RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

AAM -the abbreviation to identify the adopting agency
01 -the *State Register* issue number
96 -the year
00001 -the Department of State number, assigned upon receipt of notice
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing; or C for first Continuation.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Emission Standards for Motor Vehicles and Motor Vehicle Engines

I.D. No. ENV-14-04-00003-E
Filing No. 1052
Filing date: Sept. 17, 2004
Effective date: Sept. 17, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Parts 200 and 218 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 71-2103 and 71-2105

Finding of necessity for emergency rule: Preservation of public health and general welfare.

Specific reasons underlying the finding of necessity: New York first adopted the California Low Emission Vehicle (LEV) program in 1990 pursuant to the provisions of section 177 of the Clean Air Act (42 USC 7507) (CAA), and has maintained the program since that time. The LEV Program results in significant emission reduction benefits as compared to its Federal counterpart, and those reductions are an integral part of New York's State Implementation Plan (SIP). Failure to maintain the program would result in a need to find and implement additional emission control programs which would produce similar or greater levels of emissions reductions. New York has already implemented controls on a broad array of emissions sources, and further reductions of a magnitude similar to that available from the LEV Program would be difficult and costly to implement.

New York is in nonattainment of Federal health based air quality standards for ozone. Consequently the State has implemented a wide range of emissions control programs to reduce emissions of ozone precursors to provide healthy air for our citizens. In addition, the US Environmental Protection Agency (EPA) oversees and enforces the provisions of the State's SIP. Failure to implement a program included in the State's approved SIP can result in Federal enforcement actions that can include implementation of onerous offset provisions for new stationary sources, and withholding of Federal highway funds. The potential impact of such sanctions could be as much as $3 billion per year, over the next five years.

The CAA specifies that states adopting the California Motor Vehicle Emissions Control Program must, among other requirements, maintain the program as identical to California's so as not to create a "third car," and must provide two years of lead time to manufacturers. Since California has modified the zero emission vehicle sales mandate, it is incumbent upon New York to also adopt those changes before the commencement of the next model year or be at risk of violating the CAA provisions for identicality and lead time. Such a condition could seriously impair implementation of the ZEV sales mandate in New York. This would result in health and welfare effects on New Yorkers as a result of increased emissions from automobiles, and potential sanctions for failure to implement the approved SIP provisions.

It is necessary for the preservation of the health and general welfare that this amendment be adopted on an emergency basis as authorized by section 202(6) of the State Administrative Procedures Act, effective immediately upon filing with the Department of State.

Subject: Emission standards for motor vehicles and motor vehicle engines.

Purpose: To incorporate modifications that California has made to its vehicle emission control program relating to the ZEV mandate to reduce emissions in New York State and revise New York's ZEV alternative compliance plan provisions.

Text of emergency rule: (Section 200.1 through 200.8 remains unchanged)

Section 200.9, Table 1 is amended to read as follows:

218-1.2(d)	Clean Air Act 42 U.S.C. Section 7543 (1988) as amended by Public Law 101-549 (1990)	**
	Clean Air Act 42 U.S.C. Section 7507 (1988) as amended by Public Law 101-549 (1990)	**
218-1.2(e)	California Health and Safety Code, Section 39003 (2000)	** ***
218-1.2(j)	California Vehicle Code, Section 165 (2000)	** ***
218-1.2(k)	California Code of Regulations, Title 13, Section 1900(b)(3) (12-22-99)	** ***
218-1.2(v)	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++

	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
218-1.2(w)	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ ++
218-1.2(x)	California Code of Regulations, Title 13, Section 1905 (7-3-96)	** ***
218-1.2(ad)	California Code of Regulations, Title 13, Section 1960.5 (9-30-91)	** ***
218-1.2(ai)	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02) (12-07-01) and (5-24-02)	** ***+ ++
218.-1.2(al)	40 CFR Section 86.1827-01 (July 1, 2000)	*
218-1.2 (aq)	California Code of Regulations, Title 13, Section 2112 (11-27-99)	** ***
218-1.2(at)	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ ++
218-1.2(au)	California Code of Regulations, Title 13, Section 1900(b)(21) (12-07-01) and (5-24-02)	** ***+ ++
218-2.1(a)	California Code of Regulations, Title 13, Section 1956.8 (7-25-01)	** ***
	California Code of Regulations, Title 13, Section 1956.9 (3-6-96)	** ***
	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1960.1.5 (9-30-91)	** ***
	California Code of Regulations, Title 13, Section 1960.5 (9-30-91)	** ***
	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ ++
	California Code of Regulations, Title 13, Section 1964 (2-23-90)	** ***
	California Code of Regulations, Title 13, Section 1965 (12-22-99)	** ***
	California Code of Regulations, Title 13, Section 1968.1 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 1976 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 1978 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2030 (9-25-97)	** ***
	California Code of Regulations, Title 13, Section 2031 (9-25-97)	** ***
	California Code of Regulations, Title 13, Section 2047 (5-31-88)	** ***
	California Code of Regulations, Title 13, Section 2065 (7-25-01)	** ***
	California Code of Regulations, Title 13, Section 2235 (9-17-91)	** ***
	California Code of Regulations, Title 13, Article 1.5 (7-25-01)	** ***
218-2.1(a)	Clean Air Act 42 U.S.C. Section 7521 (1988) as amended by Public Law 101-549 (1990)	**
218-2.1(b)(5)	Clean Air Act 42 U.S.C. Section 7401 et seq. (1988) as amended by Public Law 101-549 (1990)	**
218-2.1(b)(8)	California Health and Safety Code, Section 43656 (2000)	***
218-2.1(d)	Clean Air Act 42 U.S.C. Section 7507 (1988) as amended by Public Law 101-549 (1990)	**
218-3.1	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
218-3.1(a)	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** ***+ ++
218-3.1(b)	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** *** ++
	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
218-4.1	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ [++]
218-4.2	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ [++]
218-5.1(a)	California Code of Regulations, Title 13, Section 2061 (10-23-96)	** ***
	California Code of Regulations, Title 13, Section 2062 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2065 (7-25-01)	** ***
	California Code of Regulations, Title 13, Section 2106 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2107 (11-27-99)	** ***
	California Code of Regulations, Title 13, Article 1.5 (7-25-01)	** ***
218-5.1(b)	California Code of Regulations, Title 13, Section 2061 (10-23-96)	** ***
	California Code of Regulations, Title 13, Section 2062 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2065 (7-25-01)	** ***
	California Code of Regulations, Title 13, Article 1.5 (7-25-01)	** ***
218-5.2(a)	California Code of Regulations, Title 13, Section 2065 (7-25-01)	** ***
	California Code of Regulations, Title 13, Section 2109 (11-30-83)	** ***
	California Code of Regulations, Title 13, Section 2110 (11-27-99)	** ***
	California Code of Regulations, Title 13, Article 1.5 (7-25-01)	** ***
218-5.2(b)(1)	California Code of Regulations, Title 13, Section 2106 (11-27-99)	** ***
218-5.3(b)	California Code of Regulations, Title 13, Section 2101 (11-27-99)	** ***
218-6.2	Clean Air Act 42 U.S.C. Section 7401 et seq. (1988) as amended by Public Law 101-549 (1990)	**
218-7.3(a)(1)	California Code of Regulations, Title 13, Section 2221 (11-30-83)	** ***
	California Code of Regulations, Title 13, Section 2224 (8-16-90)	** ***
218-7.3(a)(2)	California Code of Regulations, Title 13, Section 2224(a) (8-16-90)	** ***
218-7.4(b)(3)(i)	California Code of Regulations, Title 13, Section 2222 (8-16-90)	** ***
218-7.4(b)(3)(ii)	California Code of Regulations, Title 13, Section 2222 (8-16-90)	** ***
218-7.5(b)	California Code of Regulations, Title 13, Section 2222 (8-16-90)	** ***

§ 218-4.1 ZEV percentages.

Commencing in model-year [2005] *2007*, each manufacturer's sales fleet of passenger cars and light-duty trucks, produced and delivered for sale in New York, must, at minimum, contain at least [10 percent] *the same percentage of* ZEVs subject to the same requirement set forth in California Code of Regulations, title 13, section 1962 (see Table 1, section 200.9 of this Title) using New York specific vehicle numbers.

§ 218-4.2. Voluntary alternative compliance plan (ACP).

An automobile manufacturer may implement a voluntary alternative compliance plan (ACP) to section 218-4.1 of this Subpart, provided such plan complies with the following and has been approved by the commissioner.

(a) Core credit scheme. The core vehicle credit values for the ACP shall be the same as California Code of Regulations, title 13, section 1962 (See Table 1, section 200.9 of this Title).

(b) New York multiplier. After the core credit value for a vehicle is established by CARB pursuant to California Code of Regulations, title 13, section 1962 (see Table 1, section 200.9 of this Title), a New York specific multiplier will be applied to that vehicle in accordance with [the following:] *Table 1. The New York multiplier shall not be applied to type III ZEVs placed in service pursuant to the California Alternative Requirements for Large Volume Manufacturers as identified in the California Code of Regulations, title 13, section 1962(b)(2)(B).*

Table 1: Northeast Phase In Multiplier

Model Year	Requirement	PZEV Credit Multiplier	*ATPZEV Credit Multiplier*	ZEV Credit Multiplier
2002	Voluntary Early Introduction	1.5		3
2003	Voluntary Early Introduction	1.5		3
2004	[Mandatory Compliance] *Voluntary Early Introduction*	1.5	*2.25*	3
2005	Mandatory Compliance	1.3	*1.7*	2
2006	Mandatory Compliance	1.15	*1.3*	1.5
2007	[Equivalency with California program] *Mandatory Compliance*	[1] *1.15*	*1.3*	[1] *1.5*
2008	*Mandatory Compliance*	*1.15*	*1.3*	*1.5*
2009	*Equivalency with California program*	*1*	*1*	*1*

(c) Percentage requirements. An automobile manufacturer's ACP must comply with the following percentage phase-in requirements:

Table 2: Percentage Requirements for ZEVs, AT PZEVs, and PZEVs

Model Year	Minimum Percent ZEV Credit	Minimum Percent AT PZEV Credit	Maximum Percent PZEV Credit
[2004]	[0]	[0]	[10]
2005	[Combined] *0*	[1] *0*	[9] *10*
2006*	[1] *Combined*	[2] *1*	[7] *9*
2007	[2] *1*	2	[6] *7*
2008	*1*	*2*	*7*

**In MY 2006, 1 percent of a manufacturer's sales must be ZEV, AT PZEV or some combination thereof.*

Intermediate volume manufacturers may meet the entire ZEV requirement with 100 percent PZEV credits. Small and independent low volume manufacturers are not required to meet the ZEV percentage requirements but are able to generate and trade credits.

(d) Infrastructure and transportation system projects. Automobile manufacturers may meet a total of 25 percent of their 10 percent ZEV requirement by implementing infrastructure and transportation demonstration projects in accordance with the following requirements. Manufacturers may seek credits for project that advance infrastructure to encourage full development of alternative vehicle program. Such projects may include alternative fuel refueling, fuel cells and home recharging for electric vehicles. Manufacturers may also seek credits for projects that result in the placement of advanced technology vehicles in innovative transportation systems. The commissioner shall take into account associated project costs and the relationship to supporting increased usage of advanced technology vehicles.

(e) Generation and use of credits. Credits life, banking and trading will be calculated as per California Code of Regulations, title 13, section 1962. A manufacturer who generates twice as many credits from model-year [2004] *2005* or earlier PZEVs as required for model-year [2004] *2005* has through model-year [2007] *2008* to comply with the model-year [2005] *2006* AT PZEV/ZEV requirement. A manufacturer who qualifies for the [2004] *2005* AT PZEV/ZEV carryforward and generates twice as many PZEV credits as necessary for model-year [2005] *2006* has through model-year [2008] *2009* to comply with the model-year [2006] *2007* AT PZEV/ZEV requirement.

(f) Reporting. (1) Projected compliance reports will be due by the commencement of the model year. This report will include projected vehicle sales organized by engine family, marketing plans, dealerships targeted for advanced technology vehicle sales and support, plans for infrastructure and transportation system projects and credits proposed to be earned, and manufacturer projected compliance rates including potential credits or debits.

(2) Compliance reports will be required and due with annual sales reports by March 31st (with the potential to amend, based on late sales) following the completed model year. This report will include vehicle sales organized by engine family, descriptions of infrastructure and transportation system projects, manufacturer compliance rates including credits or debits earned and the way the manufacturer plans to erase any debits.

(g) Such ACP shall include, at a minimum:

(1) a demonstration that the emissions reductions from the alternative program equal or exceed those which would result from the compliance with section 218-4.1 of this Subpart;

(2) a demonstration that the alternative compliance program will lead to full compliance with all elements of section 218-4.1 of this Subpart starting no later than model year [2007] *2009*; and

(3) actions by the manufacturers that advance the sale and use of ZEV (including PZEV) and advanced technologies beyond that which would otherwise occur as a result of the fleet average requirements in Subpart 218-3 of this Part.

(h) Such ACP shall provide that advanced technology vehicle models, including ZEV's, sold or leased in California shall be available for purchase or lease in New York *except for type III ZEVs placed in service pursuant to section 1962(b)(2)(B) of the California Code of Regulations (see Table 1, section 200.9 of this Title).*

(i) Failure to meet the terms of the approved alternative compliance program will subject a manufacturer to all applicable penalties, and will require compliance with the ZEV mandate as prescribed in section 218-4.1 of this Subpart.

(j) A manufacturer shall notify the department of its intent to file an alternative compliance program within 60 days after the effective date of this regulation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. ENV-14-04-00003-P, Issue of April 7, 2004. The emergency rule will expire November 15, 2004.

Revised rule making(s) were previously published in the State Register on July 21, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Steven E. Flint, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-3255, (518) 402-8292, e-mail: seflint@gw.dec.state.ny.us

Summary of Regulatory Impact Statement

The New York State Department of Environmental Conservation (Department) is amending 6 NYCRR Subpart 200.9, and 6 NYCRR Part 218. The purpose of the rule amendment is to revise the existing Low Emission Vehicle (LEV) program to incorporate modifications that California has made to its vehicle emission control program relating to the Zero Emission Vehicle (ZEV) mandate. New York will also amend the Alternative Compliance Plan option in Part 218 to extend the expiration date of the option and to revise plan flexibilities. Adoption of these modifications is necessary to reduce emissions of air contaminants from new motor vehicles, and will also provide for continuing advancement of motor vehicle emissions control technology.

By statutory authority of, and pursuant to, Environmental Conservation Law (ECL), the Commissioner of Environmental Conservation is responsible for protecting the air resources of New York State. The Commissioner is authorized to adopt rules and regulations to enforce the ECL. The Legislature bestowed on the Department the power to formulate, adopt, promulgate, amend and repeal regulations for preventing, controlling or prohibiting air pollution.

The main purpose of enacting this program is to protect the health of New York State residents and its visitors. The revised emissions standards, developed to reduce air pollution from mobile sources, will have a positive impact by decreasing emissions of ozone precursor compounds. Exposure to motor vehicle emissions has caused or has been associated with eye, throat and bronchial irritation, headaches, nausea and lightheadedness. Deterioration in the health condition of those individuals with respiratory ailments may also occur. The primary compounds emitted from vehicle exhaust, and the secondary compounds that may form, can be detrimental to human health. Several studies have found evidence to support this.

The ZEV revisions: adopt regulations identical to California's; remove all references to fuel economy; modify the 15-year, 150,000-mile Partial ZEV (PZEV) warranty required for hybrid electric vehicles; modify the compliance requirements and options in response to the current state of

ZEV technology; and define three fuel cell development stages which start in 2003.

The regulations are also modified to include revisions to the Zero Emission Vehicle (ZEV) mandate which would delay the ZEV percentage requirements until 2007, but allow full use of credits earned prior to that date. For the 2007-2011 transition period, the ZEV obligation is reduced to one-half of the current level, and the remaining half can be met with AT PZEVs or hydrogen infrastructure. In addition, five types of hybrid electric vehicles are defined qualifying for additional allowances or allowances that may be used in the AT PZEV category. The ZEV calculation method has also been amended and five ZEV types are created that are the basis for the ZEV credits. Type III ZEVs placed in any state that is administering the California ZEV program (for example, New York State) pursuant to section 177 of the federal Clean Air Act count towards California's ZEV requirement, with the effect that the ZEV requirements of any section 177 state allow the counting of Type III ZEVs placed in California or other section 177 states.

New York includes in the ZEV program an Alternative Compliance Plan (ACP). The ACP is a voluntary alternative by which the State seeks to ramp up to the full level of the ZEV mandate utilizing a broad range of extremely clean, durable, advanced technology vehicles. The warranty provisions associated with PZEVs will benefit consumers, and prevent emission control systems degradation. The flexibility of the ACP allows for manufacturers to design an alternative compliance plan which provides clean air benefits from the commercialization of advanced motor vehicle technology, while affording the manufacturer choices over what technology to develop and place into service. Under the ACP, manufacturers notify the Department of their intent to be governed by the ACP. The ACP requires manufacturers to meet a 10 percent ZEV level, based on a credit mechanism specified in the ACP. In addition, the ACP includes early introduction and phase in credit multipliers, which decline until the program fully matches up with the California program. The ACP requires that vehicles sold or leased in California must be available for purchase or lease in New York, and that manufacturers must identify in their proposed ACP how such vehicles will be marketed. The ACP allows manufacturers to generate up to 25 percent of their credits from infrastructure and transportation projects provided such projects are identified in their approved ACP. Credits can be applied to the vehicle category (PZEV, AT PZEV, or ZEV) which the project affects. The ACP includes specific reporting requirements, both in terms of forecasting as well as progress reports. The ACP commences with model year 2005, and ends with the end of the 2008 model year.

California has projected that the incremental cost of PZEVs relative to SULEVs is likely to be less than $100 as vehicles are optimized in the next few years. The additional cost would cover some improvement in components should manufacturers design for less than a 150,000 mile life currently, and an additional $10 for zero evaporative emission control system upgrades. Similarly, California projects that the incremental cost for an AT PZEV is $1,500 in 2007-2008, $1,200 in 2009-2011 and $700 in 2012 and beyond. For Battery EVs, it is estimated that the incremental cost for full function EVs is $17,000 from 2007-2012, and City EVs have an incremental cost of $8,000 from 2007-2012. Regarding Fuel Cell EVs, the incremental costs are estimated to be $300,000 in 2007-2008, $120,000 in 2009-2011 and $9,300 in 2012 to 2020. As manufacturing economies of scale and further technological developments are achieved, it is expected that the incremental costs will be reduced.

Businesses involved in manufacturing, selling, or purchasing passenger cars or trucks could be affected by the regulations. However, these are not expected to impact automobile manufacturers significantly since manufacturers are already required to certify vehicles to standards appropriate for each state's requirements. The ZEV requirements are not expected to have a major cost impact on automobile dealers. Dealerships will experience some cost increases associated with sale and service of PZEVs and AT PZEVs, since in some cases these are a technology that a dealership has not previously handled, and is thus required to train service personnel to service these vehicles.

The amendments may have a positive impact on New York employment since the new technologies associated with sale and service of PZEVs and AT PZEVs, may require hiring or training personnel who are familiar with the products and associated technologies. In some cases these are a technology that a dealership has not previously handled. New marketing strategies will also need to be developed to promote the advantages of driving these cleaner vehicles, including significant air quality benefits, and thus increase sales to consumers.

The changes to the LEV regulations also result in no significant changes in paperwork requirements for dealers. While dealers must assure that the vehicles they sell are California certified, most manufacturers include provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York State dealers.

The flexibility of the changes to the ZEV mandate such as allowing manufacturers to bank credits, allowing the production of AT PZEVs or hydrogen infrastructure to meet part of the ZEV obligation, allowing the development of fuel cell stages, and increasing the AT PZEV allowances for advanced componentry gaseous fuel or hydrogen fuel storage systems, zero emission range and low fuel-cycle emissions will allow manufacturers to design an alternative compliance plan which provides clean air benefits from the commercialization of advanced motor vehicle technology, while affording the manufacturer choices over what technology to develop and place into service. These options will provide a long term air quality benefit, as well as a long term ZEV program compliance benefit.

Many aspects of New York LEV regulations are more stringent than their federal counterpart. Examples include the zero-emission vehicle program. Because of this, adoption of all the Tier 2 standards would provide fewer emission benefits. The federal programs do not include a specific ZEV program. Thus, acceptance of the federal program could deprive New York of some or all of the advanced technology and air quality benefits associated with the ZEV program.

This regulatory amendment will take effect immediately and the ZEV mandate is effective in model year 2007. The New York ACP is a voluntary element of this regulation, and includes required actions in model year 2005.

Regulatory Flexibility Analysis

1. Effect of rule:

The New York State Department of Environmental Conservation (Department) is amending 6 NYCRR Subpart 200.9, and 6 NYCRR Part 218. The proposed changes to the regulations may impact businesses involved in manufacturing, selling, purchasing or repairing passenger cars or trucks. However, these are not expected to impact automobile manufacturers significantly since manufacturers are already required to certify vehicles to standards appropriate for each state's requirements (either Federal or California certification standards).

State and local governments are also consumers of vehicles that will be regulated under the LEV amendments. Therefore, local governments who own or operate vehicles in New York State are subject to the same requirements as privately owned vehicles in New York State; *i.e.*, they must purchase California certified vehicles.

The changes are a revision and extension of the current LEV standards. The LEV program has been in effect in New York State since model year 1993 for passenger cars and light-duty trucks, and the New York State Department of Environmental Conservation (Department) is unaware of any adverse impact to small businesses or local governments as a result.

2. Compliance requirements:

There are no specific requirements in the regulation which apply exclusively to small businesses or local governments. Reporting, recordkeeping and compliance requirements are effective statewide. Automobile dealers (some of which may be small businesses) selling new cars, are required to sell or offer for sale only California certified vehicles. Also, some automobile dealerships will be selling and servicing advanced technology vehicles (ATV). These amendments will not result in any additional reporting requirements to dealerships other than the current requirements to maintain records demonstrating that vehicles are California certified. This documentation is the same documentation already required by the New York State Department of Motor Vehicles for vehicle registration. If local governments are buying new fleet vehicles, they should make sure that the vehicles are California certified.

3. Professional services:

There are no professional services needed by small business or local government to comply with the proposed rule.

4. Compliance costs:

California has estimated the incremental per vehicle cost of a city zero emission vehicle (ZEV) to be $8,000. A full function ZEV cost increment is projected at $17,000. A fuel cell ZEV cost increment is projected at $300,000 in 2007-2008, $120,000 in 2009-2011, and $9,300 in 2012 and beyond. The projected incremental cost for partial ZEVs (PZEVs) is projected to be $100. Advanced Technology PZEVs are projected to have a cost increment of $500 in 2007-2008 and $200 in 2009-2011. As manufacturing economies of scale and further technological developments are achieved, it is expected that the incremental costs will be reduced.

New York State currently maintains personnel and equipment to administer the LEV program. It is expected that these personnel will be retained to administer the revisions to this program. Therefore, no additional costs will be incurred by the State of New York for the administration of this program.

5. Minimizing adverse impact:

There will be no adverse impact on local governments who own or operate vehicles in the state because they are subject to the same requirements as those imposed upon privately owned vehicles.

This regulation contains exemptions for emergency vehicles, and military tactical vehicles and equipment. Furthermore, the LEV program is not applicable to vehicles with an odometer reading of 7,500 miles or more when sold.

The flexibility of the changes to the ZEV mandate such as allowing manufacturers to bank credits, allowing the production of AT PZEVs or hydrogen infrastructure to meet part of the ZEV obligation, allowing the development of fuel cell stages, and increasing the AT PZEV allowances for advanced componentry gaseous fuel or hydrogen fuel storage systems, zero emission range and low fuel-cycle emissions will allow manufacturers to design an alternative compliance plan which provides clean air benefits from the commercialization of advanced motor vehicle technology, while affording the manufacturer choices over what technology to develop and place into service. These options will provide a long term air quality benefit, as well as a long term ZEV program compliance benefit.

6. Small business and local government participation:

The Department plans on holding public hearings at various locations throughout New York State after the amendments are proposed. Small businesses and local governments will have the opportunity to attend these public hearings. Additionally, there will be a public comment period in which interested parties who are unable to attend a public hearing can submit written comments.

7. Economic and technological feasibility:

New York includes in the ZEV program an Alternative Compliance Plan (ACP). The ACP is a voluntary alternative by which the State seeks to ramp up to the full level of the ZEV mandate utilizing a broad range of extremely clean, durable, advanced technology vehicles. The warranty provisions associated with PZEVs will benefit consumers, and prevent emission control systems degradation. The flexibility of the ACP allows for manufacturers to design an alternative compliance plan which provides clean air benefits from the commercialization of advanced motor vehicle technology, while affording the manufacturer choices over what technology to develop and place into service.

The amendments may have a positive impact on New York employment since the new technologies associated with sale and service of PZEVs and AT PZEVs, may require hiring or training personnel who are familiar with the products and associated technologies. In some cases these are a technology that a dealership has not previously handled. New marketing strategies will also need to be developed to promote the advantages of driving these cleaner vehicles, including significant air quality benefits, and thus increase sales to consumers.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The New York State Department of Environmental Conservation (Department) is amending 6 NYCRR Subpart 200.9, and 6 NYCRR Part 218. The changes to the regulations modify New York State's current zero emission vehicle sales requirement. There are no requirements in the regulation which apply only to rural areas. The changes to these regulations may impact businesses involved in manufacturing, selling or purchasing passenger cars or trucks. However, these are not expected to impact automobile manufacturers significantly since manufacturers are already required to certify vehicles to standards appropriate for each state's requirements (either Federal or California certification standards).

The changes are revisions and extensions of the current LEV standards. The LEV program has been in effect in New York State since model year 1993 for passenger cars as well as light-duty trucks, and the New York State Department of Environmental Conservation (Department) is unaware of any adverse impact to rural areas as a result. The beneficial emissions impact of the program accrues to all areas of the state.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

There are no specific requirements in the amended regulations which apply exclusively to rural areas. Reporting, recordkeeping and compliance requirements apply primarily to vehicle manufacturers, and to a lesser degree to automobile dealerships. Manufacturers reporting requirements mirror the California requirements, and are thus not expected to be burdensome. Dealerships do not have reporting requirements, but must maintain records to demonstrate that vehicles and some engines are California certified. This documentation is the same as documentation already required by the New York State Department of Motor Vehicles for vehicle registration.

Professional services are not anticipated to be necessary to comply with the rules.

3. Costs:

California has estimated the incremental per vehicle cost of a city zero emission vehicle (ZEV) to be $8,000. A full function ZEV is projected to have an incremental cost of $17,000. A fuel cell ZEV incremental cost is projected at $300,000 in 2007-2008 and $120,000 in 2009-2011. The projected incremental cost for partial ZEVs (PZEVs) is projected to be $100. Advanced Technology PZEVs are projected to have an incremental cost of $500 in 2007-2008 and $200 in 2009-2011. As manufacturing economies of scale and further technological developments are achieved, it is expected that the incremental costs will be reduced.

4. Minimizing adverse impact:

The changes will not adversely impact rural areas. As a result of the changes to the current ZEV requirements, rural areas may benefit by seeing an improvement in the air quality.

5. Rural area participation:

The Department plans on holding public hearings at various locations throughout New York State once the regulation is proposed. Some of these locations will be convenient for persons from rural areas to participate. Additionally, there will be a public comment period in which interested parties who are unable to attend a public hearing can submit written comments.

Job Impact Statement

1. Nature of impact:

The New York State Department of Environmental Conservation (Department) is amending 6 NYCRR Subpart 200.9, and 6 NYCRR Part 218. The amendments to the regulations are not expected to negatively impact jobs and employment opportunities in New York State. New York State has had a LEV program in effect since model year 1993 for passenger cars and light-duty trucks, and the New York State Department of Environmental Conservation (DEC) is unaware of any adverse impact to jobs and employment opportunities as a result.

2. Categories and numbers affected:

The changes to this regulation may impact businesses involved in manufacturing, selling or purchasing passenger cars or trucks. However, these are not expected to impact automobile manufacturers significantly since manufacturers are already required to certify vehicles to standards appropriate for each state's requirements (either Federal or California certification standards). Dealerships will be able to sell California certified vehicles to buyers from states bordering New York. Since vehicles must be California certified in order to be registered in New York, New York residents will not be able to buy non-complying vehicles out of state, but may be able to buy complying vehicles out of state.

3. Regions of adverse impact:

None.

4. Minimizing adverse impact:

The ZEV requirements are not expected to have a major cost impact on automobile dealers. A principal element of the revisions is that in order for a vehicle to qualify for any of a wide range of credit multipliers, the vehicle must actually be placed in service. Thus, while dealers have historically expressed concern that manufacturers would simply "dump" ZEVs on dealerships, there is now an incentive for manufacturers and dealers to work together to ensure that the vehicles are actually placed into service. Dealerships will experience some cost increases associated with sale and service of PZEVs and AT PZEVs, since in some cases these are a technology that a dealership has not previously handled, and is thus required to train service personnel to service these vehicles.

The flexibility of the changes to the ZEV mandate such as allowing manufacturers to bank credits, allowing the production of AT PZEVs or hydrogen infrastructure to meet part of the ZEV obligation, allowing the development of fuel cell stages, and increasing the AT PZEV allowances for advanced componentry gaseous fuel or hydrogen fuel storage systems, zero emission range and low fuel-cycle emissions will allow manufacturers to design an alternative compliance plan which provides clean air benefits from the commercialization of advanced motor vehicle technology, while affording the manufacturer choices over what technology to develop and place into service. These options will provide a long term air quality benefit, as well as a long term ZEV program compliance benefit.

New York includes in the ZEV program an Alternative Compliance Plan (ACP). The ACP is a voluntary alternative by which the State seeks to ramp up to the full level of the ZEV mandate utilizing a broad range of extremely clean, durable, advanced technology vehicles. The warranty provisions associated with PZEVs will benefit consumers, and prevent emission control systems degradation. The flexibility of the ACP allows for manufacturers to design an alternative compliance plan which provides clean air benefits from the commercialization of advanced motor vehicle technology, while affording the manufacturer choices over what technology to develop and place into service.

The amendments may have a positive impact on New York employment since the new technologies associated with sale and service of PZEVs and AT PZEVs, may require hiring or training personnel who are familiar with the products and associated technologies. In some cases these are a technology that a dealership has not previously handled. New marketing strategies will also need to be developed to promote the advantages of driving these cleaner vehicles, including significant air quality benefits, and thus increase sales to consumers.

5. Self-employment opportunities:

None.

Assessment of Public Comment

Comments Received from August 27, 2004 through September 1, 2004

1. Comment: Early excess Partial Zero Emissions Vehicle (PZEV) credits should be based on the Alternative Compliance Plan (ACP) credit provisions, including the New York Phase In Multipliers from Table 1 of 6 NYCRR Subpart 218-4. (1, 3)

Response: The provisions of 218-4.2(e)(2) do not exclude the New York multiplier in the accumulation of credits. The provision merely establishes that the threshold for the use of PZEV credits to be used to meet Advanced Technology (AT) PZEV requirements must be met before application of the multiplier. The multiplier would then be used to establish the number of credits available.

2. Comment: We support the revisions to the rulemaking concerning implementation model year, percentage phase in requirements and the end date of the program. (1, 2, 3)

Response: We thank you for your support of these revisions.

3. Comment: We recommend that the PZEV phase-in multiplier for model years 2007 and 2008 be increased from 1.15 to 1.3. (2)

Response: The Department believes that the PZEV phase in multipliers are appropriate. One objective of the multipliers is to ramp up to the full Zero Emissions Vehicle (ZEV) requirement, and the multipliers in Table 1 meet that objective.

4. Comment: New York's alternative compliance plan "offer for sale" requirement should not apply to fuel cell vehicles "introductory" or "demonstration" programs until these vehicles are intended to be offered for sale by normal means for use by the general public. (4)

Response: It is not the Departments intention that the "offer for sale" requirement in 6 NYCRR Part 218-4.2(h) apply to demonstration programs for fuel cell or any other type of advanced technology vehicle. Rather, this provision requires that vehicles, including fuel cell vehicles, that are offered for sale in California to the general public in accordance with normal business practice without limitation must also be offered for sale in New York.

5. We agree that fuel cell vehicles counted towards the minimum floor obligation of the fuel cell path should not include the fuel cell multiplier. Fuel cell vehicles counted toward the ZEV mandate obligation should be treated like the rest of the ZEV program vehicles and receive the New York multiplier. (4)

Response: Under the California program fuel cell vehicles are already given a generous credit level. Application of a New York multiplier on top of the California credit level would create a credit level which is counter productive to "ramping up" to the full California program. In addition, under the California fuel cell option, manufacturers are already rewarded for production of fuel cell vehicles by other program flexibilities. Consequently New York does not believe that an additional credit multiplier is warranted.

6. For model year 2009 and beyond, manufacturers that opt to use the fuel cell option in California are required to meet a minimum floor for production of Type III ZEVs in California. We believe that the minimum floor for production of Type III ZEVs is based on the sales volume in the state that has adopted California standards under section 177 of the Clean Air Act. (4)

Response: You are correct. A manufacturer's minimum floor for production of Type III ZEVs in New York is based upon a percentage of New York specific sales. For the 2009 model year and beyond, the base number of Type III ZEVs required in New York by all large volume manufacturers will be the number specified in California Code of Regulations 1962(b)(2)(B)(1)(e) pro rated to the cumulative New York sales volume of those manufacturers.

7. Comment: We oppose any changes made to the voluntary alternative compliance plan since originally proposed and adopted in 2002. We do not believe that the proposed changes to 218-4.2(c) and 218-4.2(h) are warranted given that virtually all the auto manufacturers (except Toyota) indicated to the Department that they would exercise their right to opt-into the program as was written in February 2002 (5).

Response: Subsequent to the Department's original adoption of the ACP option California made substantive revisions to the ZEV regulations which necessitated changes to New York's base ZEV program in order to maintain identicality as required by the Clean Air Act. Since the ACP is an optional approach for the initial years of the ZEV regulatory program, and since the requirements of the ACP are derived from the base ZEV program, it was necessary to revise the requirements of the ACP to reflect the changes in the base ZEV program. In addition, in response to comments submitted on the notice of proposed rulemaking, the Department determined that certain changes, including delay of start and end date, and revisions to phase in multipliers were warranted in order to provide a more efficient and effective ramp up to the full California program. (See first response to comments.)

8. Comments were received concerning identicality, limitations on sales of California certified vehicles, leadtime, waiver and need for the ZEV mandate (6).

Response: These comments reiterate comments submitted to the record for the notice of proposed rulemaking by the same commenter. These comments were fully addressed in the first response to comments and do not address the specific revisions contained in the notice of revised rulemaking. (See first response to comments.)

List of Commenters

1. Ford Motor Company (Kelly Brown, Director, Vehicle Environmental Engineering) - written comments
2. General Motors (Alan R. Weverstad, Executive Director, Mobile Emissions and Fuel Efficiency) - written comments
3. Nissan North America, Inc. (Harland Reid, Senior Director, government Affairs) - written comments
4. Ford Motor Company (Kelly Brown, Director, Vehicle Environmental Engineering) - second set of written comments
5. American Lung Association of New York (Peter M. Iwanowicz, Director of Environmental Health) - written comments
6. DaimlerChrysler Corporation (Reginald Modlin, Director Environmental and Energy Planning) - written comments

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Migratory Game Bird Hunting Regulations

I.D. No. ENV-40-04-00001-EP
Filing No. 1051
Filing date: Sept. 16, 2004
Effective date: Sept. 16, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 2.30 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0307, 11-0903, 11-0905, 11-0909 and 11-0917

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: The Department of Environmental Conservation (department) is adopting this rule by emergency rulemaking in order to conform State migratory game bird hunting regulations with the Federal regulations for the 2004-2005 season and flyway guidelines for resource conservation. Migratory game bird population levels fluctuate annually in response to a variety of environmental factors, including weather conditions, predation, and human activities, such as land use changes and harvest. As a result, Federal regulations pertaining to hunting of migratory birds are reviewed and adjusted annually. Environmental Conservation Law, section 11-0307 requires that the department adjust State migratory game bird regulations to maintain consistency with Federal regulations. The final Federal regulations are adopted in late summer, thereby necessitating emergency adoption of State

regulations in order to have them in place for the migratory game bird seasons that begin in September.

Immediate adoption of this rule is necessary to preserve the general welfare by implementing New York State's 2004-2005 waterfowl hunting regulations. Law enforcement problems, public dissatisfaction, and adverse economic impacts would ensue if migratory game bird hunting regulations were not adjusted annually to conform with Federal regulations and hunter preferences.

Subject: Migratory game bird hunting regulations for the 2004-2005 season.

Purpose: To adjust hunting areas, season dates, bag limits and other migratory game bird hunting regulations to conform with Federal regulations and provide recreational opportunities consistent with desires of New York's 30,000+ waterfowl hunters.

Text of emergency/proposed rule: Title 6 of NYCRR, Section 2.30, entitled "Migratory game birds," is amended to read as follows:

Section 2.30 through subdivision 2.30(d) remains unchanged.

Subparagraphs 2.30(e)(1)(i) through (iv) are repealed and new subparagraphs 2.30(e)(1)(i) through (iv) are adopted to read as follows:

(i) ducks, coot and mergansers	
(a) Western Zone	*October 23-December 7 and December 27-January 9; pintails may only be taken October 23-November 21; canvasbacks may only be taken November 22-December 7 and December 27-January 9.*
(b) Northeastern Zone	*October 2-October 17 and October 23-December 5; pintails may only be taken October 2-October 17 and October 23-November 5; canvasbacks may only be taken November 6-December 5.*
(c) Lake Champlain Zone	*October 6-October 10 and October 23-December 16; pintails may only be taken October 6-October 10 and October 23-November 16; canvasbacks may only be taken November 1-November 30.*
(d) Southeastern Zone	*October 9-October 17 and November 13-January 2; pintails may only be taken November 13-December 12; canvasbacks may only be taken December 4-January 2.*
(e) Long Island Zone	*November 20-November 28 and December 11-January 30; pintails may only be taken January 1-January 30; canvasbacks may only be taken January 1-January 30.*
(ii) Canada geese	
(a) Lake Champlain Goose Hunting Area	*October 23-December 6, except the season is closed every day from noon to sunset October 23-October 31.*
(b) St. Lawrence Goose Hunting Area	*October 23-December 31.*
(c) Northeast Goose Hunting Area	*October 23-December 6.*
(d) Southwest Goose Hunting Area	*October 23-December 31.*
(e) South Central Goose Hunting Area	*October 23-November 28 and December 15-January 16*
(f) West Central Goose Hunting Area	*October 23-November 21 and December 27-January 10.*
(g) East Central Goose Hunting Area	*November 6-November 21 and November 27-December 25.*
(h) Western Long Island Goose Hunting Area	*November 20-December 8 and December 11-January 30.*
(i) Eastern Long Island Goose Hunting Area	*November 20-November 28 and December 11-January 30.*
(iii) snow geese	
(a) Western Zone	*October 23-January 22 and February 24-March 10.*
(b) Northeastern Zone	*October 2-January 1 and February 24-March 10.*
(c) Lake Champlain Zone	*October 6-December 16 except the season is closed every day from noon to sunset October 6-October 31.*
(d) Southeastern Zone	*October 9-January 8 and February 24-March 10.*
(e) Long Island Zone	*November 20-March 6.*
(iv) brant	
(a) Western Zone	*October 23-December 11.*
(b) Northeastern Zone	*October 2-November 20.*
(c) Lake Champlain Zone	*October 6-November 24.*
(d) Southeastern Zone	*October 9-November 27.*
(e) Long Island Zone	*December 12-January 30*

Subparagraph 2.30(e)(1)(v) through subparagraph 2.30(e)(2)(ii) remains unchanged.

Subparagraph 2.30(e)(2)(iii) is amended to read as follows:

(iii) Hunters may take Canada geese in the Special Late Canada Goose Hunting Area from February [7] *5* through February [12] *15*.

Clauses 2.30(e)(2)(iv)(a) through (e) are repealed and new clauses 2.30(e)(2)(iv)(a) through (e) are adopted to read as follows:

(a) Western Zone	*October 9 and 10*
(b) Northeastern Zone	*September 18 and 19*
(c) Lake Champlain Zone	*September 25 and 26*
(d) Southeastern Zone	*September 25 and 26*
(e) Long Island Zone	*October 30 and 31*

Paragraph 2.30(e)(3) through paragraph 2.30(g)(2) remains unchanged.

Subparagraph 2.30(g)(3)(vii) is repealed and new subparagraph 2.30(g)(3)(vii) is adopted to read as follows:

Species	*Times and/or places within seasons*	*Daily bag limits*	*Possession limit*
(vii) Canada geese	*During youth waterfowl hunt days*	*2*	*4*
	During September in the Lake Champlain Goose Hunting Area and during the regular season in the Northeast, Lake Champlain, East Central, Western Long Island, and West Central Goose Hunting Areas	*3*	*6*
	During September in all other areas	*8*	*16*
	During the regular goose hunting season in the Eastern Long Island and Southwest Goose Hunting Area	*2*	*4*
	During the regular goose hunting season in the St. Lawrence and South Central Hunting Areas and during the Special Late Canada Goose Season	*5*	*10*

Subparagraph 2.30(g)(3)(viii) remains unchanged.

Subparagraph 2.30(g)(3)(ix) is amended to read as follows:

Species	Times and/or places within seasons	Daily bag limits	Possession limit
(ix) Brant	All times and places	[3] *2*	[6] *4*

Subparagraph 2.30(g)(3)(x) through the end of section 2.30 remains unchanged.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 14, 2004.

Text of rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, e-mail: grbatche@gw.dec.state.ny.us

Data, views or arguments may be submitted to: Same as above

Public comment will be received until: 45 days after publication of this notice.

Additional matter required by statute: State Environmental Quality Review Act (SEQR; ECL art. 8). Establishment of hunting regulations is covered by a final programmatic impact statement (FPIS) on wildlife game species management (DEC 1980) and supplemental findings (DEC 1994), and by a Federal EIS on issuance of annual regulations permitting the sport hunting of migratory birds (USFWS 1988). The proposed action does not involve any significant departure from established and accepted practices as described in the FPIS and is therefore classified as a "type II" action pursuant to DEC's SEQR regulations (6 NYCRR § 618.2 [d][5]).

Regulatory Impact Statement

1. Statutory Authority

Section 11-0303 of the Environmental Conservation Law (ECL) authorizes the Department of Environmental Conservation (DEC) to provide for the recreational harvest of wildlife giving due consideration to ecological factors, the natural maintenance of wildlife, public safety, and the protection of private property. ECL Sections 11-0307, 11-0903, 11-0905 and 11-0909 and 11-0917 authorize DEC to regulate the taking, possession, transportation and disposition of migratory game birds.

2. Legislative Objectives

The legislative objective of the above cited laws is to ensure adoption of state migratory game bird hunting regulations that conform with federal regulations made under authority of the Migratory Bird Treaty Act (16 U.S.C. §§ 703-711). Season dates and bag limits are used to achieve harvest objectives and equitably distribute hunting opportunity among as many hunters as possible. Regulations governing the manner of taking upgrade the quality of recreational activity, provide for a variety of harvest techniques, afford migratory game bird populations with additional protection, provide for public safety and protect private property.

3. Needs and Benefits

The purpose of this rulemaking is to adjust annual migratory game bird hunting regulations to conform with the federal regulations for the 2004-2005 season and flyway guidelines for resource conservation, and to reflect preferences of hunters in New York.

Migratory game bird population levels fluctuate annually in response to a variety of environmental factors, including weather conditions, predation, and human activities, such as land use changes and harvest. As a result, federal regulations pertaining to hunting of migratory birds are reviewed and adjusted annually. The Department annually reviews and promulgates state regulations in order to maintain conformance with federal regulations, as required by Environmental Conservation Law Sections 11-0307 and 11-0903, and to address ecological considerations and user desires.

In order to conform with federal regulations, the Department is proposing the following regulatory changes: an increase in the daily bag limit for Canada geese during the regular seasons in some areas, a reduction in the season length and daily bag limit for brant in all areas, more restrictive shooting hours for goose hunting during October in the Lake Champlain Zone only, and season date adjustments for other waterfowl species (ducks, snow geese, and brant) in all areas.

The higher bag limit for Canada geese will provide additional recreational opportunity for thousands of hunters in New York, and any additional harvest that occurs will help limit growth of local-nesting or resident goose populations that are in conflict with human interests in many areas of the state. The proposed changes for brant are in response to a lower population estimate this year, and in accordance with a flyway management plan. Reduced harvest of this species will allow for faster population recovery to desired levels. Other season date and bag limit adjustments contained in this rulemaking are intended to maximize hunting opportunities when they are most desired (for example, maximizing the number of weekend days open to hunting), within constraints established by the U.S. Fish and Wildlife Service (USFWS). Season dates and bag limits for the Lake Champlain Zone are consistent with the regulations established in adjoining areas of Vermont, in accordance with federal regulations and a long standing interstate agreement. The shooting hours restriction adopted for the Lake Champlain Zone is intended to allow geese to feed undisturbed during afternoons in October, so they remain in the region longer and extend the duration of goose hunting opportunities.

4. Costs

These revisions to 6 NYCRR 2.30 will not result in any increased expenditures by state or local governments or the general public. Costs to DEC for implementing and administering this rule are continuing and annual in nature. These involve preparation and distribution of annual regulations brochures and news releases to inform the public of migratory game bird hunting regulations for the coming season.

5. Paperwork

The proposed revisions to 6 NYCRR 2.30 do not require any new or additional paperwork from any regulated party.

6. Local Government Mandates

This amendment does not impose any program, service, duty or responsibility upon any county, city, town village, school district or fire district.

7. Duplication

Section 2.30 largely duplicates federal migratory game bird hunting regulations. Each year, the USFWS establishes "framework" regulations which specify allowable season lengths, dates, bag limits and shooting hours for various migratory game bird species based on their current population status. Within constraints of the federal framework, New York selects specific hunting season dates and bag limits for various migratory game birds, based primarily on hunter preferences. These selections are subsequently included in a final federal rule making (50 CFR Part 20 Section 105), which appears annually in the Federal Register in September. However, Sections 11-0307 and 11-0905 of the ECL specify that DEC shall fix annually by regulation, migratory game bird hunting seasons and bag limits which conform with the federal regulations. This requires that Section 2.30 be amended annually.

8. Alternatives

The principal alternative, no action, would result in state waterfowl hunting regulations that do not conform with federal guidelines. Leaving season dates and bag limits unchanged would also result in a significant loss of hunting opportunity, public dissatisfaction, and adverse economic impacts because they would not reflect hunter preferences or alleviate goose damage through sport harvest to the extent possible.

9. Federal Standards

There are no federal environmental standards or criteria relevant to the subject matter of this rulemaking. However, there are federal regulations for migratory game birds. This rulemaking will conform state regulations to federal regulations, but will not establish any environmental standards or criteria.

10. Compliance Schedule

All waterfowl hunters must comply with this rule making during the 2004-2005 and subsequent hunting seasons.

Regulatory Flexibility Analysis

The purpose of this rulemaking is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local government. Therefore, a Regulatory Flexibility Analysis is not required.

All reporting or recordkeeping requirements associated with migratory bird hunting are administered by the New York State Department of Environmental Conservation (DEC) or the U.S. Fish and Wildlife Service (USFWS). Small businesses may, and town or village clerks do, sell hunting licenses, but this rule does not affect that activity. Thus, there will be no effect on reporting or recordkeeping requirements imposed on those entities.

Based on the Department's past experience in promulgating regulations of this nature, and based on the professional judgement of Department staff, the Department has determined that this rulemaking may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese. Small businesses currently benefit when migratory bird hunters spend money on goods and services. Additional goose hunting activity will not require any new or additional reporting or recordkeeping by any small businesses or local governments. For these reasons, the Department has concluded that this rulemaking does not require a Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

The purpose of this rulemaking is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas, other than individual hunters. Therefore, a Rural Area Flexibility Analysis is not required.

All reporting or recordkeeping requirements associated with hunting are administered by the New York State Department of Environmental Conservation (Department) or the U.S. Fish and Wildlife Service (USFWS). Small businesses may, and town or village clerks do, issue hunting licenses, but this rulemaking does not affect that activity.

Based on the Department's past experience in promulgating regulations of this nature, and based on the professional judgement of Department staff, the Department has determined that this rulemaking may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese. Rural areas benefit when migratory bird hunters spend money on goods and services. However, additional hunting activity will not require any new or additional reporting or recordkeeping by entities in rural areas, and no professional services will be needed for people living in rural areas to comply with the proposed rule. Furthermore, this rulemaking is not expected to have any adverse impacts on any public or private interests in rural areas of New York State. For these reasons, the Department has concluded that this rulemaking does not require a Rural Area Flexibility Analysis.

Job Impact Statement

The purpose of this rulemaking is to amend migratory game bird hunting regulations. The Department of Environmental Conservation (Department) has historically made regular revisions to its migratory game bird hunting regulations. Based on the Department's experience in promulgating those revisions and the familiarity of regional Department staff with the specific areas of the state impacted by this proposed rulemaking, the Department has determined that this rulemaking will not have a substantial adverse impact on jobs and employment opportunities. Few, if any, persons actually hunt migratory game birds as a means of employment. Hunters will not suffer any substantial adverse impact as a result of this rulemaking because it is not expected to significantly change the number of participants or the frequency of participation in the regulated activities. In fact, this rulemaking may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese. For this reason, the Department anticipates that this rulemaking will actually have no impact on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

NOTICE OF ADOPTION

Importation of Wild or Captive-Bred Cervids

I.D. No. ENV-31-04-00011-A
Filing No. 1055
Filing date: Sept. 21, 2004
Effective date: Oct. 6, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Part 189 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 11-0325 and 11-1905

Subject: Regulation of the importation into New York of any wild or captive-bred cervids belonging to the Genus Cervus or the Genus Odocoileus.

Purpose: To authorize the importation of captive cervids where the Department of Agriculture and Markets has issued an importation permit.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. ENV-31-04-00011-EP, Issue of August 4, 2004.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Patrick P. Martin, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4750, (518) 402-8995, e-mail: pxmartin@gw.dec.state.ny.us

Additional matter required by statute A negative declaration has been prepared in accordance with art. 8 of the Environmental Conservation Law and is on file with the department.

Assessment of Public Comment

An emergency and proposed rulemaking notice concerning an amendment to 6 NYCRR Part 189, Chronic Wasting Disease, was published in the New York State Register on August 4, 2004, I.D. No. ENV-31-04-00011-EP. This amendment allows for the importation of cervids under permit issued by the Department of Agriculture and Markets pursuant to 1 NYCRR Section 68.2. Written comments submitted to the Department concerning the proposal are addressed below.

Background information:

Chronic wasting disease (CWD) belongs to the family of diseases known as transmissible spongiform encephalopathies (TSE's) that include diseases such as scrapie in sheep, bovine spongiform encephalopathy (BSE) in cattle and Creutzfeld-Jakob disease in humans. White-tailed deer, Mule deer and Rocky Mountain elk are known to be naturally susceptible to CWD. There is no known treatment for CWD, and it is always fatal in deer and elk. CWD is both transmissible and infectious, but the specific details regarding transmission remain unknown. However, deer density and animal to animal contact have been shown to contribute to the spread of this disease.

On July 30, 2003, the Department adopted regulation 6 NYCRR Part 189 "Chronic Wasting Disease" to prevent the importation of the disease into New York and to minimize the spread of CWD should it be found. At the time of implementation, there were limited and inadequate regulations governing the importation and sale of captive cervids in New York or the facilities that house them. Consequently, a total ban on all importation of live cervids was invoked. Since adoption of this regulation, the Department of Agriculture and Markets (DAM) has developed guidelines and regulations, consistent with United States Department of Agriculture recommendations, establishing a herd health program that includes a herd certification program, an intensive animal tracking and health monitoring program, facility requirements, transportation and movement restrictions, frequent facility and compliance inspections, and documented herd and facility management plans. On July 14, 2004, DAM adopted emergency regulations implementing this program. Participation in the herd health program is mandatory for anyone wishing to import or possess captive bred cervids in New York.

Comment: Several comments were received which opposed easing the ban on the importation of captive deer and elk because of the risk of introducing CWD into wild deer populations.

Response: The Department of Agriculture and Markets' Herd Health Program, as delineated in 1 NYCRR Part 68, establishes strict requirements for: the importation of deer and elk; the facilities in which such animals are harbored; and the tracking and health monitoring of individual animals. This regulation also establishes an intensive inspection, recordkeeping and compliance program. Anyone wishing to import captive deer or elk must be enrolled in this program and comply with its requirements.

The limitations placed on the importation of captive deer and elk, set forth in 1 NYCRR Part 68, include the following: "CWD susceptible cervids shall be approved for importation only if they are moved from a herd which has achieved CWD certified herd status and the state of origin has adopted mandatory reporting and quarantine requirements equivalent to those set forth in this Part. Importation of CWD susceptible cervids from a CWD infected zone is prohibited." The requirements set forth in 1 NYCRR Part 68 insure that imported captive deer and elk are CWD disease free. Disease free status and quick and rapid containment should a disease break occur is further insured via the required monitoring and testing systems put in place.

DAM's Part 68 is designed to ensure that only deer and elk that are CWD-free are imported into New York. The Department of Environmental Conservation believes that DAM's program will be protective of New York's white tailed deer population and will prevent the introduction of CWD into New York. Accordingly, the Department is amending 6 NYCRR Part 189 to allow importation where a permit is issued by DAM pursuant to 1 NYCRR Part 68.

Comment: One comment supported the proposed amendment to Part 189, but also suggested that the regulation should allow for the importation of wild deer and elk.

Response: The Department does not believe it would be prudent at this point in time to permit the importation of wild deer or elk because of the difficulty associated with the monitoring of wild, free-ranging, herds for CWD. As more is learned about CWD and its distribution, it may be possible to develop sampling and certification protocols for wild herds where there is minimal immigration from potentially infected herds.

Department of Health

EMERGENCY RULE MAKING

DRGs, SIWs, Trimpoints and Arithmetic Mean LOS

I.D. No. HLT-31-04-00013-E
Filing No. 1058
Filing date: Sept. 21, 2004
Effective date: Sept. 21, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 86-1.62 and 86-1.63 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(3)

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: The Department finds that the immediate adoption of this amendment is necessary to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS). This is required by Section 2807-c(3) of the Public Health Law, which states, "The Commissioner shall establish as a basis for case classification for case based rates of payment the same system of diagnosis-related groups for classification of hospital discharges as established for purposes of reimbursement of inpatient hospital service pursuant to Title XVIII of the Federal Social Security Act (Medicare) in effect on the first day of July in the year preceding the rate period." Additionally, such amendments modify existing DRGs and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

The SIWs and non-Medicare trimpoints are an integral part of the 2004 hospital Medicaid and like payor inpatient rates. The amendments provide payors of inpatient hospital services with the new values used to determine the correct case based payment for each DRG for each hospital so hospital claims can be submitted and paid in a timely manner. Additionally, the Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of

health use and services. Such requirements warrant adoption of these amendments as soon as practicable.

Subject: Revisions to the DRGs, SIWs, trimpoints and arithmetic mean LOS used to determine case based payments.

Purpose: To modify the DRG listing, SIWs, trimpoints and arithmetic mean LOS.

Substance of emergency rule: 86-1.62 - Service Intensity Weights and Group Average Arithmetic Inlier Lengths of Stay

The proposed amendments of section 86-1.62 of Title 10 (Health) NYCRR are intended to change the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weight (SIWs) and group average arithmetic inlier length of stay (LOS) for each DRG.

The DRG classification system used in the hospital case payment system is updated to incorporate those changes made by Medicare for use in the prospective payment system and additional changes to identify medically appropriate patterns of health resource use for services that are efficiently and economically provided. The SIWs were revised accordingly to reflect the costs of the redistributed cases.

86-1.63 - Non-Medicare Trimpoints

The proposed amendments of section 86-1.63 of Title 10 (Health) NYCRR are intended to change the non-Medicare trimpoints used to determine the outlier days in the hospital case based payment system.

The changes in the DRG classification system described above (Section 86-1.62 of Title 10 (Health) NYCRR) cause a modification of the non-Medicare trimpoints to reflect the redistribution of cases from the existing DRGs to the new DRGs. These new trimpoint values are provided in Section 86-1.63.

Provider/Payor Fiscal Impact:

The changes to the DRG classification system will enable providers to place patients in the most appropriate DRG and, therefore, they will receive adequate reimbursement for services provided. In the aggregate, these changes will have a budget-neutral impact on the reimbursement system.

Reasons for Initiating Regulation:

The Department is statutorily required to update the grouper to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-31-04-00013-P, Issue of August 4, 2004. The emergency rule will expire November 19, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The authority for the subject regulations is contained in sections 2803(2) and 2807(3) of the Public Health Law (PHL), which require the State Hospital Review and Planning Council (SHRPC), subject to the approval of the Commissioner, to adopt and amend rules and regulations for hospital reimbursement rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. PHL section 2807-c(3) authorizes the SHRPC to adopt rules subject to the Commissioner's approval, to adjust the diagnosis related groups (DRGs) or establish additional DRGs to reflect subsequent revisions applicable to reimbursement for discharges of Medicare beneficiaries or to identify medically appropriate patterns of health resource use efficiently and economically provided and to subsequently amend the service intensity weights (SIWs) and trimpoints for each DRG.

Legislative Objectives:

The Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health resource use and services.

Needs and Benefits:

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York are intended to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

The SIWs and non-Medicare trimpoints are an integral part of the 2004 hospital Medicaid and like payor inpatient rates. The Department makes changes to the grouper used to assign inpatient cases to the appropriate DRG. As part of this process, the Department may make modifications, revisions and create new DRGs that reflect the current resources consumed by inpatients. After the grouper is modified, the SIWs and trimpoints must be recalculated consistent with the newly created and updated list of DRGs, thus creating new values for the SIWs and trimpoints in sections 86-1.62 and 86-1.63. Additionally, the amendments provide payors of inpatient hospital services with the new values used to determine the correct case base payment for each DRG so hospital claims can be submitted and paid in a timely manner.

Costs:

Costs to State Government:

The proposed regulations do not impact the cost base upon which payments are made. Therefore, costs to the State are not expected to markedly change as a result of these amendments.

Costs of Local Government:

No increase in costs to local governments is anticipated as a result of these amendments.

Costs to Private Regulated Parties:

In the aggregate, there will be no increases or decreases in hospital revenues as a result of these amendments. Changes to the DRG classification system will cause a realignment of cases among the DRGs. Those cases that require more intensive provision of care will realize an increase in the SIW (and reimbursement) for that DRG. The removal of such cases from the DRG to which they were previously assigned will decrease the SIW (and reimbursement) for that DRG. Therefore, revenues will shift among individual hospitals depending upon the diagnosis of and procedures performed on the patients they treat. The extent of the shift in revenues cannot be determined because it will depend upon future patient services.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

This regulation affects the costs to counties and New York City for services provided to Medicaid beneficiaries as described above. It imposes no program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

Based upon suggestions/recommendations received from hospital industry representatives, the Department revised the original proposed service intensity weights to provide more appropriate recognition of the costs related to new medical technologies. In addition, a change to the methodology utilized to develop cost proxies for certain new DRG's was instituted based on this outreach. No other significant alternatives were considered.

Federal Standards:

The proposed rule does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed rule establishes rates of payment as of January 1, 2004; there is no period of time necessary for regulated parties to achieve compliance.

Contact Person:

William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Comments submitted to Department personnel other than this contact person may not be included in any assessment of public comment issued for this regulation.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

Compliance Requirements

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of this rule.

Professional Services

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technical Feasibility

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to make current regulations consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS), and add new DRGs to reflect medically appropriate patterns of health resource use. The current SIWs and trimpoints are also updated to be consistent with the proposed DRG modifications.

Compliance Costs

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. In the aggregate, as a result of these amendments, there will be no anticipated increases or decreases in hospitals' revenues in the aggregate. Revenues will shift among individual hospitals depending upon the diagnoses of and procedures performed on the patients they treat and the extent to which they would be classified into the modified diagnosis related groups.

Minimizing Adverse Impact

The proposed amendments will be applied to all general hospitals. The Department of Health considered approaches specified in section 202-b(1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Small Business and Local Government Participation

Local governments and small businesses were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its November 20, 2003 meeting. That agenda is mailed to general hospitals qualifying as small businesses, providers, members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations that represent the interests and concerns of hospitals across New York State, including small businesses and local governments. This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Rural Area Flexibility Analysis

Effect on Rural Areas

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. In the aggregate, as a result of these amendments, there will be no increases or decreases in hospitals' revenues. Revenues will shift among individual hospitals depending upon the diagnoses of and approved procedures performed on the patients they treat.

Minimizing Adverse Impact

The proposed amendments will be applied to all general hospitals. The Department of Health considered the approaches specified in section 202-bb(2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Opportunity for Rural Area Participation

Rural areas were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its November 20, 2003, meeting. That agenda is mailed to members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations, which represent the needs and concerns of providers across New York State, including rural areas. The amendment was described at meetings of the Fiscal Policy Committee prior to the filing of the notice of proposed rulemaking.

This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations update the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weights and length of stay standards for each DRG. This classification system, which has been in effect since 1988 in New York State, is utilized to reimburse hospitals for inpatient services rendered to Medicaid beneficiaries. Since this is merely an update, the proposed regulations have no implications for job opportunities.

NOTICE OF ADOPTION

Environmental Laboratory Standards (Bioterrorism)

I.D. No. HLT-21-04-00012-A
Filing No. 1057
Filing date: Sept. 21, 2004
Effective date: Oct. 6, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of section 55-2.13 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 502

Subject: Environmental laboratory standards.

Purpose: To establish minimum requisites for laboratories testing critical agents.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-21-04-00012-P, Issue of May 26, 2004.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Insurance Department

NOTICE OF ADOPTION

Charges for Professional Health Services

I.D. No. INS-12-04-00016-A
Filing No. 1056
Filing date: Sept. 21, 2004
Effective date: Oct. 6, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Part 68 (Regulation 83) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2601, 5221; and art. 51

Subject: Charges for professional health services.

Purpose: To establish charges for professional health care services provided in no-fault claims.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-12-04-00016-P, Issue of March 24, 2004.

Final rule as compared with last published rule: No changes.

Revised rule making(s) were previously published in the State Register on August 18, 2004.

Text of rule and any required statements and analyses may be obtained from: Mike Barry, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5262, e-mail: mbarry@ins.state.ny.us

Revised Regulatory Impact Statement

1. Statutory authority: Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law and to effectuate any power granted under the Insurance Law and to prescribe forms or otherwise make regulations. Section 2601 prohibits insurers from engaging in unfair claim settlement practices and requires insurers to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies. Section 5221 specifies the duties and obligations of the Motor Vehicle Accident Indemnification Corporation (MVAIC) in the payment of no-fault benefits to qualified persons. Article 51 of the Insurance Law contains the provisions authorizing the establishment of a no-fault reparations system for persons injured in motor vehicle accidents and Section 5108 specifically authorizes the Superintendent to adopt or promulgate fee schedules for health care benefits payable under the no-fault system.

2. Legislative objectives: Chapter 892 of the Laws of 1977 recognized the necessity of establishing schedules of maximum permissible charges for professional health services payable as no-fault insurance benefits in order to contain the costs of no-fault insurance. In order to contain costs, the Superintendent is required to adopt those fee schedules that are promulgated by the Chair of the Workers' Compensation Board. In addition, the Superintendent may, after consulting with the Chairman of the Workers' Compensation Board and the Commissioner of Health, establish fee schedules for those services for which schedules have not been prepared and established by the Workers' Compensation Board.

3. Needs and benefits: The Workers' Compensation Board fee schedules were initially adopted in 1977 and have been revised regularly since that time in order to reflect inflationary increases and to incorporate other necessary enhancements. Periodic revision to these fee schedules is a part of the ongoing process of keeping the fee schedules current and reflective of changes in the health care industry, thereby facilitating access to health care for motor vehicle accident victims while controlling costs. Similar modifications and improvements have also been applied to those fee schedules established by the Insurance Department for various health care services that are not covered in any fee schedule established by the Workers' Compensation Board.

The current rule for payment of durable medical equipment and supplies contained in the Appendix to Regulation 83 fails to definitively establish consistent and reasonable values for the cost of durable medical equipment and supplies. This has produced numerous disputes between providers and insurers as to the price of the prescribed item, resulting in more claims proceeding to no-fault arbitration and the courts for resolution. In fact, of the 77,556 arbitration requests filed in 2002, 22,268 involved disputes regarding durable medical equipment. The current rule also lends itself to abusive billing practices since it permits health providers to prescribe higher priced items that are not medically justified in order to generate higher fees and profits rather than lower priced items of equal medical efficacy.

The adoption by the Superintendent of an established fee schedule that is updated as necessary to reflect increased costs and to include newer products as they are developed will provide for more timely payment of health care provider charges and result in a significant reduction in litigation costs that are being incurred due to the variable nature of the current fee schedule rule used to establish these costs. Utilization of the established New York State Medicaid fee schedules for durable medical equipment, medical/surgical supplies, orthopedic footwear and orthotic and prosthetic appliances should significantly reduce the number of disputes between insurers and health care providers, resulting in more uniform, efficient and cost effective processing and payment of no-fault claims.

A cost comparison, utilizing the data of a major New York insurer, demonstrated that during a one year period, of the top 25 most frequently prescribed and billed items, an annual cost savings of over $1,000,000 would be realized for that insurer if the Medicaid fee schedule was used in place of the fee schedule that is currently in use for the reimbursement of durable medical equipment. That savings would be in addition to reduced litigation costs for both providers and insurers that are being incurred due to the inconsistent fees that are being charged under the current rule. These savings can contribute to a stabilization of no-fault claim costs resulting in lower premiums for policyholders. Cost savings aside, use of an established fee schedule with which DME providers are already familiar and accustomed to should result in fair and consistent billings and quicker payment, with fewer disputes over the amount charged.

Accordingly, the Department is proposing the adoption of the fee schedule set forth in the New York State Medicaid Management Information System Provider Manual for durable medical equipment, medical/surgical supplies, orthopedic footwear, and orthotic and prosthetic appliances as the schedule that would be utilized for fees payable for the purchase and rental of durable medical equipment, medical/surgical supplies, orthotic footwear and orthotic and prosthetic appliances.

Part F of Appendix 17-C was revised from the previous proposal to clarify that the reimbursement for the purchase of durable medical equipment, medical/surgical supplies, orthopedic footwear and orthotic and prosthetic appliances is the fee payable for such equipment as contained in the New York State Medicaid program at the time the items are provided.

After reviewing the comments, section 68.1(b)(2) was revised to adopt Workers' Compensation fee schedule ground rules to control when determining the proper amount to pay when a licensed non-physician employee is providing care under the supervision of the licensed health provider. This would apply in any instance where a ground rule permits a licensed non-physician employee to bill at the supervising licensed health provider's rate, such as in the case of a Physical or Occupation Therapist (PT/OT) working under the supervision of a physician. In all other instances if not specifically controlled by the Workers' Compensation fee schedule, the fee payable is based on the fee schedule of the treating provider. This revision would still establish parity between the independent provider and the multi-specialty practice and reduce the financial incentive for multi-specialty practices to employ various health care providers in order to charge higher fees for services rendered. Physician fees are not being reduced by this amendment when the physician personally performs the service.

Section 68.1(b)(3) is added in which the phrase "licensed health provider" is now defined and is used in place of the term treating provider. The new definition includes a properly organized and licensed business entity. This definition was added to clarify that the rule is to apply not only to a licensed individual health care provider but also to properly licensed business entities as well.

The original proposed rule as contained in Section 68.1(b)(3)(i) & (ii) (commonly referred to as the "Concurrent Care rule"), which was derived from the Workers' Compensation fee schedule, requires the sharing of fees among licensed health providers or the payment of a fee only to the provider whose specialty is most relevant to the diagnosis, if more than one licensed health provider treated the patient at the same time, and the treatment involved overlapping or common services.

In light of the comments, and upon further review, the Department was concerned that the rule might be inappropriately applied to deny necessary patient care in instances where two or more licensed health providers provide treatment during the same period of time. Therefore, the "concurrent care" provision as proposed in section 68.1(b)(3)(i) & (ii) has been removed from the revised amendment.

Section 68.1(b)(4) was intended to define the term "active and personal supervision" as it relates to a licensed health provider providing health related services to eligible injured parties under no-fault. This was intended to prevent non-licensed parties from providing care under the licensed health provider's active and personal supervision and to limit the number of licensed health providers working under the direction of a single licensed health provider or entity and to provide a framework to curtail abusive practices while assuring quality care.

The Department received comments from various parties that the original language did not accomplish its intended objective. After reviewing the comments concerning the language of the rule the Department has concluded not to proceed with this aspect of the proposed rule at this time. The Department is continuing to monitor and review this issue.

4. Costs: This revised rule imposes no compliance costs upon state or local governments unless they are self-insured for no-fault insurance.

Insurers, self-insurers and health care providers who provide services under the no-fault system must acquire a New York State Medicaid fee schedule from the New York State Department of Health, currently at a cost of $20, if they do not possess such schedules.

Health care providers and medical supply companies that are subject to the provisions of this Part will be required to use the New York State Medicaid fee schedule for durable medical equipment, medical/surgical supplies, orthopedic footwear and orthotic and prosthetic devices. This may result in a reduction in revenue for some of those providers and companies to the extent that they provide services to motor vehicle accident victims and charge fees in excess of those allowed by the Medicaid schedule. However the use of this schedule should result in their incurring lower costs in processing claims by eliminating disputes as to the value of claims thereby reducing litigation costs and resulting in more timely payment of bills.

The regulation creates no additional requirements of a licensed health provider to submit necessary verification requested by the insurer to confirm if it is properly licensed and can lawfully be reimbursed under No-fault so that there should be no additional costs incurred for providers, insurers, and consumers.

5. Local government mandates: Some local governments are self-insured for no-fault benefits and those entities will have to comply with the requirements of this part.

6. Paperwork: There are no additional paperwork requirements generated by the amendment to this part.

7. Duplication: The provisions of this Part will not duplicate any existing federal or state rule.

8. Alternatives: The alternative of allowing the current rule for the reimbursement of durable medical equipment and supplies to remain in effect is no longer a viable option. The current rule fails to establish definitive values for the cost of durable medical equipment and supplies, resulting in frequent fee disputes that proceed to no-fault arbitration or the courts for resolution where rulings have been inconsistent and fail to provide guidance with regard to proper billing. The current fee schedule also lends itself to abusive billing practices since it encourages health providers to seek the most expensive items to prescribe in order to generate higher fees and profits.

There is no viable alternative to explicitly defining a licensed health provider as is stated in the regulation.

Chapter 892 of the Laws of 1977 recognized the viability of establishing schedules of maximum permissible charges for professional health services payable under the no-fault insurance system in order to contain the cost of no-fault insurance. The Superintendent is required to adopt the fee schedules promulgated by the Chair of the Workers' Compensation Board for various medical procedures. The Chair has not created a fee schedule for durable medical equipment. Under the workers' compensation system, the amount payable by an insurer is the cost of an item, which can vary depending upon the supplier. While this procedure has proven its effectiveness in the workers' compensation system, it is important to note that the workers' compensation system provides for direct control and review of patient care and billing procedures. In contrast, statutory no-fault health care services are provided in an unmanaged environment. Adopting that approach would continue to produce inconsistent charges and continued disputes over the amount to be charged. Therefore, the Department is proposing the adoption of the New York State Medicaid Schedule, a widely used schedule that is applicable to durable medical equipment and supplies. By using the durable medical equipment and supply fee schedule developed for the New York State Medicaid program, the processing of no-fault claims should become more uniform, cost-effective and efficient.

The provision that bases the fee to be charged upon the specialty of the licensed health provider performing the health services rather than the specialty of another provider with a higher fee schedule will address billing abuses and discourage the establishment of multi-specialty practices solely for the purpose of engaging in abusive billing practices. It assures that charges are consistent with those charged by providers who operate independently of multi-specialty practices. The alternative is maintenance of the status quo, which encourages abusive practices, including the establishment of "medical mills".

The defining of a licensed health provider assures that only properly structured and licensed business entities provide care to eligible parties and that care when rendered by a non-physician is rendered under the supervision of a properly licensed health provider.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The implementation date of this amendment provides enough lead time for insurers, self-insurers and health care providers to obtain copies of the New York State Medicaid fee schedule for medical equipment and familiarize themselves with the fees contained therein.

Revised Regulatory Flexibility Analysis

This rule applies to property/casualty insurance companies licensed to do business in New York State and self-insurers, none of which fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act, because there are none which are both independently owned and have under 100 employees.

Self-insurers are typically large enough to have the financial ability to self insure losses and the Department has never been provided information to indicate that any self-insurers are small business.

Some local governments are self-insured for no-fault benefits and those entities will have to comply with the requirements of this part to the extent applicable.

There are also some health care providers and medical supply companies that are subject to the provisions of this Part and may be considered small businesses. They will be required to use the New York State Medicaid fee schedule for durable medical equipment, medical/surgical supplies, orthopedic footwear and orthotic and prosthetic devices. This may result in a reduction in revenue for some of those providers and companies to the extent that they provide services to motor vehicle accident victims and charge fees in excess of those allowed by the Medicaid schedule. However the Medicaid fee schedule is widely used and these providers should already be familiar with its provisions. In addition, the use of this schedule should result in more timely payment of billings and lower costs for these businesses in processing claims, since, by eliminating disputes as to the value of claims, litigation costs will be reduced.

Health care providers who are considered small businesses will also be subject to the provision, which bases the fee to be charged upon the specialty of the licensed health provider actually performing the health services rendered rather than billing at the higher rate of another licensed health provider. These amendments are intended to reduce the financial incentive to establish "medical mills" which engage in abusive billing practices. Such businesses are often established to generate income without regard to patient care, thereby exploiting the no-fault system. While they may potentially lose jobs and revenue because of these changes, that lost revenue for the "medical mills" will result in premiums savings for insureds.

Licensed health care providers who are considered small businesses will also be subject to this provision. However, no additional costs should result as of this change since the licensed health provider is already subject to providing verification to the insurer in order to establish proof of claim and standing.

Revised Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers and self-insurers subject to this Part do business in every county in this state, including rural areas as defined under Section 102(13) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: There are no additional reporting, recordkeeping or other compliance requirements generated by the amendment to this part. It is not expected that professional services will be required to comply with the provisions of this Part.

3. Costs: This rule imposes no compliance costs upon state or local governments unless they are self-insured for no-fault insurance.

Insurers, self-insurers and health care providers who provide services under the no-fault system must acquire a New York State Medicaid fee

schedule from the New York State Department of Health. However, all entities affected by this part should incur lower costs in processing claims since the use of the fee schedule should eliminate disputes as to the value of claims reducing litigation costs and resulting in more timely payment of health care provider charges. There should be no additional costs for licensed health providers who provide services under the No-fault system as they are already required to provide verification to insurers in order to establish proof of claim and standing.

4. Minimizing adverse impact: The provisions of this Part apply to insurers, self-insurers and health care providers that do business throughout New York State, including rural areas and it does not impose any adverse impact on rural areas.

5. Rural area participation: Notice of the Department's intention to amend this Part was included in the Department's Regulatory Agenda which was published in the January, 2003 and June, 2003 issues of the *State Register*. The rule is being proposed as a result of suggestions made by insurers and No-Fault arbitrators and in recognition of the need to address abusive practices. The changes contained in the proposal have been discussed with the New York State Medical Society.

Revised Job Impact Statement

The proposed amendment should have minimal adverse impact on jobs or economic opportunities in New York State since it simply establishes the use of the New York State Medicaid fee schedule for durable medical equipment, medical/surgical supplies, orthopedic footwear and orthotic and prosthetic devices in the payment of no-fault claims and establishes reasonable rules for compensation for the treatment of motor vehicle accident victims. Some non-physicians employed by professional corporations that are not supervised by a licensed medical professional may lose their jobs. The savings that will result from these changes will generate premium savings for New York policyholders.

The defining of a licensed health provider should not impact properly licensed business entities providing care under the No-fault system. However, business entities that are not licensed in conformity with all applicable State laws could see a reduction in jobs until such time as the entity becomes properly licensed.

Assessment of Public Comment

The Department received comments from a billing review entity, an insurer and an attorney on this proposal.

This assessment will be limited to those comments directed to the current proposal. Summaries of the comments on the proposal and the Department's responses thereto, are as follows:

(1) A comment received by an insurer suggested a revision to Part F (a) noting that the word "specific" as used might be construed by a provider to mean a specific item produced by a particular manufacturer. The intent of the regulation's wording is as noted by the party providing the comment, which is to address specific classes of items as listed in the Medicaid fee schedule. Items of a like kind issued by various manufacturers would be included in the fee schedule classification. Another comment from the same party suggested adding additional language to Part F (a)(2) to further define what the usual and customary charge to the general public would be. The Department believes that the current language as contained in the regulation is self-explanatory and does not believe additional language or modification is necessary.

(2) Another comment received from a billing review entity requested that the services of another vendor be included in the regulation as a source for pharmacy prices. This issue is not the subject of this regulation. However, the Department will review this request for consideration in future amendments to the regulation.

(3) An attorney made various comments concerning the Department's promulgation of section 68.1(b)(3) concerning the definition of a licensed health provider. We will comment upon those points relevant to this regulatory action.

- The additional language in defining a licensed health provider is vague and it is unclear in what context it would be applicable.

The proposed definition clarifies the clear intent of the No-fault law that reimbursement for no-fault providers is limited only to entities and providers properly and lawfully licensed to provide reimbursable health services.

- The Superintendent lacks the authority to define a licensed health provider as an entity properly formed in accordance with applicable law and acting within the scope of its license.

Section 5108 of the Insurance Law gives the Superintendent broad authority to promulgate rules and regulations implementing and coordinating the provisions of this Article and the Workers' Compensation law. The Court of Appeals has consistently held that the Superintendent has broad powers to effectuate the Legislative scheme for No-fault by promulgating regulations which implement and interpret the No-fault law. In addition, and in accordance with Section 5108(b) of the Insurance Law, the Superintendent consulted with the chairman of the Workers' Compensation Board and the Commissioner of Health before proposing this amendment and addressed their concerns.

- The adoption of the definition of a licensed health provider should await an expected ruling from the New York State Court of Appeals.

The pending litigation does not concern the authority of the Superintendent to promulgate regulations. The Department will review decisions by the NYS Court of Appeals and their impact on existing regulations.

- The proposed amendment invites carrier abuses and is inconsistent with the enabling legislation.

When an insurer has a reasonable belief that a person or entity is not properly licensed under New York law in order to be eligible to receive No-fault reimbursement, it may request additional verification in order for the licensed entity or provider to establish proof of claim. Regulation 68-C, section 65-3.2(c) of the current regulation requires that insurers do not demand verification of facts unless there are valid reasons to do so. The Department will closely monitor insurer compliance through the submission of complaints and has the authority to conduct market conduct investigations of insurers and impose penalties as is necessary to prevent such abuse.

- The proposed regulation is inconsistent with the No-fault enabling legislation.

The regulation's intent is to assure that all providers rendering care under the no-fault system are properly licensed in conformity with all applicable laws to assure that only quality care is being provided to eligible injured parties. There is nothing in the enabling legislation that would exempt No-fault health providers from having to properly meet all New York licensing requirements. There have been instances under No-fault where medical professional corporations have been established to provide care using licensed non-physicians in order to bill at the higher physician rate. In some instances these facilities hire non-physicians in disciplines that the professional corporation has no physician on staff that can supervise the services being rendered. Some of these corporations have had their income siphoned off by management companies through costly rental agreements, billing and maintenance service charges. It was not the Legislature's intent in enacting the No-fault law to enrich individuals who manipulate the system at the expense of premium-paying consumers. This regulation will enhance the quality of care provided to eligible injured parties by insuring that those delivering reimbursable services are held to appropriate professional standards.

Public Service Commission

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Flex Rates by the City of Jamestown

I.D. No. PSC-40-04-00005-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by The City of Jamestown to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 6 to become effective Jan. 1, 2005.

Statutory authority: Public Service Law, section 66(12)

Subject: Flex rates.

Purpose: To initiate individual and specialized service contracts for flexible rates.

Substance of proposed rule: The City of Jamestown (Jamestown) made a tariff filing for approval to initiate individual and specialized service contracts for flexible rates. Such flex rates will be made available to existing Rate 3 native-load commercial and industrial customer applicants within Jamestown's service territory as well as business applicants relocat-

ing to Jamestown's service territory who meet qualifying criteria supporting Jamestown's portfolio of economic development programs.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-E-1105SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Quarterly Reports by Niagara Mohawk Power Corporation

I.D. No. PSC-40-04-00006-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The commission is considering whether to waive certain quarterly reporting requirements of 16 NYCRR Part 731 to permit Niagara Mohawk Power Corporation to file its quarterly reports on dates consistent with its fiscal year.

Statutory authority: Public Service Law, section 66(4)

Subject: Quarterly reports.

Purpose: To permit Niagara Mohawk to file quarterly reports in June, September and December and to file its first quarterly report on or before June 30th, consistent with its fiscal year ending March 31st.

Substance of proposed rule: The Commission is considering whether to grant a waiver of the requirements of 16 NYCRR Part 731 to permit Niagara Mohawk Power Corporation to file its quarterly reports in June, September, and December, consistent with the Company's fiscal year ending March 31. Further, that the first quarter report be filed on or before June 30 rather than March 31.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(01-M-0075SA22)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Issuance of Debt by Niagara Mohawk Power Corporation

I.D. No. PSC-40-04-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition of Niagara Mohawk Power Corporation for authority to issue, through Dec. 31, 2007, not to exceed $1,500,000,000 long term indebtedness.

Statutory authority: Public Service Law, section 69

Subject: Petition for the issuance of debt.

Purpose: To issue long-term debt.

Substance of proposed rule: The Commission is considering whether to approve or reject, in whole or in part, the petition of Niagara Mohawk Power Corporation to issue, through December 31, 2007 not exceeding $1,500,000,000 (1.5 Billion Dollars) of new long-term debt for the refinancing of maturing and/or redeemed issues of debt and/or preferred stock, or to finance the capital needs of the Company.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-M-1046SA1)

Racing and Wagering Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Video Lottery Gaming Occupational Licensing

I.D. No. RWB-40-04-00004-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: This is a consensus rule making to amend sections 4002.1 and 4101.24 of Title 9 NYCRR.

Statutory authority: Tax Law, section 1617-9(a); and Racing, Pari-Mutuel Wagering and Breeding Law, section 101

Subject: Video lottery gaming occupational licensing.

Purpose: To permit the occupational licensing of video lottery gaming employees.

Text of proposed rule: Section 4002.1 of Title 9 amended to read as follows:

4002.1. Occupational licenses.

(a) No preson shall participate in the affairs of any association or corporation licensed or franchised by the board to conduct thoroughbred race meetings at which pari-mutuel betting is permitted as director, agent, or employee of such track, unless such person shall have received an occupational license from the board.

(b) No person shall participate in or at any thoroughbred race meet as a managing owner, racing owner, trainer, assistant trainer, jockey, apprentice jockey, jockey agent, veterinarian, farrier, stable employee, track supplier, equipment supplier, salesman, agent or be the holder or operator of any concession, or perform any service, including, but without limiting, the generality thereof, the conduct of negotiations on behalf of any person or persons who engage in any racing activities or perform any services in connection with the conduct of any thoroughbred race meet, or engage in any occupation or employment at any thoroughbred race meet unless such person shall have received an occupational license from the board, with the following exceptions:

(1) public officers and public employees engaged in the performance of their official duties; and

(2) persons exempted by the board from the occupational license requirement.

(c) Every such license shall provide that the license shall comply with this Subchapter and that violation thereof may be punished by suspension or revocation of such license. Such licenses shall be issued only to natural persons.

(d) It shall be the responsibility of each track to prevent any person not holding an occupational license from doing or performing any act or acts at its track.

(e) An application for an occupational license shall be made upon a form supplied by the board and shall be executed in the manner prescribed by the board. The board may issue instructions as to the preparation and

execution of applications for occupational licenses, which instructions may be a part of or separate from the application form. Failure to comply with any such instructions shall be grounds for denial, suspension or revocation of an occupational license. When so instructed by the board, the applicant shall file with the application fingerprints and photographs in requisite number. The fingerprints so obtained shall be transmitted by the board to the New York State Identification and Intelligence System, the Federal Bureau of Investigation Identification Division, and any other government agency of any state or country selected by the board, for the purpose of establishing identity and previous criminal record, if any, of the applicant.

(f) Should a licensee lose a license or should a license in some manner be destroyed, such licensee may apply for a duplicate license by filing an affidavit on a form supplied by the board and the payment of a fee of $5.

(g) Each applicant for an occupational license shall pay an annual license fee at the time of the filing of the application. The license fees to be paid shall be as follows: original owner—$100; owner renewal, jockey—$50; trainer, assistant trainer, veterinarian—$30; jockey agent, farrier, track management—$20; mutuel—$10; stable employees (grooms, etc.) cleaning and food service workers, exercise rider, authorized agent—$5; all others—$10. Such fees shall be multiplied by two for two-year terms and by three for three-year terms.

(h) It shall be the responsibility of the trainer to determine that every person employed by him at a track and every assistant trainer, groom, clerk, assistant or other person working regularly in his stable at a track is licensed by the board. It shall be the responsibility of the trainer to refuse to represent any participant at a licensed track under circumstances in which the trainer, by the exercise or reasonable discretion, has reason to believe that said participant has not been licensed by the board and to report said circumstances to the track steward.

(i) No unlicensed person shall enter or be present in the stable area, paddock, racing strip, infield, or mutuel area of a track without permission from the board and each track shall use all practicable measures to enforce the above restrictions.

(j) Upon the board's request, an applicant for an occupational license or a licensee holding such license shall furnish the board records or information pertaining to his service in the Armed Forces, to treatment for any physical or mental condition, including confinement in any institution, to his past or present financial condition, to his past or present employment or any other information or records which may be deemed necessary by the board. Failure to furnish such records and information if available, and if not available to cooperate with and assist the board in obtaining such records and information, shall be grounds for denial, suspension, or revocation or fine by the board.

(k) Before the board issues or reinstates an occupational license, it may require as a condition for issuing or reinstating such license, that the person involved produce proof:

(1) that if he is to be employed, that his proposed employer intends to so employ him upon issuance or reinstatement of the license; or

(2) that if he is to be otherwise engaged in thoroughbred racing that he is able, financially or otherwise, to so participate upon licensing.

(l) Video lottery gaming employee license

(1) Definitions. As used in this Subchapter, the following definitions are applicable:

(a) Division. Division means the Division of the Lottery.

(b) Video lottery gaming employee. Video lottery gaming employee is any natural person who will be employed in the operation of or at a video lottery gaming facility, as such terms are defined by Part 2836 of Title 21 of the New York Code of Rules and Regulations.

(2) Video lottery gaming employee license. Notwithstanding any inconsistent provision of rule or regulation, the board shall deem an individual licensed as a video lottery gaming employee upon written notification from the Division that said individual will be issued a video lottery gaming license pursuant to Part 2836 of Title 21 of the New York Code of Rules and Regulations if licensed as a video lottery gaming employee by the board. Such written notification by the Division shall include applicant identifiers, a request for the issuance of a board video lottery gaming employee license and confirmation that a release of information to the board has been executed by the applicant. The board shall grant such license unless information existing and immediately available in records maintained by the board indicate that the applicant s financial responsibility, experience, character and general fitness are such that the participation of such person will not be consistent with the public interest, convenience or necessity and with the best interests of racing. This rule shall apply to those engaged exclusively in the employ of a video lottery gaming operation, provided however no employee engaged in the preparation, service and handling of food and beverages in the operation of a restaurant or a food or beverage dispensing facility at a track shall be required to hold an independent racing license for employment outside the video lottery gaming operation unless employed in the backstretch, stable area, paddock, racing strip, infield, mutuel area of a track, or other restricted area of the racetrack as designated by the Board.

(3) Duration of license. Each such video lottery gaming employee license granted by the board, unless revoked for cause, shall be effective for a period equal to that of the license issued by the Division; provided that a licensed gaming employee who has timely and properly applied for a license renewal may continue to be employed under the expired license until such time as final action is taken on the renewal application. Such license shall also terminate upon the end of a licensee's video lottery gaming employment.

(4) Fees. Each applicant for a video lottery gaming employee license shall pay no annual license or renewal fee.

Section 4101.24 of Title 9 amended to read as follows:

4101.24. Occupational licenses.

(a) No person shall participate in the affairs of any association or corporation licensed by the New York State Harness Racing Commission to conduct harness race meetings at which pari- mutuel betting is permitted as director, agent or employee of such track license, unless such person shall have received an occupational license from the commission.

(b) No person shall participate in or at any harness horse race meet as owner, driver, trainer, assistant trainer, groom, farrier, harness goods supplier, salesman, veterinarian, agent, or be the holder or operator of any concession, or perform any service, including but without limiting the generality thereof, the conduct of negotiations on behalf of any person or persons who engage in any racing activities or perform any services in connection with the conduct of any harness horse race meet, or engage in any occupation or employment at any harness horse race meet, unless such person shall have received an occupational license from the commission with the following exceptions:

(1) Public officers and public employees engaged in the performance of their official duties.

(2) Persons exempted by the commission from the occupational license requirement.

(c) It shall be the responsibility of each track licensee to prevent any person not holding an occupational license from doing or performing any act or acts at its track.

(d) Each such license, unless revoked for cause, shall be for the period of no more than one, two or three years, expiring on the applicant's birth date; provided, however, that the Board may, pending final determination of any question under section 309 of the Racing, Pari-Mutuel Wagering and Breeding Law, as amended, issue a temporary license upon such terms and conditions as it may deem necessary or desire to effectuate the provisions of such chapter. No person shall be qualified to receive or hold an occupational license if he is not a bona fide participant in harness racing. Licenses current on the effective date of this rule shall not be reduced in duration by this provision. An applicant who applies for a license that, if issued, would take effect less than six months prior to the applicant's birth date may, by payment of a fifty percent higher fee, receive a license which shall not expire until the applicant's second succeeding birth date. A renewal license for owner, trainer, assistant trainer, driver, driver agent, racing official, mutuel employee, maintenance employee, veterinarian, farrier, track management or track security employee shall be for three years unless an individual establishes good cause for a shorter term or the board in its discretion determines a shorter term.

(e) An application for an occupational license shall be made upon a form supplied by the commission and shall be executed in the manner prescribed by the commission. The commission may issue instructions as to the preparation and execution of applications for occupational licenses, which instructions may be a part of or separate from the application form. Failure to comply with any such instructions shall be grounds for denial, suspension or revocation of an occupational license. When so instructed by the commission, the applicant shall file with the application fingerprints and photographs in requisite number. The fingerprints so obtained shall be transmitted by the commission to the New York State Identification and Intelligence System, the Federal Bureau of Investigation Identification Division, and any other government agency of any state or country selected by the commission, for the purpose of establishing identity and previous criminal record, if any, of the applicant.

(f) Should a licensee lose a license or should a license in some manner be destroyed, such licensee may apply for a duplicate license by filing an

affidavit on a form supplied by the commission and the payment of a fee of $5.

(g) Each applicant for an occupational license shall pay an annual license fee at the time of the filing of the application. The license fees to be paid shall be as follows: original owner—$100; owner renewal—$50; trainer, assistant trainer, driver, farrier, veterinarian, track management—$20; stable employees (grooms, etc.), cleaning and food service workers—$5; all others—$10. Such fees shall be multiplied by two for two-year terms and by three for three-year terms.

(h) The commission may suspend, revoke, exclude, or refuse to license any participant whose spouse would fail to qualify should such spouse apply for a license. In this regard the commission may require a participant to produce any evidence and information it deems necessary.

(i) It shall be the responsibility of the trainer to determine that every person employed by him at a licensed track and every assistant trainer, groom clerk, assistant or other person working regularly in his stable at a licensed track is licensed by the commission. It shall be the responsibility of the trainer to refuse to represent any participant at a licensed track under circumstances in which the trainer, by the exercise of reasonable discretion, has reason to believe that said participant has not been licensed by the commission and to report said circumstances to the track steward.

(j) No unlicensed person shall enter or be present in the stable area, paddock, racing strip, infield, or mutuel area of a track without permission from the commission and each track shall use all practicable measures to enforce the above restrictions.

(k) Upon the commission's request an applicant for an occupational license or a licensee holding such license shall furnish the commission records or information pertaining to his service in the Armed Forces, to treatment for any physical or mental condition including confinement in any institution, to his past or present financial condition, to his past or present employment or any other information or records which may be deemed necessary by the commission. Failure to furnish such records and information if available, and if not available to cooperate with and assist the commission in obtaining such records and information, shall be grounds for denial, suspension, or revocation or fine by the commission.

(l) Before the commission issues or reinstates an occupational license it may require as a condition for issuing or reinstating such license that the person involved produce proof:

(1) that if he is to be employed, that his proposed employer intends to so employ him upon issuance or reinstatement of the license; or

(2) that if he is to otherwise engage in harness racing that he is able, financially or otherwise, to so participate upon licensing.

(m) Video lottery gaming employee license

(1) Definitions. As used in this Subchapter, the following definitions are applicable:

(a) Division. Division means the Division of the Lottery.

(b) Video lottery gaming employee. Video lottery gaming employee is any natural person who will be employed in the operation of or at a video lottery gaming facility, as such terms are defined by Part 2836 of Title 21 of the New York Code of Rules and Regulations.

(2) Video lottery gaming employee license. Notwithstanding any inconsistent provision of rule or regulation, the board shall deem an individual licensed as a video lottery gaming employee upon written notification from the Division that said individual will be issued a video lottery gaming license pursuant to Part 2836 of Title 21 of the New York Code of Rules and Regulations if licensed as a video lottery gaming employee by the board. Such written notification by the Division shall include applicant identifiers, a request for the issuance of a board video lottery gaming employee license and confirmation that a release of information to the board has been executed by the applicant. The board shall grant such license unless information existing and immediately available in records maintained by the board indicate that the applicant s financial responsibility, experience, character and general fitness are such that the participation of such person will not be consistent with the public interest, convenience or necessity and with the best interests of racing. This rule shall apply to those engaged exclusively in the employ of a video lottery gaming operation, provided however no employee engaged in the preparation, service and handling of food and beverages in the operation of a restaurant or a food or beverage dispensing facility at a track shall be required to hold an independent racing license for employment outside the video lottery gaming operation unless employed in the backstretch, stable area, paddock, racing strip, infield, mutuel area of a track, or other restricted area of the racetrack as designated by the Board.

(3) Duration of license. Each such video lottery gaming employee license granted by the board, unless revoked for cause, shall be effective for a period equal to that of the license issued by the Division; provided that a licensed gaming employee who has timely and properly applied for a license renewal may continue to be employed under the expired license until such time as final action is taken on the renewal application. Such license shall also terminate upon the end of a licensee's video lottery gaming employment.

(4) Fees. Each applicant for a video lottery gaming employee license shall pay no annual license or renewal fee.

Text of proposed rule and any required statements and analyses may be obtained from: Jennifer A. Whalen, Racing and Wagering Board, One Watervliet Ave. Ext., Albany, NY 12206, (518) 453-8460, e-mail: jwhalen@racing.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Consensus Rule Making Determination

No person is likely to object to the adoption of the rule as written because the rule will not impose any new restrictions or costs upon the public; rather the rule will make it easier for the Racing & Wagering Board to license those video lottery gaming employees already licensed by the Lottery by making the process of application more user-friendly and less duplicative. No fees are imposed. The rule uses the existing standards found in the Racing, Wagering Pari-Mutuel and Breeding Law Sections 213 and 309 and Title 9E of the N.Y.C.R.R. sections 4002.9 and 4101.24 as to the reasons for which a license would be revoked or denied.

The rule would make it easier for the applicant, who is required to apply for a video gaming employee's license through the Division of Lottery, by eliminating the requirement of making two applications.

The rule would not impose any new restrictions or costs on any licensed party. Any new form would be made available for download by prospective licensees through the Board's website, as is current board practice.

The New York State Racing and Wagering Board has determined that no person is likely to object to the rule as written because the amendment involves making licensing requirements less duplicative. The rule makes no substantive changes that will impact the licensing, conduct or enforcement of video lottery gaming.

Job Impact Statement

The Board has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. To the contrary, the agency has determined the rule will have a positive impact on jobs and employment opportunities. This rule will facilitate the license application process by eliminating duplicative detailed license applications.

According to estimates provided by the racetracks, it is anticipated that racetracks, or gaming agents, throughout the state are expected to employ upwards of 1900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each gaming facility (incremental over current operations) is estimated to be over 240. Hourly wages are expected to range from minimum wage to $65 per hour, with annual salaries between $22,000 to $250,000. Total annual payroll for each racetrack will range from $1.8 million to over $10.8 million, with an average payroll of over $6.6 million.

In addition to added employment from gaming operations, needed construction to the racetrack facilities will generate many new jobs at prevailing labor rates. Undoubtedly, employment in the surrounding communities will increase to service the increased labor population and influx of patrons to the racetracks.

State University of New York

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Basic State Financial Assistance

I.D. No. SUN-40-04-00002-EP
Filing No. 1053
Filing date: Sept. 20, 2004
Effective date: Sept. 20, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: This is a consensus rule making to amend section 602.8(c) of Title 8 NYCRR.

Statutory authority: Education Law, sections 355(1)(c), 6221(c) and 6304(1)(b); and L. 2004, chs. 53 and 411

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: The State University of New York finds that immediate adoption of amendments to the Code of Standards and Procedures for the Administration and Operation of Community Colleges (the code) is necessary for the preservation of the general welfare and that compliance with the requirements of subdivision 1 of section 202 of the State Administrative Procedures Act would be contrary to the public interest. The 2004-2005 Education, Labor and Social Services Budget Bill (the Budget) requires amendments to the existing funding formula for State financial assistance for operating expenses of community colleges of the State and City Universities of New York. The funding formula is to be developed jointly with the City University of New York, subject to the approval of the Director of the Budget. Negotiations between the State University, City University and the Division of the Budget were not concluded until August 2004 due to the late passage of the 2004-2005 Budget. Due to the late enactment of the 2004-2005 Budget, amendments to the code on an emergency basis for the 2004-2005 college fiscal year are necessary in order to:

1. provide timely State operating assistance to public community colleges of the State and the City Universities of New York;
2. obtain the necessary revenue to maintain essential staffing levels, program quality, and accessibility.

Compliance with the provision of subdivision (1) of section 202(6) of the State Administrative Procedure Act would be contrary to the public interest because, in light of the late enactment of the 2004-2005 Budget Bill. The requirements of subdivision (1) of section 202(6) of SAPA would not allow implementation of the State financial assistance provided in the Budget Bill in time for the 2004-2005 college fiscal year.

Subject: State basis financial assistance for operating expenses of community colleges under the program of State University of New York and City University of New York.

Purpose: To modify the existing limitations formula in order to conform to the provisions of the Education Law and the 2004-2005 Budget Bill. Also, these amendments provide for a change in language, which when adopted, would no longer require annual rule making to change dollar amounts.

Text of emergency/proposed rule: (c) Basic State financial assistance.

(1) Full opportunity colleges. The basic State financial assistance for community colleges, implementing approved full opportunity programs, shall be the lowest of the following:

(i) two-fifths (40%) of the net operating budget of the college, or campus of a multiple campus college, as approved by the State University trustees;

(ii) two-fifths (40%) of the net operating costs of the college, or campus of a multiple campus college; or

(iii) for the current college fiscal year the total of the following:

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [$2300] *$2235*; and

(b) up to one-half (50%) of rental costs for physical space.

(2) Non-full opportunity colleges. The basic State financial assistance for community colleges not implementing approved full opportunity programs shall be the lowest of the following:

(i) one-third (33%) of the net operating budget of the college, or campus of a multiple campus college, as approved by the State University trustees;

(ii) one-third (33%) of the net operating costs of the college, or campus of a multiple campus college; or

(iii) for the college fiscal year current, the total of the following:

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [$1917] *$1863*; and

(b) up to one-half (50%) of rental cost for physical space.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this subdivision, a community college or a new campus of a multiple campus community college in the process of formation shall be eligible for basic State financial assistance in the amount of one-third of the net operating budget or one-third of the net operating costs, whichever is the lesser, for those colleges not implementing an approved full opportunity program plan, or two-fifths of the net operating budget or two-fifths of the net operating costs, whichever is the lesser, for those colleges implementing an approved full opportunity program, during the organization year and the first two fiscal years in which students are enrolled.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 18, 2004.

Text of rule and any required statements and analyses may be obtained from: Dona S. Bulluck, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: Bullucdo@sysadm.suny.edu

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Consensus Rule Making Determination

The State University of New York has determined that no person is likely to object to this rule as written because it provides timely State operating assistance to public community colleges of the State and City Universities of New York and adopts amendments to the tuition regulations for community colleges under the program of the State University of New York for the 2004-2005 fiscal year.

Job Impact Statement

No job impact statement is submitted with this notice because the Emergency adoption and proposed rule does not impose any adverse economic Impact on existing jobs, employment opportunities, or self-employment. This rule making governs the financing of community colleges operating under the program of the State University and will not have any adverse impact on the number of jobs or employment opportunities in the state.

Department of Taxation and Finance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

New York State, City of New York and City of Yonkers Withholding Tables and Other Methods

I.D. No. TAF-40-04-00003-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Repeal of Appendixes 10, 10-A and 10-C and addition of new Appendixes 10, 10-A and 10-C to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 671(a)(1); 697(a); 1309; 1312(a); 1329(a); 1332(a); and section 7 of the Model Local Law found in section 1340(c); Codes and Ordinances of the City of Yonkers, section 15-105; 15-108(a); 15-121 and 15-130; Administrative Code of the City of New York, sections 11-1771(a); 11-1797(a); 11-1909 and 11-1943

Subject: New York State, City of New York and City of Yonkers withholding tables and other methods.

Purpose: To reflect the revision of certain tax rates and the tax table benefit recapture for wages and compensation paid on or after Jan. 1, 2005.

Substance of proposed rule (Full text is posted at the following State website: www.nystax.gov): Section 671(a)(1), section 1309, section 1329(a), and section 7 of the Model Local Law contained in section 1340(c) of the Tax Law and section 11-1771(a) of the Administrative Code of the City of New York mandate that employers withhold from employee wages amounts that are substantially equivalent to the amount of New York State personal income tax, City of Yonkers income tax surcharge, City of Yonkers earnings tax on nonresidents, and City of New York personal income tax on residents reasonably estimated to be due for the taxable year. The provisions authorize the Commissioner of Taxation and Finance to provide for withholding of these taxes through regulations promulgated by the Commissioner.

This rule repeals Appendixes 10 , 10-A and 10-C of Title 20 NYCRR and enacts new Appendixes 10, 10-A and 10-C of such Title to provide new New York State, City of Yonkers, and City of New York withholding tables and other methods applicable to wages and other compensation paid on or after January 1, 2005. The new tables and other methods reflect the revision of the New York State, City of Yonkers, and City of New York tax tables and the tax table benefit recapture in Chapters 62 and 63 of the Laws of 2003 and a New York City local law. Although the City of Yonkers Earnings Tax on Nonresidents withholding tables and other methods are included as part of the new Appendix 10-A, no revision was required for these tables and other methods included therein by the Laws of 2003.

Text of proposed rule and any required statements and analyses may be obtained from: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

Data, views or arguments may be submitted to: Marilyn M. Kaltenborn, Director, Technical Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; section 671(a)(1) provides that the method of determining the amounts of New York State personal income tax to be withheld will be prescribed by regulations promulgated by the Commissioner; section 697(a) provides the authority for the Commissioner to make such rules and regulations that are necessary to enforce the personal income tax. Section 1329(a) of the Tax Law and section 15-105 of the Codes and Ordinances of the City of Yonkers provide that the City of Yonkers Income Tax Surcharge shall be withheld in the same manner and form as that required by sections 671 through 678 of the Tax Law, except where noted; section 1332(a) of the Tax Law and section 15-108(a) of the Codes and Ordinances of the City of Yonkers provide that the City of Yonkers Income Tax Surcharge shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law, except where noted; Section 7 of the Model Local Law found in section 1340(c) of the Tax Law and sections 15-121 and 15-130 of the Codes and Ordinances of the City of Yonkers provide with respect to the withholding of the City of Yonkers nonresident earnings tax, that the provisions of Part V of Article 22, as described above, shall have the same force and effect as if they were incorporated into the Codes and Ordinances of the City of Yonkers, except where noted. Section 1309(not subdivided) of the Tax Law provides that City of New York personal income tax withholding shall be withheld from city residents in the same manner and form as that required by New York State; section 1312(a) of the Tax Law provides that any personal income tax imposed on New York City residents by the City of New York shall be administered and collected by the Tax Commissioner in the same manner as the tax imposed by Article 22 of the Tax Law, except where noted; Administrative Code of the City of New York, section 11-1771(a) provides that the method of determining the amount of City tax withholding will be prescribed by tax regulations promulgated by the Commissioner; section 11-1797(a) provides for the Commissioner to make such rules and regulations that are necessary to enforce the provisions of the Administrative Code of the City of New York; section 11-1909 (not subdivided) and section 11-1943 (not subdivided) provide that after January 1, 1976 the laws found in Parts V and VI of Article 22 of the Tax Law, which contain sections 671 through 699 of the Tax Law and which pertain to the withholding of tax and the procedural and administrative aspects of the state tax law, shall have the same force and effect as if they were incorporated into the Administrative Code of the City of New York, except where noted.

2. Legislative objectives: New Appendixes 10, 10-A, and 10-C of Title 20 NYCRR contain the revised New York State, City of Yonkers and City of New York withholding tables and other methods applicable to wages and other compensation paid on or after January 1, 2005. The amendments reflect the revision of the tax tables and the tax table benefit recapture in Chapters 62 and 63 of the Laws of 2003 and a New York City local law. Although the City of Yonkers Earnings Tax on Nonresidents withholding tables and other methods are included as part of the new Appendix 10-A, no revision was required for these tables and other methods included therein by the Laws of 2003.

3. Needs and benefits: This rule sets forth New York State, City of Yonkers and City of New York withholding tables and other methods, applicable to wages and other compensation paid on or after January 1, 2005, reflecting the revision of the tax tables and the tax table benefit recapture contained in Chapters 62 and 63 of the Laws of 2003 and a New York City local law. This rule benefits taxpayers by providing New York State, City of Yonkers and City of New York withholding rates that more accurately reflect the current income tax rates. If this rule was not promulgated, the use of the existing withholding tables would cause some over withholding for some taxpayers.

4. Costs: (a) Costs to regulated parties for the implementation and continuing compliance with this rule: Since (i) the Tax Law, the Codes and Ordinances of the City of Yonkers, and the Administrative Code of the City of New York already mandate withholding in amounts that are substantially equivalent to the amounts of New York State, City of Yonkers and City of New York personal income tax on residents, and City of Yonkers nonresident earnings tax reasonably estimated to be due for the taxable year, and (ii) this rule merely conforms Appendixes 10, 10-A, and 10-C of Title 20 NYCRR to the rates of the New York State income tax, the City of Yonkers income tax surcharge on residents and the City of Yonkers nonresident earnings tax, and the City of New York personal income tax on residents, any compliance costs to employers associated with implementing the revised withholding tables and other methods are due to such statutes, and not to this rule.

(b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: Since the need to revise the New York State withholding tables and other methods, the City of Yonkers income tax surcharge on residents and earnings tax on nonresidents withholding tables and other methods, and the City of New York personal income tax on residents withholding tables and other methods arises due to the statutory change in the rates of New York State and City of New York personal income tax, there are no costs to this agency or the State and local governments that are due to the promulgation of this rule.

(c) Information and methodology: This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Technical Services Bureau, Office of Counsel, Division of Tax Policy Analysis, Management Services Bureau, Operations Support Bureau and Bureau of Fiscal Management.

5. Local government mandates: Local governments, as employers, would be required to implement the new withholding tables and other methods in the same manner and at the same time as any other employer.

6. Paperwork: This rule will not require any new forms or information. The reporting requirements for employers are not changed by this rule. Employers will be sent copies of the new tables and other methods as part of the employer's guide which is routinely revised.

7. Duplication: This rule does not duplicate any other requirements.

8. Alternatives: Since the Tax Law, the Codes and Ordinances of the City of Yonkers, and the Administrative Code of the City of New York mandate that New York State, City of Yonkers and City of New York withholding tables and other methods be promulgated (see Section 1 of this statement), there are no viable alternatives to providing such tables and other methods. The only alternative to promulgating this rule would be to allow the current withholding tables to remain in effect. This alternative, however, would require that employers withhold at rates that do not reflect the personal income tax rates of New York State, City of Yonkers and City of New York which will be in effect for the 2005 tax year.

9. Federal standards: This rule does not exceed any minimum standards of the federal government for the same or similar subject area.

10. Compliance schedule: Affected employers will be receiving the required information in sufficient time to implement the revised New York State, City of Yonkers and City of New York withholding tables and other

methods for wages and other compensation paid on or after January 1, 2005.

Regulatory Flexibility Analysis

1. Effect of rule: Small businesses, within the meaning of the State Administrative Procedure Act, which are currently subject to the New York State, City of Yonkers, and City of New York withholding requirements will continue to be subject to these requirements. This rule should, therefore, have little or no effect on small businesses other than the requirement of conforming to the new withholding tables and other methods. All small businesses that are employers or are otherwise subject to the withholding requirements must comply with the provisions of this rule.

2. Compliance requirements: This rule requires small businesses and local governments that are already subject to the New York State, City of Yonkers, and City of New York withholding requirements to continue to deduct and withhold amounts from employees using the revised New York State, City of Yonkers, and City of New York withholding tables and other methods. The promulgation of this rule will not require small businesses or local governments to submit any new information, forms or other paperwork.

3. Professional services: Many small businesses currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any of such services.

4. Compliance costs: Small businesses and local governments are already subject to the New York State, City of Yonkers, and City of New York withholding requirements. Therefore, small businesses and local governments are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York and City of Yonkers purposes. As such, these changes should place no additional burdens on small businesses and local governments. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

5. Economic and technological feasibility: This rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: Sections 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be promulgated. Section 1332 of the Tax Law mandates, in part, that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. Section 11-1771(a) of the Administrative Code of the City of New York mandates that City of New York withholding tables and other methods be promulgated. There are no provisions in the Tax Law that exclude small businesses and local governments from the withholding requirements. The regulation provides some relief to small businesses and local governments with respect to the methods allowed to comply with the withholding requirements by continuing to provide employers with more than one method of computing the amount to withhold from their employees. Look-up tables are provided for employers who prepare their payrolls manually, and an exact calculation method is provided for employers with computer-based systems.

7. Small business and local government participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the New York Conference of Mayors, the Association of Towns of New York State, the New York State Association of Counties, the Deputy Secretary of State for Local Government and Community Services, the Small Business Council of the New York State Business Council, the National Federation of Independent Businesses, the Division of Small Business of the New York State Department of Economic Development and the Retail Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Every employer, including any public or private employer located in a rural area as defined in section 102(13) of the State Administrative Procedure Act, who is currently subject to the New York State, City of Yonkers and City of New York withholding requirements will continue to be subject to such requirements and will be required to comply with the provisions of this rule. The number of employers that are also public or private interests in rural areas cannot be determined with any degree of certainty. According to information supplied by the former New York State Office of Rural Affairs, there are 44 counties throughout New York State that are rural areas (having a population of less than 200,000) and 71 towns in the remaining 18 counties of New York State that are rural areas (with population densities of 150 people or less per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule requires employers that are already subject to the New York State, City of Yonkers and City of New York withholding requirements to continue to deduct and withhold amounts from employees using the revised withholding tables and other methods. The promulgation of this rule will not require employers to submit any new information, forms or other paperwork.

Further, many employers currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any such services.

3. Costs: Employers are already subject to the New York State, City of Yonkers and City of New York withholding requirements. Therefore, employers are accustomed to withholding revisions, including minor programming changes for federal, state, City of Yonkers and City of New York purposes. As such, these changes should place no additional burdens on employers located in rural areas. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

4. Minimizing adverse impact: Sections 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be promulgated. Section 1332 of the Tax Law mandates, in part, that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. Section 11-1771(a) of the Administrative Code of the City of New York mandates that City of New York withholding tables and other methods be promulgated. There are no provisions in the Tax Law or the Administrative Code of the City of New York that exclude employers located in rural areas from the withholding requirements.

5. Rural area participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the New York Conference of Mayors, the Association of Towns of New York State, the New York State Association of Counties, the Deputy Secretary of State for Local Government and Community Services, the Small Business Council of the New York State Business Council, the National Federation of Independent Businesses, the Division of Small Business of the New York State Department of Economic Development and the Retail Council of New York State.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities. These amendments provide new New York State, City of Yonkers and City of New York withholding tables and other methods, applicable for compensation paid on or after January 1, 2005, which reflect the revision of the tax tables and the tax table benefit recapture in Chapters 62 and 63 of the Laws of 2003 and a New York City local law.