

extended the expiration date of the chapter seven years from the date of filing.

The Coastal Permit Program Rules establish the procedures by which the Department reviews permit applications and appeals from permit decisions under the Coastal Area Facility Review Act (CAFRA), the Wetlands Act of 1970, and the Waterfront Development Law. The procedures also govern the reviews of Federal Consistency Determinations issued pursuant to the Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq. and Water Quality Certificates issued pursuant to Section 401 of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., when the approvals are sought in conjunction with a permit. The Coastal Permit Program Rules also contain the permits-by-rule, general permits, and Long Branch Redevelopment Zone Permit.

On June 2, 2014, the Department proposed the consolidation of the Coastal Permit Program Rules and Coastal Zone Management Rules into a single chapter with amendments (see 46 N.J.R. 1051(a); June 2, 2014). The public comment period on the June 2, 2014, proposal closed August 1, 2014. Any further action on those proposed amendments, repeals, and new rules would be the subject of a separate notice in the New Jersey Register.

(a)

GREEN ACRES PROGRAM

Real Property Taxation of Recreation and Conservation Lands Owned by Nonprofit Organizations

Readoption: N.J.A.C. 7:35

Authority: N.J.S.A. 54:4-3.63 et seq.

Authorized By: Bob Martin, Commissioner, Department of Environmental Protection.

Effective Date: November 13, 2014.

New Expiration Date: November 13, 2021.

Take notice that pursuant to N.J.S.A. 52:14B-5.1, the Real Property Taxation of Recreation and Conservation Lands Owned by Nonprofit Organizations rules at N.J.A.C. 7:35 are readopted and shall continue in effect for a seven-year period. The rules had been scheduled to expire on December 13, 2014. The Department of Environmental Protection (Department) has reviewed these rules and has determined that the rules should be readopted because they are necessary, reasonable, and proper for the purpose for which they were originally promulgated. In accordance with N.J.S.A. 52:14B-5.1.c(1), timely filing of this notice extended the expiration date of the chapter seven years from the date of filing.

Under provisions of New Jersey's tax law relating to exemptions, specifically, N.J.S.A. 54:4-3.63 to 3.70, all lands and the improvements thereon exclusively used for conservation or recreation purposes, which are owned and maintained or operated for the benefit of the public by a nonprofit corporation or organization which is qualified for exemption from Federal Income Tax under Section 501(c)(3) of the Internal Revenue Code, are qualified, or eligible, for exemption from local property taxation provided that (1) the Commissioner of the Department of Environmental Protection certifies that the real property and the property owner are qualified under the terms of the act and (2) the certification is accepted by the municipal tax assessor. The Real Property Taxation of Recreation and Conservation Lands Owned by Nonprofit Corporations rules establish the requirements for nonprofits to apply to the Department for certification of eligibility for real property tax exemption, and the procedures and standards by which the Department determines and certifies eligibility to the local tax assessors.

HEALTH

(b)

PUBLIC HEALTH SERVICES BRANCH DIVISION OF FAMILY HEALTH SERVICES COMMUNITY HEALTH AND WELLNESS UNIT TOBACCO CONTROL PROGRAM

Smoke-Free Air

Readoption with Amendments: N.J.A.C. 8:6

Adopted Repeals and New Rules: N.J.A.C. 8:6 Appendices H, I, and J

Proposed: July 7, 2014, at 46 N.J.R. 1514(a).

Adopted: November 7, 2014, by Mary E. O'Dowd, M.P.H.,
Commissioner, Department of Health.

Filed: November 14, 2014, as R.2014 d.189, **without change**.

Authority: N.J.S.A. 26:3D-55 through 64, particularly 26:3D-64.

Effective Dates: November 14, 2014, Readoption;

December 15, 2014, Amendments, Repeals, and
New Rules.

Expiration Date: November 14, 2021.

Summary of Public Comments and Agency Responses:

The Department of Health (Department) received comments from the following:

1. Maria C. Anderson, Assistant University Counsel, Montclair State University, Montclair, NJ;
2. Karen Blumenfeld, Esq., Global Advisors on Smokefree Policy, Summit, NJ;
3. Stephanie Carey, President, New Jersey Association of County and City Health Officials, Freehold, NJ;
4. Ralph D'Aries, Chief Registered Environmental Health Specialist, Sussex County Health Department, Hamburg, NJ;
5. Mr. Richard Fiocchi, Vineland, NJ;
6. Melinda R Martinson, General Counsel, Medical Society of New Jersey, Lawrenceville, NJ; and
7. William Wallace, Health Officer, Township of West Caldwell, West Caldwell, 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.

1. COMMENT: A commenter agrees that "the proposed regulations are necessary to protect workers and the non-smoking public from tobacco smoke, especially with the increased use of e-cigarettes" and "supports the proposed amendment to the general provisions to include e-cigarettes and [hookahs, and] the new definition of 'not structurally enclosed' and its formula for openings to ensure cross-ventilation." The commenter agrees "with the Department's position on the limited exemption for cigar bars and lounges on which there is a moratorium unless they existed prior to December 31, 2004." (1)

RESPONSE: The Department acknowledges the commenter's support of the proposed readoption with amendments, and the proposed repeals and new rules, at N.J.A.C. 8:6.

2. COMMENT: A commenter is "concerned that 'tobacco retail establishments' are not meant to be new venues in which patrons may smoke, lounge or hang-out" and supports "the Department's intention of not permitting tobacco retail establishments to evolve into new bars or lounges where smoking may occur." (1)

RESPONSE: The Department acknowledges the commenter's concern and support.

3. COMMENT: A commenter states: "New cigar lounges have been established in Wantage Township, Pequannock, and [West] Milford after the year 2004. This appears to be in violation of the current law and has been addressed again in the revisions. It [appears] that local officials feel that the law is gray and that new cigar lounges are permitted. Further, these cigar lounges require membership and this appears to be the gray area for allowing the cigar lounges to be established after 2004. Please

clarify the [State's] legal position on this issue. I would also like a legal [interpretation] by the [New Jersey Attorney General's] office. Please contact this office for more details." (4)

RESPONSE: The Department has consistently interpreted the exemption for cigar bars and cigar lounges in the Smoke-Free Air Act, N.J.S.A. 26:3D-55 through 64 (Act), particularly at 59, to require that a cigar bar had to have been in existence as of December 31, 2004. See, for example, the Department's responses to comments 96 and 97 in the notice of adoption of N.J.A.C. 8:6 at 39 N.J.R. 2027(a) (May 21, 2007):

"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."

See also the form of Application for Registration of Exempt Cigar Bar or Cigar Lounge (Pursuant to N.J.S.A. 26:3D-55 et seq. and N.J.A.C. 8:6) at N.J.A.C. 8:6 Appendix A, which requires an applicant to attach the operator's deed(s) or lease(s), and certificates of occupancy, for the premises at which the proposed exempt cigar bar or cigar lounge is located as of December 31, 2004, to the date of the application, and to certify that: "In the calendar year ending December 31, 2004, and for each succeeding calendar year ending December 31 of the year preceding the date of this application, 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, not including any sales from vending machines"; that "The proposed exempt cigar bar or cigar lounge has not expanded its size since December 31, 2004"; and that The proposed exempt "cigar bar or cigar lounge has not changed its location since December 31, 2004."

Thus, the existing rules at N.J.A.C. 8:6 and the Department's earlier responses to comments upon the adoption of N.J.A.C. 8:6 in 2007 clearly and affirmatively state the Department's position regarding this issue. The Department finds no further clarification or legal opinion to be necessary. Therefore, the Department will take no action on adoption in response to the comment.

4. COMMENT: "Outdoor bars with 70 [percent] open air should be up to the owners whether to allow smoking or not. The owners should place signs stating they are smoke free or not." (5)

RESPONSE: The Act, as implemented by N.J.A.C. 8:6, only prohibits smoking at "indoor public places and workplaces" as defined therein, and in school buildings and on school grounds. Provided an outdoor bar is "not structurally enclosed," as the proposed amendment would define that term, an owner or operator can elect whether or not to permit smoking at the establishment. See N.J.A.C. 8:6-2.1(c), which provides: "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." The owner or operator of an establishment that is not subject to the prohibitions against smoking contained in the Act can elect to post signage at the establishment indicating whether the owner or operator permits smoking there.

Rulemaking is not required to implement the commenter's suggestion. Therefore, the Department will take no action on adoption in response to the comment.

5. COMMENT: A commenter "supports the right of municipalities to adopt more stringent requirements for Tobacco Retail Establishments." (3)

RESPONSE: The Department acknowledges the commenter's support of the Act, particularly at N.J.S.A. 26:3D-63, which authorizes municipalities to enact municipal ordinances that "provide restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under" the Act. The Department will take no action on adoption in response to the comment.

6. COMMENT: A commenter "believes that uniform [Statewide] standard definitions [with respect to the exemption for tobacco retail establishments] will result in better health outcomes and be easier to comply with than an inconsistent municipal approach." The commenter states, "The most important issue [county and city health officials] face under [N.J.A.C. 8:6-4] is lack of specific rules that apply to the definition of 'sampling' waivers for tobacco retail establishments. The interpretation described in the Summary ... needs to be imbedded in the regulation. [Local health] agencies responsible for enforcing [N.J.A.C. 8:6] need[:] Specific language that [tobacco retail establishments] are 'cash and carry' businesses[:] a definition for 'cigar sampling'[:] A specific definition of what a 'sample' is (Rules defining what is a wine tasting versus what is a bar could be instructive in developing a definition for 'cigar sampling'[:] A specific definition that amenities such as chairs, televisions, and beverages which are conducive to lingering are a de facto cigar bar/hookah bar and are therefore prohibited[:] and clarification] regarding 'Members Only' smoking clubs, which are also being used to create de facto cigar bars. Stating that municipalities can adopt their own ordinances is an invitation to chaos. Tobacco retailers are jurisdiction-shopping. They are lobbying elected officials to pressure Health Officers to sign off on 'sampling' waivers that the Health Officers know go against the intent [of the Act.]" (3)

7. COMMENT: With respect to N.J.A.C. 8:6-4 and the "opening of new cigar bars, cigar lounges, hookah bars, and hookah lounges," a commenter quotes the statement in the notice of proposal Summary that "A number of entities not in existence as of December 31, 2004, have attempted to circumvent this date restriction by attempting to characterize their establishments as 'tobacco retail establishments,' to which no comparable date restriction applies to qualify for the exemption the Act provides tobacco retail establishments. The result of this has been to blur the distinction between cigar lounges and tobacco retail establishments, rendering meaningless the Act's express differentiation between the two, and resulting in confusion and inconsistent enforcement among municipalities." See 46 N.J.R. 1514(a), at 1515. The commenter states, "This area of the rule has to be spelled out much clearer than it is, as business are absolutely opening as [tobacco retail establishments] but are indeed cigar lounges. As the Health Officer for [a municipality,] it is very difficult to prohibit the opening of these [tobacco retail establishments] even if the [municipality] believes that they will be operating a cigar lounge! Further clarification is needed." (7)

RESPONSE TO COMMENTS 6 AND 7: The Act expressly defines the terms, "cigar bar," "cigar lounge," and "tobacco retail establishment." See N.J.S.A. 26:3D-57. The Department is disinclined to attempt to redefine terms for which the Act already establishes definitions.

Moreover, as stated in response to prior comments, N.J.S.A. 26:3D-63 authorizes municipalities to enact municipal ordinances that "provide restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under" the Act. The Act thus anticipates that municipalities may act locally to establish differing restrictions on smoking. These municipalities may elect to enact ordinances that implement some or all of the commenters' suggestions to correct the issues the commenters describe. Furthermore, to the extent the comments could be regarded as a request to amend the Act, the comment exceeds the scope of the proposed rulemaking. The Department is without authority to amend a statute.

Therefore, the Department will take no action on adoption in response to the comments.

8. COMMENT: A commenter states, "The definition of 'indoor public place' in [N.J.S.A.] 26:3D-57 needs to be revised, to include 'common and shared areas of multi-unit housing' rather than only refer to 'apartment building lobbies.' The [Department's] 2007 responses to public comments [in the notice of adoption of N.J.A.C. 8:6 in] 2007 ... discusses that 'common and shared' areas of apartment buildings should be included, but it was not codified. Since it is not codified into the

administrative code, some health departments may not be able to inspect for smoking in common or shared areas of a multi-unit housing building [that] go beyond the building's lobby. The statute needs to be amended so that local and county health departments can refer to clear language in the statute, in order to issue a citation for smoking in a 'common or shared' area of an apartment building that is greater than the lobby. (2)

RESPONSE: The existing definition of "indoor public place" at N.J.S.A. 26:3D-57 includes an "apartment building lobby or other public area in an otherwise private building." The Department views this definition as addressing and including the areas the commenter describes. Therefore, no amendment to the Act is necessary to achieve the result the commenter describes.

Nevertheless, the comment exceeds the scope of the proposed rulemaking. The Department is without authority to amend a statute. Therefore, the Department will take no action on adoption in response to the comment.

9. COMMENT: A commenter states, "The enabling language in the ... Act and the enforcement provisions need to be clarified to expressly state that the presence of 'secondhand smoke' in common and shared areas of a multi-unit housing building is an example of prima facie evidence that smoking has taken place, as was mentioned in the [Department's] responses to comments [in the notice of adoption of N.J.A.C. 8:6 in] 2007 ... that evidence of cigarette butts, ashtrays and ashes nearby is prima facie evidence. If it is not codified, then health departments may not be able to do an inspection or write a summons, even if they smell secondhand smoke in such common and shared areas. We have heard that some health departments need to see visually first-hand the smoking taking place in common areas of multi-unit housing, because the statute does codify prima facie evidence of smoking other than the act of smoking." (2)

RESPONSE: As in any matter presented in a judicial forum, the court will determine whether under all the facts and circumstances presented in each case, a trier of fact could find a violation of the Act. The Department disagrees with the commenter's assertion that local officials could not rely on circumstantial evidence (such as the presence of used smoking materials and smoking odors) to demonstrate that an owner or operator has violated the Act by allowing smoking at an indoor public place or workplace at which smoking is prohibited. The Department declines to specify the minimum amount of evidence that would warrant a local health official initiating enforcement action as this could undermine local officials in the exercise of their discretion.

Nevertheless, to the extent the comment requests amendment of the Act, the comment exceeds the scope of the proposed rulemaking. The Department is without authority to amend a statute. Therefore, the Department will take no action on adoption in response to the comment.

10. COMMENT: A commenter states, "The provisions of the [Act] need to be amended to expressly codify what is impermissible furniture for the interior of a Tobacco Retail Establishment (TRE). Since the [Department's] adoption of the rules at N.J.A.C. 8:6 in] 2007..., over the course of following seven years we are regularly made aware of establishments seeking and being granted TRE smoking waivers, when in fact they are 'Cigar Lounges.' The ... proposed regulations suggest that o [sic] each community decide what furniture is appropriate for a TRE that applies for a TRE smoking waiver, rather than issue [Statewide] standardized restrictions on seating (chairs, bar area), televisions, sampling time, etc. Without a statewide consistent standard as to specific interior furnishings for the purposes of defining a TRE vs. a cigar lounge or cigar bar, new establishments seeking regular and continuous smoking on premises will continue to forum shop in municipalities or counties that grant TRE waivers to establishments which operate as de facto cigar lounges which can't meet the cigar lounge smoking waiver requirement of existing as of December 31, 2004. Some local and county health departments have attempted to stop smoking in certain TREs that are de facto cigar lounges, but do not have the local or county government support, which results in de facto cigar lounge operating as TREs and allowing continuous smoking inside due to seating, television sets, etc. A proposed [Statewide] regulation that standardizes the elimination of seating and other lounge-like environmental settings is necessary to assist local and county health departments that face resistance enforcing smoking violations against establishments that for all intents and

purposes are not TREs but [are] cigar lounges. Some local and county health departments have shared that their municipal or county prosecutors will not prosecute a summons and notice of violation for smoking in a TRE that is a de facto cigar lounge, due to the fact that the [the rules at N.J.A.C. 8:6 that the Department adopted in] 2007 ... do not codify that a TRE is a 'cash and carry' business for sampling expensive cigars. We appreciate that the [Department's] responses to comments in [the notice of adoption of N.J.A.C. 8:6 in] 2007 ... includes verbiage that a TRE is 'cash and carry,' such language ... needs to be codified into the actual regulation, in order to ensure compliance. Limiting the amount of sampling time would be helpful to codify as well. However, if language is codified that no seating, etc. is permitted in a TRE that applies for and maintains a smoking waiver, that will greatly help with uniform and consistent enforcement throughout the [State]." (2)

11. COMMENT: A commenter states, "The Rules should be amended to add a definition of a Tobacco Retail Establishment (TRE) to identify the physical layout to not include seating, tables, TVs etc. By defining a TRE in this matter, it will make clear, on a [Statewide] level, that a TRE cannot have the physical attributes of a cigar lounge. This amendment is important to prevent smoking lounges that are currently opening in and around University communities because 90 [percent] of all smokers begin using tobacco before the age 21. In addition, we feel it is important that State regulations take into account local and county needs and to provide a [Statewide] definition of what constitutes the physical facility and interior of a TRE for purposes of granting and enforcing a smoking waiver." (1)

RESPONSE TO COMMENTS 10 AND 11: The Act expressly defines the terms, "cigar bar," "cigar lounge," and "tobacco retail establishment." See N.J.S.A. 26:3D-57. To the extent the comments request amendment of the Act or the rulemaking of standards that would layer additional requirements upon these definitions to identify "impermissible furniture" and to establish "standardized restrictions on seating (chairs, bar area), televisions, sampling time, etc." The Department is without authority to amend a statute by rulemaking, and the Department declines to exercise its rulemaking authority in a way that would intrude on the local decision-making authority with which the Act empowers municipalities.

N.J.S.A. 26:3D-63 authorizes municipalities to enact municipal ordinances that "provide restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under" the Act. These municipalities are thus empowered to enact ordinances that implement some or all of the commenters' suggestions and address commenters' concerns. As such, the Act empowers municipalities to establish restrictions on smoking that may vary from municipality to municipality.

Accordingly, the Department will take no action on adoption in response to the comments.

12. COMMENT: A commenter states, "[N.J.A.C. 8:6] should clarify that no TRE smoking waivers should be granted for sampling electronic smoking devices ('ESDs') and ESD liquids. To be granted a TRE smoking waiver, at least 51 [percent] of the products sold at the TRE need to be 'tobacco products' defined under the [New Jersey] Wholesale Tobacco Tax Act (Wholesale Act). ESDs and ESD liquids are not classified as 'tobacco products' under the Wholesale Act, and the industry admits that these products are not 'tobacco products' under the Wholesale Act, since to the best of our knowledge, the industry neither collects nor provides wholesale tobacco taxes paid on the sale of their ESD products. If a TRE sells 51 [percent] of legitimate tobacco products, they still cannot be granted a TRE smoking waiver if the balance of the 49 [percent] of products sold include sales of ESD and/or ESD liquids, due to the fact that such sales would be more than just 'incidental' sales as defined in [existing N.J.A.C. 8:6], which defines 'Incidental['] as [']minor or occasional.' Clearly, regular or daily sales of such products would not be deemed 'minor or occasional.' Local and county health departments would also benefit if [N.J.S.A.] 26:3D-57 [et] seq. is amended to explicitly state that TRE and cigar bar/lounge waivers are for the specific purpose of only smoking tobacco products as defined by the Wholesale Act, and not for the purpose of using ESDs."

RESPONSE: To the extent the comment requests amendment of the Act, the comment exceeds the scope of the proposed rulemaking. The Department is without authority to amend a statute.

To the extent the comment requests interpretation of electronic smoking devices as their sale may count toward meeting the required sales of “tobacco products” necessary to qualify an establishment as a “tobacco retail establishment,” the Department finds that no revision is necessary. N.J.A.C. 8:6-1.2 defines tobacco product to mean a “tobacco product” as the Tobacco Products Wholesale Sales and Use Tax Act defines that term at N.J.S.A. 54:40B-1 et seq., particularly at 54:40B-2. As that law does not include electronic smoking devices within the definition of tobacco products, electronic smoking device sales do not count toward meeting the required sales of “tobacco products” necessary to qualify an establishment as a “tobacco retail establishment.” Therefore, the Department will take no action on adoption in response to the comment. (1)

13. COMMENT: A commenter states, “The ... Act should be amended to codify that if a smoking waiver is granted to a TRE, no food or beverage service, or the bringing in of food or beverage onto the premises for customer/patron use/consumption is permitted. The [Department’s] responses to comments [in the notice of adoption of N.J.A.C. 8:6 in] 2007 ... notes that there is to be no food or beverage service, but that language was not codified and does not specifically include food or beverages brought in from outside which is not technically ‘served’ by the TRE. Not only in New Jersey but in other jurisdictions, this loophole has allowed for customers of TREs with smoking waivers to bring in their own food and/or beverage, thus creating a de facto lounge setting, as opposed to a ‘cash and carry’ retail store.” (2)

RESPONSE: The comment requests amendment of the Act, which exceeds the scope of the proposed rulemaking. The Department is without authority to amend a statute.

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 “tobacco retail establishment” to mean “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.” N.J.A.C. 8:6-1.2 defines the term, “incidental,” as used in the definition of “tobacco retail establishment,” to mean “minor and occasional,” and further states, “1. The sale of food or beverages for on-site consumption is a not an incidental sale of other products.” Thus, to be a tobacco retail establishment, an entity cannot engage in the sale of food or beverages.

The Act, thus, focuses on “sales” activities and does not address patron activity, other than whether patrons can smoke at tobacco retail establishments. The Department’s rulemaking obligation goes to the implementation of the Act’s prohibition against smoking, subject to the Act’s exceptions. To rulemake prohibitions against the consumption of food and beverages, other than as sales by entities subject to the Act, would exceed a reasonable interpretation of the Department’s regulatory role in implementing the Act. Therefore, the Department will take no action on adoption in response to the comments.

14. COMMENT: A commenter states, “[N.J.A.C. 8:6 needs] to be amended to clarify that there are to be no events that permit continuous smoking to be held at a TRE that has a smoking waiver, due to the fact that a smoking event morphs an off-premise consumption retail environment into an on-premise consumption environment, which resembles a de facto cigar lounge.” (2)

RESPONSE: The plain language of the Act in distinguishing among cigar bars, cigar lounges, and tobacco retail establishments means that these establishments are different from each other and that “lounging” should not occur at tobacco retail establishments. The Department declines to establish rulemaking that would define terms that the Act already defines and reiterates its Response to Comments 6 and 7. Therefore, the Department will take no action on adoption in response to the comment.

15. COMMENT: A commenter states, “[N.J.A.C. 8:6] should be amended to require that no secondhand smoke migrate from the smoking area of a casino gaming floor, into the nonsmoking non gaming areas that abut the smoking permitted gaming floor areas. [Existing N.J.A.C. 8:6 bans] outdoor secondhand smoke from migrating back into an indoor public place or a workplace [at N.J.A.C. 8:6-2.3(a)]. Additionally, the ...

Act requires no secondhand smoke can migrate from the interior of a cigar lounge or bar into a nonsmoking area of the larger establishment that the cigar bar or lounge is within. The same logic should apply to an indoor casino gaming floor: no secondhand smoke should migrate from a smoking permitted casino gaming floor area, into any nonsmoking area that it abuts any smoking areas. Just as the ... Act has ventilation requirements for cigar bars and lounges located within an establishment, and be [sic] separately enclosed so as to eliminate secondhand smoke migrating into nonsmoking areas, so should the ... Act require that the smoking-permitted casino gaming floors be separately enclosed and ventilated from the nonsmoking nongaming areas. Shared ventilation systems at casinos blow secondhand smoke into nonsmoking rooms of the building, exposing visitors and employees to secondhand smoke.” (2)

RESPONSE: To the extent the comment requests amendment of the Act, the comment exceeds the scope of the proposed rulemaking. The Department is without authority to amend a statute.

To the extent the comment requests that the Department establish rulemaking to prohibit the migration, seepage, or recirculation of smoke from smoking occurring on the gaming floor of a casino to the non-gaming floor of a casino, the Department is unaware of technology that would make a provision to this effect practical or feasible. See the Response to Comment 2 in the 2007 notice of adoption of N.J.A.C. 8:6 at 39 N.J.R. 2027(a), at 2029 (quoting from findings of the United States Surgeon General and the American Society of Heating, Refrigerating and Air Conditioning Engineers to this effect). See also N.J.S.A. 26:3D-56, wherein the Legislature finds and declares, “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 would be exceeding its obligation to implement rules that “effectuate the purposes of” the Act, N.J.S.A. 26:3D-64, if in doing so it would eradicate a statutory exemption to the Act’s prohibition against smoking (that is, the exemption for casinos and casino simulcasting facilities at N.J.S.A. 26:3D-59) by making the exemption impossible to achieve. See N.J.S.A. 52:14B-23 (standard or requirement imposed through administrative rule must be “achievable under current technology”). Therefore, the Department will take no action on adoption in response to the comment.

16. COMMENT: A commenter states, “The Rules should be amended ... to prohibit retail stores from permitting the sampling or use of the product indoors. Studies show that these products can be a health hazard to any person using or exposed to the vapor similar to second-hand smoking. Vapor products do not appear to be regulated currently by the State of New Jersey and ‘vape shops’ which sell these products are becoming popular within the State. Many of these shops allow the use of their products inside for sampling in a lounge like setting — an activity which is prohibited by State law for tobacco. [The] regulations should be amended to also prohibit this type of activity in the interest of public health and safety.” (1)

RESPONSE: The commenter appears to be referring to electronic smoking devices. P.L. 2009, c. 182 (approved January 11, 2010), amended the Act to add a definition of “electronic smoking device,” at N.J.S.A. 26:3D-57, and to include “the inhaling or exhaling of smoke or vapor from electronic smoking devices” as being within the definition of “smoking.” The proposed amendment at N.J.A.C. 8:6-1.2(a) would add “electronic smoking device” to the list of definitions used in N.J.A.C. 8:6 consistent with their use in the Act. Inasmuch as use of electronic smoking devices is smoking, N.J.S.A. 26:3D-58 prohibits their use, to the same degree as other materials that one can smoke, at indoor public places and workplaces, and in any building, or on the grounds, of an elementary or secondary school.

In establishing the amendments to the Act, the Legislature found and declared that “Electronic smoking devices have not been approved as to safety and efficacy by the federal Food and Drug Administration, and their use may pose a health risk to persons exposed to their smoke or vapor because of a known irritant contained therein and other substances that may, upon evaluation by that agency, be identified as potentially toxic to those inhaling the smoke or vapor.” N.J.S.A. 26:3D-56.

As the Act and the rules prohibit the activity the commenter describes, additional rulemaking is unnecessary and the Department will take no action on adoption in response to the comment.

Federal Standards Statement

The Department is neither readopting N.J.A.C. 8:6, nor adopting the adopted amendments, new rules, and repeals, 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. Therefore, a Federal standards analysis is not required.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 8:6.

Full text of the adopted amendments and new rules follows:

SUBCHAPTER 1. GENERAL PROVISIONS

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:

...
“Electronic smoking device”;

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

...
“Hookah” means an instrument or pipe, having one or more flexible tubes, used to vaporize or smoke tobacco, flavored dried fruit, or any other substance in which the vapor or smoke is passed through a liquid or water basin before inhalation.

1. As the Smoke-Free Air Act defines smoking to include the burning of, inhaling from or exhaling the smoke from any other matter or substance that contains tobacco or any other matter that can be smoked, smoking by means of a hookah is included in the definition of “smoking” under the Smoke-Free Air Act.

...
“Not structurally enclosed” means:

1. There are openings on the perimeter walls that are, in width, at least 50 percent of the width of the perimeter of the structure; and

2. The area of the openings totals at least 50 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. (No change.)

SUBCHAPTER 10. FORMS

8:6-10.1 Forms

Single copies suitable for photocopying of the forms provided at N.J.A.C. 8:6 Appendices A through J are available upon request to the Indoor Environments Program and are available for download from the forms website of the Department at <http://web.doh.state.nj.us/apps2/forms/index.aspx>.

APPENDIX H



State of New Jersey
DEPARTMENT OF HEALTH
PO BOX 360
TRENTON, N.J. 08625-0360
www.nj.gov/health

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

MARY E. O'DOWD, M.P.H.
Commissioner

NOTICE

On April 15, 2006, the "New Jersey Smoke-Free Air Act" (Act), N.J.S.A. 26:3D-55 et seq., took effect. The Act prohibits smoking in an indoor public place or workplace. The Act also prohibits smoking any building or on the grounds of a public or nonpublic elementary or secondary school, regardless of whether the area is indoors or outdoors.

The Act and the Smoke-Free Air Rules at N.J.A.C. 8:6 implementing the Act require this establishment to direct a person smoking in violation of the Act to stop smoking. The rules further require this establishment to remove from the premises any person who continues to smoke in violation of the Act after having been directed to stop smoking, and to enlist the assistance of local law enforcement or peace officers, if necessary, to assist in the removal.

Persons who violate the Act are subject to a complaint being filed against them and being summoned to appear in the municipal court of this jurisdiction. Persons found to be in violation of the Act are subject to fines and penalties established by the Act of \$250 for a first offense, \$500 for a second offense, and \$1,000 for each subsequent offense.

Mary E. O'Dowd, M.P.H., Commissioner
New Jersey Department of Health

APPENDIX I

New Jersey Department of Health
 Consumer, Environmental and Occupational Health Service
 Indoor Environments Program
 PO Box 369
 Trenton, NJ 08625-0369

Date Filed

NJ SMOKE-FREE AIR ACT / COMPLAINT

Information contained in this form is subject to disclosure and public access pursuant to N.J.S.A. 47:1A-1, the "Open Public Records Law."

If you would like to make an anonymous request for investigation, you can do so by contacting your local health agency. You can find out which local health agency would have jurisdiction by searching the list of local health agencies available at <http://nj.gov/health/lh/directory/lhselectcounty.htm> or by calling (609) 292-4993.

SECTION I - ESTABLISHMENT INFORMATION			
1. Name of Establishment		2. Source(s) of Smoking Violation: (Check all that apply) <input type="checkbox"/> Employee(s)/Worker(s) <input type="checkbox"/> Customer(s)/Visitor(s) <input type="checkbox"/> Owner/Operator (failure to enforce) <input type="checkbox"/> Unknown/Not Sure <input type="checkbox"/> Other (specify): _____	
Street Address			
City	State		
3. Date and Time of Smoking Violation <input type="checkbox"/> AM <input type="checkbox"/> PM		4. Were <i>No Smoking</i> or <i>Smoking Prohibited</i> signs posted in or near the location of the smoking violation? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown/Not Sure	
5. Brief Description of Smoking Violation (include the name of any supervisor/individual in charge that you spoke with concerning the smoking violation): 			
6. If this is a complaint about a smoking violation in your workplace, provide the name, title or position, and telephone number of the official in charge of smoking policy for your workplace: 			
SECTION II - COMPLAINANT INFORMATION			
7. Name of Complainant		10. Status of Complainant <input type="checkbox"/> Employee/Worker <input type="checkbox"/> Owner <input type="checkbox"/> Customer <input type="checkbox"/> Operator <input type="checkbox"/> Visitor or Guest <input type="checkbox"/> Other (specify): _____	
8. Address			
9. City, State, Zip Code		11. Telephone Number	12. Best Time to Call
<p>CERTIFICATION: <i>I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.</i></p>			
13. Signature		14. Date	

**NJ SMOKE-FREE AIR ACT / COMPLAINT
(Continued)**

15. Name of Other Complainant(s) or Witness(es) *		18. Status of Complainant <input type="checkbox"/> Employee/Worker <input type="checkbox"/> Customer <input type="checkbox"/> Visitor or Guest <input type="checkbox"/> Other (specify): _____		<input type="checkbox"/> Owner <input type="checkbox"/> Operator
16. Address				
17. City, State, Zip Code		19. Telephone Number	20. Best Time to Call	
<p align="center">CERTIFICATION: <i>I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.</i></p>				
21. Signature			22. Date	
23. Name of Other Complainant(s) or Witness(es) *		26. Status of Complainant <input type="checkbox"/> Employee/Worker <input type="checkbox"/> Customer <input type="checkbox"/> Visitor or Guest <input type="checkbox"/> Other (specify): _____		<input type="checkbox"/> Owner <input type="checkbox"/> Operator
24. Address				
25. City, State, Zip Code		27. Telephone Number	28. Best Time to Call	
<p align="center">CERTIFICATION: <i>I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.</i></p>				
29. Signature			30. Date	

* Attach additional sheet as needed and provided all requested information for any additional complainants/witnesses.

APPENDIX J

New Jersey Department of Health
 Consumer, Environmental and Occupational Health Service
 Indoor Environments Program
 PO Box 369
 Trenton, NJ 08625-0369

Date Filed

**NJ SMOKE-FREE AIR ACT
 ANONYMOUS REQUEST FOR INVESTIGATION**

Information contained in this form is subject to disclosure and public access pursuant to N.J.S.A. 47:1A-1, the "Open Public Records Law."

SECTION I - ESTABLISHMENT INFORMATION	
1. Name of Establishment	2. Source(s) of Smoking Violation: (Check all that apply) <input type="checkbox"/> Employee(s)/Worker(s) <input type="checkbox"/> Customer(s)/Visitor(s) <input type="checkbox"/> Owner/Operator (failure to enforce) <input type="checkbox"/> Unknown/Not Sure <input type="checkbox"/> Other (specify): _____
Street Address	
City State Zip Code	
3. Date and Time of Smoking Violation <input type="checkbox"/> AM <input type="checkbox"/> PM	4. Were <i>No Smoking</i> or <i>Smoking Prohibited</i> signs posted in or near the location of the smoking violation? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown/Not Sure
5. Brief Description of Smoking Violation (include the name of any supervisor/individual in charge that you spoke with concerning the smoking violation):	
6. If this is a complaint about a smoking violation in your workplace, provide the name, title or position, and telephone number of the official in charge of smoking policy for your workplace:	
SECTION II - COMPLAINANT INFORMATION (OPTIONAL)	
7. Status of Complainant <input type="checkbox"/> Employee/Worker <input type="checkbox"/> Visitor or Guest <input type="checkbox"/> Operator <input type="checkbox"/> Customer <input type="checkbox"/> Owner <input type="checkbox"/> Other (specify): _____	

Forward this completed form the address listed above.
