

[50 N.J.R. 1818\(c\)](#)

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RULE ADOPTIONS

Reporter

50 N.J.R. 1818(c)

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Agency

LAW AND PUBLIC SAFETY > DIVISION OF CRIMINAL JUSTICE

Administrative Code Citation

Adopted Amendments: [N.J.A.C. 13:51-1.2](#), [1.5](#), [1.6](#), [1.9](#), [1.12](#), [2.2](#), [3.3](#), [3.5](#), and [4.3](#)

Adopted Repeal: [N.J.A.C. 13:51-3.6](#)

Text

Chemical Breath Testing

Proposed: August 21, 2017, at [49 N.J.R. 2761\(a\)](#).

Adopted: June 27, 2018, by Gurbir S. Grewal, Attorney General.

Filed: June 28, 2018, as R. 2018 d.146, **without change**.

Authority: [N.J.S.A. 39:4-50.3](#), 39:3-10.25, and 12:7-56.

Effective Date: August 6, 2018.

Expiration Date: December 13, 2023.

Summary of Public Comment and Agency Response:

The official comment period ended October 20, 2017. The Department of Law and Public Safety (Department) received written comments from Chief Anthony Jannicello of the Woodcliff Lake Police Department.

1. COMMENT: Chief Jannicello comments that the Alcotest 7110 MKIII has been an approved device for less than 10 years and that, because of the rule change, the current Alcotest 7110 MKIII device will have to be replaced. He comments that replacing the current device will be costly to his municipality.

RESPONSE: The Department recognizes that purchasing the Alcotest 9510 will come at a cost. The Department proposed to amend the rules to add the Alcotest 9510 as an additional approved device after it was determined that replacement parts for the Alcotest 7110 MKIII were no longer being made by the manufacturer. The Alcotest 7110 MKIII will continue to be an approved device for performing chemical breath tests until the implementation of the Alcotest 9510. During implementation, law enforcement agencies will be required to switch over to the Alcotest 9510.

2. COMMENT: Chief Jannicello asks whether the Alcotest 9510 is in line with [State v. Chun, 194 N.J. 54 \(2008\)](#).

RESPONSE: The *Chun* decision specifically applies to the Alcotest 7110 MKIII. The requirements in *Chun* are not immediately applicable to the Alcotest 9510.

3. COMMENT: Chief Jannicello asks how long the Alcotest 9510 is estimated to be in-service.

RESPONSE: While the Department understands Chief Jannicello's concern regarding the cost of purchasing new devices, the length of time a company manufactures their devices and replacement parts is outside of the control of the Department and outside the scope of this rulemaking. The Department is charged with identifying devices that meet the standards established in New Jersey and enacting rules to include approved devices.

4. COMMENT: Chief Jannicello asks about the timeframe for requiring the Alcotest 9510 to be fully placed into service.

RESPONSE: The Alcotest 7110 MKIII continues to be an approved device under this rulemaking. Law enforcement departments may continue using the Alcotest 7110 MKIII until the implementation of the Alcotest 9510. The deadline for full implementation of the Alcotest 9510 is unknown at this time.

Federal Standards Statement

A Federal standards analysis is not required because the adopted amendments and repeal are not adopted under the authority of, or in order to implement, comply with, or participate in any program established under Federal law, or under a State statute that incorporates or refers to Federal law, Federal standards, or Federal requirements.

Regulations

Full text of the adopted amendments follows:

SUBCHAPTER 1. BREATH TESTING OPERATORS

13:5Definitions

For the purpose of this chapter, the terms set forth herein are defined as follows:

[page=1819] "Alcohol Influence Report" shall mean the record required, pursuant to [N.J.S.A. 39:4-50.2\(b\)](#), 39:3-10.24.b, or 12:7-55.b.

...

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

...

"Calibrating unit" shall mean "Calibrating Units for Breath Alcohol Testers" as that phrase appears on, and as currently listed in, the United States Department of Transportation, National Highway Traffic Safety Administration's (NHTSA) "Highway Safety Programs; Conforming Products List of Calibrating Units for Breath Alcohol Testers," [77 Federal Register 64588-64590](#) (October 22, 2012), incorporated herein by reference, and as NHTSA may thereafter amend.

...

"Chemical analysis" shall mean the determination of the concentration of ethanol (ethyl alcohol) in the breath using an approved "Evidential Breath Alcohol Measurement Device" as currently listed on the United States Department of Transportation, National Highway Traffic Safety Administration's (NHTSA), "Highway Safety Programs; Conforming Products List of Evidential Breath Alcohol Measurement Devices," [77 Federal Register 35747-35751](#) (June 14, 2012), incorporated herein by reference, and as NHTSA may thereafter amend.

"Electrochemical analysis" shall mean the measurement of current (voltage/resistance) generated from the catalytic conversion of ethanol (ethyl alcohol) in the breath into acetaldehyde, to acetic acid with the final product being carbon dioxide and water.

...

"Law enforcement officer" shall mean: a police or other law enforcement officer of the State of New Jersey who has completed the Basic Course for Police Officers or Basic Course for Investigators as approved by the Police Training Commission, pursuant to the provisions of [N.J.S.A. 52:17B-67](#) et seq., and the regulations adopted thereto; all sworn members of the Division of State Police; and law enforcement officers established by the laws of the United States of America.

...

"Replica" shall mean a document that is an operator's certificate (as defined herein), which shall bear the signatures or facsimile signatures of the Attorney General and the Superintendent of State Police, and where authorized by this chapter, the signature or initials of a Breath Test Coordinator/Instructor. A "replica" includes the initial Operator's Certificate and any replacements thereof as set forth at [N.J.A.C. 13:51-1.12\(c\)](#).

...

13:5Application for certification

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

13:5Certification training requirements

(a) Initial operator certification requirements are as follows:

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

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

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

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

- (c) Subject to the requirements at [N.J.A.C. 13:51-1.4\(d\)](#), recertification of an operator, whose certification is valid, requires satisfactory completion of a minimum of one day of training as prescribed and conducted by the Division of State Police. Such training shall include:

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

(d)- (No change.)

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

13:5Revocation of certificate

(a)- (No change.)

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

1. A Breath Test Coordinator/Instructor;
2. Chief of Police of the organized police department of which the operator is a sworn member;
3. Executive head of the organized police department of which the operator is a sworn member; or
4. The Attorney General, or his or her designee.

(e)- (No change.)

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

(a) (No change.)

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

- (c) A replica will be replaced for an operator when the operator's replica has been lost and duly reported as lost, or is otherwise in need of replacement, pursuant to [N.J.A.C. 13:51-1.12\(b\)](#).

The replacement replica will bear the date of issuance of the replacement and bear the signatures, or facsimile signatures, of the Attorney General and the Superintendent of State Police. The replica will show the date of the operator's original initial certification under [N.J.A.C. 13:51-1.6\(a\)](#) and, if applicable, under [N.J.A.C. 13:51-1.6\(b\)](#), and the date of the operator's most recent recertification under [N.J.A.C. 13:51-1.6\(c\)](#), or reinstatement and recertification under [N.J.A.C. 13:51-1.6\(d\)](#).

(d) (No change.)

SUBCHAPTER 2. BREATH TEST COORDINATOR/INSTRUCTORS

13:5 Training and functional qualifications

(a) A Breath Test Coordinator/Instructor shall have specialized training, as prescribed by the Division of State Police, and have the knowledge to properly perform the following functions:
Recodify existing 2.-6. as 1.-5. (No change in text.)

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

13:5 Training Breath Test Coordinator/Instructors

(a) (No change.)

(b) The initial training course shall include: the history of the instrument; nomenclature of the operational controls; detailed operating instructions, including operation and maintenance of all related instrument software and hardware and any related equipment; nomenclature of all parts and their functions, maintenance, and repair of the instrument; and class participation in the operation of the instrument. Class participation shall include practical training on the instrument. This training shall confer no ownership or licensing rights to any intellectual property or proprietary information or training materials on any participant unless set forth in an agreement between the relevant parties.

13:5 Approved instruments for the testing of a person's breath by chemical analysis

(a) The Attorney General, pursuant to P.L. 1966, c. 142, Sec. 3, as amended by P.L. 1971, c. 273, Sec. 1 ([N.J.S.A. 39:4-50.3](#)), P.L. 1990, c. 103, Sec. 17 ([N.J.S.A. 39:3-10.25](#)) and P.L. 1986, c. 39, Sec. 8 (N.J.S.A. [page=1820] 12:7-56) and this subchapter, approves the following instruments for use in the testing of a person's breath by chemical analysis:

1. The Alcotest 7110 MKIII, is a chemical breath test instrument that employs both infrared analysis and electrochemical analysis as a dual system of chemical breath testing and is an approved instrument for use in the testing of a person's breath by chemical analysis.
2. The Alcotest 9510 is a chemical breath test instrument that employs both infrared analysis and electrochemical analysis as a dual system of chemical breath testing and is an approved instrument for use in the testing of a person's breath by chemical analysis.

13:5(Reserved)

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

13:5 Periodic inspection or calibration check of approved instruments

- (a) The following concern the calibration check of approved instruments:
1. All approved instruments that employ the infrared analysis and electrochemical analysis approved method of chemical breath testing, as set forth in [N.J.A.C. 13:51-3.5\(a\)](#)1 or 2, when used in this State in connection with taking of breath samples under the provisions of [N.J.S.A. 39:4-50.2\(b\)](#), 39:3-10.24.b or 12:7-55.b, or in connection with the prosecution of a person pursuant to the provisions of [N.J.S.A. 39:4-50](#) et seq., [39:3-10.13](#), 39:3-10.20, 39:3-10.24, 12:7-46, 12:7-55, or 2A:4A-23 shall be subject to a calibration check.
 2. (No change.)
 3. A calibration check shall be performed when an approved instrument:
 - i.-ii. (No change.)
 - iii.** Within 182 days after a calibration check conducted pursuant to (a)3i or ii above; and
 - iv.** Thereafter, within 182 days after any calibration check conducted pursuant to (a)3i, ii, or iii above or after a discretionary calibration check conducted pursuant to (a)4 below.
 4. (No change.)
 5. The results of each calibration check shall be recorded on forms and in the manner specified by the Superintendent of the Division of State Police.
 - i. (No change.)
 - ii.** An original, duplicate original, photocopy, or electronic copy of each calibration check, performed under this subsection, of an approved instrument under the custody and control of an organized police department, other than approved instruments under the custody and control of the Division of State Police, shall be maintained by the organized police department having custody and control of the approved instrument.