2](#) would provide specific guidance on the area needed to qualify a space as structurally enclosed, supported by a descriptive diagram. The Department encourages the commenter to seek specific technical guidance from the local building code official, the local health agency or the Department in applying the proposed new rule to specific premises.

34. COMMENT: Proposed new N.J.S.A. 8:6-2.2(b) concerns areas that are not always structurally enclosed. It is not logical to make a distinction between an area that is screened during the summer and then is enclosed by windows during the winter. The proposed rules should be based on areas during their present conditions. (26)

35. COMMENT: "As far as defining an open area that is closed in the winter and say a porch that has screens in the summer. We feel that should not be made a distinction. If it is open, it is open. Depending upon the season, it does not really matter if it is fresh air, then it is open. To say that if it is closed in the winter but open in the summer it still cannot be a smoking area, we feel that is a bit too tight. I think we should let this regulation kind of seep in, let it happen, see what happens and maybe fix some things down the line but not try to fix every single little thing going into it." (62)

RESPONSE TO COMMENTS 34 AND 35: The Department disagrees. The Department intends proposed new [N.J.A.C. 8:6-2.2\(a\) and \(b\)](#) to protect workers and the public from lingering secondhand smoke and to provide an objective enforcement standard that would eliminate fact-sensitive proof issues of whether workers or the public were present or screens were in place at the time of an alleged occurrence of illegal smoking, particularly when changes are capable of being made on an hourly, daily, or weekly rather than seasonal basis.

36. COMMENT: The Department should change paragraph 2 of the definition of "not structurally enclosed" at [N.J.A.C. 8:6-1.2](#) to provide "The total area of the openings is at least 40 percent of the total area of the perimeter walls, excluding the exterior wall to the building." "Furthermore, the diagram and engineering requirements you have proposed ... is so complicated and technical, it would require the hiring of an engineer, and other design professionals just to build an 'outdoor smoking area.' This will further increase costs on an already depressed industry!" (37)

RESPONSE: The Department knows of no reason, and declines, to make the change suggested by the commenter.

The Department disagrees with the commenter's suggestion that measuring a space requires the retention of engineering professionals. The formula requires the use of only basic mathematical functions. Moreover, the Department believes that local health agencies probably would be willing to provide assistance in the performance of these calculations upon request. Establishments would need to be able to provide the height and length of the area under scrutiny.

The Department is without sufficient information to comment on the commenter's assertion that the industry the commenter represents is depressed.

37. COMMENT: A commenter states that the Department should change the definition of "opening" at [N.J.A.C. 8:6-1.2](#) to insert the word "open" before each of the words "door," "window," "louver," "skylight," "food or beverage pass-through," and "aperture." (37)

RESPONSE: The Department knows of no reason, and declines, to make the change the commenter suggests. The Department intends the term "opening" to mean a device that is capable of being opened. Throughout the proposed new rules, whether an opening is in an opened or closed position has legal significance as to the applicability of the prohibition against smoking. See, for example, proposed new [N.J.A.C. 8:6-2.2\(b\)](#). Therefore, the Department declines to change the definition of "opening" at [N.J.A.C. 8:6-1.2](#) as suggested by the commenter.

38. COMMENT: A commenter inquired whether proposed new [N.J.A.C. 8:6-2.2\(b\)](#) would mean that "if I have a seasonal, open air dining area that is not structurally enclosed, where smoking would be allowed, that I would not be able to 'structurally enclose' it during the winter months where no smoking is allowed? If so, we would strongly oppose this language for there are many such facilities that would be greatly harmed and discriminated against, especially in our shore areas." (37)

RESPONSE: Proposed new [N.J.A.C. 8:6-2.2\(b\)](#) would not prohibit structurally enclosing open air dining areas. It would prohibit smoking in those areas at all times of year if they were ever structurally enclosed. As stated in the proposal Social Impact, proposed new [N.J.A.C. 8:6-2.2](#) "would protect workers and the public from exposure to lingering secondhand smoke in establishments that would otherwise be subject to the Act, regardless of whether workers and the public would be on the premises when smoking would occur, and regardless of whether the establishment occasionally would be 'not structurally enclosed.'" 38 N.J.R. at 1930. An additional benefit to prohibiting smoking outright in

establishments that are periodically structurally enclosed is that the prohibition would help to avoid ambiguities and fact-sensitive issues in enforcement of the Act and the rules as to whether an establishment was structurally enclosed at the time a violation is alleged to have occurred. The Department will make no change on adoption in response to the comment.

39. COMMENT: A commenter states: "Semi-outdoor shopping malls with a semi-roof need to be smokefree." The commenter recommends prohibiting smoking in outdoor malls, "with stores facing each other, and there is a partial roof that covers the walkway between the stores, with the roof partially open. The smoke gets trapped in the walkway area, and this area is similar to an enclosed space." The commenter recommends that the Department "require that these types of outdoor malls be smokefree." (6)

RESPONSE: Without more information, the Department is unable to articulate whether the prohibition against smoking applies to the particular establishment the commenter describes. Whether an establishment or group of establishments is subject to the prohibition against smoking depends on whether the establishment is "not structurally enclosed" according to the formula contained in that proposed definition at [N.J.A.C. 8:6-1.2](#). The Department declines to establish a blanket prohibition against smoking at "outdoor shopping malls," but notes that proposed [N.J.A.C. 8:6-2.3\(a\)](#) would oblige owners and operators at such establishments to ensure that smoke in exterior areas of such establishments does not migrate, seep, or recirculate to indoor public places and workplaces at such establishments.

Economic Impact

40. COMMENT: "The Department admits that the law will have a financial impact [on] owners [and] operators, by requiring that they hire design professionals to meet the Act's financial, structural, and ventilation conditions, but the Department minimizes the loss of revenues by bars and taverns, many of whom have already lost 50 percent of their alcoholic beverage sales. The Department further states that local health departments will incur costs to inspect, verify, prosecute, etc. Does the Department plan to provide any financial assistance to local government for carrying out the provisions of this Act? If not, what happened to State-mandated, State pay? What plans does the Department have to provide guidance and assistance to business owners in helping them to minimize their costs?" (37)

RESPONSE: As stated in the proposal Economic Impact, only those owners and operators that seek to avoid the applicability of the Act by attempting to claim an exemption would incur professional costs. Owners and operators can avoid these professional costs by complying with the Act's prohibition against smoking in indoor public places and workplaces.

The Department disagrees with the commenter's characterization of the Economic Impact as "minimiz[ing] the loss of revenues by bars and taverns." Rather, the Department appropriately relies on the Legislative Fiscal Estimate, and notes that "any negative impact" resulting from a downturn in business at an establishment because clientele are deterred by the prohibition against smoking "would be as a result of the Act, not the proposed new rules." 38 N.J.R. at 1932.

The Department does not intend to provide financial assistance to local health agencies to carry out their obligations under the Act to enforce the Act. The Act provides, at N.J.S.A. 26:3D-62c, that municipalities would retain penalties recovered in enforcement proceedings local boards of health institute. As stated below in response to a subsequent comment, the Department is proposing a future rulemaking to delete the requirement at [N.J.A.C. 8:6-3.2\(b\)](#) that the cost of experts retained by local health agencies to review applications for exemptions would be at the expense of the local health agencies.

The Department is unaware of any costs of compliance to establishments other than those described in the proposal Economic Impact, all of which are nominal, such as the costs associated with photocopying and posting signage. The Department has no "plan" to assist establishments who incur fines and penalties because of violations of the Act and the proposed new rules, and the Department has no intention to provide financial assistance to establishments that incur costs associated with voluntary business decisions to secure exemptions from the Act. However, as stated below, the Department, with the cooperation and financial support of the Robert Wood Johnson Foundation, has engaged and continues to engage in significant efforts to publicize the existence of the Act to educate the public and to encourage voluntary cooperation. Moreover, the Department's Comprehensive Tobacco Control Program is available upon request to provide informational, educational, and technical assistance and training to establishments and other entities with respect to compliance. Moreover, the Department has dedicated resources to its tobacco cessation programs to assist persons seeking to quit smoking.

Jobs Impact

41. COMMENT: "The Department refutes the assertion that the Act will have a negative impact on the demand for jobs in the service and hospitality industry. Where did the Department or the Assembly get their facts to deny this assertion?" (37)

RESPONSE: As stated in the proposal Jobs Impact, the Department based its position on the Legislative Fiscal Estimate and the fact that any "decreased demand for jobs in the service industries ... would be as a result of the Act, not the proposed new rules implementing the Act." 38 N.J.R. at 1932. The Department is without authority to make representations as to the basis of findings of the **New Jersey** Assembly.

Regulatory Flexibility Analysis

42. COMMENT: "The purpose of the regulatory flexibility analysis was to cause Departments of government to be mindful of costs imposed on small businesses. But throughout the legislative process, the Department did not make one comment of concern about small businesses. However, the Department did accept the compromise of exempting 'big business' --the Casinos." (37)

RESPONSE: The comment does not appear to dispute the accuracy of the proposal regulatory flexibility analysis and the Department submits that the provided analysis comports with the requirements of the Regulatory Flexibility Act and the Administrative Procedure Act and its implementing rules at N.J.A.C. 1:30, particularly [N.J.A.C. 1:30-5.1\(c\)](#)7. The commenter appears to object to positions taken by the Department in supporting the enactment of the Act.

The Commissioner's support of the Act is irrelevant to the Department's obligation to promulgate rules to implement the Act, and therefore the comment is outside the scope of the proposed rulemaking. The Department will make no change on adoption in response to the comment.

However, the commenter is incorrect. The Commissioner testified on several occasions before the Senate and the Assembly regarding the Act, and addressed the positive economic experience of businesses in other communities that have enacted smoke-free laws. For example, the Commissioner testified on April 14, 2005 before the Assembly Budget Committee that, "The economic data from the areas that have gone smoke-free is uniformly in support of the improvement in the business climate following that." Assembly Budget Committee Hearing, April 14, 2005.

On a related point, at the same hearing, the Committee pressed the Commissioner to address the Act's impact in relation to decreased State Cigarette Tax revenues. The Commissioner's response during the colloquy quoted below is instructive:

Assemblyman Cryan: "My question is, is the revenue from the cigarette tax ... do you have any understanding of what that impact would be fiscally to the State as a reduction in revenue by losing 22,000 potential points of sale?"

Commissioner Jacobs: "I am the Commissioner of Health and Senior Services. It is not possible for me to advocate continued smoking as a revenue source. So that if revenue is lost because smoking is eliminated, that is good. You're saving money from, I hope ... in savings in health care costs, in productivity gains, in all these other things, which may not have been totally quantified yet. But it's certainly impossible for me to say to you, 'I support continued cigarette smoking because we need the money.' You will never hear me say that."

Assembly Budget Committee Hearing, April 14, 2005.

Exemption for Casinos and Casino Simulcasting Facilities

43. COMMENT: "Lastly, the casino gaming floors are still maintained as an exemption to the smoking ban regulation. While I acknowledge that this was the intention of the **New Jersey** State Legislature, I would ask the Commissioner to exercise every ability to remove this exemption and place the same protection on Atlantic City's 40,000 workers who will continue to be exposed to the devastating health effects of secondhand smoke. While the <<-AHA->> pursues other avenues of removing this loophole, we also ask that the Department promote more extensive signage for the casino gaming floors. It has been reported in the media that smoking was repeatedly witnessed outside of the gaming floor perimeter well after the ban was implemented. Patrons must be made aware of the specific locations that allow smoking, and employees must actively enforce this regulation." (75)

RESPONSE: The Department agrees with the commenter that the Act's exemption for casinos and casino simulcasting facilities at N.J.S.A. 26:3D-59e(1) and (2) should be repealed to protect the health of workers and patrons of these establishments.

Proposed [N.J.A.C. 8:6-5.3](#) would require casino licensees to place signage that meets the requirements of [N.J.S.A. 26:3D-61](#) at entrances and egresses from smoking and non-smoking areas within a casino hotel as appropriate. The Department is aware of the media reports to which the commenter refers. The Commissioner personally notified the General Counsels of each casino licensee of the effectiveness of the Act and the proposal of new rules and that the Department would deem failure to adhere to and enforce the Act and the rules, once adopted, including the signage requirements, to be violative of the Act and the rules.

44. COMMENT: "We also would like to see the casino situation, since they were exempted, in our opinion unfairly, since they do have an exemption, we think it should be very controlled and strictly regulated as to what they can and cannot do as far as putting gambling mechanisms in a bar and so forth. I was at a casino bar about two weeks ago, I gave a seminar down there, and they put about 40 machines in the bar itself and it looks to me like they're kind of maybe looking to making it into a casino floor. And, again, the regulations seem a bit nebulous on that." (62)

RESPONSE: As stated above in response to a previous comment, the Department agrees with the commenter that the exemption for casinos and casino simulcasting facilities at N.J.S.A. 26:3D-59e(1) and (2) should be legislatively repealed to protect the health of workers and patrons of these establishments. While casinos are at liberty to configure their allotted gaming areas, proposed new [N.J.A.C. 8:6-5.2](#) would address temporary expansions of gaming space area to protect patrons and workers in areas that one would not customarily expect to encounter secondhand smoke, such as banquet rooms.

45. COMMENT: "I am writing to you to voice my concerns about second hand smoke in the casinos. I have worked in the casino business in **New Jersey** for 27 years, as has my husband. Now my 21-year-old son is a dealer part-time while he is going to college. Since my whole family is working in such an unhealthy atmosphere, I am very concerned about our health. Casino workers should not be treated as second-class citizens! The health and well-being of the casino workers should <<-supersede->> economic concerns of the casino industry. I suspect that smokers would still gamble even if a total ban were implemented, and that these smokers would just get used to the idea of taking their smoke outside.

The smoking and nonsmoking areas are a joke! I have seen first hand that this does not work. First of all, many of the smokers simply ignore the rules and are uncooperative when you try to restrict them to designated areas. Second of all, the smoke simply drifts over to the nonsmoking areas and there really is no difference between the air quality at all.

I know that I speak for my fellow coworkers when I say that we appreciate the effort that has been made in this State so far to improve the air and the health of its workers, but this effort must be extended to include the casino worker." (1)

46. COMMENT: "I am complaining loud and clear on banning smoke in the casinos. You could only be doing everyone a blessing to help stop casino smoking. I am

a [senior citizen] and I'm sick every time I go to the casinos. Please use your power to help the nonsmokers and those poor smokers." (7)

47. COMMENT: "I have been a casino worker since 1980. In 1996, I was diagnosed with lung cancer, which was directly related to my smoking and the secondhand smoke in the casino. After they removed my left lung, I returned to work in the casino with the prospect of looking for another line of work. Due to the high cost of health insurance and the instability of the tourist economy, I have no other choice [but] to stay with my present employer.

In regard to the present law of no smoking in NJ, the casinos should not be exempt. Laws are laws; isn't this what we are [illegible] the Iraqi's [illegible]. Why is our democracy conditional?

As far as the casinos losing money, the governor proved last week [(referring to government shutdown during budget negotiations)] that doesn't really matter.

In closing, remember smokers are the minority; if stopped the nonsmokers would return as they did in [New York].

These casinos will be spitting out profits for the next 50 to 100 years. Why should they do it at the expense of a whole generation.

I would like to see my grandkids also; is that too much to ask in a democratic society?" (10)

48. COMMENT: "We urge you to do everything you can to eliminate smoking in the [Atlantic City] casinos. To allow such is criminal, considering the proven health hazards." (12)

49. COMMENT: "I am one of the supporters of smoke free casinos. I am so deeply concerned about the smoking casinos, particularly the secondhand smoke that may cause cancer to those exposed to it permanently, day after day, month after month, after month. I have been told and known that enough scientific and medical studies that have shown the very harmful effects of smoking and the secondhand smoke. I think that all of my co-workers who don't smoke share my deep concerns about this very important matter.

The following story is from my father, who has just come from California to visit our family, about the related secondhand smoke critical effects. He has a friend who has been and still is a chronic and chain smoker. Unfortunately, his friend's wife who didn't smoke ever had to suffer her lung cancer and had to be operated to have one part of her lung cut. She is now still living, yet who knows what will happen or who knows if the cancer may recur? She is surviving but not very optimistic in life. This is a true story of a victim of the secondhand smoke. The husband has been satisfied with smoking, but the wife has suffered!

I hope someday all public gatherings such as casinos, etc. will be healthy and smoking-free environment places. Eventually, casinos will attract more and more people who don't like smoking would like to come to enjoy games and other entertainments." (23)

50. COMMENT: "It is imperative that ... you urge the legislators to ban smoking in all areas of the Casinos.

The current arrangement of permitting smoking on the casino floor is not working. Smokers continuously violate the law by smoking in the 'smoke-free' areas. Poor enforcement of existing smoking regulations by casino managements is the norm. Furthermore, managements' intent to effectively police the situation is questionable. Evidence of this are the ash trays that are placed within non-smoking areas far from any boundary with a smoking-permitted area, such as, hallways and lobbies, connoting a 'wink and a nod' attitude toward the current ban.

Smoking must be banned throughout the entire casino, including the casino floor, for the following reasons:

1. According to the recent study by the Surgeon General, designating smoking and non-smoking areas in a space is not adequate to combat the ill effects of second-hand smoke.

2. It is easy to see and smell that the current arrangement in the casinos is not working. Nearly all areas of all casinos are contaminated by tobacco smoke.

3. It is clearly evident by the large number of patrons smoking in non-smoking areas around the casino floor that only a full smoking ban will create the regulatory atmosphere needed to stop violations and allow for practical enforcement. Presently, it is too easy for a smoker to carry a lit cigarette into a non-smoking area knowing if he gets caught that an excuse of ignorance or forgetfulness will suffice.

4. Allowing smoking on the casino floor, a public place, contradicts the spirit of the current clean air law.

The Casinos were never given a license to gamble with our health. Please support entirely smoke-free casinos." (24)

51. COMMENT: "The ruling allowing smoking in the casinos is ludicrous. These workers are being exposed to second hand smoke the same as in any other public building where smoking has been banned.

It is obvious the casino lobbyists have the State at bay. Are they going to pay the penalties awarded in the lawsuits that are certainly sure to follow the inevitable illnesses and deaths caused by second hand smoke? And how do you put a price tag on suffering and loss? But the greedy casinos don't care, as long as they are getting theirs.

Stand up for the 'little people' for once and make casinos 'NO SMOKING'! Then you won't have to worry about the signage indicating where you can or can't smoke." (31)

52. COMMENT: "I wish to express my concern about smoking on the casino floor. The air, essential to good health, doesn't have walls or partitions, and it's

impossible for casinos to install walls/doors into every gaming area, so the smoke drifts into the non-gaming areas as well. And as a casino dealer, I'm continually being exposed to harmful toxins. I am head of my household and I need the paycheck, so I'm gambling with my life. Please endorse or support a bill that will protect the health of all of **New Jersey's** people by banning tobacco smoke in all workplaces. Thank you for caring." (33)

53. COMMENT: "I am vehemently opposed to the exclusion of the casinos from the Smoke Free Air Act. It exhibits a blatant disregard for the safety and well being of thousands of casino employees who are exposed to this toxic environment day in and day out. They deserve a safe work environment. They deserve that at least as much, and probably more, than restaurant guests deserve to eat in a smoke free environment.

As an official with the Department of Health, I implore you to lend your voice to this cause and speak out on behalf of the casino employees." (43)

54. COMMENT: "I am in favor of no smoking in the casinos. Here are my reasons.

1. I feel sorry for the workers whether they be at the tables or working the floor. They have to suffer for eight hours every time they work.

2. I live nearby and come sometimes once or twice a week. I love everything about the casinos except the smoking.

When I come I notice I get a stuffed nose and a headache. When I come home I notice all my clothes and myself smell of smoke.

55. COMMENT: Finally for the health of all the casino workers and myself, I would like to see no smoking in the casinos at all." (44)

56. COMMENT: "I am exposed to second hand smoke, by working on the casino floor. I would like to see the casino floors smoke free. I do not know how they cannot be included in the smoke-free bill. I will not vote for anyone in the next election who does not include the casinos in that bill. Also if the State does not want to protect us then they should pay for our health insurance and funerals." (57)

57. COMMENT: "I am in support of the legislation to end the smoking on casino floors Bill A-2067, which would eliminate the smoking that should NOT be allowed, as our State law is supposed to [be] smoke free in ALL public places. The casinos should be no different.

Here are my comments and experiences regarding the current smoke-free air act in the casinos where I work:

1. The smoking prohibited non-gaming areas of the Trump casinos are not properly displaying signage to prevent and inform patrons NOT to smoke. I have seen many people smoking in these no smoking areas and they seem to have no idea they are breaking the law as [there is] very limited signage in their properties.

2. Additionally, smoke from the smoking permitted casino floors in casinos has infiltrated the non-smoking areas. This harms patrons with the dangers of second-hand smoke that cannot be properly ventilated. (See Surgeon General's Report of June 27, 2006) Not to mention the damage to the employees who are on the casino floor who get this infiltration every day.

3. My recommendation is to more strongly enforce the no-smoking as designated by law and to hold the casinos responsible for improper enforcement and improper signage. The Trump properties seem to go out of their way to display signs indicating 'smoking permitted' on the casino floor, but you cannot find as many signs that indicate 'No Smoking' in the designated areas.

4. Legislation should be approved as soon as possible to eliminate smoking on casino floors due to the health risks as found in the Surgeon Generals comprehensive factual report." (58)

58. COMMENT: "Our ... concern is the hazardous secondhand smoke that not only casino employees, but also casino patrons, are exposed to while in the casinos. In our experience, even though the casinos have designated areas as 'smoke-free,' we are still subjected not only to high levels of toxins from secondhand smoke, but also to the stench of the strong, accumulated cigarette and cigar smoke exhaled and side-streamed by smoking patrons. The 'smoke eaters' and other supposed preventive measures taken by the casinos are simply not adequate. Therefore, we have not gone back to the [Atlantic City] casinos and plan to go to the Delaware casinos instead ... Casino workers are people too! They deserve to have a clean, healthy environment in which to work. I personally know a casino baccarat dealer, a nonsmoker, who has chronic bronchitis and black lungs. Her doctor advised her to quit her job at the casino but, as a single parent, she can't afford to quit. She's looked for employment elsewhere -- but would have to take a drastic cut in pay--one she simply cannot afford to do. She, and thousands like her in the casino industry, deserve to not be threatened by the carcinogens and toxins contained in secondhand smoke while on the job!" (63)

59. COMMENT: "We understand that you are addressing updating the NJ Smoke-Free Air Act and may consider its relationship to casinos.

It would be great if you could extend the Act to include casino floors. Having this area as an exception does not make sense.

1. If smoking (including second-hand smoke) is not beneficial to a person's health, why have a confined area such as a casino floor excluded.

2. The effect on the casinos would probably be negligible--where else would people who enjoy gambling have as an alternate. Also there might be additional people who would go to the casinos. We know that we would increase our time on the casino floor without the aggravation of smoke.

3. The little difference in State income, if any, would be more than offset by the costs related with treating cancer and other illnesses related to smoking.

By the way, we really appreciate any input you had to implementing the NJ

Smoke-Free Air Act." (66)

60. COMMENT: "I am writing today with some observations and thoughts on the **New Jersey** Smoke-Free Air Act. I am concerned that the non-gaming areas of the casinos are smoky. I have seen (and smelled) this at the three casinos on the north end of the boardwalk, the only ones I've visited, Showboat, Taj Mahal and Resorts. Smoke is migrating from the gaming floors and smokers are smoking in the corridors. The signage is insufficient. As an employee of a contractor that does work in all of the casinos I am also concerned about being exposed to secondhand smoke. It's no secret that second hand smoke is a carcinogen. The casinos aren't really interested in policing this law. I think the regulations should insist on air handling systems that eliminate the migrating carcinogens, provide ample signage and policing of the law." (68)

61. COMMENT: "My husband and I frequent Harrah's Casinos in Atlantic City for gambling -- mostly on the slot machines. We really enjoy our visits there but are considering limiting our visits because of the smoking that is still allowed in the casinos.

Since the smoke-free laws in NJ came into effect, we are concerned about the increase of second-hand smoke in the gambling areas. We realize that it is our choice to go to the casinos but why should we be penalized because the NJ laws were made favoring the casinos and the bottom-line profits for the gaming industry and the State of NJ.

Also, this smoke is not confined to just the gambling floor. Because these gaming areas are not enclosed, the smoke permeates the hallways and the nearby open restaurants where the no-smoke rules are enforced. Of course, if the casinos are forced to enclose the gaming areas to keep the smoke within, that will be the last day we gamble in NJ. All gambling non-smokers would suffer and that would be unfair. I wonder what would happen to the profit bottom-line if the non-smokers just stop going to the casinos to gamble.

On June 27[, 2006,] the U.S. Surgeon General issued a new report on secondhand smoke, which concluded that even brief exposure causes immediate harm, and recommended eliminating all smoking indoors. Smokers should be protected also -- they are doubly affected by their own smoke plus those of others.

Please do something -- all public buildings and public areas should be smoke-free. It is the only fair solution for workers and patrons alike." (70)

62. COMMENT: "I would like to contribute some suggestions for finalizing the **New Jersey** Smoke Free Air Act that went into effect on April 15[, 2006]. I think it is wonderful **New Jersey** went this far, but I think it needs some improvement.

First, I think the act should be extended to include casinos. Only 20 percent of adult New Jerseyans smoke, and allowing smoking on the casino floor is making the majority bend to the habits of a small minority. Casino workers deserve the protections everyone else in the State now enjoys. But that may be beyond the scope of this comment period.

There needs to be more 'No Smoking' signs in the non-gaming areas of casinos. The law is almost three months old, and I still see people smoking in non-gaming areas all the time. More signs are needed to make sure they know they're not supposed to smoke off the gaming floor." (74)

63. COMMENT: "As a casino employee of over 25 years in Atlantic City, I viewed the Surgeon General's recent report on the dangers of secondhand smoke with resignation that the damage to my respiratory system has already occurred, and I must be beyond the point of no return. How sad that our State legislators have seen fit to exempt my workplace from the restriction, in spite of that report. It just doesn't seem right that they feel so many of our lives are expendable. The [Surgeon General]'s report said that ventilation systems are not sufficient, so preventing smoke from migrating to non-smoking areas is a losing battle. In the casino that I work in, we have non-smoking tables right next to smoking tables. The odor intrudes, so the particulate matter does too.

While I can appreciate the Board of Health's attempts to define and set procedures for implementation of the new law, I wish that our Commissioner of Health would use his good office to recommend that casino workers' health be considered and that our workplace be included in the ban." (76)

64. COMMENT: "I am a 25-plus year casino games supervisor and have been exposed to tremendous health risks due to second-hand smoke. I presently suffer from bronchiectasis, emphysema, asthma and calcified lung tissue. I have two spots on my left lung, which are checked annually for growth. Because of my exposure and condition, I can speak with conviction as to this issue.

The initial and most striking issue regarding the legislation is the way casino employees are made out to be second class citizens and are not offered the same protection under the law. The second issue is how the tax money is politically distributed to such a degree as to risk the health and safety of **New Jersey** residents and employees. If our State is so controlled by the powers to be, we should have our medical bills covered by the State. Likewise, if there is any compromise short of a smoke-free workplace, I can only offer my suggestions.

The casino floor should be restricted to only 25 percent smoking or 75 percent non-smoking. This would severely restrict the ability of many smokers from lighting up repeatedly. Also, there should be no smoking permitted at any table game due to the direct exposure, which is abusive, allergic and harmful to any employee trying to breathe. If you do not agree with this, you really need to put yourself in the dealers' shoes and have smoke blown in your face for eight hours to fully understand what it is like. Perhaps spend an evening in any Asian pit in Atlantic City so you can feel your lungs tighten as you loosen your collar and struggle to catch a full breath of clean air. Only then will you realize the seriousness of the issue.

My final recommendation is to have the air quality and the infiltration systems monitored and inspected by the State. If the State can pass legislation to protect **New Jersey** residents, how can we be totally ignored? If you are not completely convinced, perhaps you should read the U.S. Surgeon General's report published June 27, 2006, which clearly exposes the dangers of second-hand smoke.

It is time that we stop running our government like an organized crime operation and start representing the residents in a fair and prudent manner. The time to act is now, and the responsibility is yours." (77)

65. COMMENT: "I wish to call attention to the condition of tobacco smoke migrating from gaming floors into non-smoking areas, such as common walkways and bathrooms. I have no suggestions for their elimination other than an extension of the NJ Smoke Free Air Act to cover gaming floors, as well. The existing ventilation systems are not adequate to effectively remove harmful smoke from that environment.

I have always found second-hand smoke to be a consideration when my wife and I want to gamble in Atlantic City. I'm annoyed at the stench on my clothes, my skin and my hair after our visits. I come away from Atlantic City feeling as if I have a cold, symptoms of which are usually present for two to three days afterward.

Now I have a choice. I find that we're gravitating more to Delaware where gaming is in a smoke-free setting. I suspect that there are many who also are giving up on [Atlantic City].

I've attached a recent statement by the Federal Health and Human Services Secretary, Michael Leavitt, which unequivocally states second-hand smoke as being toxic and a poison and that there is no risk-free level of exposure.

Unfortunately many of us know that already, but others still need to be convinced."

The commenter encloses the Message of Michael O. Leavitt, Secretary of Health and Human Services, from the Surgeon General's Report, which states in part as follows:

"Secondhand smoke, also known as environmental tobacco smoke, is a mixture of the smoke given off by the burning end of tobacco products (sidestream smoke) and the mainstream smoke exhaled by smokers. People are exposed to secondhand smoke at home, in the workplace, and in other public places such as bars, restaurants, and recreation venues. It is harmful and hazardous to the health of the general public and particularly dangerous to children. It increases the risk of serious respiratory problems in children, such as a greater number and severity of asthma attacks and lower respiratory tract infections, and increases the risk for middle ear infections. It is also a known human carcinogen (cancer-causing agent). Inhaling secondhand smoke causes lung cancer and coronary heart disease in nonsmoking adults ... [I]nvoluntary exposure to secondhand smoke remains a serious public health hazard that can be prevented by making homes, workplaces, and public places completely smoke-free ... Smoke-free environments are the most effective method for reducing exposures." (5)

RESPONSE TO COMMENTS 45 THROUGH 65: The Department thanks those commenters who express support of the Department's efforts with respect to the Smoke-Free Air initiative and the proposed new rules.

As stated above in response to a previous comment, the Department is bound to recognize the statutory exemption for casinos and casino simulcasting facilities established at N.J.S.A. 26:3D-59e(1) and (2), while supporting its repeal.

The testimony these casino patrons and employees provide movingly demonstrates the public health imperative of the repeal of the exemption. The examples they cite of some casino licensees' failure to adhere to the Act are unacceptable, particularly in view of the findings in the Surgeon General's Report. The Department encourages the commenters to notify their legislators and the local government officials with jurisdiction over Atlantic City as to their opposition to the exemption. The Department notes that local government officials with jurisdiction over Atlantic City have authority to establish "restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under" the Act and the proposed new rules, pursuant to [N.J.S.A. 26:3D-63](#).

The Department encourages the commenters to report violations to casino licensee management, to local health agencies with jurisdiction, and to the Department, and to file complaints directly with their municipal courts. Casino licensees that fail to adhere to or enforce the Act and the proposed new rules, once adopted, including the signage requirements, are subject to enforcement action.

The Department declines to mandate the use of "air handling systems." As discussed more fully above in response to previous comments, available scientific evidence supports the finding that while "air handling systems" can provide some reduction in exposure, they cannot minimize the adverse health effects of secondhand smoke. ASRAE Position Document, supra.

Enforcing authorities may treat the presence of cigar and cigarette butts, ashes, and ashtrays in areas where smoking is prohibited, except at entrances to and egresses from nonsmoking areas, as prima facie evidence of the failure of an owner or operator to enforce the prohibition against smoking, with respect to which enforcement action is appropriate.

The Department would not have jurisdiction to address a request for air monitoring made by an employee of a casino hotel. The Federal Occupational Safety and Health Administration (OSHA) would have jurisdiction over such a request, to ascertain whether the components of secondhand smoke exceed permissible exposure limits established at [29 CFR §1910.1000](#), Table Z-1. OSHA's position with respect to secondhand smoke is that in "normal situations, exposures would not exceed these permissible exposure limits." OSHA Standard Interpretation for [29 CFR §1910.1000](#), Reiteration of Existing OSHA Policy on Indoor Air Quality: Office Temperature/Humidity and Environmental Tobacco Smoke, (February 24, 2003) available at: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INT_ERPRETATIONS&p_id=24602.

66. COMMENT: "After the government fiasco this past week [(commenter presumably is referring to 2006 government shutdown during budget impasse)], there are more important issues than a smoking ban, which never should have gone into effect. Check casino hotel lounges where smoking is not allowed--most

are empty--no money there but lounges on casino floor are thriving and workers are happy as they are making good tip money. You will find this also occurring in most of the indoor tourist bars and lounges.

A lot of the [second] hand smoke figures have been skewed as already been printed in the News Media. Check out two reliable studies by the Boston Journal of American Medicine and U.C.L.A research study of 20 years where no definitive link has been established to passive smoke. A person walking or jogging in cities will [inhale] many more carcinogens.

Smoking is a legal use, greater concentrations should be put on illegal drug users who will rob you, beat you up and kill you for money for their illegal habit. Check out nurseries in hospitals where crack [cocaine] babies remain for [three] or more months after being born from a user. This is a lot of health care moneys being used, which should not have been. A great majority of people on oxygen are obese (young [and] old), which really affects breathing.

There are many of us that grew up in smoke filled rooms and cars and were not harmed by [second] hand smoke, and we are in our 60s, 70s, and 80s,--no one smoked more than in the roaring 1920's and [depression] 1930's and also drank bathtub gin.

A little trivia [first] smoking ban was in 1938 in Germany dictated by two little men who thought they could [rule] the world. The little [German] dictator and his emperor ally did not like smoking. We all know what happened to these two--they did not control or rule long. In the United States there is such a thing as a Bill of Rights for all Citizens--[let's] get back to that.

Sincerely, A [septuagenarian] lady that does aerobics [two times a] week and two mile walks the rest of the days. Oh, also a social smoker with evening cocktail or two--and since April [2006,] only money now spent in **New Jersey** is at Casino Lounge or [Pennsylvania] and Maryland. Not far jaunts for weekend trips." (2)

RESPONSE: The commenter appears to raise issues arguing against passage of the Act, but does not raise any issues with respect to the proposed new rules. The Department refers the commenter to its responses to previous comments that express general opposition to the Act. The Department notes that Comments 45 through 65 above support the inference that at least some patrons and employees of casino licensees are not "happy" that certain wagering areas of casino hotels are exempt from the Act and would prefer that the Act apply uniformly throughout the State. Subject to the foregoing, the Department makes no response to the Comment to the extent it raises issues beyond the scope of the proposed rulemaking.

67. COMMENT: "It's my humble opinion that the law is a little unconstitutional when it would allow one segment of our economy, namely the gaming industry, to get a complete bye on the smoking rules while restaurants and other establishments must insist that their patrons leave the restaurant or the bar to smoke outside of the building. In the gaming industry it is quite legal to offer open perks if they so desire. In the restaurant business if these similar perks were offered to our lawmakers and legislators, they would be considered a bribe, which is illegal and chances are they might have to defend themselves in

court, pay fines and even spend some jail time. I do not think that that is a level playing field as far as the Constitutionality of the law is considered." (69)

RESPONSE: The commenter appears to raise issues arguing against the validity of the "casino exemption" contained in the Act at [N.J.S.A. 26:3D-59\(e\)](#), but does not raise any issues with respect to the proposed new rules. As stated above in response to a previous comment, the Department is bound to recognize the statutory exemption for casinos and casino simulcasting facilities established at N.J.S.A. 26:3D-59e(1) and (2), while supporting its repeal.

68. COMMENT: "The following comments to the ... proposed <<-new rules->> are being submitted on behalf of the Casino Association of **New Jersey** (hereinafter 'CANJ'). CANJ is an organization comprising all operating casino companies in **New Jersey** and accordingly these comments should be deemed submitted by each duly licensed casino entity operating in the State of **New Jersey**.

[The commenter provides a discussion of legal authority relating to a court's standard of review of administrative agency rulemaking.]

These comments question the authority of the Department to promulgate certain provisions of the proposed [new rules]. The guiding star, of course, is the [Act]. Insofar as is pertinent to these comments, the [Act] states [at [N.J.S.A. 26:3D-59](#)]:

[']The provisions of this act shall not apply to:[...] e. the area within the perimeter of: (1) any casino as defined in section 6 of P.L.1977, c.110 (C.5:12-6) approved by the Casino Control Commission that contains at least 150 stand-alone slot machines, 10 table games, or some combination thereof approved by the commission, which machines and games are available to the public for wagering; and (2) any casino simulcasting facility approved by the Casino Control Commission pursuant to section 4 of P.L.1992, c.19 (C.5:12-194) that contains a simulcast counter and dedicated seating for at least 50 simulcast patrons or a simulcast operation and at least 10 table games, which simulcast facilities and games are available to the public for wagering.'

And while reference is made in the [proposal] Summary ... at [38] N.J.R. 1925 [(a)] to the December 8, 2005 Legislative Statement to S1926 found in the First Senate Re-Print of the Act, it should be noted that the Legislative Statement provided in the superseding Second Re-Print, dated January 5, 2006, simply defines the exempted area as:

'-- the area within the perimeter of any casino as defined in [N.J.S.A. 5:12-6](#) approved by the Casino Control Commission that contains at least 150 stand-alone slot machines, 10 table games, or some combination thereof approved by the commission, which machines and games are available to the public for wagering; and

--the area within the perimeter of any casino simulcasting facility approved by the Casino Control Commission pursuant to [NJ.S.A. 5:12-194](#) that contains a simulcast counter and dedicated seating for at least 50 simulcast patrons or

a simulcast operation and at least 10 table games, which simulcast facilities and games are available to the public for wagering.'

Therefore, with the background of the authorizing statute and Legislative Statement, CANJ's comments to the [proposed new rules] are as follows <<- below as Comment 68 and as Comments 69 through 73 that follow->>:

1. Extent of Exemption. There is no basis in the legislation or in the final Legislative Statement to support proposed Subchapter 5, [N.J.A.C. 8:6-5.1](#). Both the legislation and the final Legislative Statement provide that there shall be an exemption for smoking "within the perimeter" of any casino or simulcasting facility. The Oxford English Dictionary defines "perimeter" as "the outermost parts or boundary of an area or object." All perimeters have edges or boundaries. Therefore, the interpretation must follow that the Legislature intended any place within the limits of the authorized casino or simulcasting floor to be exempted from the prohibition on smoking contained in the [Act]. The Department by attempting to promulgate a regulation that requires that any exempted area on the casino floor must be surrounded on all sides (or 360 degrees) by casino or simulcasting floor space is simply overstepping the legitimate province of rule-making and exceeding the statutory mandate of [the Act]. The consequence is, if this regulation were promulgated, that all floor area spaces including certain casino bar facilities on the edge of the perimeter of casino floor space would not be exempted as was specified by the Legislature in the [Act]. Common sense also dictates that this proposed regulation should be withdrawn. Most of these bars abutting the inside of the perimeter of casino and simulcasting floor space do not have effective separations from the casino floor, thus to ban smoking in them makes no sense, and was not intended by the Legislature. 'It is confusing and unwise to depart in the language of the regulation from the plain language of the legislation. To the extent that the regulation exemption for 'establishments ... completely surrounded by a casino' differs from the statutory exception for 'the area within the perimeter of ... any casino,' the regulatory language is invalid and void.' [(Commenter provides no citation or attribution for this quotation.)]" (59)

RESPONSE: The Department disagrees with the commenter's assertion that proposed new [N.J.A.C. 8:6-5.1\(a\)](#) is "invalid and void." The Department is unaware of any "specifi[cation] by the Legislature in the" Act that "certain casino bar facilities on the edge of the perimeter of casino floor space" be exempt from the Act's prohibition against smoking.

Proposed new [N.J.A.C. 8:6-5.1\(a\)](#) is consistent with [N.J.S.A. 26:3D-59](#), which was intended to, and does, exempt certain, but not all gaming floor areas (only those that contain the specified minimum number of machines and/or table games, hereinafter referred to as "qualified casinos"). [N.J.S.A. 26:3D-59](#), and in accordance therewith, proposed new [N.J.A.C. 8:6-5.1\(a\)](#), only incidentally exempts those restaurants, bars, and walkways that are within the perimeter of, and not merely abutting or adjacent to, qualified casinos. This outcome is consistent with [N.J.S.A. 26:3D-57](#), which requires restaurants and bars to be smoke-free by virtue of the definitions of "indoor public place" and "workplace."

Proposed new [N.J.A.C. 8:6-5.1\(a\)](#) is also consistent with legislative intent

as expressed by Senator Adler in proposing the exemption at [N.J.S.A. 26:3D-59](#), when he stated: "The purpose of this amendment, in specifying 'the area within the perimeter of a casino and simulcasting facility,' is to exempt only those areas in a casino and simulcasting facility that are completely surrounded by the applicable wagering area." Statement to First Reprint of Senate, No. 1926 with Senate Floor Amendments (Proposed by Senator Adler) (December 8, 2005).

The Casino Control Commission informs the Department that the amount of casino gaming floor space available to a particular licensee is calculated based on its available hotel space. The Commission further advises that it is entirely within the power and discretion of casino licensees to allocate and configure their available casino gaming floor space within their facilities. Thus, licensees are free to reallocate their available casino gaming floor space to completely surround those restaurants and bars that now only abut or are adjacent to qualified casinos.

The Department agrees from a public health standpoint with the commenter's assertion that where nonsmoking areas of casino hotels have no "effective separations from the casino floor," the Act's exemption for casinos and casino simulcasting facilities "makes no sense," and the Department urges the Legislature to repeal the exemption.

69. COMMENT: "2. Signage. [Proposed new] [N.J.A.C. 8:6-5.3](#) is virtually impossible to comply with in the context of existing casinos in **New Jersey**. As written the proposed regulation requires that a sign be posted at each and every entrance to and from a smoking area to a non-smoking area. In each casino, particularly those designed after the advent of 24-hour gaming there are hundreds of possible entrances and exits to and from the casino or simulcasting floor space. To require signage at each and every possible entrance or exit is regulatory overkill and would render all operating casinos to appear to be one large mass of signage.

This makes no sense, accomplishes no reasonable regulatory goal and was clearly not within the intention or contemplation of the legislation. This proposal must be recast to fulfill its intended purpose in a reasonable way.'
(59)

RESPONSE: Proposed new [N.J.A.C. 8:6-5.3](#) generally tracks the language and intention of [N.J.S.A. 26:3D-61](#) which requires owners or operators of indoor public places and workplaces to "place in every public entrance" thereto "a sign" that complies with the technical requirements provided therein alerting the public as to the permissibility of smoking in that location. Consistent with their obligation pursuant to [N.J.S.A. 26:3D-62](#) to require patrons and employees to comply with the Act, licensees are obliged to ensure that their workers and patrons are reasonably informed as to locations within their facilities at which smoking is permissible and impermissible. The statements contained in Comments 45 through 65 above suggest that, at least in these early days of the effectiveness of the Act, more signage rather than less is necessary and appropriate to alert patrons to extinguish their smoking materials as they move into nonsmoking areas of casino hotels, which presumably would assist in alleviating the enforcement burden on licensees. The Department encourages the owners and operators of casino hotels to educate their security

and other employees as to the applicability of the Act so that they can assist patrons with compliance.

70. COMMENT: "3. Percentage of Openings: Definition of Indoor Space. The BOCA Code (Section 406.3.3.1) as enacted in **New Jersey** requires structures to have 20 [percent] of their perimeter open to the outside air to be deemed 'open' under that regulatory regime. Casino parking structures have been designed to that criteria and are deemed open ventilated structures pursuant to BOCA. Under ... proposed [new] [N.J.A.C. 8:6-1.2](#)[,] to be deemed an open structure and hence be an area in which smoking is permitted, our garages or other facilities would have to have a total opening of at least 40 ... percent of their perimeter walls. There is no basis for this deviation from the BOCA Code in the ... proposed rule. Its' consequence is that our parking garages would be deemed 'open' for the purpose of BOCA and its ventilation requirements dealing with carbon monoxide and other vehicle exhaust gases, and 'closed' for the purposes of Departmental non-smoking rules. All of this without any guidance from the Legislature and without any justification by the Department. We request this definition be better substantiated as based on the legislative mandate or withdrawn or amended to comply with the BOCA Code." (sic) (59)

RESPONSE: [N.J.S.A. 26:3D-57](#) defines an "indoor public place" at which smoking is prohibited to include a "garage or parking facility." Thus, regardless of whether the proposed definition of "not structurally enclosed" is consistent with the "BOCA Code" for parking structures, the Act prohibits smoking at "casino parking structures" inasmuch as they are garages and/or parking facilities.

However, the commenter is incorrect with respect to the minimum percentage opening for a parking garage using natural (non-mechanical) ventilation to comply with the International Building Code (the BOCA Code was replaced some years ago by the International Building Code), which the Department of Community Affairs incorporates by reference in **New Jersey** through the Uniform Construction Code (UCC), N.J.A.C. 5:23. To comply with the UCC, a parking structure must be either at least 40 percent open on one side, or a minimum of at least 20 percent open on each of two or more sides for a total of at least 40 percent open. The proposed definition of "not structurally enclosed" is consistent with the UCC.

71. COMMENT: "4. Enforcement Requirements. [Proposed new] N.J.A.C. 8:6-9.1 et seq. (Subchapter 9) purports to establish new rules for the enforcement of the legislation and imposes a stricter burden on the owner or operator of a place of public accommodation than that imposed by the legislation. The legislation requires the owner or operator to order anyone failing to comply with the legislation to comply. The proposed new rule, N.J.A.C. 8:6-9.1(b) 1 would add the requirement that if the violator continues to violate the Act, the owner or operator must order the departure and removal of the offender. This additional obligation substantially exceeds the enforcement requirement of the legislation at [N.J.S.A. 26:3D-62\(a\)](#). The legislation requires that a violator be ordered to comply but does not require an order for their removal or forced departure. It is axiomatic that enforcement or penal provisions of statutes must be strictly construed and this proposed rule considerably expands the statutory obligation. [(No citation provided.)] (59)

RESPONSE: The Act does not establish a criminal liability for illegal smoking and it is not a penal law. Likewise, proposed N.J.A.C. 8:6 is not a penal rule. The commenter's suggestion that the Act and the proposed new rules require strict construction, rather than the reasonable exercise of managerial control over nonsmoking premises, is unwarranted. The Department has repeatedly emphasized, both in its general communications to the media and the public, and in the proposal, that the Smoke-Free Air initiative is a public health initiative to protect workers and the public, and not an effort to turn smokers into criminals. See, for example, the Social Impact, 38 N.J.R. at 1931: "Ideally and preferably, persons having control of an establishment will not need to involve law enforcement or peace officers, except as a last resort with respect to a recalcitrant person smoking illegally who refuses to either stop smoking or leave. The purpose of involving law enforcement or peace officers is not to file complaints for violation of the Act and proposed new N.J.A.C. 8:6, but to obtain the orderly removal of persons smoking illegally."

It is unlikely that the person in control of a bar or restaurant would wait for health officials to arrive on scene before refusing service to a person who entered the premises barefoot, in violation of public health and food safety laws. It is more likely the person in control would simply ask the person to either put on shoes or leave, and would not tolerate the person remaining barefoot on the premises. The Department intends this same level of reasonableness and the proper exercise of managerial control to inhere to the enforcement of the Act and the proposed new rules at N.J.A.C. 8:6.

The Department disagrees with the commenter's suggestion that the proposed new rules at N.J.A.C. 8:6-9 exceed the Commissioner's authority at [N.J.S.A. 26:3D-64](#) "to adopt rules ... to effectuate the purposes of the Act." The protection of nonsmokers from the "substantial health hazard" constituted by secondhand smoke is paramount among these purposes. [N.J.S.A. 26:3D-56](#).

[N.J.S.A. 26:3D-62](#) requires a person having control of an indoor public place or workplace to "order" a person smoking illegally to comply with the Act, and requires the Department or other officials suspecting violations of the Act to order the person having control to take "appropriate action." An "order" without consequence is not an order, but a suggestion and does little to protect the public from the hazards of secondhand smoke.

The Department believes that providing guidance to the regulated public as to the interpretation of the Act's mandates is within the Commissioner's appropriate rulemaking jurisdiction. Moreover, the Department has determined that requiring owners and operators to arrange for the departure or removal of recalcitrant smokers to be reasonable direction as to the "appropriate action" they should take to protect their employees and patrons, and invites the commenter to suggest alternatives that would, as effectively, "effectuate the purposes of the Act."

The presence of government officials, and/or the issuance of a citation, are not necessary preconditions to the obligation of a person in control to take reasonable and immediate steps to protect employees and patrons in a nonsmoking establishment or area from exposure to secondhand smoke from others smoking illegally. The proposed new rules at N.J.A.C. 8:6-9 would empower and require persons in control to remove a person smoking illegally, as an

alternative to the person in control receiving a citation for violating the Act by tolerating illegal smoking therein.

The Commissioner previously and directly notified the commenter's clients in writing that the Department suspects that violations of the Act are occurring on their premises, and the statements contained in Comments 45 through 65 above corroborate this suspicion. In that written notice, the Commissioner directed the commenter's clients to take appropriate action. The Commissioner was not specific, assuming that the commenter's clients would be capable of exercising good business judgment and managerial discretion as to the manner in which they should use their extensive security resources to protect their employees and patrons. However, should the commenter's clients prefer guidance of a more specific nature, such as a specific order that they are to require the departure or removal from their facilities of persons smoking illegally, the Department would provide this direction on request.

72. COMMENT: "5. Temporary Expansion of Casino Floor Area. The proposed rule at [N.J.A.C. 8:6-5.2](#), which purports to deny the casino expansion [(sic; probably should be 'exemption')] to a temporary expansion of a casino or simulcasting area goes well beyond the scope of the legislative enactment. The Department lacks the jurisdiction and power to implement this regulation without legislative direction or mandate." (59)

RESPONSE: The Department disagrees with the commenter's suggestion that proposed new [N.J.A.C. 8:6-5.2](#) would exceed the Commissioner's rulemaking authority at [N.J.S.A. 26:3D-64](#). As stated in the proposal at 38 N.J.R. at 1929, the Department understands that temporary expansions typically involve the use of banquet halls and other areas of a casino hotel where nonsmoking employees and hotel patrons might not reasonably expect to be exposed to secondhand smoke, such as if they were in Atlantic City for a social event or conference rather than to participate in gaming. The Department does not believe it was within the legislative intent of the Act to permit smoking in areas of casino hotels at which the public would not expect to be subject to secondhand smoke exposure as they would in the permanent gaming areas of casino hotels.

73. COMMENT: "6. Migration of Smoke. The proposed rule at [N.J.A.C. 8:6-2.3\(a\)](#) does not advance any objective criteria to determine culpability for "migration, seepage or recirculation of smoke" and if adopted this rule would simply be void as the standard set is non-existent and impermissibly vague. Without some criteria how could you determine where the smoke is coming from, how it was created and who would be culpable if the source of the smoke generation was not in the control of the owner or operator of any facility. (59)

RESPONSE: In implementing proposed [N.J.A.C. 8:6-2.3\(a\)](#), the Department expects owners and operators to undertake reasonable efforts to protect workers and patrons from outdoor smoke entering their premises. Owners and operators would need to undertake reasonable investigation to ascertain the source of smoke entering premises, and undertake reasonable efforts to disperse the smokers creating the entering smoke.

74. COMMENT: "On behalf of CANJ, I would request that the Department review

and act upon these comments. CANJ operates businesses in one of the most highly regulated environments in the State. Our compliance record is unparalleled. But our compliance is to regulation which is warranted, reasonable and mandated by statute. The proposed rules as noted above go beyond legitimate regulation pursuant to the ... Act and accordingly should be withdrawn or substantially modified." (59)

RESPONSE: The Department's issue-specific responses to the commenter's assertions are above. As more specifically addressed in response to those issue-specific comments above, the Department generally disagrees with the commenter's suggestion that proposed N.J.A.C. 8:6 exceeds the Commissioner's rulemaking authority. The Department takes no position with respect to the commenter's assertion that its "compliance record is unparalleled," other than to note that the assertions in Comments 45 through 65 above would support the inference that some of the commenter's clients are not complying with their obligation under the Act, effective as of April 15, 2006, to prohibit smoking in the nonsmoking areas of casino hotels.

75. COMMENT: A commenter recommends "an increased notice of demarcation with respect to gaming floors in casinos for purposes of determining where patrons can and cannot smoke in casinos. Evidence has shown that casino patrons have been going from the casino floors where smoking is permitted to areas that are now smoke-free. These patrons did not pass any form of notification or casino personnel urging them to put out their cigarettes or cigars. To ensure that casino guests and casino hotel patrons are clearly aware where the smoking boundaries exist, appropriate signage needs to be clearly displayed on and around casino gaming floors. The proposed regulations should be expanded upon to set up clear requirements regarding signage on gaming floors. Furthermore, casino employees should be educated about where the smoking boundaries exist so that they may properly inform a patron if they have stepped into a smoke-free zone with a lit cigarette or cigar." (21)

RESPONSE: Upon the adoption of the proposed new rules, the Department intends to monitor the effectiveness of the proposed signage requirements, and the extent to which owners and operators, including casino hotels, are acting with due diligence and in good faith to enforce the prohibition against smoking, to ascertain whether rulemaking to establish additional requirements relating to signage are necessary to ensure and enhance compliance. Subject to the conclusions of that review, the Department will not make a change to the proposed signage requirements upon adoption in response to the comment.

76. COMMENT: A commenter states that it "hosted a casino workers' forum in Atlantic City [in late May 2006]. Over 50 workers came and wanted to know why they were secondhand citizens in **New Jersey**. I would be remiss, then, if I didn't note that many questions remained regarding locations exempted by the new law, especially these casinos. These 40,000 left-behind workers need to know that they're not secondhand citizens and that **New Jersey** must move forward." The commenter begs "the Department to act on this as soon as possible and" states that it "will not rest until these 40,000 workers and their families are protected from life-threatening secondhand smoke ... We call out to the owners of the Atlantic City casinos not to wait for further legislation but rather to announce today that they will initiate voluntary smoke-free gaming." The commenter "wholeheartedly support[s] ongoing efforts to include

the casino floors [in] the ... Act's [prohibition against smoking]." (21)

RESPONSE: As stated in response to a previous comment, the Department supports the effort to eliminate the exemption at N.J.S.A. 26:3D-59e.

Rectories and Convents

77. COMMENT: A commenter objects to N.J.A.C. 8:6-8.1(a), asserting that the "Legislature recognized that some private homes are used as workplaces. For example, if someone hires a housekeeper, child care provider, or other domestic worker, the home is a workplace for that person. If someone operates a business or has an office in the home, perhaps hiring an assistant or secretary or other employees, the home is a workplace. A private residence may also be an indoor public place if a business to which clients, patients, or customers come is operated out of the residence. The Legislature determined to exempt such businesses and indoor public places." In support of this statement, the commenter cites to [N.J.S.A. 26:3D-59\(d\)](#), which exempts "private homes, private residences and private automobiles."

The commenter further states: "In a meeting with your office, it was suggested that only private homes that are not used as workplaces or indoor public places are exempt. We must respectfully point out that such an interpretation finds absolutely no support in the statute. If the Legislature did not intend to exempt workplaces and indoor public places located in private homes and residences, there would be no need to add an exemption for private homes and residences to the statute. The statute does not ban smoking in all buildings or all indoor places. It bans smoking only in workplaces and indoor public places. A home or residence would be subject to the smoking ban in the first instance only if it were also a workplace or an indoor public place. An exemption for homes and residences is only needed, and only has meaning, if it exempts those homes and residences otherwise subject to the smoking ban -- those that are used as workplaces or indoor public places." The commenter cites to rules of statutory construction to support this premise.

The commenter further cites to Legislative Committee statements accompanying versions of the bills that ultimately became the Act. Specifically, the commenter cites to the Senate Health, Human Services and Senior Citizens Committee Statement to Senate, No. 1926 (with committee amendments) (March 14, 2005), which states: "Also, the provisions of the bill would not apply to private homes, private residences and private automobiles. This provision concerning private homes and residences is intended to include residences such as a rectory or convent which is located on the grounds of a private school." The commenter also cites to Assembly Health and Human Services Committee Statement to Senate, No. 1926 (January 5, 2006), which states: "The following are exempted from the restrictions on smoking: ... private homes, private residences and private automobiles (which is intended to include residences such as a rectory or convent located on the grounds of a private school)."

The commenter further states: "In short, the statute explicitly exempts private homes and residences from the smoking ban and the Legislature took steps to ensure it was understood that this exemption applies to homes and residences located on the grounds of a private school--specifically noting that such homes may include rectories and convents. [Proposed new N.J.A.C. 8:6-

8.1 turns] this clear exemption on its head, providing that 'certain residences' are 'not exempt.' With respect to rectories and convents, and only rectories and convents, [proposed new N.J.A.C. 8:6-8.1(a) states] that the exemption will not apply if the rectory or convent is used as workplace or is generally accessible to the public[, which] is objectionable and unlawful on several grounds.

First, [proposed new N.J.A.C. 8:6-8.1(a)] is patently unlawful as an ultra vires act of the Department. Regulations are intended to implement a statute. A regulatory agency may not use its rulemaking authority to go beyond the dictates of a statute and certainly may not repudiate provisions in that very statute. A regulation that is plainly at odds with the statute is ultra vires. [(Citations omitted.)]

In this case, the Legislature did not act to ban smoking in all buildings or in all homes and residences. The ban is limited to workplaces and indoor public places. With respect to those buildings subject to the ban, the Legislature then created certain exemptions, including an exemption for homes and residences otherwise subject to the ban. The Legislature also made its intent clear that this exemption applies to residences, including rectories and convents, even if they are located on the grounds of a private school. [Proposed new N.J.A.C. 8:6-8.1(a) ignores] the legislative intent and, indeed, the plain language of the statute, to impose the ban on rectories and convents, whether or not they are on school grounds, if they are used as workplaces or are generally accessible to the public. This proposed regulation blatantly disregards the plain language of the statute and is ultra vires.

For reasons that are not explained, only Catholic rectories and convents are singled out for this more restrictive treatment. Residences of the leaders of other religious congregations are not mentioned. Residences in general that are used as workplaces or that are generally accessible to the public are not mentioned. [Proposed new N.J.A.C. 8:6-8.1(a)], therefore, violates the religion clauses of the Federal and State Constitutions, as well as the Equal Protection Clause.

[Proposed new N.J.A.C. 8:6-8.1(a)] specifically states that a rectory or convent is not exempt if it is 'Used in whole or in part as a workplace of the parish or diocese by employees or volunteers of the parish or diocese other than those who reside there (for example, for the performance of clerical work in an office area).' So, if there are offices located in the home of a Catholic priest or a Catholic nun, that home is treated differently than any other home which contains an office. Even if the parish offices are located in another building, if there is a paid employee or a volunteer who prepares meals or does housekeeping, again the home is treated differently than the home of any neighbor who may hire a cook or a housekeeper.

Even if absolutely no one ever works in the rectory or convent, the proposed regulation goes on to state that the residence is not exempt if it is 'generally accessible to the public.' The phrase 'generally accessible to the public' is defined as follows:

(1) Persons other than persons having control of an establishment are permitted or required to enter the establishment for any purpose, regardless of

whether the entry is occasional or routine; or

(2) Persons other than persons having control of the establishment perform a service or labor at the establishment, regardless of whether the service or labor is performed for profit or remuneration or on a non-profit or volunteer basis, and regardless of whether the service or labor is performed occasionally or routinely.

Proposed [N.J.A.C. 8:6-1.2](#).

Given this definition, if someone knocks on the door of a rectory at night seeking assistance or counseling and the priests lets that person in, the rectory becomes 'generally accessible to the public.' If parish volunteers or employees who work in another building are permitted (not required) to enter the kitchen in the rectory to store their lunch in the refrigerator, make coffee, eat lunch, or for any other purpose, the rectory is 'generally accessible to the public.' If a meter reader enters a convent a couple of times a year, the convent is 'generally accessible to the public.' If anyone other than the priests or nuns living in the rectory or convent is permitted to enter the residence 'for any purpose, regardless of whether the entry is occasional or routine' the residence is considered 'generally accessible to the public.'

Besides being ridiculously overbroad, [proposed new N.J.A.C. 8:6-8.1(a)] is clearly unlawful in that it attempts to impose restrictions on certain homes based only on the fact that they are occupied by Catholic priests and nuns. There is no reason to treat these residences differently than any other residence in the State. The statute exempts private homes and residences and the [proposed new rules] cannot disregard that exemption." (20)

78. COMMENT: "I am a Catholic [Monsignor] residing in [a **New Jersey** parish rectory]. I must very strongly oppose ... proposed [N.J.A.C. 8:6-8].

I am a smoker. I am 76 years of age and I have smoked since I was 15. I have no intention of stopping now.

The other priest who resides in the rectory is a non-smoker who has not objected to my smoking. For years, I have not smoked at any public meetings of priests or laity. I do not attempt to smoke in homes where friends or others do not wish people to smoke; and that includes my own brother's house.

The [Act] bans smoking in workplaces, indoor public places and school grounds, but it specifically states that the provisions of the act shall not apply to private homes, private residences, and private automobiles. The Committee Statements from both the Senate and the Assembly state that the exemption for private homes and residences is intended to include residences 'such as rectories and convents even when they are located on the grounds of a private school.' your proposed regulations, however, not only totally ignore this exemption; they deny it.

I cannot speak about convents because I have never seen a religious sister smoke. But I can speak about rectories, especially about the rectory in which I live. We have an office for each priest and for the parish secretary who, by

the way, is a smoker. These offices are on the first floor of our rectory. We do not allow any smoking in any of the offices at any time. The other area of the first floor of our rectory contains our dining room, the kitchen, a pantry, a laundry and a suite for a visiting priest should we have one. The second floor contains the suites of the other priest and myself. The only other full-time occupant of the rectory is my labrador retriever. No one other than the other priest, the parish secretary, the cook, who is in only three days a week, and any people who may be called in to do repairs and the dog are permitted in any area of the rectory other than the offices. Aside from the three offices, the rest of the building is our private home where we live, eat, and sleep. We vigorously maintain that distinction. It is a private home. The only people who are ever allowed in that private area are other priests who may come, members of our families and close friends who may visit us, the secretary, the cook and contractors who do repairs.

Do I smoke in that area of the first floor? Yes, I do. Do I smoke in the dining room? Not if the other priest is there ... When we are together, I do not smoke in his presence ... The other areas on the first floor of the rectory are the dining room, the laundry, pantry and we have a visitor's room if somebody comes. Do I smoke in those rooms? Yes, I do. Do I smoke in my own room? Yes I do. Do I smoke in the other priest's room? No, I don't.

Now as I read [proposed new N.J.A.C. 8:6-8], if any person other than the priests living in [the] rectory are 'permitted or required to enter the establishment, for any purpose, regardless of whether the entry is occasional or routine' then the whole rectory is 'generally accessible to the public.'

So in other words, if anyone, other than the two priests, is ever permitted to enter the rectory for any purpose--personal guests, family members, friends, the secretary, the cook, a meter reader, plumbers, electricians, et cetera--then our home is deemed 'generally accessible to the public' and is not exempt in this chapter on residences. No other residence is subjected to this standard.

What about a doctor's office in his private home? Or a lawyer's office in his private home? Or an insurance agent who has an office in his home? Or a salesman?

At this point and only at this point, I am not accusing the proposed regulation of prejudice, but why has it singled out Catholic rectories and Catholic convents? Catholic priests? Catholic nuns? Are not non-Catholic parsonages and manses used for the same purposes by non-Catholic ministers and rabbis? Yes, they are.

How about others who have offices in their homes that are not mentioned? Why has this regulation singled out us Catholic priests? And, personally, why are you trying to deny me a home, which you do not deny to others?

Am I upset? Yes, I am.

Will you change the wording of [N.J.A.C. 8:6-8]? I certainly hope so. Because if you don't, I assure you, if you don't, I am going to accuse you of

bigotry and prejudice." (4)

79. COMMENT: "I ... am at a loss to understand why 'rectories' and 'convents' are targeted as non-exempt in almost all circumstances, despite the wording of the statute, and, further, that 'parsonages' and other private residences remain exempt[. While] the proposal may be well-intentioned it effectively and unjustly singles out a specific class of persons.

I am a volunteer at my local 'rectory.' [This] rectory, like every other one I've known, is the private residence of the priests. It is their home, and the only place they live. I believe that, as long as smoking remains legal, every citizen is entitled to equal treatment under the law, including smoking in the private areas of their home.

Employees of our parish are well aware that the rectory is a private home. They are free to choose where they work." (14)

80. COMMENT: "I am not a smoker, but I cannot see why the State would forbid adults to smoke in my house, workplace and outdoor area. I am outraged that the State would presume to regulate my home and no one else's home. Why is the Catholic property being singled out by our State senators/government for these outlandish regulations[.] Like everyone else, I should be permitted to decide whether or not smoking is permitted in my home. (19)

Our rectory office/home has had no smoking inside the facility long before anyone started these ridiculous regulations. The volunteers and any office help have always gone outside the building to smoke (they have their own ashtrays, outside, which are taken care of by them, they do not leave butts etc. around the grounds or surrounding area or offended anyone) this has never been an issue with anyone." (Sic.) (19, 56)

81. COMMENT: "With regard to the definition of a workplace, why are Catholic rectories and convents not considered to be a private residence and all other minister's homes are private even if they may be used for counseling? Why if an individual has an office in their home and works from this office their home is exempt but a rectory, the home of the priests, has an office is not exempt. There are members of the clergy who choose to smoke, should they be required not to smoke in their homes. Again, I am not a smoker, but I should be free to decide whether to allow smoking in my home or not." (32)

82. COMMENT: "I am the pastor of [a Catholic] parish in ... **New Jersey**. At my parish, the rectory is a building separate from the church, the school, and the parish offices. It is currently home for me and one other priest stationed at the parish. The house is across the street from the church building and the parish offices and a block away from the school. It is situated between other single-family residences.

I do not understand why my home should be regulated any differently than any other home on the street. But the proposed regulations do treat it differently and for no other reason than Catholic priests live in the home. Ministers of other faith are not subject to the regulations as we are. Other individuals are not subject to these regulations in their homes.

Even though the statute says that private residences are exempt, the proposed regulations attempt to regulate some private residences--namely those occupied by Catholic priests. For rectories--which is a term used for the homes of Catholic priests, but not used by ministers of other religions--smoking is banned if any part of the residence is used as a workplace by employees or volunteers of the parish or if the residence is generally accessible to the public.

In my case, the parish offices are not located in the same building as the rectory. However, there is a cook who works in the rectory. Under the proposed regulations, this makes the rectory a workplace and smoking would be banned. But, if my neighbor hires a cook, or a maid, or someone to look after the children, my neighbor's house does not cease being a residence and lose the exempt status provided by the statute. The statute recognizes that private homes are different from other workplaces and from public places. The legislature was clearly reluctant to regulate legal behavior occurring in one's private home. The proposed regulations, however, presume to do just that--but only for ministers of a particular religion.

I would not consider my home 'generally accessible to the public' but it would be the way that term is defined in the proposed regulations. Parish employees and volunteers are not required to come to the rectory, but I do allow them to come in at lunch time and use the kitchen. So, people other than myself and my associate pastor are permitted to enter the building, which, according to the regulations, makes my home 'generally accessible to the public.' if I occasionally meet with someone to counsel them or allow a small parish group to meet in my dining room, again my home becomes 'generally accessible to the public.' Even if all of this is banned, but a meter reader occasionally enters to read the water meter, my home all of sudden becomes a workplace in which smoking is banned. How is this so when my neighbors can invite people into their homes without those homes suddenly becoming public places?

Even if I were to ban all employees and volunteers from the rectory, keep all of the meter readers out, and forbid any and all meetings, the first time a parishioner knocked on my door in the middle of the night looking for help and I let him in, my home would become a place 'generally accessible to the public.%' This is simply unfair and nonsensical.

I would also like to point out that the rectory, where I presently live, is not located on the same plot of land as the school. Many rectories are, however, located on parish grounds with a school building. In such cases, the proposed regulations may ban smoking outside the rectory, at all times, but permit smoking inside if the rectory is not a workplace or accessible to the public. This leads to a situation where a smoking priest who lives with a nonsmoking priest is forced to smoke indoors when he would otherwise willingly step outside. So, even at midnight in the middle of August, the man who smokes cannot go outside on the porch in consideration of the nonsmoker who shares the house.

You may think this is not a concern because the nonsmoking priest is not likely to report to authorities. What you need to understand is that anyone who has a complaint about the parish--because they don't like the bells on Sunday

morning, or they don't like people parking on the street to go to mass, or their child was expelled from the parish school--can use this as a means of retaliation.

I am here today to ask you to treat my home like every other home. The legislators exempted private residences--all private residences--and the regulations should not take that exemption away from some of us. They particularly should not impose restrictions on some of us merely because of our vocation in life or our choice of religion." (73)

83. COMMENT: "I am outraged but not surprised at the trickling affect of the NJ Smoke-Free Air Act. What began from prohibiting smoking in indoor public places and workplaces is now trickling its way into our own private homes--beginning with Catholic rectories and convents.

Should I, as a layperson, decide to hire an outside contractor to perform a service, or a friend or family member enters my home asks for advice, I am entitled to smoke in their presence in my home and rightly so. However, if the same contractor, friend or family member enters a rectory or convent, the priests or sisters are not able to smoke in their residence, their home. What difference could there possibly be between their home and mine? There isn't any.

This proposed regulation not only ignores the statutory exemption and Statements of Legislation intent contained in the Committee Statements--it clearly states to me that sooner or later all citizens of the United States will no longer have the rights, freedom or privileges we so proudly have. We will be dictated to the level that we will be told what we can and cannot do in our 'private homes'--beginning with the Catholic rectories and convents." (38)

84. COMMENT: "The proposed regulations treat the residences of Catholic priests and nuns differently from any other residences." (22, 34, 39)

"The Smoke Free Air Act specifically states that the provisions of the Act shall not apply to 'private homes, private residences, and private automobiles.'" (22, 39, 49)

"The Committee Statements from both the Senate and the Assembly state that the exemption for private homes and residences is intended to include residences, such as rectories and convents even when they are located on the grounds of a private school." (22, 34, 38, 39, 49)

"The proposed regulations ignore the plain language of the statutory exemption and the statements of legislative intent contained in the Committee Statements." (22, 39, 47, 49)

"The statute exempts private residences, whether or not the residence is also a workplace and whether or not the residence is also an indoor public place. The proposed regulations, however, ignore this exemption in the case of residences of Catholic priests and nuns." (19, 22, 39, 47, 49)

"Our homes are not exempt if they are 'used in whole or in part as a workplace

of the parish or diocese by employees or volunteers of the parish or diocese other than those who reside there.' So, if I hire a domestic or a cook, my home is not exempt. If anyone else hires a domestic or a cook, his home remains exempt. If the parish offices are in the same building as my home, my home is not exempt. But, if anyone else operates an office or business out of a home, that home is exempt." (22, 39, 47, 49)

"Even if a rectory is not a workplace, a rectory, unlike any other home, is not exempt if it is 'generally accessible to the public.' If someone else operates a business in his home that is open to clients, patients, or customers, his home remains exempt. Yet, if I hold a meeting at my home, or if I counsel someone in my home, suddenly it is generally accessible to the public and is no longer my home." (22, 39, 47, 49)

"If a doctor, lawyer, plumber, electrician or anyone else maintains and conducts a business in their home, their home, as a private residence, is still considered exempt, even if they hire a cook or housekeeper, but a rectory, is singled out as non-exempt in the same circumstances. If the above mentioned professionals meet with clients, patients or customers, the home remains exempt. Yet, if a priest counsels someone or meets with someone in this home, this generates a non-exempt status? Why should the home of a priest or nun be treated differently than anyone else's home?" (34)

"Why is my home treated differently than anyone else's home? (19, 22, 39, 47, 49)

"Why are Catholic 'rectories' and 'convents' singled out? What possible reason could there be for treating the homes of Christian ministers differently from the homes of ministers or religious leaders of any other faith? Why should a minister's home be treated differently from anyone else's home?" (19, 22, 34, 39, 47, 49)

"I do not smoke, but I am outraged that the State would presume to regulate my home and no one else's home. Like everyone else, I should be permitted to decide whether smoking is permitted in my home." (19, 22, 39, 49)

"The proposed regulations are an outrageous encroachment on my personal liberty. I should be extended the same right as everyone else to decide whether or not smoking is permitted in my home." (34)

"[The] proposed regulations in regard to my objections do not reflect an understanding of the day-today parish work and those engaged in the many and varied ministries in parish work." (39)

85. COMMENT: "I am writing to support the **New Jersey** Catholic Conference argument that ... rectories and convents should be treated like every other residence in the State of **New Jersey**....

I am upset that the State would presume to regulate my rectory/home and no one else's home. Like every one else, I should be permitted to decide whether or not smoking is permitted in my home. Especially when the office of the rectory is divided/sectioned off by a locked door from my living quarters.

I ask that the regulations be revised so that every ones civil rights are not over burden by the Smoking Law guidelines." (sic.) (46)

86. COMMENT: "My ... concern involves Catholic rectories and convents. I cannot understand why we are being singled out and being treated differently then other private residences provided for the clergy of other denominations. The rectory is where I live. It is no different than anyone else who operates a business form their home. I live, eat and sleep here. There are offices in a separate section of the building where business is conducted. Is this not an invasion of my privacy as an individual?" (47)

87. COMMENT: "I am ... concerned with the regulations concerning private residences. Homes for clergy (rectories) and religious (convents, priories, monasteries) are private residences and therefore should not be subject to the provisions of the Act as is stated within the Act itself.

If it is legal for a person to smoke in his or her own home when there is in that person's employ a hired housekeeper, cook, and/or groundskeeper, then the same should apply to the homes of Catholic clergy and religious sisters and brothers and should not be singled out for different treatment under the law. Catholic clergy and religious are still citizens and should be afforded the same civil rights as any other citizen." (51)

88. COMMENT: "I don't feel we should be subject to this NJ Smoke-Free Air Act. Reason:

The priests['] common space rectory/home should not be held to this regulations when other entities are not held to the same standards, why should Catholic priests abode be subject to or treated differently from anyone else's home? When ministers of different faiths or religious leaders are not held to the same standards?

I do not feel that our facilities should be subject to this law, as we have always been concerned for our people and employees by giving them a smoke free workplace." (56)

RESPONSE TO COMMENTS 77 THROUGH 88: [N.J.S.A. 26:3D-59\(d\)](#) exempts "private homes, private residences and private automobiles" from the prohibition against smoking. Presumably, if all homes, residences, and automobiles were exempt, then there would have been no need to use the word "private" in the exemption. The Act does not define "private homes, private residences and private automobiles." Therefore, it is within the Department's rulemaking authority to construe by rule the characteristics of homes, residences, and automobiles that make them "private." ([N.J.S.A. 26:3D-64](#) "The Commissioner of Health and Senior Services ... shall adopt rules ... to effectuate the purposes of" the Act.)

Proposed new N.J.A.C. 8:6-8.1 would construe the meaning of "private homes" and "private residences" by reference to the Act's definitions of "indoor public places" and "workplaces" at [N.J.S.A. 26:3D-57](#). The essential characteristic of an indoor public place is that it is "a structurally enclosed

place of business, commerce or other service-related activity, whether publicly or privately owned or operated on a for-profit or nonprofit basis, which is generally accessible to the public." [N.J.S.A. 26:3D-57](#). The essential characteristic of a workplace is that it is "a structurally enclosed location or portion thereof at which a person performs any type of service or labor." *Id.*

Thus, a home or residence is not "private" if it is "a place of business, commerce or other service-related activity" that is "generally accessible to the public" or if it is a workplace. This analysis is consistent with the Act's worker and public protection purposes. How this analysis would apply to a particular establishment may depend on a fact-sensitive investigation of the uses of the establishment.

For these reasons, were the Department or a local health agency to receive a complaint regarding smoking in an indoor public place or a workplace, that happened to be a rectory, a convent, or a so-called "home office," the Department or local health agency would investigate the complaint in the ordinary course, and would process such a complaint as to which it found the allegations to be true in accordance with the enforcement provisions of the Act and the proposed new rules.

In drafting proposed N.J.A.C. 8:6-8.1, the Department was aware of the Senate and Assembly Committee Statements cited by the commenter (Statements). The Department was also aware that the Statements' discussion of "rectories" and "convents" was not part of the Act's "Exceptions" section at [N.J.S.A. 26:3D-59](#). Proposed N.J.A.C. 8:6-8.1 represents the Department's effort to reconcile the Statements with the Act's explicit prohibition against smoking in indoor public places and workplaces, and on school grounds. This is the "reason ... not explained" why proposed new N.J.A.C. 8:6-8.1(a) specifically addresses "rectories and convents."

Before the bill that became the Act became law, the commenter requested special treatment for rectories and convents. In the March 14, 2005, correspondence of Dr. George V. Corwell, Associate Director for Education v Catholic Conference, to the Members of the Senate Health, Human Services and Seniors Committee, Re: S1926, Dr. Corwell specifically objected to Senate Bill No. 1926 on the grounds that it might prohibit smoking by a "priest" in a "rectory," and that "parishioners leaving mass" en route to their automobiles would be cited for smoking if a "church" was on the grounds of a "nonpublic school." Dr. Corwell sought no generic exemption for the pastoral residences of other religions such as "parsonages" (residences for clerics of non-Catholic Christian faiths such as Protestants) and "manses" (residences for rabbis) but only sought exemption for Catholic "rectories" and Catholic church grounds. Proposed new N.J.A.C. 8:6-8.1(a) would have provided the commenters and Dr. Corwin with the exemption they themselves sought using the terminology they themselves used.

The Department had no specific intention to single out the Catholic faith in proposing N.J.A.C. 8:6-1.8. As described above, the rule represents the Department's effort to reconcile the Statements' discussion of "rectories" and "convents" with the Act's prohibition against smoking in indoor public places and workplaces. In addition, the Department's use of the specific terms

"rectory," "parish" and "diocese" at N.J.A.C. 8:6-8.1(a) also result in part from a scrivener's unintentional misapprehension and/or ignorance with respect to these terms as being applicable to religions other than those of the Catholic faith.

The Department believes the Act's definitions of "indoor public places" and "workplaces" are sufficient to alert the regulated public as to the characteristics of places at which the Act prohibits smoking. If a convent, a rectory, or another establishment in the nature of a home or a residence is an indoor public place or a workplace, then by definition, it is not a "private" home or a "private" residence, and it is subject to the Act's prohibition against smoking as would be any other indoor public place or workplace.

For the foregoing reasons, the Department will not adopt N.J.A.C. 8:6-8.1(a). The Department will also change proposed new N.J.A.C. 8:6-8.1(d) on adoption to recodify the subsection as N.J.A.C. 8:6-8.1(b), to delete the reference to "a parish, diocese, or school ... under their jurisdiction and control" and to replace this phrase with "the owner or operator of a residence on school grounds."

The Department rejects the assertion that employees can elect to work elsewhere if they do not want to be exposed to the hazards of secondhand smoke. During their respective committee hearings, the Assembly and the Senate heard and rejected similar testimony to that effect made by the owners and operators of establishments seeking exemption from the Act with respect to employees of bars, restaurants and other establishments. Hearings of the Assembly Health and Human Services Committee (January 5, 2006), and Senate Health, Human Services and Senior Citizens Committee (March 14, 2005).

School Grounds

89. COMMENT: The Department received photocopies of the following comment from 17 commenters:

"Dear Bingo Players,

Enclosed is a sample comment letter that we are asking you to submit to the State of **New Jersey** concerning some of the inadequate regulations that are being proposed in the new Smoke-Free Air Act. If these misguided regulations go through then the only places you will be able to smoke is in you cars or on the Delsea Drive and that's crazy. These letters must be in the hands of the committee by July 14, 2006. The address is listed below, feel free to use the letter we have drawn up or make up one of your own. All letters must be signed. Please cooperate and help us to continue our bingo as a pleasant experience for you.

I would like to make some comments on the new Smoke Free Act. I have read the law and find it serious [(sic)] lacking in several areas.

1. It does not define school grounds and this is especially confusing since a private or parish-operated school runs on a different set of guidelines than a public school. A parish school has no grounds of its own, all grounds belong to the parish and are used for many activities besides the school. Your law does

not take this into consideration. While school is in session the school has the use of these grounds but does not own or control them. I strongly feel that there should be NO smoking on the grounds while the children are present, but when they are not present then the parish may permit smoking when it is holding another activity. The smoking should be limited to the grounds and definitely not inside any buildings.

2. I also feel strongly that the proposed 25-foot space between the building and the smoking area is unfair and discriminates. The handicapped and some senior citizens who may be attending a parish social or activity or for that matter any public activity would have great difficulty in walking that distance. The law definitely discriminates against them and needs to be corrected." (Sic.) (3, 13, 15, 17, 18, 25, 27, 35, 36, 40, 48, 53, 54, 55, 60, 61, 65)

90. COMMENT: "I am the pastor of [a Catholic] church ... On the grounds of our parish, there is a church, a rectory, a convent and a school building. There is also a parking lot and grassy areas that are used for parish activities, but also for school activities. The definition of "school grounds" in the proposed regulations assumes that all schools are located on their own property so that the land around the school building is naturally and easily recognized as school grounds. The parking lot is used for people who are coming and going to the school. The grassy areas are used by the schoolchildren for sports activities and play areas. The proposed regulations do not recognize that private schools may be very different. I can speak to Catholic schools on these issues. Other religious or other private schools may have similar issues.

Catholic schools are very often located on parish grounds. [The school on the grounds of my parish] is located on land owned by [the] parish and is situated on the same land as the church building, the rectory and the convent building. [The school] has no grounds of its own. The children use the parish grounds for activities.

The Catholic parish exists to serve the spiritual needs of people of all ages. The school is only one activity that occurs on the parish grounds. We, of course, have Mass and other liturgical celebrations, and prayer services. There are also weddings and funerals and parish socials, meetings, counseling, summer carnivals, bingo, other fundraisers, AA and NA meetings, and a host of other activities that grow out of the life of a parish. The great majority of these activities occur at night or on weekends when the school is not in session. They also occur all summer long when the school is closed and there are no school activities.

Most parish schools are located on county or State roads or highways. The proposed regulations would require that parishes conducting any kind of activities would require anyone who wished to smoke to do so on the shoulder of the State or county road where the school is located, certainly not a safe location. (sic.).

I am not a smoker and I cannot see why the State should forbid adults to smoke in outdoor areas when the school is not in session just because there happens to be a school building nearby. Under the proposed regulation, a person attending an AA meeting, or a funeral or a Saturday night social can step

outside in the parking lot, and lights a cigarette, whether it be at midnight or during the summer months, and be subject to a fine.

I understand that, for the indoor areas where smoking is prohibited, it is prohibited at all times, and I totally agree with this. It is my understanding that this was done because of a concern about smoke getting into ventilation systems. But I don't think this applies to outdoor areas, where there are no ventilation systems.

[Smoking] on our grounds, anybody coming out of the church or social hall, smoking on your grounds is subject to a fine; whereas anyone coming out of a church or social grounds where there is no school, there is no fine.

I would ask that the regulations be revised to take into account the situation of schools [that] are not located on their own grounds. For private schools that are not located on their own land but share land with other uses, I would propose that school grounds be defined as 'land or portions of land used by a school during those times when the school is using such land or portion of land.' This would make the outdoor grounds of a private school non-smoking when school is in session and at other times when there are school activities taking place, thus protecting the schoolchildren when they are present, but also recognizing that the grounds are first and foremost parish grounds.

This would be similar to the way other playgrounds and fields used by schools, but not owned by the school, are treated. Under the proposed regulations, if a public school uses a playground or a ball field owned by the municipality or a private entity, that playground or ball field is a non-smoking area 'during those times when the school district has exclusive use of a portion of such land,' but a smoking area when it is not being used for a school activity. This recognizes that there are outdoor areas that are sometimes, but not always, used by schoolchildren. (16)

91. COMMENT: "The statute prohibits smoking on school grounds, but does not define 'school grounds.' The proposed regulations define 'school buildings' and 'school grounds' to include 'Land, portions of land, structures, buildings, and vehicles, owned, operated or used for the provision of academic or extracurricular programs sponsored by a school ...' The prohibition applies at all times of the day, at all times of the year, whether or not school is in session. School grounds are the only outdoor areas subject to such prohibitions." (20)

"The definition of 'school grounds' in the proposed regulations assumes that all schools are located on their own property and does not account for the fact that private schools may be very different. Catholic schools are very often located on parish grounds and are situated on the same land as a Church building, a rectory, a parish hall, and/or a convent." (20, 22, 32, 39, 46, 51)

A Catholic parish exists to serve the spiritual needs of people of all ages. Education is only one of many activities that take place on parish grounds. There are also: Mass and other liturgical celebrations, prayer services, weddings, funerals, parish socials, meetings of parish groups, counseling, vacation bible school, summer carnivals, Bingo and other fundraisers, AA [(Alcoholics Anonymous)] and NA [(Narcotics Anonymous)] meetings, self-help and

support group meetings, social events, worship services, prayer meetings, adult education opportunities, lawn festivals, church picnics, and a host of other activities. (20, 22, 32, 34, 39, 51, 56)

"In the situation of a parish/church, the buildings and property are owned by the parish/church and it uses these as it sees fit to fulfill its role in the community. These buildings could include a church, rectory, social hall, school, convent, athletic complex. None of these buildings are owned by the participants who merely have use of them at specific times to be determined by the parish/church. The following are but a few examples as to how this principal works: A rectory may be used as a residence, a meeting facility, offices or even for religious services. When children are present in the school or on the school grounds, then it is considered a school with absolute no smoking anywhere on the grounds. When the children are not present on the grounds then the school is used for meetings not only for the parish/church but also for the community, such as AA and as most people know most of their members substitute smoking for alcohol and under the present legislation they would have to go out and stand on the local highway to smoke, which is certainly not a safe environment. The school is also used for social, religious and athletic activities. It is the parish/church that determines who uses the facilities and when they are used.

[The Act] does not take any of this into consideration when it fails to define the school property issue. Yet when a public school uses or leases a piece of land for a school activity that piece of land becomes a no smoking area until the school leaves that area and then it reverts to a smoking area." (16)

"Some Catholic parishes host AA/NA meetings. Many individuals struggling with a drug or alcohol addiction compensate by smoking cigarettes. Why should these individuals not be permitted to go outside during breaks and smoke when there are no school activities going on?" (19, 20, 22)

"Such meetings occurring at a parish without a school, at a religious center of another faith without a school, or any other building, are not subject to such restrictions. The proposed regulations impermissibly interfere with the exercise of the Church's mission--forcing parishes to choose between educating their youth and serving a vulnerable adult population." (20)

"Why should someone who steps out of the Church from a funeral in the middle of July and lights a cigarette be fined for smoking on school grounds? Someone leaving a funeral at a church without a school who lights a cigarette is not subject to fines.

Someone who lights a cigarette in the parking lot of a social establishment is not subject to a fine, but someone who lights a cigarette in the parking lot after a parish social or fundraiser is subject to a fine." (19, 20, 22, 34, 39, 46, 51)

"The preamble to the regulations states that the definition of school buildings and school grounds is generally consistent with the definition of these terms provided in the rules of the Department of Education at [N.J.A.C. 6A:16-1.3](#) and [6A:26-1.2](#). This is not the case. [N.J.A.C. 6A:16-1.3](#) defines 'school grounds' as 'Land, portions or land, structures, buildings, and

vehicles, when used for the provision of academic or extracurricular programs ...' (emphasis added). [N.J.A.C. 6A:16-1.2](#) does not define 'school grounds.' We request that the proposed regulations be revised to recognize that buildings used for private schools are often used for other purposes as well and that the grounds surrounding those schools may not be exclusively school grounds." (20)

"The grounds of a Catholic church are first and foremost parish grounds." (20, 34, 39, 51)

"Many, perhaps most, parish activities occur at night or on weekends when school is not in session. They also occur all summer long when the school is closed and there are no school activities. The ban on smoking on school grounds would not be diminished or adversely affected if it were applied only when the grounds are being used by the school children." (20, 39, 46)

"Thus, we propose that 'school grounds' be defined, at least with respect to private schools, as follows:

Land and portions of land owned, operated or used for the provision of academic or extracurricular programs sponsored by a school or community provider, during those times when such land or portion of land is being used for the provision of academic or extracurricular programs.

This definition would respect the ban on smoking in outdoor areas when in use for school activities, but would also respect the functioning of a parish that provides a multitude of services beyond the operation of a school. In this way, a church that operates a school can proceed with its other activities in the same manner as any other church, at times when the grounds are not in use by the school." (20)

"I am requesting that the State ... [revise] the school grounds issue of the ... Act to state that schools that are not located on their own land but share land that has other uses, school grounds to be defined as; all outdoor areas when school is in session and during school activities involving children." (16)

"I ask that the regulations be revised to specifically say that smoking on [school grounds] is prohibited only when school is in session or during school activities." (22, 34)

"I am not a smoker, but I cannot understand why the State feels it should forbid adults to smoke in an outdoor area when school is not in session just because the school building is on the parish property. If the regulation were as such that school grounds were defined as outdoor areas when school is in session and during school activities that is much more rational." (32)

"I ask, given the above objections, that the regulations be revised so that, for schools that are not located on their own land but share land with other uses, school grounds are defined as outdoor areas WHEN SCHOOL IS IN SESSION AND DURING SCHOOL ACTIVITIES." (39)

"I ... support the **New Jersey** Catholic Conference argument that smoking should be prohibited on parish grounds only when school is in session and during school activities ...

"Smoking outside of the building in these occasions should be acceptable. Schools depend on fundraisers for income and the no smoking law would financially [affect] every church/school." (46)

"I ask that the regulations be revised so that schools that are not located on their own land but share space with other uses be granted exemptions to allow smoking in outdoor areas when school is not in session or school-related activities are taking place." (51)

92. COMMENT: "Our parish grounds are used for many social affairs. I am not a smoker, but members of my family are and I don't see why they should not be allowed to enjoy a cigarette at an outdoor social event. Certainly when school is in session or functions involving the school children are scheduled, smoking should be restricted. For parish events not related to school, however, there is no point or purpose to the restriction and it unfairly targets our parishes." (14)

93. COMMENT: "I do not feel that our facilities [or] any other Catholic 'school grounds' in the proposed regulation should be subject to this law, when clearly other faiths are not subject to the same. (19)

94. COMMENT: "As a pastor of a Catholic church where a school is located ... two areas ... are of concern to me and our Parish. The first deals with the definition of school grounds, since the school is located on the parish grounds. Smoking is never permitted while school is in session. However, after school hours our buildings are used for a variety of activities. We host two AA groups, there are parish meetings and socials, we have Sunday and weekday services, weddings, funerals and other church-related functions. One contradiction comes to mind immediately. On the opposite corner from our church is the Collingswood Grand Ball Room. Why should smoking be permitted in their parking lot during a social and not be permitted in ours during socials and other activities when school is not in session? I ask that the regulations be revised so that, for schools that are not located on their own land, but share land with other uses, school grounds are defined as outdoor areas when school is in session and during school activities." (47)

RESPONSE TO COMMENTS 89 THROUGH 94: [N.J.S.A. 26:3D-58](#) states: 'Smoking is prohibited in any area of any building of, or on the grounds of, any public or nonpublic elementary or secondary school, regardless of whether the area is an indoor public place or is outdoors.' The Act does not establish a temporal element or other condition to the prohibition against smoking in school buildings and on school grounds, such as the suggestion of the commenters that the prohibition apply only when children are present. The Department is without authority to establish by rule a temporal exception to the statutory prohibition against smoking in school buildings and on school grounds as suggested by the commenters.

The commenters' assertion that buildings and grounds shared by a parish and a school are "first and foremost parish grounds" is irrelevant with respect to

the applicability of the Act. That school grounds are associated with a parish, of itself, does not exempt school grounds from laws designed to protect public health and safety, such as fire codes, building codes, and food sanitation codes. Use of the building and grounds at any time for school purposes, rather than ownership of the building and grounds, is the triggering factor as to the applicability of the prohibition against smoking.

This is not an issue faced exclusively by "parishes" of the "Catholic church" with adjacent parochial schools. Public and private secular schools that have on their premises such facilities as nondenominational chapels, dining halls, theaters, sports fields, administration buildings, and auditoria also must adhere to the prohibition against smoking at all times. This includes times during which they permit non-student functions to take place on the premises, such as weddings, banquets, theatrical productions, art exhibits, government meetings, recreational and sporting events, recovery meetings, continuing adult education, carnivals, and legalized games of chance, such as bingo.

Thus, the commenters' assertion, that proposed N.J.A.C. 8:6-7 would affect only Catholic schools that share grounds with a Catholic church or other buildings, is false. The determining issue as to the applicability of the Act and the proposed new rules is whether the grounds or buildings are used at any time for school purposes or activities, regardless of whether a church or another entity or organization has a concurrent right of access to or use of the grounds, and regardless of any distinction as to whether the church, the school, or another entity, owns or leases the grounds.

The Department does not believe that the Act and the proposed new rules impose an unreasonable enforcement burden on entities that use school grounds for non-school purposes. The Department sees the enforcement where people can smoke as no greater burden on these entities than the burden these entities presumably undertake in directing people as to other rules of conduct while on the grounds, such as where, when, and whether they can park, for example, during theatrical or social events, or throw confetti or rice, for example, during sporting events and weddings. Moreover, the Department believes that over time, as people become more aware of the Act, the enforcement burden would diminish.

The Department disagrees with the commenters' assertion that permitting smoking when students are not present would not undermine the purposes of the Act. It is possible that the drafters of the Act, in prohibiting smoking outdoors on school grounds without establishing a temporal exception with respect to whether students were present, had purposes other than preventing student exposure to secondhand smoke. Tolerance of smoking by some but not all persons on school grounds sends a mixed message to students about smoking as an acceptable behavior.

Moreover, prohibiting smoking on school grounds helps to prevent exposure of students to the litter that invariably accompanies outdoor smoking. One could perceive a similar rationale in the "drug-free school zone" laws, which help to avoid students' exposure to used drug paraphernalia while preventing their exposure to drug dealers. The paraphernalia might not necessarily be capable of harming students, but the Legislature might have wanted to protect students from the mere sight of it having been used. Those laws do not establish a temporal exception as to when school grounds are "drug-free school zones," and

the Department perceives no reason to infer that such an exception exists with regard to smoking on school grounds.

The commenter is correct in noting that the definition of "school grounds" at proposed new N.J.A.C. 8:6-7.2 is not identical to the definition of that term at [N.J.A.C. 6A:16-1.3](#). It is similar, that is, "generally consistent," with that definition in that it generally tracks that definition's list of infrastructural facilities that are components of schools, but does not use the temporal or conditional language as to the time of use, for the reasons stated above.

The assertion that the Act's prohibition against smoking in school buildings and on school grounds at all times is a deterrent to recovering substance abusers' attendance of at recovery meetings is moot; the Department does not have authority to ignore the Act's prohibition to establish an exception for persons in recovery. Moreover, the rationale for such an exception would be an improper consideration. Part of recovery is the development of responsibility and adherence to the same rules to which everyone else must adhere.

Many hospitals permit recovery groups to use hospital conference rooms for meetings. The Department is aware that many **New Jersey** hospitals and other health care facilities have been voluntarily implementing campus-wide smoke-free policies. The Department has received no reports that these hospitals have been unable to fulfill their missions resulting from the implementation of these policies. The Department does not anticipate that churches on the grounds of schools would have a different experience.

The commenter is incorrect in stating that the prohibition against smoking on school grounds at all times is the only outdoor prohibition that applies at all times. Proposed new [N.J.A.C. 8:6-2.2](#) would establish that if the Act prohibits smoking at a location at any time, then the prohibition is in effect at all times. Proposed new [N.J.A.C. 8:6-2.3\(a\)](#) would establish that smoking in an exterior area is prohibited if smoky air is used as supply air for an indoor public place or a workplace at which smoking is prohibited. There is no temporal exception to this prohibition.

The proposed new rules as published would not require a "25-foot space between the building and the smoking area." The commenters are misinformed with respect to this issue. See, for example, the Response to Comments 19 and 20 above.

Cigar Bar and Cigar Lounge Exemption

95. COMMENT: "I am an accountant in **New Jersey** and have several questions related to the **New Jersey** No Smoking Law ... Specifically, the questions relate to the "Cigar Bar Exemption" ... [N.J.S.A. 26:3D-57](#) and 59 ... The exemption requires a signed certification by a CPA, whereby the CPA is required to give a sworn statement to certify the establishment meets the 15 percent of sales related to tobacco and related products for the years ending December 31, 2004 and 2005. An accountant could not possibly sign this certification without performing a financial statement audit in accordance with generally accepted accounting principles, set out by the American Institute of Certified Public Accountants. Financial statement audits require various controls to be in place at the time of the audit. If these controls are not in place in 2004 and/or 2005 an accountant cannot render an opinion on the financial statements as of

2004 and/or 2005. Under the rules ... the accountant is subjecting themselves to civil and criminal penalties and licensure action by signing the Certification. Even if they are familiar with the establishment, are highly experienced, spend a limitless amount of time to evaluate the establishment, and use professional, ethical and licensure standards, they believe but cannot determine with absolute certainty that the establishment generated 15 percent or more of its total annual gross income from the on-site sale of tobacco products (as defined by the statute) and the rental of on-site humidors in 2004 and 2005 because records are not available or sufficiently informative.

Based on the above facts my questions are as follows:

How could the "Cigar Bar" have a financial statement audit of a time frame when they haven't put procedures in place to allow a proper audit of their financial statements?" (64)

RESPONSE: The Act establishes the qualifying sales percentages. The Department has no authority to regulate the manner in which entities potentially eligible for the exemption maintained their records in 2004 until the present. The proposed new rules would establish only proposed forms through which applicants for the exemption could channel their applications to local health authorities for consideration.

96. COMMENT: "With respect to future or newly opened establishments: what if the establishment wasn't open for a full calendar year in 2004?" (64)

RESPONSE: Applicants that became cigar bars or a cigar lounges after January 1, 2004, and prior to December 31, 2004, would need to document the commencement date of the new establishment as a cigar bar or a cigar lounge, and to show that the proposed cigar bar or cigar lounge met the requirements for the exemption for the entire time that it operated as a cigar bar or a cigar lounge in 2004 through to the present.

97. COMMENT: "What if the establishment opened in 2005? What if the establishment wasn't opened until January 2006? What if someone wanted to open a cigar bar in the future?" (64)

RESPONSE: The exemption for cigar bars and cigar lounges is only available to establishments that were in existence as of and since 2004. The Act precludes the availability of the exemption to establishments opened after 2004. Entities are free to open cigar bars and cigar lounges; however, no smoking can occur therein.

98. COMMENT: "How could you perform an audit and sign the certification for a 2004 and/or 2005 calendar year to certify that the sales of tobacco and related products reach the 15 percent threshold if sales were not broken down by individual categories?" (64)

RESPONSE: Failure to attribute 15 percent or more of an establishment's total annual gross income to the "on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines," as required by the Act at N.J.S.A. 26:3D-59a, either through records kept in the

ordinary course of business or through extraneous proof would preclude the applicant from receiving the exemption.

99. COMMENT: "What if the establishment has a fiscal year end? What time frame would be considered 2004? If this were a June year-end, would the time frame be June 2004 or June 2005?" (64)

RESPONSE: The Act establishes that records are to be evaluated as of December 31, 2004, for initial registration of a cigar bar or a cigar lounge, and further establishes that for registration renewals, records are to be evaluated for the period of "the preceding calendar year," that is, as of January 1 through December 31 of each subsequent year. N.J.S.A. 26:3D-59a.

100. COMMENT: "What if there are no detailed sales records to determine the breakdown of sales between "tobacco" related and "non tobacco" related? Is there an alternative to determine the 15 percent of sales if sales records are not available (such as cost of goods sold)?" (64)

RESPONSE: Failure to itemize sales as required by the Act would preclude the applicant from receiving the exemption. An applicant can attempt to demonstrate the required sales percentages by extrapolating from other records, such as records of purchases, inventory, and price lists. However, the reviewing health authority would need to evaluate the credibility and accuracy of these records in making a determination as to the applicability of the exemption in accordance with the exception eligibility standard the Act articulates at N.J.S.A. 26:3D-59a.

101. COMMENT: "Can a 'Cigar Bar' co-exist with another establishment?" (64)

RESPONSE: Based upon the Act's definition of a "cigar bar" as meaning a "bar, or area within a bar," a cigar bar can co-exist within a larger establishment only if the larger establishment is a bar, and subject to the following conditions: the cigar bar within a bar meets the structural and ventilation requirements established in the definition of "cigar bar" at [N.J.S.A. 26:3D-57](#), and the larger bar establishment conforms to the definition of a "bar" at [N.J.S.A. 26:3D-57](#), including the requirement that the bar "is devoted to the selling and serving of alcoholic beverages for consumption by the public, guests, patrons or members on the premises and in which the serving of food, if served at all, is only incidental to the sale or consumption of such beverages."

102. COMMENT: "As I understand it is up to the local health agency to determine the eligibility of the 'Cigar Bar Exemption,' are there criteria for the local health agency and/or Division of Taxation of the N.J. Department of the Treasury to follow to determine the 15 percent threshold?" (64)

RESPONSE: The Department has established the criteria provided at proposed new N.J.A.C. 8:6-3. The Department assumes that professionals in the Department of the Treasury in reviewing the accuracy of statements and records submitted to their consideration would be guided by professional standards applicable to the practices of auditing and accounting.

103. COMMENT: "The above represents various concerns that I have related to the certification by Certified Public Accountants for the purpose of establishing the 15 percent criteria required to meet a 'Cigar Bar' exemption under these rules and regulations. I would like to do the right thing and assist establishments in determining if they meet these criteria, without risking forfeiture of my license for not adhering to the rules and regulations set forth by this Act. Many of these types of establishments are independently owned and operated by people who do not have many of the required accounting controls to properly perform an audit. Again, I cannot see how any CPA in NJ would sign the certification without performing such an audit." (64)

RESPONSE: The Department appreciates the commenter's concern for accuracy and accountability. The Department assumes that the statutory exemption for cigar bars and cigar lounges was to not disable businesses that had established authentic status as cigar purveyors as of the end of 2004 from continuing to operate. The Department anticipates that the Act and the proposed new rules would make the exemption available to entities that were truly engaged in the operation of cigar bars and cigar lounges as of 2004. The Department further anticipates that the Act and the proposed new rules would appropriately make the exemption unavailable to entities that are recently labeling themselves cigar bars and cigar lounges in an attempt to avoid the Act's prohibition against smoking in indoor public places and workplaces. If a business is not able to prove compliance that can be certified, either through records kept in the ordinary course of business or through extraneous proofs, than the exemption cannot be claimed

104. COMMENT: "We recommend amending [N.J.A.C. 8:6-3.2](#), which deals with the local agency conferral with the permit entity access for inspection, to state that experts retained by a local authority will be at the expense of the applicant and not the local health agency. Experts that are retained by local planning boards and the applicant are required to pay for those experts. Local health agencies are providing a public service and should not subsidize the establishment's permit costs. Similarly, we recommend amending N.J.A.C. 8:6-3.5(b), which deals with changes in the initial registration, to state that the experts retained by the local health authority will be at the expense of the applicant for the same reason stated previously." (9)

RESPONSE: The Department agrees that it may be appropriate for the owner of a cigar bar or cigar lounge to assume the local health agency's costs related to the retention of inspectors and other experts attendant to its review of an application for registration of a cigar bar or a cigar lounge; however, the Department would want to consider the comments of others as to the issue. The Department is proposing a future rulemaking that would require an applicant for initial or renewal registration of a cigar bar or cigar lounge to bear the costs of experts retained by the local health agency attendant to its review of that application.

105. COMMENT: "The definition of a 'cigar bar/lounge' should require that no one needs to walk through it. The current [definition] does not address situations in which a person needs to walk through the cigar bar/lounge to get to a bathroom or another part of the establishment, or when a worker needs to pass through [it] to get to the kitchen. This loophole leaves workers and patrons potentially exposed to secondhand smoke. The definition of a cigar

bar/lounge should clarify that no person needs to walk through it in order to get to another portion of that establishment or to enter or exit the establishment. (6)

RESPONSE: The Department agrees that the measure suggested by the commenter would help to protect patrons and workers from exposure to secondhand smoke. However, the Department declines to make a change on adoption as suggested by the commenter. The Act is specific as to the requirements it imposes on exempt cigar bars and cigar lounges. The Act does not require establishments to ensure that patrons and workers in the nonsmoking parts of an establishment in which an exempt cigar bar or cigar lounge is located have access to separate entrances or egresses. The Act does not require that patrons and workers need not traverse the exempt (smoking) areas to get to nonexempt areas. The Act requires only that appropriate signage is in place to alert patrons and workers whether the area they are entering is smoking or nonsmoking. Therefore, the Department will not make a change on adoption in response to the comment.

Tobacco Retail Establishment

106. COMMENT: "The new law restricting smoking includes several exceptions where smoking is permitted. One of these exceptions is found in N.J.S.A. 26:3D-59b, which states that the smoking restriction shall not apply to 'any tobacco retail establishment, or any area that tobacco retail establishment provides for the purposes of smoking.' Under the Act at [N.J.S.A. 26:3D-57](#), a 'tobacco retail establishment' is defined as 'an establishment in which at least 51 percent of retail business is the sale of tobacco products and accessories, and in which the sale of other products is merely incidental.'

While the law does not include a specific definition of 'tobacco products,' a straightforward and commonsense definition of the term would include cigarettes, cigars, little cigars, pipe tobacco, chewing tobacco and any other product that is designed to be smoked and is comprised of tobacco. I believe the term 'tobacco products' should be used in its broadest sense because there is no limiting term that would exclude any specific kind of product from the definition. Since cigarettes, cigars, little cigars, pipe tobacco, and chewing tobacco all contain tobacco, they should fall under the definition of 'tobacco products.' Moreover, the new law also defines the term 'smoking' as meaning 'the burning of, inhaling from, exhaling the smoke from, or the possession of a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco or any other matter that can be smoked.'

The difficulty I have with the proposed regulation is that a retail tobacco store would not be allowed to include cigarette sales in establishing the 51 percent threshold for obtaining an exception. The Department would impose this limitation by relying on the definition of 'tobacco product' under the Tobacco Products Wholesale Sales and Use Tax Act. The definition of 'tobacco product' under this tax statute means 'any product containing tobacco for personal consumption, including but not limited to cigars, little cigars, cigarillos, chewing tobacco, pipe tobacco, smoking tobacco and their substitutes, and snuff but does not include cigarettes as defined in section 102 of the Cigarette Tax Act.'

The reliance on this tax statute of tobacco products in my opinion fails to follow the legislative intent of the law and is contradicted by the very terms

of the new smoking restriction act. As I stated before, the language of the law itself uses broad terms and makes no reference to relying on the Cigarette Tax Act definition in an entirely different chapter of the **New Jersey** statutes to determine what constitutes a 'tobacco product.' You have to look no further than the definition of 'smoking' under the Act to realize the Legislature intended cigarettes to be included within the definition of 'tobacco products.' Virtually every tobacco store in **New Jersey** that I am aware of sells cigarettes plus numerous other kinds of tobacco products. Since the new law specifically includes the word 'cigarette' under the definition of 'smoking' and the legislature intended to include cigarettes within the term 'tobacco products,' then the proposed regulation must allow tobacco retail stores to include cigarette sales when determining whether they sell 51 percent of their products in tobacco.

The exception for all retail tobacco stores clearly makes sense. A key reason for the need for the ... Act was to protect employees and customers from any adverse impact of secondhand smoke. I am not going to address the issue of secondhand smoke at this time, not because I would concede there are any meaningful or measurable adverse impacts but rather because in the case of retail tobacco stores I believe this point is moot. Virtually all customers of tobacco stores either are smokers themselves or live in a house with smokers. Virtually all employees of retail tobacco stores are smokers themselves. Given these facts, the exception should clearly apply to all retail tobacco stores and not just certain retail tobacco stores that sell a particular mix of products." (41)

107. COMMENT: "Our Association is comprised of one and/or two-shop owner-operators. These are small mom-and-pop-type stores that would be seriously affected by the outcome of these regulations if they are implemented as proposed. It is clear to us that the **New Jersey** legislators, in passing the Smoke Free Act, established the exclusion of retail tobacco establishments doing 51 percent of their business in the sale of tobacco products and accessories. However, the proposal, as it now stands, excluding cigarettes in the 51 percent is unfair and will become detrimental to the small business owners of these shops if it becomes law. We feel that the initial intent of the legislators was not to exclude cigarettes, since it mentions simply 'tobacco products.' All of these shops sell tobacco products, cigar smoking accessories, gift items, and cigarettes. The total mix of products including cigarettes approaches the 51 percent margin by three percentage points. Taking cigarettes out of the mix, which is a tobacco product, will, in effect, cause hardship for these stores as the customers will be not allowed to smoke in their shops. As a lifelong resident of **New Jersey**, a taxpayer in **New Jersey**, an employer in **New Jersey**, and a small business owner in **New Jersey**, I ask you wholeheartedly to include cigarettes in the 51 percent. Do not put us in an unfair position by disallowing this exclusion. Our business owners are fighting every day for their survival. With increased taxes and unfair competition of out-of-State sales where taxes of tobacco products are not paid, this would only be, as we hate to say, another nail in the coffin." (71)

RESPONSE TO COMMENTS 106 AND 107: The commenter is correct in stating that the Act does not define the term "tobacco products" as used in the Act, but it does define "smoking." The Department construes the broader prohibition against "smoking" in all forms as a means of capturing, and thus prohibiting, all types of smoking in indoor public places and workplaces. This would include smoking

by means of waterpipes, also known as "hookahs," and smoking of products that appeal to youth such as sweetened or fruit-flavored products.

The World Health Organization Study Group on Tobacco Product Regulation issued a scientific advisory note on waterpipe tobacco smoking that documents the "serious potential health hazard to smokers and others of the smoke emitted" during waterpipe tobacco smoking. "Advisory Note: Waterpipe Tobacco Smoking: Health Effects, Research Needs and Recommended Actions by Regulators" at 3, World Health Organization Study Group on Tobacco Product Regulation (2005), published by the World Health Organization Document Production Services, Geneva, Switzerland, and available at http://www.who.int/tobacco/global_interaction/tobreg/waterpipe/en/index.html and at http://www.who.int/tobacco/global_interaction/tobreg/Waterpiperecommendation_Final.pdf. The report notes that in a typical 20- to 80-minute waterpipe smoking session, a waterpipe smoker may "inhale as much smoke during one session as a cigarette smoker would inhale consuming 100 or more cigarettes." Id. The report further finds that waterpipe smokers and persons exposed to secondhand smoke from waterpipes are "at risk for the same kinds of diseases as are caused by cigarette smoking." Id. at 3-4.

Thus, the Department finds that it is possible and appropriate to view the Act's broader definition of "smoking" as being purposeful within the Act, as a means to capture all kinds of smoking that can generate secondhand smoke and cause harm to nonsmokers.

At the same time, the Department finds that defining "tobacco product" as having a more limited meaning is also appropriate. In construing the definition of a "tobacco retail establishment," the Department determined to incorporate by reference the existing definition of "tobacco product" established in a related taxation statute rather than to establish a new definition for the term. It is appropriate to assume the Legislature intended to use like terms consistently across the State's body of laws, and particularly in statutes addressing related matters. See, for example, [In re Huyler, 133 N.J.L. 171, 173 \(Sup. Ct. 1945\)](#), wherein Justice Heher wrote: "It is a primary canon of construction that the provisions of statutes in pari materia shall be reconciled and harmonized, if possible, into a consistent, homogeneous whole. [Crater v. County of Somerset, 123 N.J.L. 407](#); [Broderick v. Abrams, 116 N.J.L. 40](#)."

To provide otherwise could mean, for example, that every small grocery or convenience store in **New Jersey** that sells cigarettes might be eligible, at least with respect to qualifying sales, for one or more of the exemptions that allow smoking on premises. The Department does not believe the Legislature or the Governor intended this result in promulgating the Act. The Department does not believe the Legislature or the Governor intended to create a new type of smoking facility at which smoking can occur.

Rather, the Department believes it is reasonable to infer that the purpose of the exemption for tobacco retail establishments was to permit retail consumers to sample cigars, which can be costly, exotic, and/or luxury items, prior to making larger purchases of multiple units. No similar need to test cigarettes prior to purchasing applies, given that cigarettes are generally not exotic or luxury items and are generally relatively lower in cost than cigars.

Establishments at which at least 51 percent of sales do not involve "tobacco products," as the Department proposes to define that term, have less reliance on sales of cigars as exotics or costly luxury items and therefore less need for prepurchase sampling. Establishments that do not meet the qualifying sales requirement thus are more like convenience stores that sell cigarettes than they are "tobacco retail establishments," as the Department envisions that type of facility. Therefore, it is appropriate that these establishments would not qualify for the exemption for tobacco retail establishments upon the application of the proposed definition of "tobacco products."

The Department disagrees with the commenter's suggestion that workers and patrons of establishments that sell cigarettes are probably smokers themselves and that protecting them from secondhand smoke is somehow moot or pointless. Minors and persons under the legal age to purchase cigarettes (that is, age 19; see P.L. 2005, c. 384, approved January 15, 2006) can work in such stores. It is not moot or pointless to protect them from secondhand smoke. It is likewise not moot to protect nonsmoking patrons who purchase cigarettes on behalf of family members and friends.

It is difficult to understand the hardship the commenters suggest would occur by patrons of the retail stores they represent not being able to smoke on the premises. Retail sales mean sales of goods directly to the ultimate consumers, but examples of other types of retail businesses where consumption routinely occurs immediately upon purchase on the premises do not come readily to mind. Rather, the phrase "cash and carry" is more consistent with the concept of a store in which the majority of its business involves sales of cigarettes.

108. COMMENT: "We recommend amending proposed new [N.J.A.C. 8:6-4.2](#), which deals with an exemption not applicable in certain circumstances, to require a self-closing door rather than just recommending it." (9)

RESPONSE: The Act requires a cigar bars and cigar lounges that are in an area within an establishment to have solid door but does not require that door to be self-closing. See [N.J.S.A. 26:3D-57](#); see also proposed new N.J.A.C. 8:6-3. Proposed new [N.J.A.C. 8:6-4.2](#) represents the Department's determination to apply the equivalent standard to a tobacco retail establishment within an establishment. For uniformity of treatment, the Department declines to establish a standard for tobacco retail establishments greater than that the Act establishes for cigar bars and cigar lounges. Pursuant to [N.J.S.A. 26:3D-63](#), local governments have authority to establish more stringent local standards than those provided under the Act and the proposed new rules at N.J.A.C. 8:6.

Signage

109. COMMENT: "The requirements to post a sign at every single entrance seems excessive and unnecessary, and the size and information that must be included on the signs means that the owner would have to have these signs printed at their own expense! Isn't the Department aware that this will result in additional costs? Does the Department plan to have the appropriate signs made up and distribute them to the affected businesses?" (37)

RESPONSE: N.J.S.A. 26:3D:1 et seq. establishes the requirement that establishments "place in every public entrance" a sign indicating whether

smoking is permitted. Proposed N.J.A.C. 8:6 Appendices E through G provide suggested forms of acceptable signage. Use of these signs would require establishments to either photocopy these Appendices or print them from the Department's webpage to a desktop printer, both of which result in establishments incurring nominal expense. Ancillary costs associated with posting the signs include the staff cost associated with posting the signs at the entrance, and the cost of tape or other adhesive. The Economic Impact describes these costs.

110. COMMENT: "Obviously, the [ACS] believes strongly that the casino exemption should be stricken from the law, and we expect that it will be, hopefully sooner rather than later.

In the meantime, you have developed good signage requirements to alert casino patrons to the hazards they are going to encounter. But what about the workers? Given this exemption, and the failure of the Occupational Safety and Health Administration to address the hazards of secondhand smoke, you have an opportunity to create a Right to Know provision for casino workers, by requiring that employers post warnings of the dangerous chemicals they may face on the job." (28)

RESPONSE: The Department is without authority to require casino hotel owners and operators to comply with the Worker and Community Right to Know Act, [N.J.S.A. 34:5A-1](#) et seq. (Right to Know Act) because casino hotels are not "employers" within the meaning of the Right to Know Act.

[N.J.S.A. 34:5A-3](#) establishes the definition of "employer" to mean, "any person or corporation engaged in business operations" in a list of specified industrial classifications. The classification for casino hotels is not among the listed industries. See also [N.J.A.C. 7:1G-1.2](#) (industry code for casino hotels not listed among industries included within the definition of "employer" for purposes of the Worker and Community Right to Know Regulations of the Department of Environmental Protection) and [N.J.A.C. 8:59-11.3](#) (industry code for casino hotels not listed among industries included within the definition of "employer" for purposes of Department rules addressing Community Right to Know; Labeling, Private Employers in the Worker and Community Right to Know Act Rules).

Based on the foregoing, the Department does not have the authority to require casino hotels to comply with the Right to Know Act with respect to secondhand smoke. Therefore, the Department will not make a change on adoption to the proposed new rules in response to the comment.

Inasmuch as casino hotels are not subject to the Right to Know Act, the Department does not reach, and therefore reserves judgment as to, the issue of whether the Right to Know Act would apply to secondhand smoke as a "hazardous substance" within the meaning of the Right to Know Act. See the Right to Know Act's definition of "hazardous substance" at N.J.S.A. 34:5A-2m.

Enforcement

111. COMMENT: "There has been recent discussion of visitors to public locations smelling smoke, despite there being no direct evidence of smoking taking place. The proposed regulations dictate that enforcement of the

regulation may take place when actual smoking is observed. The [AHA] would appreciate allowing for public health officers to pursue enforcement of the regulation due to 'reasonable suspicion' of smoking. This additional component to the enforcement concept could be outlined with the assistance of the greater expertise of your office. However, this condition would allow public health officers a more extensive ability to reprimand owners and patrons that are attempting to skirt the law." (75)

112. COMMENT: The proposed regulations should also be clarified to address enforcement as it pertains to actual observation of smoking versus a reasonable suspicion of smoking. As currently written, it is difficult, if not impossible, to enforce this law in situations where the actual observation of smoking has not occurred within the designated smoke-free area. Under most instances, reasonable deduction and oftentimes common sense, can be relied upon to determine if smoking had recently occurred in the enclosed environment. In order for the Smoke Free Air Act to be successful, local health officials who are charged with enforcing it and establishment owners who wish abide by it need to be given appropriate latitude necessary to assist in enforcement. (21)

RESPONSE TO COMMENTS 111 AND 112: The Department is unaware of the discussions to which the commenter refers. With respect to enforcement against individual smokers, the Act provides that "a person, after being ... ordered [to comply with the Act], who smokes in violation of [the Act] is subject to a fine ..." With respect to establishments subject to the Act, the enforcing entity is authorized to order establishments to comply with the Act "upon written complaint or having reason to suspect that [the establishment] is or may be in violation of [the Act]." Thereupon, the establishment's failure or refusal to comply with the Act and the order to comply can result in the imposition of monetary sanction and injunctive relief.

The Department does not believe that the Act or the proposed new rules would subject individuals or establishments subject to the Act to enforcement only "when actual smoking is observed." Indicia of the occurrence or tolerance of smoking in places where smoking is prohibited, such as the presence and location of ashtrays (full or empty) or ashes, could be grounds for the initiation of enforcement proceedings.

113. COMMENT: "We think it would be reasonable to expect customers first to inform in writing owners and operators of establishments prior to filing a complaint. I think this will prevent unfrivolous complaints and lawsuits." (sic.) (26)

RESPONSE: Establishments are free to provide their patrons and employees with complaint forms to enable them to register complaints with owners, operators, and local health officials regarding illegal smoking. However, the Department believes that to mandate a written notice requirement prior to an owner or operator being required to act upon a employee or patron's verbal complaint of illegal smoking would impose an unreasonable and unnecessary burden with no correlating public health benefit, and declines to mandate this requirement. Establishments are free to document their receipt of verbal complaints and their action upon receipt thereof, should they believe it would serve some purpose to do so.

114. COMMENT: "The fact that a person that sees a person smoking and they do not cease to smoke must call the police or have the smoker removed seems to be part of this regulation; that it is [the establishment's] duty to call the police, have them removed and go sign a complaint. We feel that really pits the establishment against their patrons. Again, that is a situation we would like to avoid and not have animosity between patrons and owners and managers and so forth." (26)

RESPONSE: The commenter overstates the obligation of owners and operators in stating that the proposed new rules would require them "to call the police, have [illegal smokers] removed and go sign a complaint." The Act at [N.J.S.A. 26:3D-62](#) requires, and the proposed new rules at N.J.A.C. 8:6-9 would require, the owner or operator of an establishment at which smoking is prohibited to take steps necessary to prevent and stop violations, or risk being charged with violations for failing or refusing to comply with or enforce the Act and the proposed new rules. The proposed new rules at N.J.A.C. 8:6-9 would require owners and operators to arrange for the departure or removal of illegal smokers who fail or refuse to stop, and would empower, but not require owners to avail themselves of appropriate means to arrange for involuntary removal, including requesting the assistance of law enforcement or peace officers. Owners and operators, like other members of the public, are empowered, but not required to file complaints against violators. Owners and operators can endeavor to avoid unpleasant confrontation by ensuring that required signage is in place and promoting an environment that fosters voluntary compliance, such as through on-site efforts to publicize that the prohibition against smoking is in effect and that the establishment intends to comply fully with the law.

115. COMMENT: A commenter inquires whether N.J.A.C. 8:6-9.1 means "that an individual may file a complaint with the municipal court? This language appears to far exceed statutory authority with respect to enforcement, and establish a system that could turn into a scary witch hunt against retail establishments." (37)

RESPONSE: Proposed new N.J.A.C. 8:6-9.1 would authorize any person to file a complaint. N.J.S.A. 26:3D-62d establishes that a "municipal court shall have jurisdiction over proceedings to enforce and collect any penalty imposed because of a violation of [the Act] if the violation has occurred within the territorial jurisdiction of the court. N.J.S.A. 26:3D-62c provides that a "penalty recovered under the [Act] shall be recovered by and in the name of the Commissioner of Health and Senior Services or by and in the name of the local board of health." N.J.S.A. 26:3D-62e provides that there is "no private right of action against a party for failure to comply with" the Act.

116. COMMENT: "With regard to proposed new N.J.A.C. 8:6-9.3(a), allowing "an 'anonymous' person to trigger an investigation is most troublesome. It would result in court costs and lost time for an owner to defend the complaint even if the complaint turned out to be nothing more than someone having a 'grudge,' or playing a joke. We strongly urge that this language be removed, because it is in conflict with the statute." (37)

RESPONSE: The Department is aware of no provision in the Act with which proposed new N.J.A.C. 8:6-9.3 is in conflict.

As stated in the Social Impact, proposed new N.J.A.C. 8:6-9.3 "would enable persons fearing reprisal to obtain enforcement assistance without risk to themselves. At the same time, inasmuch as a request for investigation would not be a signed and sworn statement, the request for investigation itself could not be used as evidence in a case against a person having control of an indoor public place or a workplace for alleged violation of, or failure or refusal to comply with, the Act and proposed new N.J.A.C. 8:6.' The initiation of an investigation would not result in owners incurring "court costs and lost time," unless the investigation results in a finding of a violation and the enforcing agency institutes a penalty action against the owner or operator of the establishment.

Contrary to the commenter's assertion, the Department anticipates that the anonymous investigation request procedure may help establishments to avoid "court costs and lost time." A likely scenario that may result from a request for investigation is that if an investigating agency notifies an establishment as to an allegation, the establishment in turn might implement corrective actions that would prevent both present and future findings and allegations of violations and the institution of penalty proceedings.

For the foregoing reasons, the Department declines to delete proposed new N.J.A.C. 8:6-9.3(a) on adoption as suggested by the commenter.

117. COMMENT: On April 30, 2006, a Newark Airport restaurant hostess advised me that the restaurant continued to maintain smoking and nonsmoking sections, and that the Newark Airport was exempt from the smoking ban because it is on property owned by the Port Authority of New York and **New Jersey** due to anticipated negative reaction from international visitors. We would like to know if this exemption is authorized and if so on what grounds. (26)

RESPONSE: The Port Authority of New York and **New Jersey** (PANYNJ) advises the Department that because it is a bi-State authority, unilateral laws of either New York or **New Jersey** are not binding on the PANYNJ unless adopted with the consent of the PANYNJ Board of Commissioners, and subject to the approval of the two States' respective Governors.

The PANYNJ issued rules on July 22, 2006, comparable to salient provisions of the Smoke-Free Air Act, including a prohibition against smoking in Newark Liberty International Airport restaurants. See "The Port Authority of New York and **New Jersey** Airport Rules and Regulations" at Chapter III, Personal Conduct, Part M, Smoking and Open Flames, available at <http://www.panynj.gov/CommutingTravel/airports/html/rules.html>.

The PANYNJ advises that all restaurants within the Newark Liberty International Airport terminals are now smoke-free, in accordance with the PANYNJ rule cited above, and have signage in place to that effect.

118. COMMENT: "At N.J.A.C. 8:6-9 governing enforcement, we recommend that a sample warning letter should be developed by the State. The complaint filing process and the anonymous complaint procedure should be developed at the State level and incorporated into the rules. We strongly recommend this so that there

is uniform enforcement and application of the rules Statewide." (9)

RESPONSE: The Act does not authorize a procedure for warning violators prior to citation for a first violation, and the Department does not recommend or endorse this process. The Department does not have the authority to waive the liability of persons who violate the Act. The Department, with the cooperation and financial support of the Robert Wood Johnson Foundation, has engaged and continues to engage in significant efforts to publicize the existence of the Act to encourage voluntary cooperation. The Department doubts that there are many **New Jersey** residents or businesses unaware by now that the Act is in effect, and perceives no basis for "first warnings" for violators.

In informal discussions with representatives of municipalities and local health officials, including the group the commenter represents, there was consensus that the municipalities and local health officials preferred to develop their own procedures and forms of complaint and anonymous request for investigation, mainly to accommodate variations in available enforcement resources. Municipalities and health officials are free to adopt as their official forms of complaint and anonymous request for investigation the forms of complaint and referral provided at proposed N.J.A.C. 8:6 Appendices I and J, but based on the representations described above, the Department declines to mandate this form be used. The Department would be pleased to cooperate with local health officials and municipalities to make the form template available for revision to reflect local address information and the like.

Economic Impact

119. COMMENT: We would like to comment on some statistics that we have compiled based on a survey that we have conducted. Just preliminarily we sent 1,500 surveys; 56 reported lower sales; 19 reported higher sales; and 36 reported same sales. (26)

RESPONSE: The Department thanks the commenter for the information.

Federal Standards Statement

The Department is not adopting the adopted new rules 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, standards, or requirements. The Department is adopting the adopted new rules under the authority of [N.J.S.A. 26:1A-15](#) and 16 through 19, and [26:3D-55](#) et seq., particularly 26:3D-64. Therefore, a Federal standards analysis is not required.

Full text of the adopted new rules follows: (additions to proposal indicated <<+thus+>>; deletions from proposal indicated <<-thus->>):

CHAPTER 6
SMOKE-FREE AIR
SUBCHAPTER 1. GENERAL PROVISIONS

<< [NJ ADC 8:6-1.1](#) >>

8:6-1.1 Purpose

The purpose of this chapter is to implement P.L. 2005, c. 383, the **New Jersey** Smoke-Free Air Act, [N.J.S.A. 26:3D-55](#) et seq.

<< [NJ ADC 8:6-1.2](#) >>

8:6-1.2 Definitions

(a) The following words and terms are defined in the Act at [N.J.S.A. 26:3D-55](#) et seq., particularly 26:3D-57 and 59, and are used in this chapter as defined in the Act:

"Bar";

"Casino";

"Casino simulcasting facility";

"Cigar bar";

"Cigar lounge";

"Indoor public place";

"Person having control of an indoor public place";

"Smoking";

"Tobacco retail establishment"; and

"Workplace".

(b) As used in this chapter, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise:

"Backstream" means recirculate, as that term is defined in the mechanical subcode of the **New Jersey** State Uniform Construction Code at [N.J.A.C. 5:23- 3.20](#).

"Commission" means the **New Jersey** Casino Control Commission as that term is defined at [N.J.S.A. 5:12-14](#).

"Department" means the Department of Health and Senior Services.

"Establishment" means a place of business, commerce or other service-related activity, whether public or privately-owned or operated on a for-profit or nonprofit basis.

"Exterior area" means an area that is not structurally enclosed.

1. Potential examples of exterior areas, depending upon whether an area is

structurally enclosed, can include balconies, courtyards, decks, gazebos, parking lots, patios, porches, sidewalks, terraces, or yards.

"Evenly distributed" means, with respect to the openings used to qualify a space as not structurally enclosed, the area of the smallest opening is no less than 20 percent of the total opening area necessary to qualify the space as being not structurally enclosed.

"Generally accessible to the public," when used to describe an establishment, means:

1. Persons other than persons having control of an establishment are permitted or required to enter the establishment, for any purpose, regardless of whether the entry is occasional or routine; or

2. Persons other than persons having control of the establishment perform a service or labor at the establishment, regardless of whether the service or labor is performed for profit or remuneration or on a non-profit or volunteer basis, and regardless of whether the service or labor is performed occasionally or routinely.

"Incidental" means minor and occasional.

1. The sale of food or beverages for on-site consumption is a not an incidental sale of other products.

"Indoor Environments Program" means the program by that name established in the Public Health Services Branch of the Department, the mailing address of which is: Indoor Environments Program, Consumer and Environmental Health Services, Public Health Services Branch, **New Jersey** Department of Health and Senior Services, PO Box 369, Trenton, NJ 08625-0369.

"Local board of health" shall have the meaning provided at [N.J.A.C. 8:52- 2.1](#).

"Local health agency" shall have the meaning provided at [N.J.A.C. 8:52- 2.1](#).

1. A searchable database and downloadable list of local health agencies, the municipalities over which they have jurisdiction, and their contact information is available at <<+http:// nj.gov/health/lh/directory/lhdselectcounty.htm.+>>

2. Contact information for local health agencies is available in the government listings section (blue pages) of most telephone directories.

3. The Department shall provide contact information for local health agencies upon request made by telephone to (609) 292-4993 or in writing to the Office of Public Health Infrastructure, PO Box 360, Trenton, NJ 08625- 0360.

"**New Jersey** design professional" means:

1. A person licensed in **New Jersey** as a registered architect pursuant to Title 45 of the **New Jersey** Statutes, particularly [N.J.S.A. 45:3-1](#) et seq., and the rules promulgated pursuant thereto at N.J.A.C. 13:27; or

2. A person licensed in **New Jersey** as a professional engineer pursuant to Title 45 of the **New Jersey** Statutes, particularly [N.J.S.A. 45:8-27](#) et seq., and the rules promulgated pursuant thereto at N.J.A.C. 13:40.

"**New Jersey**-licensed certified public accountant" means a person licensed in **New Jersey** as a certified public accountant pursuant to Title 45 of the **New Jersey** Statutes, particularly [N.J.S.A. 45:2B-42](#) et seq., and the rules promulgated pursuant thereto at N.J.A.C. 13:29.

"Not structurally enclosed" means:

1. There are evenly distributed openings on at least two or more sides, or on at least one side and overhead; and

2. The total area of the openings is at least 40 percent of the total area of the perimeter walls.

"Opening" means a door, a window, a louver, a skylight, a food or beverage pass-through, or any aperture that allows the exchange of air between a building interior and the outside atmosphere.

1. An opening remains an "opening" when screening is in place, such as at a screened-in porch, but not, if or when the screening is replaced by a material that obstructs airflow such as a storm window, glass, wood, awning material, tent material, or plastic or polyethylene sheeting such as Visqueen.

2. An exterior wall or portion thereof consisting of glass, wood, awning material, tent material, or plastic or polyethylene sheeting such as Visqueen is not an "opening."

"Person having control of an establishment" means the owner or operator of the establishment.

"School" means public and private elementary and secondary schools.

"Tobacco product" shall have the meaning provided in the Tobacco Products Wholesale Sales and Use Tax Act, [N.J.S.A. 54:40B-1](#) et seq., particularly [N.J.S.A. 54:40B-2](#).

SUBCHAPTER 2. INDOOR PUBLIC PLACE OR WORKPLACE

<< [NJ ADC 8:6-2.1](#) >>

8:6-2.1 Indoor public places and workplaces subject to the Act unless exemption applies; more stringent provisions authorized

(a) Pursuant to [N.J.S.A. 26:3D-58](#), an indoor public place or a workplace is subject to the Act and this chapter, except as provided in the Act, particularly at [N.J.S.A. 26:3D-59](#), and this chapter.

(b) An establishment is an indoor public place if it is structurally enclosed and generally accessible to the public.

(c) This chapter shall not be construed to limit the ability of an owner or operator of an establishment from establishing restrictions on or prohibitions against smoking at the establishment that are greater than those provided in the Act and this chapter.

<< [NJ ADC 8:6-2.2](#) >>

8:6-2.2 Smoking in indoor public place or workplace; time irrelevant

(a) The time of entry into an establishment by workers or members of the public is irrelevant to the issue of whether the establishment is generally accessible to the public and/or a workplace.

1. For example, the fact that janitorial personnel may enter a structurally enclosed establishment during times other than those times when smoking would occur in the establishment does not matter; the establishment would be a workplace and/or an indoor public place at which smoking is prohibited.

(b) The fact that an establishment is not always structurally enclosed is irrelevant to the issue of whether smoking is prohibited at the establishment if the establishment is occasionally or seasonally an indoor public place and/or a workplace.

1. For example, the fact that smoking would occur in an establishment that is generally accessible to the public in the summer when screens would be in place in openings that would qualify the establishment as "not structurally enclosed," and that smoking would not occur in winter when storm windows are in place is irrelevant; if the openings are not permanently open, the area is an indoor public place and/or a workplace at which smoking is prohibited at all times.

<< [NJ ADC 8:6-2.3](#) >>

8:6-2.3 Exterior area of indoor public place or a workplace

(a) Subject to (b) below, smoking is prohibited at an exterior area if smoking in the exterior area results in migration, seepage, or recirculation of smoke to an indoor public place or a workplace at which smoking is prohibited.

(b) Subsection (a) above shall not apply to a designated outdoor smoking area established by the administrator of a correctional facility in accordance with [N.J.A.C. 10A:14-2.6](#), provided that this exception shall not apply to smoking areas established for the exclusive use of persons other than inmates.

SUBCHAPTER 3. REGISTRATION: CIGAR BARS AND CIGAR LOUNGES

<< [NJ ADC 8:6-3.1](#) >>

8:6-3.1 Procedure for initial registration; form

(a) A person having control of an establishment seeking to register the establishment or an area within the establishment as an exempt cigar bar or cigar lounge pursuant to [N.J.S.A. 26:3D-59](#) shall submit the following to the local health agency with jurisdiction over the municipality in which the proposed exempt cigar bar or cigar lounge is located:

1. The completed and fully executed application form provided at chapter Appendix A, incorporated herein by reference;

2. A copy of deeds or leases for the premises at which a proposed exempt cigar bar or cigar lounge is located held by the applicant or its predecessors in title or leasehold showing the occupancy of the premises as a cigar bar or cigar lounge as of December 31, 2004, to the date of application;

3. A copy of the certificate of occupancy for the premises as of December 31, 2004, and/or thereafter, as applicable, if the issuance of a certificate of occupancy was or is a condition of occupancy pursuant to applicable local law, as of December 31, 2004, and/or thereafter;

4. The sworn and notarized affidavit of a **New Jersey** licensed certified public accountant attesting that the proposed exempt cigar bar or cigar lounge generated 15 percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, excluding sales from vending machines, for the calendar year ending December 31, 2004, and for each succeeding calendar year ending December 31 of the year preceding the date of the application;

i. The information contained in the application and affidavit required pursuant to (a)1 and 4 above shall be subject to reporting to and auditing by the Division of Taxation of the **New Jersey** Department of the Treasury; and

5. If the proposed exempt cigar bar or cigar lounge is located within an establishment at which smoking is prohibited pursuant to the Act, the sworn and notarized affidavit of a **New Jersey** design professional attesting that:

i. The proposed exempt cigar bar or cigar lounge is in an area within the location that is enclosed by:

(1) Solid walls or windows;

(2) A ceiling; and

(3) A solid door; and

ii. The ventilation system of the proposed exempt cigar bar or cigar lounge is separately exhausted from the nonsmoking areas of the establishment so that air from the proposed smoking area would not be recirculated to the nonsmoking areas and smoke would not be backstreamed into the nonsmoking areas.

<< [NJ ADC 8:6-3.2](#) >>

8:6-3.2 Local health agency conferral with permit entity; access for inspection

(a) A local health agency to which an initial application for registration of a proposed exempt cigar bar or cigar lounge has been made shall confer with the local construction code enforcing agency with jurisdiction over the municipality in which the proposed exempt cigar bar or cigar lounge is located to ascertain whether, since December 31, 2004, to the date of the application, the proposed exempt cigar bar or cigar lounge has expanded in size and/or whether a permit to expand in size has been made.

(b) Upon reviewing any documents or information that the applicant submits pursuant to [N.J.A.C. 8:6-3.1](#), the local health agency may require the applicant to provide the local health agency and, at the option of the local health agency, any experts retained by, and at the expense of, the local health agency, with access to inspect one or more of the following, at no cost to the applicant:

1. The physical configuration of the establishment at which the proposed exempt cigar bar or cigar lounge is located;
2. The ventilation systems at the establishment; and
3. Records of sales of tobacco products and/or rentals of on-site humidors occurring at the establishment for the periods addressed in the application.

(c) The local health agency shall schedule any inspections required pursuant to (b) above so that the inspections occur within 20 business days of the local health agency's receipt of a completed application and supporting documentation.

<< [NJ ADC 8:6-3.3](#) >>

8:6-3.3 Local health agency review of application; issuance of initial registration

(a) In determining whether to register a proposed exempt cigar bar or cigar lounge pursuant to [N.J.S.A. 26:3D-59](#), a local health agency to which an initial application for registration is made pursuant to [N.J.A.C. 8:6-3.1](#) shall review the application, the supporting documentation submitted pursuant to [N.J.A.C. 8:6-3.1](#), the information the local health agency receives pursuant to [N.J.A.C. 8:6-3.2\(a\)](#), and the results of any inspections conducted pursuant to [N.J.A.C. 8:6-3.2\(b\)](#).

1. In addition, the local health agency shall consider any applicable local ordinance that provides restrictions on or prohibitions against smoking equivalent to or greater than those provided under the Act and this chapter, in accordance with [N.J.S.A. 26:3D-63](#).

(b) The local health agency shall grant an initial application for registration of a proposed exempt cigar bar or cigar lounge if the local health agency determines that:

1. The proposed exempt cigar bar or cigar lounge has not expanded in size since December 31, 2004, to the date of the application;

2. The proposed exempt cigar bar or cigar lounge has not changed its location since December 31, 2004, to the date of the application;

3. The proposed exempt cigar bar or cigar lounge generated 15 percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, excluding sales from vending machines, for the calendar year ending December 31, 2004, and for each succeeding calendar year ending December 31 of the year preceding the date of the application;

4. If the proposed exempt cigar bar or cigar lounge is located within an establishment at which smoking is prohibited pursuant to the Act:

i. The proposed exempt cigar bar or cigar lounge is in an area within the establishment that is enclosed by:

(1) Solid walls or windows;

(2) A ceiling; and

(3) A solid door; and

ii. The ventilation system of the proposed exempt cigar bar or cigar lounge is separately exhausted from the nonsmoking areas of the establishment so that air from the smoking area is not recirculated to the nonsmoking areas and smoke is not backstreamed into the nonsmoking areas; and

5. There is no applicable local ordinance pursuant to (a)1 above that prohibits granting the application for registration.

(c) If the local health agency finds that a proposed exempt cigar bar or cigar lounge meets the conditions for registration in (b) above, the local health agency, within 20 business days of the local health agency's receipt of a completed application and any required supporting documentation, and the conclusion of any inspections the local health agency may require pursuant to [N.J.A.C. 8:6-3.2\(b\)](#), shall:

1. Issue a written notice to the applicant advising the applicant of the approval of the request for registration; and

2. Place a notice of registration of the exempt cigar bar or cigar lounge on file in the official records of the local board of health with jurisdiction over the municipality in which the exempt cigar bar or cigar lounge is located.

(d) The registration of an exempt cigar bar or cigar lounge shall expire on June 30 of the year following the year of issuance.

(e) If the local health agency finds that a proposed exempt cigar bar or cigar lounge fails to meet the conditions for registration in (b) above, the local health agency, within 20 business days of the local health agency's receipt of a completed application and any supporting documentation, and the conclusion of any inspections the local health agency may require pursuant to [N.J.A.C. 8:6-3.2\(b\)](#), shall issue a

written notice to the applicant advising the applicant as to the basis or bases for denial.

<< [NJ ADC 8:6-3.4](#) >>

8:6-3.4 Procedure for renewal of registration

(a) A person having control of an establishment seeking to renew the registration of an exempt cigar bar or cigar lounge pursuant to [N.J.S.A. 26:3D-59](#) shall submit the following, subject to (b) below, as applicable, to the local health agency with jurisdiction over the municipality in which the proposed exempt cigar bar or cigar lounge is located by no later than April 15 of the year in which the existing registration is to expire:

1. The completed registration renewal application form provided at chapter Appendix B, incorporated herein by reference;

2. A copy of the deed or lease for the premises at which a proposed exempt cigar bar or cigar lounge is located held by the applicant or its predecessors in title or leasehold showing the occupancy of the premises as a cigar bar or cigar lounge from the date of the last registration renewal to the date of the application;

3. A copy of the certificate of occupancy for the premises from the date of the last registration renewal to the date of the application, to the extent the issuance of a certificate of occupancy was a condition of occupancy pursuant to local law during the period since the date of the last registration renewal; and

4. The sworn and notarized affidavit of a **New Jersey** licensed certified public accountant attesting that the exempt cigar bar or cigar lounge generated 15 percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, excluding sales from vending machines, during the calendar year ending December 31 of the year preceding the date of the registration renewal application.

i. The information contained in the affidavit required pursuant to (a)4 above shall be subject to reporting to and auditing by the Division of Taxation of the **New Jersey** Department of the Treasury.

(b) If the proposed exempt cigar bar or cigar lounge is located within an establishment at which smoking is prohibited pursuant to the Act, the applicant shall submit, in addition to information required pursuant to (a) above:

1. The applicant's sworn and notarized statement in the appropriate location on the registration renewal application form that there has been no modification to the enclosure, ventilation system, or location of cigar bar or cigar lounge since the date of the last registration; and/or

2. If there has been any modification to the enclosure or ventilation system of the exempt cigar bar or cigar lounge, the sworn and notarized affidavit of a **New Jersey** design professional attesting that, with respect to any modification to the enclosure or ventilation system to occurring since the date of the last registration, the ventilation system of the exempt cigar bar or cigar lounge is

separately exhausted from the nonsmoking areas of the establishment so that air from the smoking area is not recirculated to the nonsmoking areas and smoke is not backstreamed into the nonsmoking areas, and the exempt cigar bar or cigar lounge remains in an area within the location that is enclosed by:

- i. Solid walls or windows;
- ii. A ceiling; and
- iii. A solid door.

<< NJ ADC 8:6-3.5 >>

8:6-3.5 Local health agency conferral with permit entity as to changes since initial registration

(a) A local health agency to which an application for renewal of the registration of an exempt cigar bar or cigar lounge has been made shall confer with the local construction code enforcing agency with jurisdiction over the municipality in which the exempt cigar bar or cigar lounge is located to ascertain whether the exempt cigar bar or cigar lounge has expanded in size during the period beginning on the date of the last registration to the date of the application.

(b) Upon reviewing an application for renewal of the registration of an exempt cigar bar or cigar lounge, any supporting documentation, and the information the local health agency receives pursuant to (a) above, the local health agency may require the applicant to provide the local health agency, and, at the option of the local health agency, any experts retained by, and at the expense of, the local health agency, access to inspect one or more of the following, at no cost to the applicant:

1. The physical configuration of the establishment at which the proposed exempt cigar bar or cigar lounge is located;
2. The ventilation systems at the establishment; and
3. Records of sales of tobacco products and/or rentals of on-site humidors occurring at the establishment for the periods addressed in the application.

(c) The local health agency shall schedule any inspections required pursuant to (b) above so that the inspections occur within 20 business days of the local health agency's receipt of a completed application and supporting documentation.

<< NJ ADC 8:6-3.6 >>

8:6-3.6 Local health agency review of registration renewal application; issuance of registration renewal

(a) In determining whether to renew the registration of an exempt cigar bar or cigar lounge pursuant to [N.J.S.A. 26:3D-59](#), a local health agency to which a registration renewal application is made pursuant to [N.J.A.C. 8:6-3.4](#) shall review

the application, the supporting documentation submitted pursuant to [N.J.A.C. 8:6-3.4](#), the information the local health agency receives pursuant to N.J.A.C. 8:6-3.5(a), and the results of any inspections conducted pursuant to N.J.A.C. 8:6-3.5(b).

1. In addition, the local health agency shall consider any applicable local ordinance that provides restrictions on or prohibitions against smoking equivalent to or greater than those provided under the Act and this chapter, in accordance with [N.J.S.A. 26:3D-63](#).

(b) The local health agency shall renew the registration of an exempt cigar bar or cigar lounge if the local health agency determines that:

1. The exempt cigar bar or cigar lounge has not expanded in size since the last registration to the date of the application;

2. The exempt cigar bar or cigar lounge has not changed its location since the last registration to the date of the application;

3. Sales of tobacco products and/or rentals of on-site humidors at the location of the exempt cigar bar or cigar lounge totaled at least 15 percent or more of the total annual gross income of the proposed exempt cigar bar or cigar lounge, excluding sales from vending machines, during the calendar year ending December 31 preceding the date of the registration renewal application;

4. If the exempt cigar bar or cigar lounge is located within an establishment at which smoking is prohibited pursuant to the Act:

i. The exempt cigar bar or cigar lounge is in an area within the establishment that is enclosed by:

(1) Solid walls or windows;

(2) A ceiling; and

(3) A solid door; and

ii. The ventilation system of the exempt cigar bar or cigar lounge is separately exhausted from the nonsmoking areas of the establishment so that air from the smoking area is not recirculated to the nonsmoking areas and smoke is not backstreamed into the nonsmoking areas; and

5. There is no applicable local ordinance pursuant to (a)1 above that prohibits renewing the application for registration.

(c) If the local health agency finds that an exempt cigar bar or cigar lounge meets the conditions for registration renewal in (b) above, the local health agency, within 20 business days of the local health agency's receipt of a completed application and any required supporting documentation, and the conclusion of any inspections the local health agency may require pursuant to N.J.A.C. 8:6-3.5(b), shall:

1. Issue a written notice to the applicant advising the applicant of the approval of the request for registration renewal; and

2. Place a notice of registration renewal of the exempt cigar bar or cigar lounge on file in the official records of the local board of health with jurisdiction over the municipality in which the exempt cigar bar or cigar lounge is located.

(d) If the local health agency finds that an exempt cigar bar or cigar lounge fails to meet any of the conditions for registration renewal in (b) above, the local health agency, within 20 business days of the local health agency's receipt of a completed registration renewal application and any supporting documentation, and the conclusion of any inspections the local health agency may require pursuant to [N.J.A.C. 8:6-3.2\(b\)](#), shall issue a written notice to the applicant advising the applicant as to the basis or bases for denial.

<< NJ ADC 8:6-3.7 >>

8:6-3.7 Maintenance of enclosure

(a) An exempt cigar bar or cigar lounge registered pursuant to this subchapter and [N.J.S.A. 26:3D-59](#) that is located within an establishment at which smoking is prohibited pursuant to the Act shall ensure that:

1. The solid door of the cigar bar or cigar lounge remains closed at all times except when the door is in use for entry to and egress from the cigar bar or cigar lounge;

i. The use of a self-closing door is recommended for this purpose; and

2. The ventilation system of the cigar bar or cigar lounge at all times is maintained in operable condition to ensure that air from the cigar bar or cigar lounge is separately exhausted from the nonsmoking areas of the establishment and not recirculated to the nonsmoking areas, and that smoke is not backstreamed into the nonsmoking areas.

SUBCHAPTER 4. TOBACCO RETAIL ESTABLISHMENT

<< [NJ ADC 8:6-4.1](#) >>

8:6-4.1 Annual provision of notice of claim of exemption and retail sale income verification

(a) An establishment that is an indoor public place or a workplace that intends to claim that the establishment is exempt from the Act as a tobacco retail establishment within the meaning of [N.J.S.A. 26:3D-57](#) and 59 shall file, by April 15 of each year, the form of notice provided at chapter Appendix C, incorporated herein by reference, with the local health agency with jurisdiction over the municipality in which the establishment is located.

1. The information contained in the notice required pursuant to (a) above shall

be subject to reporting to and auditing by the Division of Taxation of the **New Jersey** Department of the Treasury.

<< [NJ ADC 8:6-4.2](#) >>

8:6-4.2 Exemption not applicable in certain circumstances

(a) With respect to an establishment that otherwise qualifies as a tobacco retail establishment, if the establishment is within or part of an indoor public place or a workplace, such as a retail store within a shopping mall, the exemption provided at N.J.S.A. 26:3D-59b shall not apply to the establishment unless the establishment is enclosed by solid walls or windows, a ceiling, and a solid door, and equipped with a ventilation system that is separately exhausted from the indoor public place or workplace in which the tobacco retail establishment is located, so that air from the tobacco retail establishment is not recirculated to the indoor public place or workplace and smoke is not backstreamed into the indoor public place or workplace, and provided that:

1. The solid door of the tobacco retail establishment remains closed at all times except when the door is in use for entry to and egress from the tobacco retail establishment;

i. The use of a self-closing door is recommended for this purpose; and

2. The ventilation system of the tobacco retail establishment at all times is maintained in operable condition to ensure that air from the tobacco retail establishment is separately exhausted from and not recirculated to the nonsmoking areas of the indoor public place or workplace in which the tobacco retail establishment is located, and that smoke is not backstreamed into the nonsmoking areas.

(b) The exemption provided at N.J.S.A. 26:3D-59b is not available to the extent an applicable local ordinance restricts or prohibits its availability, in accordance with [N.J.S.A. 26:3D-63](#).

SUBCHAPTER 5. CASINOS AND CASINO SIMULCASTING FACILITIES

<< [NJ ADC 8:6-5.1](#) >>

8:6-5.1 Area within the perimeter of a casino or a casino simulcasting facility

(a) Establishments that are completely surrounded by a casino that meets the requirements of N.J.S.A. 26:3D-59e(1) are within the perimeter of a casino for the purpose of the exemption the Act affords casinos pursuant to N.J.S.A. 26:3D-59e.

1. The perimeter of a casino is the casino boundary delineation on the floor plan a casino licensee files with the Commission as part of its operation certificate pursuant to [N.J.A.C. 19:43-7.3\(b\)](#)¹, subject to Commission approval.

2. For an establishment to be "completely surrounded" by a casino, a casino shall exist on all sides of, that is, in a 360-degree radius around, the establishment,

provided the casino meets the requirements of N.J.S.A. 26:3D-59e(1).

(b) Establishments that are completely surrounded by a casino simulcasting facility that meets the requirements of N.J.S.A. 26:3D-59e(2) are within the perimeter of a casino simulcasting facility for the purpose of the exemption the Act affords casino simulcasting facilities pursuant to N.J.S.A. 26:3D-59e.

1. The perimeter of a casino simulcasting facility is the casino simulcasting facility boundary delineation on the floor plan a casino licensee files with the Commission as part of its operation certificate pursuant to [N.J.A.C. 19:43-7.3\(b\)](#)1, subject to Commission approval.

2. For an establishment to be "completely surrounded" by a casino simulcasting facility, a casino simulcasting facility shall exist on all sides of, that is, in a 360-degree radius around, the establishment, provided the casino simulcasting facility meets the requirements of N.J.S.A. 26:3D-59e(2).

<< [NJ ADC 8:6-5.2](#) >>

8:6-5.2 Temporary expansion of casino or a casino simulcasting facility

If a casino hotel obtains a Commission-approved resolution authorizing the amendment of the casino hotel's operation certificate for the temporary expansion of a casino or a casino simulcasting facility, the temporarily expanded space is not a "casino" or a "casino simulcasting facility" for the purpose of the exemption the Act affords casino and casino simulcasting facilities pursuant to N.J.S.A. 26:3D-59e.

<< [NJ ADC 8:6-5.3](#) >>

8:6-5.3 Designation of smoking and non-smoking areas

(a) Casino licensees shall place signage indicating that smoking is permitted at each entrance to an area at which smoking is permitted from an area at which smoking is not permitted.

(b) Casino licensees shall place signage indicating that smoking is not permitted at each entrance to an area at which smoking is not permitted from an area at which smoking is permitted.

(c) The signage a casino licensee uses to implement this section shall meet the technical requirements provided at [N.J.S.A. 26:3D-61](#).

SUBCHAPTER 6. SIGNAGE DESIGNATING SMOKING AND NONSMOKING AREAS

<< NJ ADC 8:6-6.1 >>

8:6-6.1 Acceptable forms of signage designating smoking and nonsmoking areas

(a) Signs containing the content provided at chapter Appendices D or E, incorporated herein by reference, are acceptable to meet the content requirement

for the signs [N.J.S.A. 26:3D-61](#) requires a person having control of an indoor public place or workplace at which smoking is prohibited pursuant to the Act to post at every public entrance to the indoor public place or workplace indicating that smoking is prohibited.

(b) Signs containing the content provided at either chapter Appendix F or G, incorporated herein by reference, are acceptable to meet the content requirement for the signs [N.J.S.A. 26:3D-61](#) requires a person having control of an indoor public place or workplace at which smoking is permitted pursuant to the Act to post in those areas of the indoor public place or workplace at which smoking is permitted.

(c) This section shall not be construed to prohibit a person having control of an establishment required to post signage pursuant to the Act to post another form of the required signs, provided the signs meet the requirements of [N.J.S.A. 26:3D-61](#).

SUBCHAPTER 7. SCHOOL BUILDINGS AND GROUNDS

<< NJ ADC 8:6-7.1 >>

8:6-7.1 Purpose

The purpose of this subchapter is to implement the prohibition against smoking in school buildings and on school grounds pursuant to [N.J.S.A. 26:3D-58](#).

<< NJ ADC 8:6-7.2 >>

8:6-7.2 Smoking prohibited in school buildings and on school grounds

(a) Pursuant to N.J.S.A. 26:3D-58b, smoking is prohibited in school buildings and on school grounds.

(b) As used in (a) above, "school buildings" and "school grounds," means and includes, with respect to public and nonpublic elementary and secondary schools:

1. Land, portions of land, structures, buildings, and vehicles, owned, operated or used for the provision of academic or extracurricular programs sponsored by a school or a community provider and structures that support these buildings, such as school wastewater treatment facilities, generating facilities, and other central service facilities including, but not limited to, kitchens and maintenance shops;

2. Athletic stadiums, swimming pools, any associated structures or related equipment tied to such facilities including, but not limited to, grandstands and night field lights, greenhouses, garages, facilities used for non-instructional or non-educational purposes, and any structure, building or facility used solely for school administration;

3. Playgrounds, and recreational places owned by local municipalities, private entities or other individuals during those times when the school district has exclusive use of a portion of such land; and

4. Certain faculty or administrator residences on school grounds as provided in N.J.A.C. 8:6-8.1(b).

SUBCHAPTER 8. RESIDENCES

<< NJ ADC 8:6-8.1 >>

8:6-8.1 Certain residences not exempt

<<-(a) A rectory or a convent is a private residence at which smoking is permitted for the purpose of the exemption the Act affords private residences pursuant to N.J.S.A. 26:3D-59d, unless the rectory or convent is:->>

<<-1. Used in whole or in part as a workplace of the parish or diocese by employees or volunteers of the parish or diocese other than those who reside there (for example, for the performance of clerical work in an office area); or->>

<<-2. Generally accessible to the public (for example, for meeting or counseling purposes).->>

<<-(b)->> <<+(a)+>> A faculty or administrator residence on school grounds is a private residence at which smoking is permitted for the purpose of the exemption the Act affords private residences pursuant to N.J.S.A. 26:3D-59d, unless the residence is:

1. Used in whole or in part as a workplace of the school by persons other than those who reside there (for example, a place at which school personnel are required to perform secretarial, security, maintenance, or housekeeping work);

2. Generally accessible to the public;

3. Used by students (for example, for tutoring, counseling, or extracurricular purposes); or

4. Located within a student dormitory.

<<-(d)->> <<+(b)+>> This section is not to be construed to prevent <<-a parish, diocese, or school,->> <<+the owner or operator of a residence on school grounds+>> from prohibiting smoking in <<+the+>> residence<<-s under their jurisdiction and control->>, in accordance with [N.J.S.A. 26:3D-63](#).

SUBCHAPTER 9. ENFORCEMENT

<< NJ ADC 8:6-9.1 >>

8:6-9.1 Enforcement against individuals

(a) A person having control of an indoor public place or workplace shall order a person smoking in violation of the Act and this chapter (person smoking illegally) to comply with the Act and this chapter, and may elect to provide the person smoking illegally with a copy of the notice provided at chapter Appendix H,

incorporated herein by reference.

(b) If, after having been ordered to comply with the Act and this chapter in accordance with (a) above, a person smoking illegally continues to violate the Act and this chapter, the person having control of the indoor public place or workplace:

1. Shall order the departure and removal from the indoor public place or workplace of the person smoking illegally; and

2. In the discretion of the person having control of the indoor public place or workplace, may request the assistance of law enforcement or peace officers with jurisdiction over the indoor public place or workplace to accomplish this departure and removal.

(c) A person may file a complaint against a person smoking illegally in accordance with [N.J.S.A. 26:3D-62](#) by:

1. Contacting the local health agency with jurisdiction over the indoor public place or workplace and by adhering to complaint procedures each local health agency shall establish;

2. Filing a complaint directly with the municipal court with jurisdiction over the establishment, or

3. Filing the form of complaint at chapter Appendix I, incorporated herein by reference, with the Indoor Environments Program.

(d) This section shall not be construed to impair the ability of law enforcement or peace officers with jurisdiction to charge a person under any other applicable law, including [N.J.S.A. 2C:33-13](#).

<< NJ ADC 8:6-9.2 >>

8:6-9.2 Enforcement against person having control of an indoor public place or workplace

(a) Any person may file a complaint against a person having control of an indoor public place or workplace who violates or fails or refuses to comply with or enforce the Act and this chapter by:

1. Contacting the local health agency with jurisdiction over the indoor public place or workplace and by adhering to complaint procedures each local health agency shall establish;

2. Filing a complaint directly with the municipal court with jurisdiction over the establishment, or

3. Filing the form of complaint at chapter Appendix I, with the Indoor Environments Program.

<< NJ ADC 8:6-9.3 >>

8:6-9.3 Procedure for anonymous request for investigation

(a) A person may submit an anonymous request for the performance of an investigation of an indoor public place or workplace for alleged violation of, or failure or refusal to comply with or enforce, the Act and this chapter by:

1. Contacting the local health agency with jurisdiction over the indoor public place or workplace and by adhering to anonymous investigation request procedures each local health agency shall establish; or

2. Filing the form of request for investigation at chapter Appendix J incorporated herein by reference, with the Indoor Environments Program.

(b) An anonymous request for investigation shall not be evidence of a violation of, or a failure or refusal to comply with or enforce, the Act and this chapter.

<< NJ ADC 8:6-9.4 >>

8:6-9.4 Entry upon premises by enforcing entity

(a) A person having control of an establishment shall permit full access to the establishment, for the purposes of examination, inspection, investigation, and enforcement of the Act and this chapter, to:

1. Representatives of a local health agency with jurisdiction over the establishment;

2. Representatives of the Department; and

3. Any experts retained by, and at the expense of, the local health agency of the Indoor Environments Program.

<< NJ ADC 8:6-9.5 >>

8:6-9.5 Fines for violations

(a) Pursuant to [N.J.S.A. 26:3D-62](#), fines for violations of the Act and this chapter are as follows:

1. \$250.00 for a first offense;

2. \$500.00 for a second offense; and

3. \$1,000 for each subsequent offense.

SUBCHAPTER 10. FORMS

<< NJ ADC 8:6-10.1 >>

8:6-10.1 Forms

Single copies suitable for photocopying of the forms provided at Appendices A through J are available upon request to the Indoor Environments Program and are available for download from the forms internet web page of the Department at <http://web.doh.state.nj.us/forms>.

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