

# RULE MAKING ACTIVITIES

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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; or EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

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

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## Office of Alcoholism and Substance Abuse Services

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### REGULATORY IMPACT STATEMENT, REGULATORY FLEXIBILITY ANALYSIS, RURAL AREA FLEXIBILITY ANALYSIS AND/OR JOB IMPACT STATEMENT

#### Administration of “Other Approved Agents” Such as Buprenorphine to Treat Opioid Addictions

I.D. No. ASA-17-08-00007-E

*This regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and/or job impact statement* pertain(s) to a notice of emergency rule making, I.D. No. ASA-17-08-00007-E, printed in the *State Register* on April 23, 2008.

#### **Regulatory Impact Statement**

The proposed emergency revision to Part 828 – Requirements for the operation of chemotherapy substance abuse programs will revise methadone regulations that have existed for 24 years without change. The amendment to the definitions of Part 828 are being adopted by emergency because the need to allow alternative chemotherapy options to methadone clinics is in the interest of the public health, safety and welfare.

Opioid addiction is a chronic illness which can be treated effectively with medications that are administered under conditions consistent with

their pharmacological efficacy, and when treatment includes necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, medical services and, when appropriate, vocational rehabilitation. Medication assisted treatment can be effective in facilitating recovery from opioid addiction for many patients. The proposed regulation sets forth standards to guide opioid addiction treatment.

#### 1. Statutory Authority:

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services (“the Commissioner”) to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.21(b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse, and chemical dependence facilities.

Section 19.21(d) of the Mental Hygiene Law requires the Commissioner to promulgate regulations which establish criteria to evaluate chemical dependence treatment effectiveness and to establish a procedure for reviewing and evaluating the performance of providers of services in a consistent and objective manner.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.05 of the Mental Hygiene Law requires providers to obtain an operating certificate issued by the Commissioner in order to operate chemical dependence services including but not limited to methadone.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

Section 32.09(b) of the Mental Hygiene Law gives the Commissioner the power to withhold an operating certificate for a Methadone provider until statutory requirements are satisfied.

The relevant sections of the Mental Hygiene Law cited above, allow the Commissioner to regulate how chemical dependency services are administered. This regulation will alter the way those services are administered, providing greater flexibility within the State regulations in alignment with Federal rules promulgated by SAMHSA in 2003. The objective is in line with the legislative intent behind the enactment of Sections 19, 22 and 32 of the Mental Hygiene Law, allowing the Commissioner to certify, inspect, license and establish treatment standards for all facilities that treat chemical dependency. Revising policy and procedures with regard to opioid treatment, will establish a standard for all facilities, which is in the best interest of the patient, and will assist opioid treatment programs to provide better health care services and recovery from opioid addiction.

#### 2. Legislative Objectives:

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the State to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. The legislature enacted Section 19, enabling the Commissioner to establish best practices for treating chemical dependency.

#### 3. Needs and Benefits:

Research supports that opioid addiction is a chronic illness that can be treated effectively with medications when administered under conditions consistent with their pharmacological efficacy and when treatment includes necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, medical services and when appropriate vocational rehabilitation (CSAT, 2001). Medication assisted treatment can be effective in facilitating recovery from opioid addiction for many patients.

Approximately 40,000 patients, who represent 36% of patients currently being served in addiction treatment, are in opioid treatment programs in New York State. OASAS Part 828 regulations were written more than 24 years ago and have not been revised despite the fact that SAMHSA promulgated an amendment to the rules in 2003 that allowed opioid treatment programs to offer Buprenorphine treatment along with methadone. The proposed emergency regulation would allow chemotherapy programs to provide Buprenorphine for the maintenance or detoxification treatment of dependence on opioids such as heroin or prescription pain relievers. Consistency between Federal and State regulations is a benefit to providers.

In addition, New York State law currently allows Buprenorphine to be administered by physicians in their private practices in addition to OTP clinics. However, the current OASAS regulation Part 828 does not permit Buprenorphine administration. Buprenorphine treatment for opioid dependence is well served in the OTP setting, since clients will receive additional services such as counseling, toxicology and medical support. The proposed emergency revision will address this problem and patients will benefit from this added service.

#### 4. Costs:

Additional costs are expected to be minimal. Any costs incurred by providers or the State will be offset by better treatment outcomes and healthier patients, which will result in lower costs for medical and other services.

##### a. Costs to regulated parties:

Regulated parties include patients and providers of substance abuse services. Patients should not incur additional costs as Buprenorphine is covered by Medicaid. Cost to providers remains the same.

There should be no additional costs for materials.

##### b. Costs to the agency, state and local governments:

OASAS is not expected to see increased cost related to administering the rule. The decision to provide buprenorphine is voluntary, and the current Part 828 methadone clinics will not be forced to provide it. There will be anticipated cost increases for state and local governments due to the weekly rate of Buprenorphine which is \$ 235.00 and the difference of a weekly rate for Methadone of \$136.02. In addition, providers may need some addition staffing for the induction phase of Buprenorphine. However, it is important to realize that the number of people treated is not changing only their options about treatment. Patients may opt to be placed on Buprenorphine while receiving other services such as toxicology testing and counseling whereas Medicaid patients who opt for Buprenorphine treatment at physicians offices do not receive the benefit of these additional services. There will be no additional costs to counties, cities, towns or local districts.

#### 5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

#### 6. Paperwork:

Amended Part 828 regulations would not change the paperwork currently required.

#### 7. Duplications:

There is no duplication of other state or federal requirements.

#### 8. Alternatives:

The only other alternative is to keep the existing regulation in place. This would be detrimental to both the opioid treatment providers and patients being served.

#### 9. Federal Standards:

The CSAT Federal regulations preserve States' authority to regulate OTPs. The Federal regulations are considered minimal and the States are authorized to determine appropriate additional regulations. Federal regulations for dispensing Buprenorphine in opioid treatment programs are more restrictive than minimal Federal regulations for dispensing in physicians. In support of reducing opioid dependence it is demonstrated that there are numerous benefits which include improved retention in treatment for patients, making OTP's more attractive to new patients, and giving patients more control over their treatment experience. In addition, patient quality of

life may be improved through the reduction in daily attendance at an OTP clinic.

#### 10. Compliance Schedule:

It is expected that full implementation of Part 828 will be completed within three months of the adoption of the regulation.

#### **Regulatory Flexibility Analysis**

**Effect of the Rule:** The proposed amendments to Part 828 will impact certified and or funded providers. It is expected that the amendment of the methadone regulation will result in better patient care. Local Government will not be effected by the rule. Business that provide Buprenorphine may benefit from increased sales of the drug because of a wider distribution.

**Compliance Requirements:** Providers will document the use of Buprenorphine in compliance with federal standards. This rule is voluntary and does not place any additional requirements on small businesses or local governments. It is not expected that there will be significant changes in compliance requirements. Since providers are already required to provide utilization review, it is not expected that this regulation, will have significant additional costs.

**Professional Services:** It is not expected that programs will need to utilize additional professional services.

**Compliance Costs:** No additional costs are expected. This rule is voluntary, therefore compliance is not mandatory.

**Economic and Technological Feasibility:** The economic and technological feasibility of compliance with this voluntary rule by small businesses and local governments is such that the implementation may require certain businesses to increase their sale and production of Buprenorphine in order to comply with the demand for the drug.

**Minimizing Adverse Impact:** Part 828 has been carefully reviewed to ensure minimum adverse impact to providers. Any impact this rule may have on small businesses and the administration of State or local government, will either be a positive impact or the minimal costs for materials and compliance are so small that they will be absorbed into the already existing economic structure.

**Small Business and Local Government Participation:** These amendments were adopted on an emergency basis.

#### **Rural Area Flexibility Analysis**

A rural area flexibility analysis is not provided since these proposed regulations would have no adverse impact on public or private entities in rural areas. The majority of Methadone providers are located in NYC. There are a few others upstate, but they are in cities, of various sizes. There are only three providers located in Ulster, Broome and Montgomery which may be considered a rural area however they are in towns where the density is greater than 150 people per square mile. The compliance, record-keeping and paperwork requirements are the minimum needed to insure compliance with state and federal requirements and quality patient care.

#### **Job Impact Statement**

The implementation of emergency regulation Part 828 will have a minimal impact on jobs in that it may require some additional staffing during the induction phase of Buprenorphine. This regulation will not adversely impact jobs outside of the agency.

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## Office of Children and Family Services

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### NOTICE OF ADOPTION

#### **Payment of Adoption Subsidies**

**I.D. No.** CFS-06-08-00002-A

**Filing No.** 342

**Filing date:** April 18, 2008

**Effective date:** May 7, 2008

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

**Action taken:** Amendment of section 421.24 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(f) and 450-458; L. 1997, ch. 436

**Subject:** Payment of adoption subsidies.

**Purpose:** To authorize the payment of adoption subsidies prior to finalization of adoptions to approved adoptive parents.

**Text or summary was published** in the notice of proposed rule making, I.D. No. CFS-06-08-00002-P, Issue of February 6, 2008.

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

**Text of rule and any required statements and analyses may be obtained from:** Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

**Assessment of Public Comment**

The Office of Children and Family Services (OCFS) received formal comments from one member of the OCFS Advisory Board. The comments were in support of the regulation. As such, the regulation contains no changes based on the comments received.

- Associate of Hebrew Letters (A.H.Litt.)
- Associate of Humane Letters (A.H.L.)
- Associate of Jewish Theology (A.J.T.)
- Associate of Laws (LL.A.)
- Associate of Letters (A.Litt.)
- Associate of Music (A.Mus.)
- Associate of Pedagogy (A.Pd.)
- Associate of Sacred Theology (A.S.T.)

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

**Regulatory Impact Statement**

1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule-making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Section 210 of the Education Law grants to the Board of Regents the authority to register domestic and foreign institutions in terms of New York standards.

Section 214 of the Education Law provides that higher educational institutions that are incorporated in New York State shall be members of The University of the State of New York.

Section 215 of the Education Law authorizes the Commissioner of Education to visit, examine, and inspect schools or institutions under the educational supervision of the State and require reports from such schools.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to enforce all laws relating to the educational system of the State and execute all educational policies determined by the Board of Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools and institutions subject to the Education Law.

Subdivision 5-b of section 6306 of the Education Law authorizes the board of trustees of community colleges to award honorary associate degrees subject to the approval of the Board of Regents.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statutes by listing the honorary degree titles that community colleges and other New York degree-granting institutions may award.

3. NEEDS AND BENEFITS:

Chapter 324 of the Laws of 2006 amended § 6306 of the Education Law by adding subdivision 5-b: "Subject to the approval of the board of regents, the board of trustees shall have the authority to award honorary associate degrees."

The honorary degree titles available for use by New York degree-granting institutions are those listed in § 3.50(c) of the Rules of the Board of Regents, presently consisting of only master's degree and doctoral titles. An amendment is needed to list the honorary associate degree titles that may be used. It is proposed to list 13 such titles, consistent with those already authorized for honorary master's and doctoral degrees.

By implementing § 6306(5-b) of the Education Law by identifying the associate degree titles available for use, this amendment would benefit community colleges. Those titles also could be awarded by the SUNY and CUNY Boards of Trustees, by independent colleges that seek amendment of their charters to authorize their use, or by any New York degree granting institution meeting the requirements of '3.48 of the Rules of the Board of Regents: (1) holding an absolute charter or the equivalent, (2) conferring baccalaureate or higher degrees, and (3) holding institutional accreditation by a Nationally Recognized Accrediting Agency.

The State University of New York polled its community colleges and advised the Department that they preferred to use Associate of Humane Letters (A.H.L.) and Associate of Letters (A.Litt.) as honorary degrees. CUNY did not disagree. (CUNY community colleges do not have separate boards of trustees and the CUNY Board of Trustees is authorized to award any honorary degree listed in § 3.50(c). Recognizing that other New York higher education institutions might be interested in awarding honorary associate degrees, the Department proposes to include the titles requested by SUNY and go well beyond them.

## Education Department

### NOTICE OF ADOPTION

**Analysis of Average Interest Rates**

**I.D. No.** EDU-05-08-00022-A

**Filing No.** 355

**Filing date:** April 22, 2008

**Effective date:** May 8, 2008

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

**Action taken:** Amendment of section 175.41 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided) and 3602(6)(e)(1)

**Subject:** Analysis of average interest rates applied to capital debt incurred by the New York City for school purposes.

**Purpose:** To conform the commissioner's regulation to changes to statute and provide an appropriate methodology for computation of the true cost of debt issued by New York City for the purpose of financing school construction.

**Text or summary was published** in the notice of proposed rule making, I.D. No. EDU-05-08-00022-P, Issue of January 30, 2008.

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

**Text of rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Assessment of Public Comment**

The agency received no public comment.

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Honorary Associate Degrees**

**I.D. No.** EDU-19-08-00004-P

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

**Proposed action:** Amendment of section 3.50(c) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 210 (not subdivided), 214 (not subdivided), 215 (not subdivided), 305(1) and (2), and 6306(5-b)

**Subject:** Honorary associate degrees.

**Purpose:** To establish the list of honorary associate degrees that community colleges and other New York degree-granting institutions may award.

**Text of proposed rule:** Subdivision (c) of § 3.50 of the Rules of the Board of Regents is amended by the addition of a new paragraph (3), effective August 21, 2008, as follows:

(3) Associate Degrees:

Associate of Civil Law (A.C.L.)

Associate of Commercial Science (A.C.S.)

Associate of Divinity (A.D.)

Associate of Fine Arts (A.F.A.)

## 4. COSTS:

(a) Costs to State government. This amendment will not impose any additional costs on State government.

(b) Costs to local government. None.

(c) Costs to private regulated parties. The proposed amendment will not impose any additional costs on private regulated parties.

(d) Costs to the regulatory agency. The proposed amendment will not impose additional costs on the State Education Department.

## 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty, or responsibility on local governments.

## 6. PAPERWORK:

The proposed amendment does not impose additional paperwork.

## 7. DUPLICATION:

The proposed amendment does not duplicate any existing State or federal requirements.

## 8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment, and none were considered.

## 9. FEDERAL STANDARDS:

There are no federal standards related to honorary degrees.

## 10. COMPLIANCE SCHEDULE:

The proposed amendment merely established authorized associate honorary degrees that may be conferred by New York degree-granting institutions, and does not impose any compliance requirements or costs.

**Regulatory Flexibility Analysis**

The proposed amendment adds a list of honorary associate degree titles to the registered honorary degree titles available for use by New York degree-granting institutions, and will not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

**Rural Area Flexibility Analysis**

## 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will apply to colleges and universities authorized to award degrees in New York State, including such institutions located in the State's 44 rural counties with fewer than 200,000 inhabitants and 71 towns in urban counties with a population density of 150 per square mile or less. There are 269 degree-granting institutions in the State, including 64 campuses and community colleges in the State University of New York, 19 senior and community colleges of The City University of New York (CUNY), 146 independent colleges and universities, and 39 proprietary colleges. Excluding CUNY's 19 campuses leaves 250 degree-granting institutions, of which 62 (24.8 percent) are located in rural areas.

## 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

The purpose of the proposed amendment is to prescribe a list of honorary associate degrees to the list of registered honorary degree titles that degree-granting institutions may award. The proposed amendment merely expands the list of registered honorary degree titles which degree-granting institutions may confer to include honorary associate degrees, and will not impose any reporting, recordkeeping, or other compliance requirements on degree-granting institutions. No professional services will be needed to comply with the proposed amendment.

## 3. COSTS:

The proposed amendment will not impose any initial capital costs or annual costs to comply with the amendment on degree-granting institutions, including those located in rural areas. The proposed amendment merely expands the list of registered honorary degree titles which degree-granting institutions may confer, to include honorary associate degrees.

## 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment merely expands the list of registered honorary degree titles which degree-granting institutions may confer to include honorary associate degrees, and will not impose any reporting, recordkeeping, or other compliance requirements, or costs, on degree-granting institutions. The proposed amendment makes no exception for degree-granting institutions that are located in rural areas. Section 3.50 of the Rules of the Board of Regents lists the degree titles that are available for use by degree-granting institutions, Statewide, including those located in rural areas. Consequently, the State Education Department believes that the prescribed list of registered honorary associate degrees also must apply uniformly State-wide to all such institutions, including those located in rural areas

and that it would be inappropriate to establish different standards for eligible institutions located in rural areas.

## 5. RURAL AREA PARTICIPATION:

The State University of New York polled its community colleges, including those located in rural areas, and advised the State Education Department that they preferred to use Associate of Humane Letters (A.H.L.) and Associate of Letters (A.Litt.) as honorary degrees. Recognizing that other New York higher education institutions might be interested in awarding honorary associate degrees, the Department proposes to include the titles requested by SUNY and go well beyond them.

**Job Impact Statement**

The proposed amendment adds a list of honorary associate degree titles to the registered honorary degree titles available for use by New York degree-granting institutions, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, no further steps were needed to ascertain these facts and none were taken. Accordingly, a job impact statement was not required and one was not prepared.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Student Dental Health Certificates**

**I.D. No.** EDU-19-08-00005-P

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

**Proposed action:** Addition of section 136.3(k) to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 305(1) and (2), and 903(2)(a) and (b), (3)(b) and (4)

**Subject:** Student dental health certificates.

**Purpose:** To prescribe requirements for school districts to request a dental health certificate from each student in the public schools at designated intervals.

**Text of proposed rule:** Section 136.3 of the Regulations of the Commissioner is amended by the addition of a new subdivision (k) effective September 1, 2008, as follows:

(k) *Dental health certificates.*

(1) *It shall be the duty of the trustees and boards of education to request that each student, within 30 days after such student's entrance into school and within 30 days after such student's entry into the 2nd, 4th, 7th and 10th grades, submit to the principal or the principal's designee a dental health certificate that meets the requirements of this subdivision; provided that no dental health certificate shall be requested of a student for which an accommodation for religious beliefs is made pursuant to subdivision (f) of this section.*

(i) *The dental health certificate shall:*

(a) *be signed by a duly licensed dentist who is:*

(1) *authorized by law to practice in this State, and consistent with any applicable written practice agreement; or*

(2) *authorized to practice in the jurisdiction in which the examination was given, provided that the Commissioner has determined that such jurisdiction has standards of licensure and practice comparable to those of New York;*

(b) *describe the dental health condition of the student when the examination was made, which examination shall not have been given more than 12 months prior to the commencement of the school year in which the examination is requested; and*

(c) *state whether such student is in fit condition of dental health to permit his or her attendance at the public schools.*

(ii) *Within 30 days after the student's entrance in such school or grades, the dental health certificate, if obtained, shall be filed in the student's cumulative health record.*

(2) *An examination and dental health history of any child may be requested by the local school authorities at any time in their discretion to promote the educational interests of such child.*

(3) *It shall be the duty of the trustees and boards of education to ensure that a notice of request for dental health certificates be distributed at the same time that parents of, or persons in parental relationship to, students are notified of health examination requirements. The notice shall include a statement that a list of dentists to which children who need comprehensive dental examinations may be referred for treatment on a free or reduced cost basis is available upon request at the child's schools. Such list shall be as prescribed by the Commissioner and shall be made*

available by school districts to parents or persons in parental relationship upon request.

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

Section 207 of the Education Law empowers the Board of Regents and the Commissioner to adapt rules and regulations to carry out the laws of the state regarding education and the functions and duties conferred on the Department by law.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to enforce all laws relating to the educational system of the State and execute all educational policies determined by the Board of Regents. Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools and institutions subject to the Education Law.

Education Law section 903, as amended by Chapter 281 of the Laws of 2007, provides that each student shall be requested to furnish a dental health certificate at the same time that health certificates are required, and authorizes the Commissioner of Education to promulgate regulations to implement the statute. Chapter 281 takes effect on September 1, 2008.

##### **2. LEGISLATIVE OBJECTIVES:**

The proposed rule is consistent with the above statutory authority and is necessary to implement Chapter 281 of the Laws of 2007 by prescribing requirements for student dental health certificates.

##### **3. NEEDS AND BENEFITS:**

The proposed rule is necessary to implement Chapter 281 of the Laws of 2007. The statute and proposed rule rest upon the premise that a barrier to learning will occur if a student is declared not in fit condition of dental health to permit his or her attendance at the public school. Presently, schools require that all students upon entrance to a school or entering 2nd, 4th, 7th and 10th grades submit a health certificate which describes the condition of the student, and states whether such student is in a fit condition of health to permit his or her attendance at the public schools. Consistent with the statute, the proposed rule would extend such evaluations to include an optional assessment of a student's oral health by a duly licensed dentist, at the same time a health certificate is required.

##### **4. COSTS:**

a. Cost to State Government: None.

b. Cost to Local Government: The proposed rule will not impose additional costs on school districts, BOCES or other local governments. The statute imposes a cost to school districts for reasonable and necessary expenses to notify parents that the school district will request dental certificates. In addition, there will be statute-imposed cost associated with the school health personnel for time devoted to the record keeping of the requested certificates. It is anticipated that any such costs will be minimal in that they will be included, using existing staff and resources, within the practices presently used by school districts to provide notification of student general health certificates. All public schools currently have a system for notification related to health examination requirements.

c. Costs to private regulated parties: None.

d. Costs to the regulatory agency. The proposed rule will not impose additional costs on the State Education Department. The statute requires the State Education Department, in collaboration with the Department of Health, to compile and maintain a list of dentists to which children who need comprehensive dental examinations may be referred for treatment on a free or reduced cost basis, and to make the list available to all public schools for their distribution to parents and persons in parental relation upon request. Any costs to the State Education Department associated with such list are expected to be nominal.

##### **5. LOCAL GOVERNMENT MANDATES:**

The proposed rule is necessary to implement Chapter 281 of the Laws of 2007 and will not impose any additional duty, program or service on local governments beyond that required by the statute. Consistent with the statute, trustees and boards of education shall request each student, within 30 days after the student's entrance into school and within 30 days after the student's entry into the 2nd, 4th, 7th and 10th grades, to submit a dental

health certificate to the principal or principal's designee. Trustees and boards of education shall ensure that a notice of request for dental health certificates be distributed at the same time that parents of, or persons in parental relationship to, students are notified of health examination requirements. The notice shall include a statement that a list of dentists to which children who need comprehensive dental examinations may be referred for treatment on a free or reduced cost basis is available upon request at the child's school.

##### **6. PAPERWORK:**

The proposed rule will require some additional paperwork by school districts and BOCES, which are required to notify parents of the request for a dental health certificate and to record and file the certificates returned to the school.

##### **7. DUPLICATION:**

The proposed rule is necessary to implement Chapter 281 of the Laws of 2007 and is not duplicative of existing State or federal regulations.

##### **8. ALTERNATIVES:**

The proposed rule is necessary to conform the Commissioner's Regulations to changes in statute. There were no significant alternatives and none were considered.

##### **9. FEDERAL STANDARDS:**

The proposed rule relates solely to the request for dental certificates of students in public schools within New York State, pursuant to State statute. There are no applicable federal standards.

##### **10. COMPLIANCE SCHEDULE:**

The New York State Education Department shall in collaboration with the Department of Health compile and maintain a list of dentists to which children who need comprehensive dental examinations may be referred on a free or reduced cost basis. It is anticipated that the list will be distributed to school districts on September 1, 2008.

#### **Regulatory Flexibility Analysis**

##### **(a) Small Businesses:**

The proposed rule is necessary to implement Education Law section 903, as amended by Chapter 281 of the Laws of 2007, by prescribing requirements for school districts to request dental health certificates from students, and will not have an adverse impact on jobs or employment opportunities. It does not impose any adverse economic impact, reporting, recordkeeping or other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### **(b) Local Governments:**

##### **1. EFFECT OF RULE:**

The proposed rule is necessary to implement Education Law Section 903, as amended by Chapter 281 of the Laws of 2007, by prescribing requirements for school districts to request dental health certificates from students. The proposed rule applies to all public school districts and boards of cooperative educational services (BOCES) in the State.

##### **2. COMPLIANCE REQUIREMENTS:**

The proposed rule is necessary to implement Chapter 281 of the Laws of 2007 and will not impose any compliance requirements on school districts or BOCES beyond that required by the statute. Consistent with the statute, trustees and boards of education shall request each student, within 30 days after the student's entrance into school and within 30 days after the student's entry into the 2nd, 4th, 7th and 10th grades, to submit a dental health certificate to the principal or principal's designee. Trustees and boards of education shall ensure that a notice of request for dental health certificates be distributed at the same time that parents of, or persons in parental relationship to, students are notified of health examination requirements. The notice shall include a statement that a list of dentists to which children who need comprehensive dental examinations may be referred for treatment on a free or reduced cost basis is available upon request at the child's school.

Some additional paper work by the school districts and BOCES will be needed in order to account for, record, and file the requested dental certificates. It is anticipated that similar tasks and functions are already in place and that the additional tasks and functions required by the statute and proposed rule will be carried out using existing staff and resources.

##### **3. PROFESSIONAL SERVICES:**

The proposed rule is necessary to implement Educational Law 903 as amended by Chapter 281 of the Laws of 2007. The proposed rule imposes no additional professional services requirements on school districts and BOCES beyond those inherent in the statute.

##### **4. COMPLIANCE COSTS:**

The proposed rule will not impose additional costs on school districts, BOCES or other local governments. The statute imposes a cost to school districts for reasonable and necessary expenses to notify parents that the school district will request dental certificates. In addition, there will be statute-imposed cost associated with the school health personnel for time devoted to the record keeping of the requested certificates. It is anticipated that any such costs will be minimal in that they will be included, using existing staff and resources, within the practices presently used by school districts to provide notification of student general health certificates. All public schools currently have a system for notification related to health examination requirements.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technology requirements on public school districts. Economic feasibility is addressed under the Compliance Costs section above.

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law 903, as amended by Chapter 281 of the Laws of 2007, and imposes no compliance requirements or costs on school districts and BOCES beyond those required by the statute. It is anticipated that similar tasks and functions to notify and record responses are already in place in public school districts and that the additional tasks and functions required by the statute and proposed rule will be carried out by using existing staff and resources. The proposed rule has been carefully drafted to meet statutory requirements. It does not impose any unfunded mandates.

#### 7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

#### *Rural Area Flexibility Analysis*

##### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all school districts and BOCES in the State. There are 198 rural districts which include districts located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

##### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

The proposed rule is necessary to implement Chapter 281 of the Laws of 2007 and will not impose any compliance requirements on school districts or BOCES beyond that required by the statute. Consistent with the statute, trustees and boards of education shall request each student, within 30 days after the student's entrance into school and within 30 days after the student's entry into the 2nd, 4th, 7th and 10th grades, to submit a dental health certificate to the principal or principal's designee. Trustees and boards of education shall ensure that a notice of request for dental health certificates be distributed at the same time that parents of, or persons in parental relationship to, students are notified of health examination requirements. The notice shall include a statement that a list of dentists to which children who need comprehensive dental examinations may be referred for treatment on a free or reduced cost basis is available upon request at the child's school.

Some additional paper work by the school districts and BOCES will be needed in order to account for, record, and file the requested dental certificates. It is anticipated that similar tasks and functions are already in place and that the additional tasks and functions required by the statute and proposed rule will be carried out using existing staff and resources.

##### 3. COSTS:

The proposed rule will not impose additional costs on school districts, BOCES or other local governments. The statute imposes a cost to school districts for reasonable and necessary expenses to notify parents that the school district will request dental certificates. In addition, there will be statute-imposed cost associated with the school health personnel for time devoted to the record keeping of the requested certificates. It is anticipated that any such costs will be minimal in that they will be included, using existing staff and resources, within the practices presently used by school districts to provide notification of student general health certificates. All public schools currently have a system for notification related to health examination requirements.

##### 4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law 903, as amended by Chapter 281 of the Laws of 2007, and imposes no compliance requirements or costs on school districts and BOCES located in rural areas beyond those required by the statute. Since these statutory requirements apply to all schools throughout the State, it was not possible to establish different compliance and reporting requirements for school districts in

rural areas, or exempt them from provisions of the proposed amendment. The proposed rule has been carefully drafted to meet statutory requirements. It does not impose any unfunded mandates. It is anticipated that similar tasks and functions to notify and record responses are already in place in public school districts and that the additional tasks and functions required by the statute and proposed rule will be carried out by using existing staff and resources.

#### 5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

#### **Job Impact Statement**

The proposed rule is necessary to implement Education Law section 903, as amended by Chapter 281 of the Laws of 2007, by prescribing requirements for school districts to request dental health certificates from students, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed rule that it will have no impact on jobs and employment opportunities, no further steps were needed to ascertain these facts and none were taken. Accordingly, a job impact statement was not required and one was not prepared.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Special Education Programs and Services

**I.D. No.** EDU-19-08-00006-P

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

**Proposed action:** Addition of section 177.2 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided) and 3602-c(7) and L. 2007, ch. 378, section 4

**Subject:** Special education programs and services.

**Purpose:** To prescribe a dispute resolution mechanism regarding the costs for special education services provided to a non-resident New York State student with a disability who is parentally placed in a nonpublic school in New York State.

**Text of proposed rule:** Section 177.2 of the Regulations of the Commissioner of Education is added, effective July 17, 2008, as follows:

§ 177.2 *Claim by a school district to recover costs for special education provided to non-resident students pursuant to Education Law section 3602-c(2).*

(a) *Definitions. For purposes of this section:*

(1) *"Non-resident student" means a student with a disability who is a legal resident of a school district in New York State, who is placed by the student's parent, guardian or person having legal custody of the student, in a nonpublic elementary or secondary school located in another school district in New York State.*

(2) *"School district of residence" means the school district in which the non-resident student legally resides.*

(3) *"School district of location" means the school district in which the nonpublic elementary or secondary school attended by the non-resident student is located.*

(b) *A school district of location may recover from the school district of residence the special education services costs, evaluation costs and committee on special education administrative costs for a nonresident student in accordance with the following procedures:*

(1) *Where the parent, guardian or person legally having custody of a non-resident student has provided written consent to the sharing between the school district of location and the school district of residence, of personally identifiable information concerning such student from records collected or maintained pursuant to Part B of the Individuals with Disabilities Education Act [between the school district of location and the school district of residence], the school district of location may submit a claim, subject to the requirements of paragraph (3) of this subdivision, to the school district of residence for the evaluation costs, committee on special education administrative costs and special education services costs for the non-resident student. The school district of residence shall pay the school district of location the costs claimed, unless the school district of residence disagrees with such costs and requests an administrative review by the Commissioner pursuant to paragraph (4) of this subdivision.*

(2) *Where the parent, guardian or person legally having custody of a non-resident student has refused to provide written consent to the sharing between the school district of location and the school district of residence, of personally identifiable information concerning such student from*

records collected or maintained pursuant to Part B of the Individuals with Disabilities Education Act, the school district of location may submit a claim to the State Education Department, on a form prescribed by the Commissioner and subject to the requirements of paragraph (3) of this subdivision, for reimbursement of evaluation costs, committee on special education administrative costs and special education services for the non-resident student. Upon verification of the amount of such claim, the Commissioner shall certify the amount of the claim to the State Comptroller and request an intercept of funds from the school district of residence to the school district of location.

(3) The amount charged by the school district of location for the costs attributable to providing special education services to the non-resident student, the costs of conducting evaluation(s) of such student and the committee on special education administrative costs attributable to such student shall not exceed the actual cost to the school district of location, after deducting costs attributable to such student that are paid with federal or state funds. The state aid attributable to such a student with a disability shall be determined in accordance with a methodology set forth in guidelines of the Commissioner. The federal aid attributable to such a student with a disability shall be the per capita amount of funds received by the school district pursuant to sections 611 and 619 of Part B of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1411 and 1419 (United States Code, 2000 edition, Supplement V, Volume 3; Superintendent of Documents, U. S. Government Printing Office, Stop SSOP, Washington, D.C. 20402-0001; 2007 - available at the Office of Vocational and Educational Services for Individuals with Disabilities, Room 1624, One Commerce Plaza, Albany, New York 12234), as determined pursuant to guidelines of the Commissioner.

(4) Administrative review of claim.

(i) A school district of residence that disagrees with the amount of costs charged by the school district of location may submit a request for an administrative review of such claim to the State Education Department on a form prescribed by the Department. A request for an administrative review by the Department, shall be submitted not later than one year from the date of receipt of the claim. Such administrative review shall be the exclusive remedy for resolution of disputes pursuant to this section and the determination of the Commissioner or the Commissioner's designee upon such review shall be the final determination of the Department.

(ii) Upon receipt of such claim, the Department shall require the school district of location to provide: (a) verification of the non-resident student's school district of residence; (b) a certification that the costs attributable to such student represent the actual costs to the school district of location; and (c) a detailed accounting of such claim including, but not limited to, when the costs were incurred and their relationship to the reimbursable activities. Upon request of the Department, the school district of location shall provide any applicable source documents to verify the claim.

(iii) The review shall culminate in a determination by the Commissioner or the Commissioner's designee and shall be limited to a determination of whether the claimed costs were attributable to the non-resident student and reflect the actual cost to the school district of location pursuant to paragraph (3) of this subdivision, and whether such student resided in the school district from which recovery is sought. The school district of residence shall pay the costs to the school district of location, in accordance with the determination of the Commissioner or the Commissioner's designee. The Commissioner or the Commissioner's designee may modify the amount claimed by the school district of location, as necessary, to reflect the actual cost to such school district.

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Rebecca H. Cort, Deputy Commissioner, VESID, Education Department, Rm. 1606, One Commerce Plaza, Albany, NY 12234, (518) 473-2714, e-mail: rcort@mail.nysed.gov

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

#### Regulatory Impact Statement

##### STATUTORY AUTHORITY:

Education Law section 207 authorizes the Regents and Commissioner to adopt rules and regulations to carry out State laws regarding education.

Education Law section 3602-c establishes district responsibilities for provision of special education services to students enrolled in nonpublic schools.

Section 4 of Chapter 378 of the Laws of 2007 amended subdivision 7 of section 3602-c of the Education Law, relating to the provision of special education services to parentally-placed nonpublic school students. Section 3602-c, consistent with the federal requirements of the Individuals with Disabilities Education Act (IDEA), requires the school district where a nonpublic school is located (district of location) to be the provider of special education services to a student with a disability. Subdivision 7 of section 3602-c entitles the school district of location to recover costs of special education services, costs of individual evaluations provided for the student and costs of committee on special education (CSE) administration directly from the district of residence of the student (district where the student's parents reside). The amount charged by the school district of location for services, evaluation and CSE administrative costs cannot exceed the actual cost to the school district of location, after deducting any costs paid with federal or State funds. The law further requires the Commissioner to adopt regulations prescribing a dispute resolution mechanism that will be available to a school district of residence where such district disagrees with the amount of the costs charged by the school district of location.

##### LEGISLATIVE OBJECTIVES:

The proposed regulation is necessary to carry out the legislative objectives in section Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007.

##### NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, which entitles the school district of location to recover costs to provide special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district, from a school district of residence; and requires the Commissioner to adopt regulations prescribing a dispute resolution mechanism regarding the amount of charges for special education services provided to a nonresident parentally placed student with a disability.

##### COSTS:

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, and will not impose any costs beyond those inherent in the statute. The proposed regulation will:

(1) Establish the process by which a claim by a school district where a nonpublic school is located for costs to provide special education services to a New York State resident student with a disability who resides in another school district may be made to the school district where that student resides; and

(2) Describe the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services.

The proposed regulation does not impose any additional compliance requirements on school district. The claiming of reimbursable cost by a school district of location, or the initiating of administrative review by the Commissioner of disputed costs by a school district of residence, is at the discretion of each school district.

- a. Costs to State government: None
- b. Costs to local governments: None
- c. Costs to regulated parties: None

d. Costs to the State Education Department of implementation and continuing compliance: The State Education Department will incur administrative costs to review documentation and render decisions regarding the claim dispute process and to process claims for students where the parents have not provided consent to share personally identifiable information about their child between the school district providing services and the school district of residence. It is anticipated that these costs will be absorbed using existing Department staff and resources.

##### LOCAL GOVERNMENT MANDATES:

In general, the proposed regulation is necessary to implement 3602-c(7) of the Education Law, as amended by Chapter 378 of the Laws of 2007, and does not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by the statute. The claiming of reimbursable cost by a school district of location, or the initiating of administrative review by the Commissioner of disputed costs by a school district of residence, is at the discretion of each school district.

The proposed amendment would add a new Commissioner's Regulations section 177.2 to establish the process by which a claim by a school district of location for reimbursement of its costs to provide special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district may be

made to the school district where that student resides; and describes the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services.

**PAPERWORK:**

The proposed regulation would require that, in instances where parental consent to share personally identifiable special education information about the student is not provided, the school district of location shall submit its reimbursement claim to the State Education Department, on a form prescribed by the Commissioner for reimbursement of evaluation costs, committee on special education administrative costs and special education services for the non-resident student. Upon verification of the amount of such claim, the Commissioner shall certify the amount of the claim to the State Comptroller and request an intercept of funds from the school district of residence to the school district of location. In instances where parental consent to share personally identifiable special education information is provided, the school district of location is entitled to directly recover its costs from the school district of location.

The proposed regulation also requires that requests for administrative review by the State Education Department of disputed claim amounts be submitted on forms prescribed by the Department not later than one year from the date of receipt of the claim. Upon receipt of such claim, the Department shall require the school district of location to provide verification of the non-resident student's school district of residence; a certification that the costs attributable to such student represent the actual costs to the school district of location; and a detailed accounting of such claim including, but not limited to, when the costs were incurred and their relationship to the reimbursable activities. Upon request of the Department, the school district of location shall provide any applicable source documents to verify the claim.

**DUPLICATION:**

The proposed regulation will not duplicate, overlap or conflict with any other State or federal statute or regulation and is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007.

**ALTERNATIVES:**

In general, the proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, and to that extent there were no significant alternatives and none were considered. Regarding the dispute resolution mechanism, the Department considered various procedures to ensure the reimbursement to the school district of location for the cost of special education services to nonresident NYS students, including binding arbitration, and determined that the proposed amendment would present the most timely and cost effective resolution of such disagreements.

**FEDERAL STANDARDS:**

The proposed regulation relating to reimbursement of cost and a dispute resolution mechanism is not required by federal law or regulations, but is necessary to implement 3602-c(7) of the Education Law, as amended by Chapter 378 of the Laws of 2007. There are no applicable Federal statutes, regulations or other requirements.

**COMPLIANCE SCHEDULE:**

It is anticipated that regulated parties will be able to achieve compliance with the proposed regulation by its effective date.

**Regulatory Flexibility Analysis**

**Small Businesses:**

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Section 4 of Chapter 378 of the Laws of 2007, which entitles the school district of location to recover its costs of providing special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district, from the student's district of residence. The proposed regulation does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the rule that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

**Local Governments:**

The proposed regulation applies to all public school districts in the State.

**COMPLIANCE REQUIREMENTS:**

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, which became effective June 30, 2007, and does not impose any additional

compliance requirements upon local governments beyond those imposed by the statute. The claiming of reimbursable cost by a school district of location, or the initiating of administrative review by the Commissioner of disputed costs by a school district of residence, is at the discretion of each school district.

The proposed regulation would add a new Commissioner's Regulation section 177.2 to establish the process by which a claim by a school district of location for reimbursement of its costs to provide special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district may be made to the school district where that student resides; and describes the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services.

The proposed regulation would require that, in instances where parental consent to share personally identifiable special education information about the student is not provided, the school district of location shall submit its reimbursement claim to the State Education Department, on a form prescribed by the Commissioner for reimbursement of evaluation costs, committee on special education administrative costs and special education services for the non-resident student. Upon verification of the amount of such claim, the Commissioner shall certify the amount of the claim to the State Comptroller and request an intercept of funds from the school district of residence to the school district of location. In instances where parental consent to share personally identifiable special education information is provided, the school district of location is entitled to directly recover its costs from the school district of location.

The proposed regulation also requires that requests for administrative review by the State Education Department of disputed claim amounts be submitted on forms prescribed by the Department not later than one year from the date of receipt of the claim. Upon receipt of such claim, the Department shall require the school district of location to provide verification of the non-resident student's school district of residence; a certification that the costs attributable to such student represent the actual costs to the school district of location; and a detailed accounting of such claim including, but not limited to, when the costs were incurred and their relationship to the reimbursable activities. Upon request of the Department, the school district of location shall provide any applicable source documents to verify the claim.

**PROFESSIONAL SERVICES:**

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, which became effective June 30, 2007, and does not impose any additional professional service requirements on local governments.

**COMPLIANCE COSTS:**

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, and will not impose any costs beyond those inherent in the statute. The proposed regulation will:

(1) Establish the process by which a claim by a school district where a nonpublic school is located for costs to provide special education services to a New York State resident student with a disability who resides in another school district may be made to the school district where that student resides; and

(2) Describe the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services.

The proposed regulation does not impose any additional compliance requirements or costs on school districts beyond those inherent in the statute. The claiming of reimbursable cost by a school district of location, or the initiating of administrative review by the Commissioner of disputed costs by a school district of residence, is at the discretion of each school district.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed regulation does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

**MINIMIZING ADVERSE IMPACT:**

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, and to that extent, does not exceed any minimum State standards. The proposed regulation has been carefully drafted to meet State statutory requirements and does not impose any additional costs or compliance requirements on school districts beyond those inherent in the statute.

The proposed regulation would add a new Commissioner's Regulation section 177.2 to establish the process by which a claim by a school district of location for reimbursement of its costs to provide special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district may be made to the school district where that student resides; and describes the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services. The claiming of reimbursable cost by a school district of location, or the initiating of administrative review by the Commissioner of disputed costs by a school district of residence, is at the discretion of each school district.

#### LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed regulation will be provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment.

#### **Rural Area Flexibility Analysis**

##### TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed regulation will apply to all public school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

##### REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, which became effective June 30, 2007, and does not impose any additional reporting, recordkeeping and other compliance requirements upon rural areas beyond those imposed by the statute.

The proposed regulation would add a new Commissioner's Regulation section 177.2 to establish the process by which a claim by a school district of location for reimbursement of its costs to provide special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district may be made to the school district where that student resides; and describes the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services.

The proposed regulation would require that, in instances where parental consent to share personally identifiable special education information about the student is not provided, the school district of location shall submit its reimbursement claim to the State Education Department, on a form prescribed by the Commissioner for reimbursement of evaluation costs, committee on special education administrative costs and special education services for the non-resident student. Upon verification of the amount of such claim, the Commissioner shall certify the amount of the claim to the State Comptroller and request an intercept of funds from the school district of residence to the school district of location. In instances where parental consent to share personally identifiable special education information is provided, the school district of location is entitled to directly recover its costs from the school district of location.

The proposed regulation also requires that requests for administrative review by the State Education Department of disputed claim amounts be submitted on forms prescribed by the Department not later than one year from the date of receipt of the claim. Upon receipt of such claim, the Department shall require the school district of location to provide verification of the non-resident student's school district of residence; a certification that the costs attributable to such student represent the actual costs to the school district of location; and a detailed accounting of such claim including, but not limited to, when the costs were incurred and their relationship to the reimbursable activities. Upon request of the Department, the school district of location shall provide any applicable source documents to verify the claim.

The proposed regulation does not impose any additional professional service requirements on local governments.

#### COSTS:

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, and will not impose any compliance requirements or costs on school districts in rural areas beyond those inherent in the statute. The proposed regulation will:

(1) Establish the process by which a claim by a school district where a nonpublic school is located for costs to provide special education services to a New York State resident student with a disability who resides in

another school district may be made to the school district where that student resides; and

(2) Describe the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services.

The claiming of reimbursable cost by a school district of location, or the initiating of administrative review by the Commissioner of disputed costs by a school district of residence, is at the discretion of each school district.

#### MINIMIZING ADVERSE IMPACT:

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, and to that extent, does not exceed any minimum State standards. The proposed regulation has been carefully drafted to meet State statutory requirements and does not impose any additional costs or compliance requirements on school districts beyond those inherent in the statute. Since these requirements apply to all school districts in the State, it is not possible to adopt different standards for school districts in rural areas.

The proposed regulation would add a new Commissioner's Regulation section 177.2 to establish the process by which a claim by a school district of location for reimbursement of its costs to provide special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district may be made to the school district where that student resides; and describes the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services. The claiming of reimbursable cost by a school district of location, or the initiating of administrative review by the Commissioner of disputed costs by a school district of residence, is at the discretion of each school district.

#### RURAL AREA PARTICIPATION:

Copies of the proposed rule will be submitted for discussion and comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

#### **Job Impact Statement**

The proposed rule is necessary to implement Education Law section 3602-c(7), as amended by Section 4 of Chapter 378 of the Laws of 2007, which entitles the school district of location to recover its costs of providing special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district, from the student's school district of residence; and requires the Commissioner to adopt regulations prescribing a dispute resolution mechanism regarding the amount of charges for special education services provided to a nonresident parentally-placed student with a disability. The proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### Educational Requirements Relating to Tuition Assistance Program (TAP) Awards

I.D. No. EDU-09-08-00011-RP

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

**Revised action:** Amendment of sections 145-2.2 and 145-2.9 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 602(1) and (2), 661(2), and 665(2) and (6)

**Subject:** Educational requirements relating to Tuition Assistance Program (TAP) awards including those awards for accelerated study.

**Purpose:** To update the academic achievement requirements (minimum credits and minimum cumulative grade point average) a student must meet before being certified for a payment on his or her Tuition Assistance Program (TAP) award including such an award for accelerated study.

**Text of revised rule:** 1. Section 145-2.2 of the Regulations of the Commissioner of Education is amended, effective July 17, 2008, as follows:

§ 145-2.2 Academic requirements; program pursuit and academic progress.

(a) *State awards first received prior to September 1, 1981.* For the purposes of articles 13 and 14 of the Education Law, students who have

received a State award prior to September 1, 1981 shall meet the following academic requirements:

(1) Attendance. Failure of the student to pursue the program of study will result in the loss of eligibility to receive an award. The institution, in recording and reporting student academic progress, shall take cognizance of attendance as it relates to progress.

(2) Good academic standing. Good academic standing, where required by law, means that: (i) the institution maintains a formal, published statement of its requirements for the maintenance of good academic standing; (ii) the student is matriculated at the institution; and (iii) the institution has determined that the student meets its standard for good academic standing.

(b) *State awards first received during academic year 1981-1982, and thereafter.*

(1) *Part-time study, academic requirements.* For the purposes of articles 13 and 14 of the Education Law, *part-time* students who receive their first State award during the [1981-82 school] 1981-1982 academic year and thereafter shall maintain good academic standing by complying with the requirements prescribed in subparagraph (i) of this paragraph.

[(1)] (i) Loss of good academic standing for [full-time study or] part-time study [, whichever is applicable,] shall be determined at the end of each term of the academic year, and shall mean that a student has either:

[(i)] (a) failed to pursue the program of study in which he or she is enrolled, as determined pursuant to [paragraph (3)] *subparagraph (iii)* of this [subdivision] *paragraph*; or

[(ii)] (b) failed to make satisfactory progress toward the completion of his or her program's academic requirements, as determined by [paragraph (4)] *subparagraph (iv)* of this [subdivision] *paragraph*.

[(2)] (ii) Following a determination that the recipient of an award has lost good academic standing, further payments of any award under article 13 or 14 of the Education Law shall be suspended until the student is restored to good academic standing by either:

[(i)] (a) pursuing the program of study in which he or she is enrolled and making satisfactory progress toward the completion of his or her program's academic requirements; or

[(ii)] (b) establishing in some other way, to the satisfaction of the commissioner, evidence of his or her ability to successfully complete an approved program.

[(3)] (iii) Except as provided for in [paragraph (5)] *subparagraph (v)* of this [subdivision] *paragraph*, a student shall be deemed to be pursuing the approved program of study in which [he] *the student* is enrolled if:

[(i)] (a) during each term of study in the first year for which an award is being received, [he] *the student* receives a passing or failing grade in at least one half of the minimum amount of study required to constitute [full-time study or] part-time study, [whichever is applicable,] pursuant to section 145-2.1 of this Subpart; or

[(ii)] (b) during each term of study in the second year for which an award is being received, [he] *the student* receives a passing or failing grade in at least three fourths of the minimum amount of study required to constitute [full-time study or] part-time study, [whichever is applicable,] pursuant to section 145-2.1 of this Subpart; or

[(iii)] (c) during each subsequent term of study for which an award is being received, [he] *the student* receives a passing or failing grade in no less than the minimum amount of study required to constitute [full-time study or] part-time study, [whichever is applicable,] pursuant to section 145-2.1 of this Subpart.

[(4)] (iv) Except as provided for in [paragraph (5)] *subparagraph (v)* of this [subdivision] *paragraph*, to determine whether a student receiving an award is making satisfactory progress toward the successful completion of his or her program's academic requirements, each institution shall establish and apply a standard of satisfactory academic progress which includes required levels of achievement to be measured at stated intervals. Criteria for achievement shall include, but need not be limited to:

[(i)] (a) the minimum number of credits earned, or courses successfully completed, at each interval; and

[(ii)] (b) the minimum cumulative grade point average or similar measure at each interval.

Each institution shall obtain the approval of the commissioner prior to the implementation of its standard of satisfactory academic progress and prior to any changes in such standard.

[(5)] (v) The provisions of [paragraphs (3)] *subparagraphs (iii)* and [(4)] (iv) of this [subdivision] *paragraph* may be waived once for an undergraduate student and once for a graduate student if an institution certifies, and maintains documentation, that such waiver is in the best

interests of the student. Prior approval by the commissioner of the criteria and procedures used by an institution to consider and grant waivers shall not be required. The commissioner may review such criteria and procedures in use, and require an institution to revise those found to be not acceptable.

(2) *Full-time study, academic requirements.* For the purposes of articles 13 and 14 of the Education Law, full-time students who receive their first State award during the 1981-1982 academic year and thereafter shall maintain good academic standing by complying with the requirements prescribed in subparagraph (i) of this paragraph.

(i) Loss of good academic standing shall be determined at the end of each term of the academic year, and shall mean that a student has:

(a) failed to pursue the program of study in which he or she is enrolled, as determined pursuant to subparagraph (iii) of this paragraph; and/or

(b) failed to make satisfactory progress toward the completion of his or her program's academic requirements, as determined by subparagraph (iv) of this paragraph.

(ii) If a student is determined to have lost good academic standing by failing to meet the conditions established in clauses (a) and (b) of subparagraph (i) of this paragraph, further payments of any award under article 13 or 14 of the Education Law shall be suspended until the student is restored to good academic standing by either:

(a) pursuing the program of study in which he or she is enrolled and making satisfactory progress toward the completion of his or her program's academic requirements; or

(b) establishing in some other way, to the satisfaction of the commissioner, evidence of his or her ability to successfully complete an approved program.

(iii) Except as provided for in subparagraph (v) of this paragraph, a student shall be deemed to be pursuing the approved program of study in which the student is enrolled if:

(a) during each term of study in the first year for which an award is being received, the student receives a passing or failing grade in at least one half of the minimum amount of study required to constitute full-time study pursuant to section 145-2.1 of this Subpart; or

(b) during each term of study in the second year for which an award is being received, the student receives a passing or failing grade in at least three fourths of the minimum amount of study required to constitute full-time study pursuant to section 145-2.1 of this Subpart; or

(c) during each subsequent term of study for which an award is being received, the student receives a passing or failing grade in no less than the minimum amount of study required to constitute full-time study pursuant to section 145-2.1 of this Subpart.

(iv) Except as provided for in subparagraph (v) of this paragraph, to determine whether a student receiving an award is making satisfactory progress toward the successful completion of his or her program's academic requirements, each institution shall establish and apply a standard of satisfactory academic progress which includes required levels of achievement to be measured at stated intervals. Each institution shall obtain the approval of the commissioner prior to the implementation of its standard of satisfactory academic progress and prior to any changes in such standard. Such standard or revised standard shall include the criteria for achievement established by the institution pursuant to the provisions in this subparagraph and shall be submitted in a format prescribed by the commissioner. Criteria for achievement shall include, but need not be limited to:

(a) for students who receive their first State award during the 1981-1982 academic year through and including the 2005-2006 academic year, the minimum number of credits earned, or courses successfully completed, at each interval and the minimum cumulative grade point average or similar measure at each interval; or

(b) for students who receive their first State award during the 2006-2007 academic year and thereafter, and who are enrolled full-time in a two-year, four-year, or five-year undergraduate program on a semester or trimester basis, or their equivalent, the applicable required minimum number of credits accrued and minimum grade point average earned at the time of the institution's certification for each payment made on the student's award, as specified in subparagraphs (i), (ii), (iii) or (iv) of paragraph (c) of subdivision (6) of section 665 of the Education Law; provided that institutions operating on a trimester basis during the 2006-2007 academic year shall apply the satisfactory academic progress standard pursuant to the provisions in section 665 of the Education Law, and shall apply the particular requirements prescribed in the satisfactory academic

progress charts in such section of law for the 2007-2008 academic year and thereafter.

(v) *The provisions of subparagraphs (iii) and (iv) of this paragraph may be waived once for an undergraduate student and once for a graduate student if an institution certifies, and maintains documentation, that such waiver is in the best interests of the student. Prior approval by the commissioner of the criteria and procedures used by an institution to consider and grant waivers shall not be required. The commissioner may review such criteria and procedures in use, and require an institution to revise those found to be not acceptable.*

2. Section 145-2.9 of the Regulations of the Commissioner of Education is amended, effective July 17, 2008, as follows:

§ 145-2.9 Accelerated study.

(a) To be eligible to receive payment for accelerated study beyond the regular program of study for the academic year, except for part-time awards pursuant to Education Law, section 666, or for Vietnam veterans tuition awards pursuant to Education Law, section 669-a, a student shall [.] :

(1) during the regular academic year, be a full-time student matriculated in an approved program in a school or degree-granting institution in this State, unless out-of-state study is approved during the regular academic year ; and

(2) prior to the term of the application, have earned twenty-four semester hours, or its equivalent, from such school or institution in the two immediately preceding, consecutive semesters, or their equivalent, provided that for students pursuing a program of study at a degree-granting institution, the twenty-four semester hours may include the equivalent of three semester hours of remedial course work per semester.

(b) For the purposes of this section, all attendance during a single summer period [, including intersessions,] shall be considered to constitute a single term of attendance. To be eligible for an award for half-time accelerated study, a student shall be a full-time student during the preceding [or succeeding] term and shall have earned twenty-four semester hours, or its equivalent, from such school or institution in the two immediately preceding consecutive semesters, or their equivalent, provided that for students pursuing a program of study at a degree-granting institution, the twenty-four semester hours may include the equivalent of three semester hours of remedial course work per semester.

[(b)] (c) Accelerated study shall denote study which meets the following criteria:

(1) The term of study shall be a separately organized term in addition to the regular [school] academic year, with separate registration and separate charge for tuition and fees.

(2) Accelerated study shall be accompanied by accelerated tuition charges, so that the total tuition charge upon completion of the accelerated program is comparable to the total tuition charge for the [nonaccelerated] non-accelerated program.

**Revised rule compared with proposed rule:** Substantial revisions were made in section 145-2.9(a) and (b).

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

**Public comment will be received until:** 30 days after publication of this notice.

**Regulatory Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on February 27, 2008, the following substantial revisions were made to the proposed rule:

Section 145-2.9 was revised to expressly provide for the award of TAP for accelerated study to students enrolled at both degree-granting institutions and non-degree granting schools and to clarify that students pursuing a program of study at a degree-granting institution may include three remedial course credits per semester in satisfaction of the eligibility requirement for such TAP award that students must complete twenty-four credit hours, or their equivalent, in the preceding two semesters at such school or institution.

The revisions do not require any further changes to the previously published Regulatory Impact Statement.

**Regulatory Flexibility Analysis**

Since publication of a Notice of Proposed Rule Making in the State Register on February 27, 2008, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revisions to the proposed rule do not require any further changes to the previously published Regulatory Flexibility Analysis.

**Rural Area Flexibility Analysis**

Since publication of a Notice of Proposed Rule Making in the State Register on February 27, 2008, the proposed rule was revised as set forth in the Statement concerning the Regulatory Impact Statement filed herewith.

The above revisions to the proposed rule do not require any changes to the previously published Rural Area Flexibility Analysis.

**Job Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on February 27, 2008, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement.

The proposed amendment, as revised, is necessary to conform sections 145-2.2 and 145-2.9 of the Commissioner's Regulations to subdivisions 2 and 6 of section 665 of the Education Law, as amended by Chapter 57 of the Laws of 2007, respectively, relating to the academic achievement requirements a student must meet before being certified for a payment on his or her TAP award including such an award for accelerated study, and will not have an adverse impact on jobs or employment activities. Because it is evident from the nature of the revised amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

**Assessment of Public Comment**

Since publication of a Notice of Proposed Rule Making in the State Register on February 27, 2008, the State Education Department received the following comment on the proposed amendment.

COMMENT:

The State Education Department received a letter in support of the proposed amendment to sections 145-2.2 and 145-2.9 of the Commissioner's Regulations.

DEPARTMENT RESPONSE:

No response is necessary.

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## New York State Energy Research and Development Authority

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**REVISED RULE MAKING  
HEARING(S) SCHEDULED**

**CO<sub>2</sub> Allowance Auction Program**

**I.D. No.** ERD-43-07-00027-RP

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

**Revised action:** Addition of Part 507 to Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 1850-a, 1851, 1854 and 1855

**Subject:** Create the CO<sub>2</sub> Allowance Auction Program, to operate in conjunction with the Department of Environmental Conservation CO<sub>2</sub> Budget Trading Program.

**Purpose:** To provide for the administration and implementation by the New York State Energy Research and Development Authority (authority) or its designee of CO<sub>2</sub> allowance auctions and programs to promote the purposes of the clean energy technology account (the account) as provided by the CO<sub>2</sub> Budget Trading Program at 6 (NYCRR) Part 242. This Part complements the provisions of the CO<sub>2</sub> Budget Trading Program, which was established by the Department of Environmental Conservation to stabilize and then reduce anthropogenic emissions of CO<sub>2</sub>, a greenhouse gas, from CO<sub>2</sub> budget sources in an economically efficient manner.

**Public hearing(s) will be held at:** 2:00 p.m., June 9, 2008 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129, Albany, NY; 1:00 p.m., June 9, 2008 at Department of Environmental

Conservation, Region 1, 50 Circle Rd., Conference Basement Rm. 002 A/B, Stony Brook, NY.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Interpreter Service:** Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Substance of revised rule:** The CO<sub>2</sub> Budget Trading Program, as promulgated by the Department of Environmental Conservation, is implemented as the New York State commitment to the Regional Greenhouse Gas Initiative, and agreement among ten Northeastern State to control and reduce greenhouse gas emissions and to address the significant challenge of climate change. The CO<sub>2</sub> Budget Trading Program creates a cap and trade program to reduce carbon dioxide emissions from power plants. The CO<sub>2</sub> Allowance Auction Program, as proposed herein, implements essential segments of the CO<sub>2</sub> Budget Trading Program. The CO<sub>2</sub> Allowance Auction Program creates the Energy Efficiency and Clean Energy Technology Account, into which CO<sub>2</sub> emissions allowances will be allocated. From that Account, emissions allowances will be auctioned to entities which must comply with the CO<sub>2</sub> Budget Trading Program cap and trade requirements. This rule establishes the rules and procedures to implement an auction program. The proceeds of the auction(s) will be used to promote the stated purposes of the Account, and for administrative and implementation expenses incurred.

**Substantial revisions were made in sections:** 507.6, 507.7, 507.11 and 507.12.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Peter R. Keane, Energy Research and Development Authority, 17 Columbia Circle, Albany, NY 12203-6399, (518) 862-1090 ext. 3366, e-mail: 242rggi@gw.dec.state.ny.us

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

**Public comment will be received until:** 10 days after the last public hearing.

**Additional matter required by statute:** Pursuant to article 8 of the State Environmental Quality Review Act, a short environmental assessment form, a positive declaration and a draft generic environmental impact statement are on file. (The supplemental DGEIS is currently being prepared.) These documents have been prepared jointly with the DEC under their proposed rule making RGGI Budget Trading Program, ENV-43-07-00028. This rule must be approved by NYSERDA's Board.

#### **Revised Regulatory Impact Statement**

##### **BACKGROUND**

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of ten Northeast and Mid-Atlantic States have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO<sub>2</sub>) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.<sup>1</sup> In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) has proposed to establish the CO<sub>2</sub> Budget Trading Program by promulgating 6 NYCRR Part 242.

The CO<sub>2</sub> Budget Trading Program is designed to allocate CO<sub>2</sub> emissions allowances ("Allowances") to an Energy Efficiency and Clean Energy Technology Account ("Account"), which will be established and administered by the New York State Energy Research and Development Authority ("Authority") under this Part 507. The CO<sub>2</sub> Allowance Auction Program as set forth at Part 507 is designed to complement the provisions of the CO<sub>2</sub> Budget Trading Program and to effectuate the purposes of the Account stated therein.

As stated in Section 242-5.3 of the proposed CO<sub>2</sub> Budget Trading Program rule, the Account will be established to promote and reward investments in energy efficiency, renewable or non-carbon emitting technologies, and/or innovative carbon emissions abatement technologies with significant carbon reduction potential. The Authority will conduct auctions, pursuant to the process provided in Part 507, through which the allowances will be made available for sale. The proceeds of the auction(s) will be used to promote the above-stated purposes of the Account, and for administrative and implementation expenses incurred.

##### **1. STATUTORY AUTHORITY**

The Authority currently administers energy efficiency and clean energy technology programs that are similar to the programs and/or projects

that will be funded by the proceeds raised by the auction of allowances from the Account. The stated purposes of the Account are consistent with the Authority's statutory authority, which directs the Authority to conduct, sponsor and assist programs related to new energy technologies and to provide services related to their development. The Authority has the statutory authority to sell the allowances and enter into any contracts and to execute all instruments necessary to develop, research, promote and reward investments related to energy efficiency, renewable or non-carbon-emitting technologies.

The Authority's statutory authority springs from Title 9 of Article 8 of the Public Authorities Law (PAL). In enacting Title 9 of Article 8, the legislature declared, in relevant part, that the purpose of the Authority is, among other things, to promote the development and utilization of "safe, dependable, renewable and economic energy sources and the conservation of energy and energy resources." PAL Section 1850-a. The statute directs the Authority to develop and implement [these] "new energy technologies" and "energy conservation technologies" as such terms are broadly defined by the statute, in a manner consistent with economic, social and environmental objectives. PAL Sections 1851(10), (11); 1854. Taken together, the "new energy technologies" and "energy conservation technologies" that the statute directs the Authority to promote closely match the "energy efficiency, renewable or non-carbon-emitting technologies" that are to be promoted through Part 507. In exercising its statutory powers, the Authority is directed to cooperate and act in conjunction with various entities, including State agencies, in exercising its powers, and is authorized to provide services to State agencies in furtherance of its corporate purposes. PAL Section 1854(2). The Authority is empowered to make rules and regulations governing the exercise of its corporate powers and in fulfillment of its corporate purposes by PAL Section 1855(4).

Pursuant to PAL Section 1855, the Authority is specifically empowered to accept from any State agency the grant of any aid in any form and to comply, subject to the relevant provisions of the Authority's enabling legislation, with the terms and conditions of the grant of the aid. Public Authorities Law Section 1855 also provides that the Authority may receive, acquire, sell, and dispose of any personal property, and may "enter into any contracts and to execute all instruments necessary or convenient for the exercise of its corporate powers and the fulfillment of its corporate purposes." PAL Sections 1855(5), (10). Finally, the statute provides the Authority with the statutory authority "to do all things necessary or convenient to carry out its corporate purposes and exercise the powers given and granted by this title." PAL Section 1855(17).

Given the numerous references and express emphasis in the Authority's enabling statute on the development of energy conservation and renewable energy resources, as central to the Authority's purpose, the Authority's establishment of the Account, auction of the allowances, and use of allowance sale revenues for the purposes stated in the Account definition clearly fall within the authority granted to NYSERDA by Title 9 of Article 8 of the PAL.

##### **2. LEGISLATIVE OBJECTIVES**

The legislative history reinforces the plain import of the statutory language. The Governor's Memoranda approving the Authority's creation states that the primary purpose of this bill is to accelerate the development and use within the State of new energy technologies." L.1975, c. 864. Upon amendment in 1980, the Governor stated that it is the Authority's statutory mandate to "foster, sponsor and assist development and demonstration of new energy generation and conservation technologies." L.1980, c. 558.

##### **3. NEEDS AND BENEFITS**

The Department has determined that the burning of fossil fuels to generate electricity is a major contributor to a warming climate, and that a warming climate poses a serious threat to environmental resources and public health of New York State. In response, the Department has proposed to establish the CO<sub>2</sub> Budget Trading Program by promulgating 6 NYCRR Part 242. Under that Part 242, proceeds from the sale of allowances to affected generators of CO<sub>2</sub> will be used by the Authority to fund programs promoting energy efficiency, renewable or non carbon-emitting technologies, and innovative carbon-emissions abatement technologies with significant carbon reduction potential. The CO<sub>2</sub> Allowance Auction Program will thereby effectuate the purposes of the CO<sub>2</sub> Budget Trading Program by producing significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

In support of these goals, the auctions will be designed to achieve the following objectives: achieve fully transparent and efficient pricing of allowances; promote a liquid allowance market by making entry and trading as easy and low-cost as possible; be open to participation by the categories of bidders determined to be eligible by the Authority or its designee in consultation with the Auction Advisory Committee; monitor for and guard against the exercise of market power and market manipulation; be held as frequently as is needed to achieve design objectives; avoid interference with existing allowance markets; align well with wholesale energy and capacity markets; and to not act as a barrier to efficient investment in relatively clean existing or new electricity generating sources.

An Auction Advisory Committee ("Committee") comprised of the President and Chief Executive Officer of the Authority, the Commissioner of the Department and the Chairperson of the New York State Public Service Commission, or their respective designees, shall advise the Authority on procedures relevant to conducting the auctions described in Part 507. Beginning in 2008, CO<sub>2</sub> Allowance auctions will be held at least quarterly, but may be held as often as necessary to effectuate the objectives of the CO<sub>2</sub> Budget Trading Program, as determined by the Authority in consultation with the Committee.

Prior to each auction, the Authority or its designee, in consultation with the Committee, shall select the category or categories of bidders eligible to participate in each auction. Eligible bidders for an auction may include owners of CO<sub>2</sub> budget units located in New York, owners of CO<sub>2</sub> budget units located outside of New York but within the RGGI participating States that have final CO<sub>2</sub> Budget Trading rules in place at the time of the auction, and other market participants including but not limited to owners of fossil fuel-fired generation units located outside of the RGGI participating State, brokers, environmental groups and financial and investment institutions. All otherwise eligible bidders wishing to participate in an auction will be required to open and maintain a compliance or a general CO<sub>2</sub> allowance account pursuant to Part 242.

A detailed description of each auction, including details regarding participation, will be set forth in a Notice of CO<sub>2</sub> Allowance Auction ("Notice"), which will be published on a CO<sub>2</sub> allowance auction website and in the Department's Environmental Notice Bulletin at least 45 days prior to each auction. The Notice will include but will not be limited to the following information: date and time of auction, type of auction, eligible categories of bidders, number of CO<sub>2</sub> Allowances to be auctioned, location and/or electronic address of auction, format of bids, surety or security mechanism to certify eligibility to participate, and the Authority's information contact person.

Auctions will be implemented through a two-step process, consisting of (1) a qualification application step that will qualify bidders, and (2) a competitive bidding step. Only those bidders found qualified through the step one application process will be permitted to submit bid(s) in the auctions. The qualification application will include a detailed description of the bidder and its corporate background. Prior to participation in auctions, otherwise eligible bidders will be required to provide bidder surety. The surety required may be a letter of credit, bond, or other surety instrument deemed acceptable to the Authority or its designee that guarantees payment of the stated surety amount in the event the bidder's offer is accepted and the bidder fails to complete the transaction.

The Authority will review each pre-qualification application and make determinations as to qualification for participation in bidding. Failure to provide any information required by the Notice may result in the pre-qualification application being declared incomplete or otherwise deficient. All prospective bidders will be notified in writing of such determinations no later than 15 days prior to the date upon which the auction may be conducted. If a pre-qualification application is determined to be incomplete or otherwise deficient, the Authority shall notify the bidder and state the reasons therefore. Prospective bidders whose pre-qualification applications have been determined to be incomplete or deficient will be given a reasonable opportunity to provide additional information and to cure such deficiencies.

The initial auction shall be conducted as a Single Round Sealed-Bid Uniform Price Auction, which is defined as a single round sealed-bid uniform price auction format, under which bidders may submit multiple bids at different prices; the price paid by all awarded bidders will be uniform and equal to the highest rejected bid price.

The Authority, in consultation with the Committee, may employ a Single Round Sealed-Bid Uniform Price Auction or an Ascending Price, Multiple Round Auction in subsequent auctions. An Ascending Price, Multiple Round Auction is defined as a multiple round auction starting

with an opening price with increases each round by predetermined increments. In each round, bidders offer the quantity they are willing to purchase at the posted price. Rounds continue so long as demand exceeds the quantity offered for sale. At the completion of the final round, allowances may be allocated, subject to Section 507.6.

At such time as the transactions are complete, the Authority will notify the Department or its designee to transfer the corresponding CO<sub>2</sub> allowances to the winning bidders' compliance or general accounts. All unsuccessful bidders may submit a written request for return of all financial securities or payments following the conclusion of each auction. After the auction is completed, any CO<sub>2</sub> Allowances left unsold shall be made available for sale in a subsequent auction or group of auctions, according to the provisions of Part 242.

As noted above, proceeds of such auctions will be deposited into a designated Authority account and will be used to promote and implement programs for energy efficiency, renewable or non-carbon emitting technologies, and innovative carbon emissions abatement technologies with significant carbon reduction potential, and for reasonable administrative costs incurred by the Authority in undertaking the activities described in Part 507 and for administrative costs, auction design and support costs, and program design and support costs associated with the CO<sub>2</sub> Budget Trading Program, whenever incurred.

#### 4. COSTS

The administrative costs to regulated parties and other bidders of participation in the CO<sub>2</sub> Allowance Auction Program are expected to be minimal. The auction process will provide regulated sources with an opportunity to acquire CO<sub>2</sub> allowances for compliance with the CO<sub>2</sub> Budget Trading Program. It has been designed to provide a user-friendly, web-based auction platform, and participation will not require qualifications or expertise not already available to regulated parties. Opportunities for participant training will be available. The requirement that regulated sources, consisting of fossil fuel-fired electric generating units, reduce their greenhouse gas emissions and otherwise comply with the CO<sub>2</sub> cap and trade program is imposed by the CO<sub>2</sub> Budget Trading Program. A detailed analysis of the costs of the CO<sub>2</sub> Budget Trading Program, as promulgated by the Department at Part 242, which this Part 507 is designed to complement, is included in the Regulatory Impact Statement for that program.

The Authority will incur costs associated with the design, administration and implementation of the CO<sub>2</sub> Allowance Auction program and associated with administration and implementation of the Account and the programs that will be funded thereby.

With regard to the administration and implementation of the auctions, the Authority will need sufficient staff to: administer the auction process on an ongoing basis, including the preparation of notices to the public and other documents required under the process, to review applications submitted by prospective bidders, to conduct and/or supervise the conduct of each auction, to complete the transactions reached under each auction, and to coordinate the administration of the CO<sub>2</sub> Allowance Auction Program with the Department. The Authority estimates that between two and three person years (the full time equivalent of working 100 percent on the project for a full work year expressed as 220 days) will be required to administer and implement the CO<sub>2</sub> Allowance Auctions, at a cost of \$110,000 per person per year, inclusive of employee benefits, or up to \$330,000 annually. The Authority also expects to contract for various administrative and support services, including but not limited to services with respect to the development and administration of an allowance tracking system and the auction platform, market monitoring and the development of standards for qualifying offset projects.

The costs incurred by the Authority and the number of staff needed to administer and implement the programs that are to be funded through auction proceeds are difficult to quantify at this time, as those costs will depend in large part on the size and scope of those programs, which in turn will be determined by the amount of funds realized through the auctions.

The Authority currently administers application-based offerings and implements programs, under the System Benefits Charge (SBC) program, that are similar to the energy efficiency and clean energy technology programs that the Authority expects to administer and implement, through the use of auction proceeds, under the CO<sub>2</sub> Allowance Auction Program. Under the SBC program, the Authority's administration and evaluation expenditures are capped at 10% of the funds available. Based on the similarity between the current SBC programs and those that the Authority expects to initiate under the CO<sub>2</sub> Allowance Auction Program, the Authority expects that administration and evaluation costs under the CO<sub>2</sub> Allowance Auction Program will approximate 10% of the funds available to the

Authority through auction proceeds. The Authority expects that all costs will be recovered from the auction proceeds.

#### 5. LOCAL GOVERNMENT MANDATES

The Jamestown Board of Public Utilities ("JBPU"), a municipally owned utility, owns and operates the S.A. Carlson Generating Station, and will need to comply with the provisions of the CO<sub>2</sub> Budget Trading Program. In addition to the purchase of allowances through the CO<sub>2</sub> Allowance Auction Program, various strategies are available for JBPU to comply with the CO<sub>2</sub> Budget Trading Program, including increasing the efficiency of the natural gas-fired turbine, co-firing with biofuel, or the purchase of offsets. Should the JBPU decide to participate in the CO<sub>2</sub> Allowance Auction Program for compliance purposes, the JBPU will be required to comply with the provisions of Part 507.

No other additional record keeping, reporting, or other requirements will be imposed on local governments under this rulemaking.

#### 6. PAPERWORK

Bidders in the CO<sub>2</sub> Allowance Auction Program will be required to submit a qualification application and associated supporting documentation as outlined in Part 507. The process has been designed to minimize the amount of paperwork associated with each application, and allows for the continuing qualification of bidders, absent changes, for subsequent auctions.

#### 7. DUPLICATION

The CO<sub>2</sub> Allowance Auction Program is designed to complement the provisions of the CO<sub>2</sub> Budget Trading Program. It does not duplicate any current regulation or rule.

#### 8. ALTERNATIVES

The CO<sub>2</sub> Allowance Auction Program is designed to complement the provisions of the CO<sub>2</sub> Budget Trading Program, which provides for the auction of CO<sub>2</sub> allowances that are allocated to the Account. The Authority will design and implement auctions in accordance with the requirements of the CO<sub>2</sub> Budget Trading Program. As is provided by the rule, NYSERDA has identified two alternative auction formats that may be employed for individual auctions over the course of the program, including:

(1) Single Round Sealed-Bid Uniform Price Auction, which is defined as a single round sealed-bid uniform price auction format, under which bidders may submit multiple bids at different prices; the price paid by all awarded bidders will be uniform and equal to the highest rejected bid price;

(2) Ascending Price, Multiple Round Auction, which is defined as a multiple round auction starting with an opening price with increases each round by predetermined increments. In each round, bidders offer the quantity they are willing to purchase at the posted price. Rounds continue so long as demand exceeds the quantity offered for sale. At the completion of the final round, allowances may be allocated, subject to Section 507.6.

NYSERDA hired a consultant to provide information useful in selecting the auction format to be employed. The consultants have provided information about the advantages/disadvantages of each format. The consultants have also provided guidance about how frequently to hold auctions, whether and how to sell allowances from future compliance periods in advance of their associated compliance period, and with respect to the use of a reserve price. Within the restrictions of Part 507, NYSERDA and the Auction Advisory Committee will use this information to weigh these alternatives and make decisions about what auction features should be used in each auction.

#### 9. FEDERAL STANDARDS

The CO<sub>2</sub> Allowance Auction Program is an administrative program, and does not exceed any current federal standard.

#### 10. COMPLIANCE SCHEDULE

The CO<sub>2</sub> Allowance Auction Program will be administered in such a manner as to ensure that regulated parties have the opportunity to comply with the requirements of the CO<sub>2</sub> Budget Trading Program in a timely manner.

<sup>1</sup> In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

#### **Regulatory Flexibility Analysis**

The changes made to the last published express terms do not require any change to the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

#### **Revised Rural Area Flexibility Analysis**

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the signifi-

cant challenge of climate change. Under the agreement, the governors of ten Northeast and Mid-Atlantic States have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO<sub>2</sub>) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.<sup>1</sup> In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) has proposed to establish the CO<sub>2</sub> Budget Trading Program by promulgating 6 NYCRR Part 242.

The CO<sub>2</sub> Budget Trading Program is designed to allocate CO<sub>2</sub> emissions allowances ("Allowances") to an Energy Efficiency and Clean Energy Technology Account ("Account"), which will be established and administered by the New York State Energy Research and Development Authority ("Authority") under this Part 507. The proposed CO<sub>2</sub> Allowance Auction Program as set forth at Part 507 is designed to complement the provisions of the CO<sub>2</sub> Budget Trading Program and to effectuate the purposes thereof.

As stated in Section 242-5.3 of the proposed CO<sub>2</sub> Budget Trading Program rule, the Account will be established to promote and reward investments in energy efficiency, renewable or non-carbon emitting technologies, and/or innovative carbon emissions abatement technologies with significant carbon reduction potential. The Authority will conduct CO<sub>2</sub> allowance auctions ("Auctions"), through the process provided in Part 507, through which the allowances will be made available for sale. The proceeds of the Auction(s) will be used to promote the above-stated purposes of the Account, and for administrative and implementation expenses incurred.

#### 1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS

The proposed CO<sub>2</sub> Allowance Auction Program is designed to facilitate compliance with the CO<sub>2</sub> Budget Trading Program by providing for the sale of the CO<sub>2</sub> allowances to the owners of affected sources of CO<sub>2</sub> emissions and other entities. Owners and other entities that are located in rural areas will be affected, if at all, no differently than those in other areas of the State.

#### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES

Bidders in the CO<sub>2</sub> Allowance Auction Program will be required to comply with the Auction application requirements, including the requirements for supporting documentation, as is outlined in Part 507. The Auction process has been designed to provide a user-friendly, web-based auction platform, and participation will not require qualifications or expertise not already available to regulated parties.

#### 3. COSTS

The costs to regulated parties and other bidders of participation in the CO<sub>2</sub> Allowance Auction Program are expected to be minimal.<sup>2</sup> The auction process has been designed to provide a user-friendly, web-based auction platform, and participation will not require qualifications or expertise not already available to regulated parties.

The Authority will incur costs associated with the administration and implementation of the CO<sub>2</sub> Allowance Auctions and associated with administration and implementation of the Account and the programs that will be funded thereby.

With regard to the administration and implementation of the auctions, the Authority will need sufficient staff to: administer the auction process on an ongoing basis, including the preparation of notices to the public and other documents required under the process, to review applications submitted by prospective bidders, to conduct and/or supervise the conduct of each auction, to complete the transactions reached under each auction, and to coordinate the administration of the CO<sub>2</sub> Allowance Auction Program with the Department. The Authority estimates that between two and three person years (the full time equivalent of working 100 percent on the project for a full work year expressed as 220 days) will be required to administer and implement the Auctions, at a cost of \$110,000 per person per year, inclusive of employee benefits, or up to \$330,000 annually. The Authority also expects to contract for various administrative and support services, including but not limited to services with respect to the development and administration of an allowance tracking system and the auction platform, market monitoring and the development of standards for qualifying offset projects.

The costs incurred by the Authority and the number of staff needed to administer and implement the programs that are to be funded through auction proceeds are difficult to quantify at this time, as those costs will depend in large part on the size and scope of those programs, which in turn will be determined by the amount of funds realized through the auctions.

The Authority currently administers application-based offerings and implements programs, under the System Benefits Charge (SBC) program,

that are similar to the energy efficiency and clean energy technology programs that the Authority expects to administer and implement, through the use of auction proceeds, under the CO<sub>2</sub> Allowance Auction Program. Under the SBC program, the Authority's administration and evaluation expenditures are capped at 10% of the funds available. Based on the similarity between the current SBC programs and those that the Authority expects to initiate under the CO<sub>2</sub> Allowance Auction Program, the Authority expects that administration and evaluation costs under the CO<sub>2</sub> Allowance Auction Program will approximate 10% of the funds available to the Authority through auction proceeds. The Authority expects that all costs will be recovered from the auction proceeds.

4. MINIMIZING ADVERSE IMPACT

Since the proposed CO<sub>2</sub> Allowance Auction Program regulations apply equally to affected parties statewide, rural areas are not impacted any differently than other areas in the State. The Auction process has been designed to provide a user-friendly web-based auction platform, and participation will not require qualifications or expertise not already available to regulated parties.

5. RURAL AREA PARTICIPATION

Since the announcement of the Regional Greenhouse Gas Initiative in September of 2003, numerous stakeholder meetings were held with affected parties and various representative coalitions and consultants to the electric industry. Copies of the draft regulations for the CO<sub>2</sub> Budget Trading Program were forwarded to all affected parties prior to initiating the promulgation of the regulations and interested parties afforded informal opportunities for public comment. Initial drafts and the discussions that ensued included the auction of allowances and the use of the auction proceeds.

<sup>1</sup> In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

<sup>2</sup> An analysis of the costs of the CO<sub>2</sub> Budget Trading Program, promulgated by the Department at Part 242, is included in the Regulatory Impact Statement for that program.

**Job Impact Statement**

The changes made to the last published express terms do not require any change to the Job Impact Statement as originally filed.

**Assessment of Public Comment**

See Assessment of Public Comment at Department of Environmental Conservation, Notice of Revised Rule Making, I.D. No. ENV-43-07-00028-RP, printed in this issue of the *State Register*.

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## Department of Environmental Conservation

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

**Open Fires**

**I.D. No.** ENV-19-08-00003-P

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

**Proposed action:** Addition of Part 215, and amendment of Parts 191 and 621 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 9-0105, 9-1103, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 70-0707, 71-2103, and 71-2105

**Subject:** Open fires.

**Purpose:** To extend a ban of open burning to all household waste and most agricultural wastes, and eliminate permit requirements for types of open burning that will be allowed.

**Public hearing(s) will be held at:** 5:00 PM - 8:00 PM, June 23, 2008 at Cortlandville Fire Department, 999 Rte. 13, Cortland, NY; 5:00 PM - 8:00 PM, June 24, 2008 at Norrie Point Environment Center, Margaret Lewis Norrie State Park, 256 Norrie Point Way, Staatsburg, NY; 9:30 AM - 12:00 PM, June 25, 2008 at Department of Environmental Conservation, Central

Office, 625 Broadway, Public Assembly Rm. 129, Albany, NY; 5:00 PM - 8:00 PM, June 25, 2008 at Department of Environmental Conservation, Central Office, 625 Broadway, Public Assembly Rm. 129, Albany, NY; 5:00 PM - 8:00 PM, June 26, 2008 at Harrietstown Town Hall, Main St. and Lake Flower Ave., Saranac Lake, NY; 5:00 PM - 8:00 PM, June 30, 2008 at Dulles State Office Bldg., 1st Fl. Auditorium, 317 Washington St., Watertown, NY; and 5:00 PM - 8:00 PM, July 2, 2008 at Genesee Community College, College Dr., Conable Technology Bldg., Rm. T102, Batavia, NY.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Interpreter Service:** Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Text of proposed rule:** Existing Part 215 is repealed.

A new Part 215 is added as follows:

6 NYCRR Part 215, *Open Fires*

Section 215.1 *Definitions.*

(a) *Open Fire* - Any outdoor fire or outdoor smoke producing process from which air contaminants are emitted directly into the outdoor atmosphere. Open fires include burning in barrels or modifications thereof. Open fires do not include burning in outdoor furnaces or boilers that are used to heat buildings when the devices are actually used for such purpose.

(b) *Agricultural Land* - The land and on-farm buildings, equipment, manure processing and handling facilities, and practices that contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise, including a 'commercial horse boarding operation' and 'timber processing'. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other.

(c) *Camp Fire* - any outdoor open fire less than three feet in height, length and width or diameter.

(d) *Agricultural Waste* - Any waste from naturally grown products such as vines, trees and branches from orchards, leaves and stubble. Agricultural waste does not include pesticide containers, fertilizer bags, large plastic storage bags (including bags commonly known as "Ag bags"), offal, tires, plastic grain bags, and other plastic or synthetic materials.

(e) *Acquired Structure* - A structure donated or loaned from a property owner for the purpose of conducting fire training.

Section 215.2 *Prohibitions.*

Except as permitted by section 215.3 of this Part, no person shall burn, cause, suffer, allow or permit the burning of any materials in an open fire.

Section 215.3 *Exceptions and restricted burning.*

Burning in an open fire, provided it is not contrary to other law or regulation, will be allowed as follows:

(a) *Barbecue grills, maple sugar arches, and similar outdoor cooking devices when actually used for cooking or processing food.*

(b) *Small fires for cooking and camp fires provided that only charcoal or natural untreated wood is used as fuel and the fire is not left unattended until extinguished.*

(c) *On-site burning of agricultural wastes as part of a valid agricultural operation on contiguous agricultural lands larger than five acres actively devoted to agricultural or horticultural use, provided such waste is actually grown on those lands and such waste is capable of being fully burned within a 24-hour period.*

(d) *The use of liquid petroleum fueled smudge pots to prevent frost damage to crops.*

(e) *Ceremonial or celebratory bonfires where not otherwise prohibited by law, provided that only natural untreated wood or other agricultural products are used as fuel and the fire is not left unattended until extinguished.*

(f) *Small fires that are used to dispose of a flag or religious item, and small fires or other smoke producing process where not otherwise prohibited by law that are used in connection with a religious ceremony.*

(g) *Burning on an emergency basis of explosive or other dangerous or contraband materials by police or other public safety organization.*

(h) *Prescribed burns performed according to Part 194 of this Title.*

(i) *Fire training, including firefighting, fire rescue, and fire/arson investigation training, performed under applicable rules and guidelines of the New York State Department of State's Office of Fire Prevention and Control. For fire training performed on acquired structures, the structures must be emptied and stripped of any material that is toxic, hazardous or likely to emit toxic smoke (such as asbestos, asphalt shingles and vinyl siding or other vinyl products) prior to burning and must be at least 300*

feet from other occupied structures. No more than one structure per lot or within a 300 foot radius (whichever is bigger) may be burned in a training exercise.

(j) Individual open fires as approved by the Director of the Division of Air Resources as may be required in response to an outbreak of an animal disease upon request by the Commissioner of the Department of Agriculture and Markets.

(k) Individual open fires that are otherwise authorized under the environmental conservation law, or by rule or regulation of the Department.

6 NYCRR Part 191, Forest Fire Prevention

Sections 191.1 and 191.5 are repealed

Sections 191.2-191.4 are renumbered to be sections 191.1-191.3

6 NYCRR Part 621, Uniform Procedures

Subdivision (g) of section 621.1 is amended to read as follows:

(g) Air Pollution Control, ECL article 19, (implemented by 6 NYCRR Parts 201, 203, [215,] and 231): including construction and operation of a new emission source or a modification to an existing emission source of air contamination, and construction of indirect sources of air contamination [and restricted open burning for air pollution control purposes (Note: permits for restricted open burning for the purpose of forest fire control, under authority of section 9-1105 of the Environmental Conservation Law and 6 NYCRR Part 191, are not subject to this Part)];

**Text of proposed rule and any required statements and analyses may be obtained from:** Robert Stanton, P.E., Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8403, e-mail: 215fires@gw.dec.state.ny.us

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

**Public comment will be received until:** 5:00 p.m., July 10, 2008

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file. This rule must be approved by the Environmental Board.

#### Regulatory Impact Statement

##### STATUTORY AUTHORITY

The statutory authority for these regulations is found in the Environmental Conservation Law (ECL) Sections 1-0101, 3-0301, 9-0105, 9-1103, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 70-0707, 71-2103 and 71-2105. These sections include provisions for the civil and criminal enforcement of Article 19 of the ECL.

##### LEGISLATIVE OBJECTIVES

It is the declared policy of the state of New York, as pronounced by the Legislature in the ECL, to maintain a reasonable degree of purity of the air resources of the State consistent with the public health and welfare and the public enjoyment and the protection of physical property and other resources. That policy requires the use of all available practical and reasonable methods to prevent and control air pollution in the State of New York. The Department of Environmental Conservation (department) has the power, as provided for in the ECL, to formulate, adopt and promulgate, amend and repeal codes and rules and regulations for preventing, controlling or prohibiting air pollution in a manner consistent with that policy. In furtherance of that policy and the Legislature's objectives, the proposed rule revision will further limit toxic emissions and be protective of public health by prohibiting the open burning of residential solid waste and yard waste in all cities, villages and towns across the State. With this proposed rule, there are some exceptions to address the needs of rural agricultural communities, local fire departments (for fire training exercises), and law enforcement officials. Existing 6 NYCRR Part 215 only prohibits the burning of "rubbish" in cities, villages and towns with populations greater than 20,000 and burning of land clearing debris for construction and yard waste.

##### NEEDS AND BENEFITS

The department was granted specific powers by the Legislature to prevent forest fires in the state. In furtherance of these objectives, the proposed rule revisions to Part 191 clarify that mission and make it consistent with the revisions to Part 215. The elimination of the Part 191 permit scheme requires the deletion of the reference to it in Part 621. Part 191 will be eliminated because the original purpose of this rule (and the permit system associated with it) was to alert Forest Rangers in fire towers that the smoke from a planned fire was not a forest fire, and therefore did not require emergency response. The fire tower program no longer exists since more modern methods of forest fire detection have evolved.

Part 215 is being revised to update regulatory requirements in regard to open fires and open burning. The composition of the residential solid waste generated today differs significantly from 30 years ago when the current

Part 215 was promulgated. Plastics and other types of synthetic packaging of consumer products are a large part of today's waste stream. Smoke or emissions containing toxic compounds and particles is released into the air by the burning or combustion of plastics and other synthetic materials. The smoke from so-called burn barrels or backyard burning is often released from a smoldering fire, with little dispersion and at ground level, where people can easily breathe it. Exposure to this smoke may cause eye and nose irritation, coughing, nausea, headaches or dizziness. It may also trigger asthma attacks, aggravate heart and lung problems and increase the risk of other chronic health problems upon repeated exposure. The chance of developing health effects depends upon the type, amount and duration of exposure.<sup>1</sup>

In addition to the smoke, the ash produced may contain toxic compounds that persist in the environment and contaminate the soil. Open fires also have an effect on the safety of New Yorkers and their property. In a typical year, a significant cause of wildfires in New York State is burning debris from open fires. Finally, in addition to the recognized public health impact, the smoke and odors from backyard burning present a serious quality of life issue by unreasonably interfering with an individual's comfortable enjoyment of life or property. The department's regional offices receive numerous complaints regarding smoke and odors from backyard burning.

##### Inappropriate Fuels

The primary issue in the combustion of residential solid waste is inappropriate fuels including materials such as garbage, glossy or colored papers (e.g., Sunday comics), bleached papers, plastics, polystyrene (such as foam cups), natural or synthetic rubber, chemical and pressure-treated wood, heavy oils, asphalt, tar, etc. Heavy metals such as arsenic can be released in the smoke or remain in the ash when chromium-copper-arsenate pressure-treated wood is burned. Other toxic metals including lead, nickel and chromium may be also found in the ash depending upon the composition of the residential waste. Dioxins and related compounds can form when materials containing chlorine, such as plastics or wood treated with pentachlorophenol are burned.<sup>2</sup> These compounds are produced by the low temperatures and incomplete combustion which is typical of backyard burning. Obviously there are no controls on an open fire which can minimize the release of these compounds as is the case with municipal solid waste incinerators. In fact, a study conducted by USEPA, NYSDOH and the department determined that uncontrolled backyard burning of 10 pounds of trash a day produced as much air pollution as the burning of 400,000 pounds a day in a well-controlled waste incinerator.<sup>3</sup>

##### Potential Health Impacts from Exposure to Smoke from Open Fires

Smoke and ash from open fires contains several toxic compounds including dioxins, particulate matter (PM), polycyclic aromatic hydrocarbons (PAH), heavy metals, benzene, formaldehyde, styrene, hydrogen chloride, hydrogen cyanide, and hexachlorobenzene. A summary of the potential health effects from some of these compounds is presented in the following paragraphs.

##### Dioxin

Open burning is a major source of uncontrolled dioxin. According to the EPA, for the years 2002-2004, backyard burning accounted for 57 percent of the US emissions of dioxins and furans, both known carcinogens that persist in the human body and the environment. Studies have linked dioxin exposure to adverse reproductive and developmental effects, suppression of the immune system, disruption of hormonal systems, and cancer.<sup>4</sup> Dioxins are persistent and bioaccumulative compounds that remain in the environment and can build up in the food chain. Dioxins can accumulate in the fat found in meat, fish, and dairy products. Exposure to dioxin can occur when foods are eaten that have been contaminated by dioxin; for example, when backyard burning has contaminated fruits and vegetables grown in gardens or farm animals grazing upon contaminated feed or soil near burn barrels.

##### Particulate Matter (PM)

The 1997 EPA study evaluation of the emissions from the open burning of household waste in barrels found that PM emissions were significant (19 grams per kilogram of refuse burned) especially when compared to the emissions of a modern, well-controlled incinerator. Almost all of the PM emissions were <2.5 5m in diameter.<sup>5</sup> Due to their size, PM-2.5 particles can by-pass the filtering mechanisms of the human respiratory system and can travel deep in to the lungs. Toxic compounds such as PAHs can adsorb onto fine particulates.<sup>6</sup> Short-term affects from exposure to PM-2.5 include eye, nose and throat irritation, and can cause coughing, sneezing and shortness of breath. Further, short-term exposures can worsen existing medical conditions such as heart disease and asthma.<sup>7</sup> Long-term or chronic exposures to PM-2.5 can lead to bronchitis and increased risk of

lung cancer or heart disease. Exposure to particulate matter has been directly linked with a variety of health effects, including increased risks of cardiopulmonary diseases. This increase may result in additional emergency room visits and hospitalizations as well as increased school and work absenteeism. Children, the elderly, people with preexisting cardiovascular or respiratory diseases, such as asthma, and others who are active outdoors are at risk to exposures to PM-2.5.<sup>8</sup>

#### PAHs

PAHs are a group of naturally-occurring substances formed during the incomplete burning of coal, fuel oil, gas, wood, or other carbon-containing compounds. There are over 100 compounds in this pollutant group. PAHs are commonly found in particulate matter released from backyard burning. Some PAHs are believed to be human carcinogens.<sup>9</sup>

#### Carbon Monoxide

Exposures to low levels of carbon monoxide can cause serious health concerns to people with heart disease, including chest pain or limiting a person's ability to exercise.<sup>10</sup>

#### Benefits of the Proposed Rule

The primary benefit of the proposed rule, if promulgated, would be a significant improvement in health and quality of life for those impacted by smoke from a neighbor's burn barrel.

The benefit of revising Part 191 will be to eliminate a permit scheme that is no longer needed. The revised Part 215 bans outdoor burning, with some exceptions, thereby eliminating the need for the permits.

The benefit of revising Part 621 is to remove what would otherwise be a confusing, as well as obsolete, reference to Part 191.

#### COSTS

The following is an estimate of the costs to implement Part 215, Part 191 and Part 621. These costs are somewhat difficult to estimate since the implementation of these rules will have a financial affect only on the section of the general public which currently disposes of their solid waste by burning. Difficulty arises since costs of solid waste are sometimes included in the tax base of the community. Therefore, estimating is typically done by two methods, one being the cost to the individual who is disposing of his waste, the other being the cost to the community in which that individual lives.

#### Costs to the Individual:

For those who currently dispose of their household trash by burning it in an open fire, there will be some costs for proper disposal of their household refuse. Some individual households will choose to have their refuse picked up by a waste hauler at their homes. The cost of household refuse pickup varies, but typical amounts range from \$20.00 - \$80.00 per month. Other households will choose to drop off their refuse at the local landfill or transfer station. According to the department's Division of Solid and Hazardous Materials, a survey of rural counties across New York State found the average per bag (approximately 30 gallons) disposal rate at transfer stations ranged from \$1.00 to \$3.00 per bag. Assuming a two bag per week average, this represents a cost of \$104.00 to \$312.00 per year. Transfer stations may also charge an annual fee for a permit. This cost could be as much as \$100.00 per year. Combining all these costs gives us an average range of \$104.00 to \$412.00 per household per year.

#### Costs to the Community:

Most transfer stations are owned and run by municipalities (cities, towns and villages). This is due, for the most part, to the 6 NYCRR Part 360 regulations which were promulgated on December 15, 1988. These regulations required each county to be responsible for the management and disposal all municipal solid waste generated in their area. Most counties formed solid waste management associations and either built a landfill, built a series of transfer stations, or both. In turn, the municipalities which were now responsible for waste disposal would pay for the cost of disposal by raising taxes, charging fees at transfer stations, or both. For example, a rural community with a population of 1000 might expect their cost of transport and disposal of solid waste to increase by as much as \$12,155.00 per year. This is based on data provided by the Division of Solid and Hazardous Materials and assumes the following worst case factors: one resident in three currently uses a burn barrel to dispose of their waste; an average person produces four pounds of solid waste a day; and the cost of transport and disposal of solid waste is \$50.00 per ton. Comparing these minimal garbage disposal costs to the costs associated with burning barrels such as the degradation of air quality, accidental forest fires, and foremost, the possible public health effects and loss of quality of life, the costs seem even more inconsequential.

There will likely be a need for more employees (or employee hours) at rural solid waste transfer stations and at private waste haulers. Rural solid waste transfer stations are usually small facilities where residents bring

their refuse, leaves, brush and recyclables. They typically consist of a few roll-off containers into which residents deposit their wastes. When the containers are full, they are carted off to a permitted, composite lined solid waste landfill.

Due to the potential increase in the amount of household waste, brush, and land clearing debris, communities may need to upgrade these transfer facilities. Most rural transfer stations are located on adequate land for expansion; many of them being located at a former landfill which was closed under 6 NYCRR Part 360 regulations. Upgrades would primarily consist of large trash compactors for household refuse, and wood chippers or tub grinders for brush and land clearing debris. Some communities currently rent tub grinders on a weekly or monthly basis to reduce brush/limbs to wood chips or mulch. These products can in turn be given back to the residents or used in municipal landscaping projects.

There are limited exemptions for agricultural operations which should mitigate some of the costs. These are for the burning of agricultural wastes generated on-site as part of a valid agricultural operation on lands which are devoted to agricultural or horticultural use.

In addition, societal savings of health related costs in affected rural areas should more than make up for the increased costs of solid waste disposal. A single hospitalization for asthma outside of New York City costs over \$8,900 and the total cost for asthma hospitalizations amounted to over \$284 million in 2002.<sup>11</sup> This does not account for other societal costs related to asthma such as medications, lost work time, etc. Even modest reductions in the rate of asthma incidence would amount to savings of millions of dollars as well as the increased quality of life for asthma sufferers.

#### LOCAL GOVERNMENT MANDATES

No additional record keeping, reporting or other requirements would be placed upon local governments if the revisions to Part 191, Part 215, and Part 621 are promulgated. There will be less paperwork on the part of local government entities that now process open burning permits.

#### DUPLICATION

No duplication or overlap exists with other rules. The changes to Parts 191 and 215 will serve to eliminate regulatory overlap.

#### ALTERNATIVES

The primary alternative is to leave the scheme as is, that is to do nothing. Another alternative is to merely lower the population threshold that would allow open burning. A third alternative would be to change the threshold to one of population density. None of these alternatives would be as protective of both the environment and human health as the proposed changes. Several municipalities do have open burning restrictions. The towns of Depew and Lancaster in Western New York and the county of Monroe (Rochester) have bans on all open burning. However, a state regulation insures consistency across the state (although municipal/county bans can be more stringent) and, when it comes to crafting an air pollution regulation, the Division of Air Resources has a higher level of expertise than municipalities. Other states such as New Jersey have regulations which ban "open burning for the purpose of disposal". We prefer an option which does not require "determination of intent". A ban on all open burning is easier to understand and enforce. In addition, the department is charged under Article 19 of the ECL with the task of setting standards that are protective of the public health.

#### FEDERAL STANDARDS

There are no applicable federal regulations pertaining to open burning.

#### COMPLIANCE SCHEDULE

Compliance will be required upon the effective date of the rule, which is 30 days after filing with the Department of State.

<sup>1</sup> NYS DOH, "Does Burning Trash May It Disappear?" <http://www.health.state.ny/environmental/outdoors/air/trash.htm>

<sup>2</sup> "Toxicological Profile for Chlorinated Dibenzo-p-Dioxins", U.S. Department of Health and Human Services, Public Health Service, Agency for Toxic Substances and Disease Registry, December 1998, Page 3.

<sup>3</sup> Lemieux, P.M. Evaluation of Emissions from the Open Burning of Household Waste in Barrels, Vol. 1; Technical Report EPA-600/R-97-134a (NTIS PB98-127343); U.S. Government Printing Office: Washington, D.C., November 1997.

<sup>4</sup> US EPA, "Backyard Burning," <http://www.epa.gov/msw/backyard/health.htm>

<sup>5</sup> Lemieux, P.M. Evaluation of Emissions from the Open Burning of Household Waste in Barrels, Vol. 1; Technical Report EPA-600/R-97-134a (NTIS PB98-127343); U.S. Government Printing Office: Washington, D.C., November 1997, page 2.

<sup>6</sup> "Health Effects of Wood Smoke", Washington State Department of Ecology, August 2004, page 8.

<sup>7</sup> "Fine Particles Questions and Answers", NYSDOH, [www.health.state.ny.us/environmental/indoors/air/pm\\_q\\_a.htm](http://www.health.state.ny.us/environmental/indoors/air/pm_q_a.htm), page 1. Downloaded June 15, 2007.

<sup>8</sup> "Fine Particle (PM 2.5) Designations, Frequent Questions", EPA, [www.epa.gov/pmdesignations/faq/htm](http://www.epa.gov/pmdesignations/faq/htm), page 2.

<sup>9</sup> US EPA, "Backyard Burning," <http://www.epa.gov/msw/backyard/health.htm>

<sup>10</sup> "Health and Environmental Impacts of CO", USEPA, March 6, 2007 (obtained at [www.epa.gov/air/urbanair/co/hlth1.htm](http://www.epa.gov/air/urbanair/co/hlth1.htm) | on June 25, 2007).

### **Regulatory Flexibility Analysis**

The purpose of revising Part 191 and Part 215 is to update regulatory requirements in regard to open fires and open burning. The need to update is based on the changes in both the type of materials burned in such fires and the increase in scientific knowledge about the toxic materials released into the air by the combustion of those materials. Part 621 is being revised to remove a reference that will become obsolete with the changes in the other two parts.

#### **EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS**

The revisions to Part 621 will have no effect on small business because it is solely to remove a reference that becomes obsolete by the other revisions. The revisions to Part 191 will have no effect on small business generally. To the extent that pre-printed permits forms are used for Part 191 permits, the one possible exception to this is that there will be less demand for printing services.

The revisions to Part 215 will affect small businesses involved in agriculture, construction, and waste haulers. Agricultural operations that produce rubber wastes (from old tires), plastic wastes and paper wastes that are now burned in an open fire will need to expend funds to properly dispose of those materials. Any construction involving land clearing may be affected, as the waste from grubbing and land clearing will no longer be allowed to be burned in an open fire, but will need to be disposed of by other methods such as recycling, placement in a sanitary landfill, or burned in a permitted municipal waste incinerator. Some wastes produced from land clearing operations may be turned into salable products such as mulch, firewood and wood pellets. Waste haulers may need to hire additional staff to deal with increased demand for their services, especially in rural areas. No other businesses will be affected since they (any commercial businesses) are already banned from open burning under the existing rule.

Local governments may need to hire additional employees for their transfer stations and there will be increased landfill costs associated with final disposal of a somewhat larger waste stream. These additional costs should be offset by the additional revenues which will be generated from fees at the local transfer stations. There may be some one-time costs associated with upgrading these transfer stations to be able to handle the additional waste stream.

#### **COMPLIANCE REQUIREMENTS**

For the revisions to Part 191, Part 215, and Part 621 there are no reporting or recordkeeping requirements for small businesses or local governments.

#### **PROFESSIONAL SERVICES**

The revisions to Part 215 may cause some local governments to require engineering planning and design for the upgrading of their transfer stations and related solid waste facilities sooner than they may would otherwise need. The revisions to Part 191 and Part 621 will not require any professional services on the part of local governments. Small businesses will not require any professional services to comply with any of the proposed rules.

#### **COMPLIANCE COSTS**

The following is an estimate of the costs to implement Part 215, Part 191 and Part 621. It is being done in this manner since these rules must be implemented together. These costs are somewhat difficult to estimate since the implementation of these rules will have a financial affect only on the section of the general public which currently disposes of their solid waste by burning. Difficulty arises since costs of solid waste are sometimes included in the tax base of the community. Therefore, estimating is typically done by two methods, one being the cost to the individual who is disposing of his waste, the other being the cost to the community in which that individual lives.

#### **Costs to the Community:**

Most transfer stations are owned and run by municipalities (cities, towns and villages). This is due, for the most part, to the 6 NYCRR Part 360 Regulations which were promulgated on December 15, 1988. These regulations required each county to be responsible for the management and

disposal all municipal solid waste generated in their area. Most counties formed solid waste management associations and either built a landfill, built a series of transfer stations, or both. In turn, the municipalities which were now responsible for waste disposal would pay for the cost of disposal by raising taxes, charging fees at transfer stations, or both. For example, a rural community with a population of 1000 might expect their cost of transport and disposal of solid waste to increase by as much as \$12,155.00 per year. This is based on data provided by the Division of Solid and Hazardous Materials and assumes the following worst case factors: one resident in three currently uses a burn barrel to dispose of their waste; an average person produces four pounds of solid waste a day; and the cost of transport and disposal of solid waste is \$50.00 per ton. Comparing these minimal garbage disposal costs to the costs associated with burning barrels such as the degradation of air quality, accidental forest fires, and foremost, the possible public health effects and loss of quality of life, the costs seem even more inconsequential.

#### **MINIMIZING ADVERSE IMPACT**

The express terms contain limited exemptions for agriculture. These are for the burning of agricultural wastes generated on-site as part of a valid agricultural operation on lands which are devoted to agricultural or horticultural use.

#### **SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION**

Small businesses and local governments will have the opportunity to comment on this proposed rule and speak at public hearings. The State Administrative Procedures Act requires agencies to provide public and private interests in rural areas the opportunity to participate in the rule making process and/or public hearings. The Department will hold public hearings on Part 215 in upstate areas and will notify interested parties of this proposed rulemaking.

#### **ECONOMIC AND TECHNOLOGICAL FEASIBILITY**

There are no technological or economic impediments which would interfere with the revisions to Parts 191, 215, and 621. The termination of the Part 191 permit scheme would eliminate paperwork. Although there are currently limits on the feasibility of recycling some types of agricultural waste, the North East Waste Management Officials Association (NEWMOA) has recently received a grant to facilitate a solution. NEWMOA is forming a work group (with the help of Cornell Cooperative Extension) to assist in the development and implementation of a regional project to conduct training and provide technical assistance to increase recycling of agricultural plastics in rural areas of four Northeastern states: Maine, New Hampshire, New York and Vermont. There should be no other affect on the limitations and feasibility issues regarding recycling plants and landfills.

#### **Rural Area Flexibility Analysis**

The purpose of revising Part 215 is to update regulatory requirements in regard to open fires and open burning. The need to update is based on the changes in both the type of materials burned in such fires and the increase in scientific knowledge about the contaminants released into the air by the combustion of those materials.

The purpose of revising Part 191 is to repeal outdated portions of the rule and portions that will become redundant if Part 215 is revised as recommended.

The purpose of revising Part 621 is to remove references to the permits required by current versions of Parts 191 and 215 that will become outdated if those rules are revised as recommended.

#### **TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED**

Part 215 applies statewide. The proposed revision may have a greater impact in rural areas. Although there are no firm statistics, the Department believes that many rural residents do not properly dispose of their household trash but instead burn the trash in open fires, typically in a 55-gallon drum known colloquially as a "burn barrel."

Section 191.1 applies in "the following areas, excepting therein within the corporation tax limits of any city or village; or in any town with a total town population, including incorporated or unincorporated areas, of greater than 10,000 people; all of Columbia County; all of Dutchess County except the town of Poughkeepsie; the town of New Bremen in Lewis County; all of Orange County; all of Putnam County; all of Rensselaer County; the towns of Brasher, Hermon, Lawrence, Russell and Stockholm in St. Lawrence County; the towns of Galway, Greenfield, Milton, Moreau, Northumberland, Providence, Saratoga and Wilton, and the city of Saratoga Springs outside the corporation tax limits, all in Saratoga County; the towns of Bethel, Callicoon, Cochection, Delaware, Fallsburg,

Forestburg, Fremont, Highland, Liberty, Lumberland, Mamakating, Thompson and Tusten, all in Sullivan County.”

Repealing this section will have no impact on local municipalities since the activity needing the 191 permit is, for the most part, being banned by the new Part 215. Those open burning activities that will continue to be authorized by the new Part 215 (campfires, ceremonial fires, explosive demolition) are not directly regulated by current ECL or 6NYCRR statutes. Municipalities may need to revise their current statutes and ordinances to further regulate those authorized activities by the new Part 215 but most will have included these types of burning in their current regulations. Implementing the new Part 215 will simplify the enforcement of open burning by making most traditional debris fires illegal. Department police officers (ECOs and Rangers) as well as state police, sheriff deputies and local police are already authorized by State Fire Code to take action (issue a ticket or make an arrest) as they deem appropriate. Fire and local code enforcement officers will also have authority to demand an open debris fire be extinguished since State Fire Code prohibits open fires that are prohibited by State laws and regulations.

#### COMPLIANCE REQUIREMENTS

The changes that the Department is proposing will establish a general ban on open burning with some limited exceptions. This means that no one can dispose of their trash by burning it in an open fire anywhere in the state. Currently residents of towns with populations under 20,000 are not subject to any statewide prohibition that would prevent them from burning rubbish; under the new rule this practice would be banned.

The revisions to Part 191 and Part 215 will eliminate the need for permits for those types of open fires that will still be allowed.

#### COSTS

The following is an estimate of the costs to implement Part 215, Part 191 and Part 621. It is being done in this manner since these rules must be implemented together. These costs are somewhat difficult to estimate since the implementation of these rules will have a financial affect only on the section of the general public which currently disposes of their solid waste by burning. Difficulty arises since costs of solid waste are sometimes included in the tax base of the community. Therefore, estimating is typically done by two methods, one being the cost to the individual who is disposing of his waste, the other being the cost to the Community in which that individual lives.

##### Costs to the Individual:

For those who dispose of their household trash by burning it in an open fire and will no longer be able to do so under the new rule, there will be some costs for proper disposal of their household refuse. Some individual households will choose to have their refuse picked up by a waste hauler at their homes. The cost of household refuse pickup varies, but typical amounts range from \$20.00 - \$80.00 per month. Other households will choose to drop off their refuse at the local landfill or transfer station. According to the Departments' Division of Solid and Hazardous Materials, a survey of rural counties across New York State found the average per bag (approximately 30 gallons) disposal rate at transfer stations ranged from \$1.00 to \$3.00 per bag. Assuming a two bag per week average, this represents a cost of \$104.00 to \$312.00 per year. Transfer stations may also charge an annual fee for a permit. This cost could be as much as \$100.00 per year. Combining all these costs gives us an average range of \$104.00 to \$412.00 per household per year.

##### Costs to the Community:

Most transfer stations are owned and run by municipalities (cities, towns and villages). This is due, for the most part, to the 6 NYCRR Part 360 Regulations which were promulgated on December 15, 1988. These regulations required each county to be responsible for the management and disposal all municipal solid waste generated in their area. Most counties formed solid waste management associations and either built a landfill, built a series of transfer stations, or both. In turn, the municipalities which were now responsible for waste disposal would pay for the cost of disposal by raising taxes, charging fees at transfer stations, or both. For example, a rural community with a population of 1000 might expect their cost of transport and disposal of solid waste to increase by as much as \$12,155.00 per year. This is based on data provided by the Division of Solid and Hazardous Materials and assumes the following worst case factors: one resident in three currently uses a burn barrel to dispose of their waste; an average person produces four pounds of solid waste a day; and the cost of transport and disposal of solid waste is \$50.00 per ton. Comparing these minimal garbage disposal costs to the costs associated with burning barrels such as the degradation of air quality, accidental forest fires, and foremost, the possible public health effects and loss of quality of life, the costs seem even more inconsequential.

The proposed rule allows exemptions for agricultural materials. These exempted materials would include wastes which are actually grown on agricultural land such as cover crops, grape vines and orchard trimmings. However, agricultural operations that currently burn plastic materials will now be required to dispose of those materials properly. Materials that fall into this category are pesticide containers, grain bags, fertilizer bags, “ag” bags (large plastic silage bags), and other packaging. Some of these materials cannot be recycled due to contamination (by the materials they contained, such as pesticides) or to the limitations of local recycling programs which may take only certain kinds of plastic (e.g., only number one or only number two plastic). For some agricultural operations these may represent a significant amount of material, potentially hundreds or even thousands of pounds of waste material.

#### MINIMIZING ADVERSE IMPACTS

There are limited exemptions for agricultural operations which should mitigate some of the costs. These are for the burning of agricultural wastes generated on-site as part of a valid agricultural operation on lands which are devoted to agricultural or horticultural use.

In addition, societal savings of health related costs in affected rural areas should more than make up for the increased costs of solid waste disposal. A single hospitalization for asthma outside of New York City cost over \$8,900 and the total cost for asthma hospitalizations amounted to over \$284 million in 2002. This does not account for other societal costs related to asthma such as medications, lost work time, etc. Even modest reductions in the rate of asthma incidence would amount to savings of millions of dollars as well as the increased quality of life for asthma sufferers.

#### RURAL AREA PARTICIPATION

The State Administrative Procedures Act requires agencies to provide public and private interests in rural areas the opportunity to participate in the rule making process and or public hearings. The Department will hold public hearings on Part 215 in upstate areas and will notify interested parties of this proposed rulemaking.

#### Job Impact Statement

The purpose of revising Part 215 is to update regulatory requirements in regard to open fires and open burning. The need to update is based on the changes in both the type of materials burned in such fires and the increase in scientific knowledge about the toxic materials released into the air by the combustion of those materials.

The changes that the Department is proposing will establish a general ban on open burning with some limited exceptions. Since household trash will no longer be able to be burned by homeowners in an open fire there may be an increased opportunity for jobs in the solid waste disposal industry.

The purpose of revising Part 191 is to repeal outdated portions of the rule and portions that will become redundant if Part 215 is revised as recommended. The purpose of revising Part 621 is to remove references to the permits required by current versions of Parts 191 and 215 that will become outdated if those rules are revised as recommended.

#### NATURE OF IMPACT

The impact will be statewide. We have no firm number of households or individuals that may be impacted by the rule, it is estimated, however, based on an extrapolation of a study done in St. Lawrence County<sup>1</sup>, the number of households that burn their waste is thought to be in the tens of thousands. Rather than being burned, most of this waste will be placed in a landfill.

There is a potential increase in available employment associated with the proper disposal of solid waste. There will likely be a need for more employees (or employee hours) at rural solid waste transfer stations and at private waste haulers. Rural solid waste transfer stations are usually small facilities where residents bring their refuse, leaves, brush and recyclables. They typically consist of nothing more than a few roll-off containers into which residents deposit their wastes. When the containers are full, they are carted off to a permitted, composite lined solid waste landfill.

Due to the potential increase in the amount of household waste, brush, and land clearing debris, communities may need to upgrade these transfer facilities. A recent review of the Department's Division of Solid and Hazardous Materials records indicated that most rural transfer stations are located on adequate land for expansion; many of them being located at a former landfill which was closed under 6 NYCRR Part 360 Regulations. Upgrades would primarily consist of large trash compactors for household refuse, and wood chippers or tub grinders for brush and land clearing debris. Some communities currently rent tub grinders on a weekly or monthly basis to reduce brush/limbs to wood chips or mulch. These prod-

ucts can in turn be given back to the residents or used in municipal landscaping projects.

The Department currently has a program through which communities may receive Municipal Solid Waste Grants. These grants will reimburse fifty percent of the purchase price of wood chippers, tub grinders, or additional recycling equipment. There should be no additional costs to municipalities as any additional services they provide will be covered by the additional user fees. There may be a one-time administrative and/or engineering cost associated with upgrading the transfer stations. According to the Division of Solid and Hazardous Materials, there is no shortage of landfill space in the state, so there will be no impact on landfills.

The repeal of Sections 191.1 and 191.5 and the changes to Part 621 will eliminate permits currently required to conduct open burning. However since the revisions to Part 215 would ban most of these fires, there should be no job impacts due to the Part 191 and 621 revisions.

#### CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

While there may be an increased opportunity for jobs handling solid waste, it is difficult to determine the exact number of jobs. The amount of the increase in solid waste to be handled is thought to be a small percentage of the existing amount.

##### REGIONS OF ADVERSE IMPACT

None.

##### MINIMIZING ADVERSE IMPACT

No adverse impacts.

##### SELF-EMPLOYMENT OPPORTUNITIES

There may be self-employment opportunity involved with handling solid waste; it is difficult to determine the exact number of jobs.

<sup>1</sup> Studies were done by staff of the St. Lawrence County Planning Office in November 1996, November 2002 and November 2006. A Summary Report can be downloaded at <http://www.co.st-lawrence.ny.us/Planning/OpenBurningAwareness/OpenBurningSummary-April 2006.pdf>

## REVISED RULE MAKING HEARING(S) SCHEDULED

### New York State CO<sub>2</sub> Budget Trading Program

I.D. No. ENV-43-07-00028-RP

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

**Revised action:** Addition of Part 242, and amendment of Part 200 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 11-0303, 11-0305, 11-0535, 13-0105, 15-0109, 15-1903, 16-0111, 17-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 24-0103, 25-0102, 34-0108, 49-0309, 71-2103 and 71-2105; Energy Law, sections 3-101 and 3-103; Public Authorities Law, sections 1850, 1851, 1854 and 1855

**Subject:** New York State CO<sub>2</sub> Budget Trading Program. These regulations apply statewide to fossil fuel-fired electric generating units.

**Purpose:** To reduce CO<sub>2</sub> emissions from fossil fuel-fired electric generating sources statewide to counter the threat of a warming climate. The CO<sub>2</sub> Budget Trading Program will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

**Public hearing(s) will be held at:** 1:00 p.m., June 9, 2008 at Department of Environmental Conservation, Region 1, 50 Circle Rd., Conference Rm., Basement Rm. #002 A/B, Stony Brook, NY; 2:00 p.m., June 9, 2008 at Department of Environmental Central Office, 625 Broadway, Public Assembly Rm. 129, Albany, NY.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Interpreter Service:** Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Substance of revised rule:** Part 242 establishes the New York State CO<sub>2</sub> Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of carbon dioxide (CO<sub>2</sub>), a greenhouse gas (GHG), from CO<sub>2</sub> Budget sources in an economically efficient manner.

Part 242 establishes emission budgets for CO<sub>2</sub>. Part 242 establishes a trading program by creating and allocating allowances that are limited authorizations to emit up to one ton of CO<sub>2</sub> in each control period. Affected sources are required to hold for compliance deduction, at the respective allowance transfer deadlines, the tonnage equivalent to the emissions at the source for the control period immediately preceding such deadline.

For Part 242, the first control period commences on January 1, 2009 and concludes on December 31, 2011. Subsequent control periods begin on January 1st and conclude on the December 31st three years later. Part 242 applies to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sells or uses any amount of electricity.

Part 242 includes a limited exemption provision that allows units otherwise affected by the regulation to be exempt from nearly all of the reporting, permitting and allowance compliance requirements. A limited exemption is available to industrial units that restrict the supply of the unit's electrical output to the grid during a control period to less than 10 percent of the gross generation of the unit.

Part 242 requires each CO<sub>2</sub> budget unit to have a CO<sub>2</sub> authorized account representative (AAR) who shall be responsible for, among other things, complying with the CO<sub>2</sub> budget permit requirements, the monitoring requirements, the allowance provisions, and the recordkeeping and reporting requirements. The owner and/or operator of the unit may also designate an alternate CO<sub>2</sub> AAR to perform the above duties. The CO<sub>2</sub> Budget Trading Program was designed to allow for the use of agents that can make electronic submissions on behalf of the AAR and Alternate AAR. If the CO<sub>2</sub> budget source is also subject to the CAIR NOx Ozone Season Trading Program, CAIR NOx Annual Trading Program, or CAIR SO<sub>2</sub> Trading Program then, for a CO<sub>2</sub> Budget Trading Program compliance account, this natural person shall be the same person as the alternate CAIR designated representative under such programs. If the CO<sub>2</sub> budget source is also subject to the Acid Rain Program, then for a CO<sub>2</sub> Budget Trading Program compliance account, this natural person shall be the same person as the alternate designated representative under the Acid Rain Program.

In order to meet the necessary permit requirements, the authorized account representative of each CO<sub>2</sub> budget unit shall submit a complete application for a facility operating permit or a modification to an existing permit in accordance with the provisions of 6 NYCRR Parts 201 and 621. The CO<sub>2</sub> AAR shall submit to the department a compliance certification report for each control period by March 1st immediately following the relevant control period.

The Statewide CO<sub>2</sub> Budget Trading Program base budget is 64,310,805 tons per year for the first two control periods (2009-2011 and 2012-2014). The base budget decreases as follows: to 62,703,035 tons in 2015, to 61,095,265 tons in 2016, to 59,487,495 tons in 2017 and to 57,879,725 tons per year for 2018 and beyond. By January 1, 2009, the department or its agent will record in the energy efficiency and clean technology account the CO<sub>2</sub> allowances for all allocation years.

The department will allocate most of the CO<sub>2</sub> Budget Trading Program base budget to the energy efficiency and clean energy technology account. The New York State Energy Research and Development Authority (NYSERDA) will administer the energy efficiency and clean technology account so that allowances will be sold in an open and transparent allowance auction or auctions. The proceeds of the auction or auctions will be used to promote the purposes of the energy efficiency and clean technology account and for administrative costs associated with the CO<sub>2</sub> Budget Trading Program. The auction will be carried out to achieve the following objectives to the extent practicable: achieve fully transparent and efficient pricing of allowances; promote a liquid allowance market by making entry and trading as easy and low-cost as possible; be open to participation for bidding by any individual or entity that meets reasonable minimum financial requirements; monitor for and guard against the exercise of market power and market manipulation; be held as frequently as is needed to achieve design objectives; avoid interference with existing over-the-counter allowance markets; align well with wholesale energy and capacity markets; and be designed to not act as a barrier to efficient investment in existing or new electricity generating sources.

New York has agreed to specific design elements of the auction. These include: reserve price, auction structure and format, allowance sale schedule, participation, unsold allowances, notice of auctions, monitoring, and auction results.

The Reserve Price represents the price below which no allowances will be sold at the auction. It will be used to mitigate the potential for auction prices to clear significantly below current market prices, due to tacit or

explicit collusion, weak competition, or to maintain a minimum rate of progress in reducing emissions below business as usual. The Department and the Authority will disclose the Reserve Price before every auction.

The hybrid reserve price mechanism includes two components: 1) a Minimum Reserve Price (MRP) of \$1.86 (adjusted for the Consumer Price Index); and 2) a Current Market Reserve Price (CMRP) that is 80 percent of the Current Market Price of a CO<sub>2</sub> Allowance for the particular allowance vintage year. The reserve price for each auction will be the higher of the Minimum Reserve Price or Current Market Reserve Price.

The first component of the hybrid reserve price mechanism, the Minimum Reserve Price of \$1.86, was established based on the ICF International's Integrated Planning Model. Some of the critical program impacts evaluated with the model include CO<sub>2</sub> emission reductions achieved, projected CO<sub>2</sub> allowance prices, and projected impacts on electricity prices. According to the model, the projected CO<sub>2</sub> allowance price under the selected RGGI program design is \$2.32/ton (2009 dollars) at the beginning of the Program in 2009. Because the modeled value of \$2.32 is the expected Current Market Price for the first auction, it was determined that \$1.86, or 80 percent of the modeled value of \$2.32, will be Minimum Reserve Price.

The second component of the hybrid reserve price mechanism, the Current Market Reserve Price, is 80 percent of the Current Market Price of a CO<sub>2</sub> Allowance for the particular allowance vintage year. A volume-weighted average of market transactions will be used to produce an estimate of the Current Market Price.

All unsold allowances will be available for sale in auctions where the reserve price in effect is greater than the Minimum Reserve Price. Since unsold allowances may exist at the end of the first control period, the Department will decide whether to retire any unsold allowances from the first control period or to roll these allowances into auctions during the second control period.

The department will also include a voluntary renewable energy market and long term contract set-aside allocation. Accordingly, the department shall allocate 700,000 and 1,500,000 tons to the voluntary renewable energy market and long term contract set-aside accounts, respectively, from the CO<sub>2</sub> Budget Trading Program annual base budget.

The department may award early reduction allowances to a CO<sub>2</sub> budget source for reductions in the CO<sub>2</sub> budget source's CO<sub>2</sub> emissions (inclusive of all emissions from the CO<sub>2</sub> budget units at the CO<sub>2</sub> budget source) that are achieved by the source during the early reduction period (2006, 2007 and 2008). Total facility shutdowns or reductions that result from enforcement actions shall not be eligible for early reduction allowances. Early reductions during the control period will be demonstrated against the baseline period (2003, 2004 and 2005).

The department will establish one CO<sub>2</sub> compliance account for each CO<sub>2</sub> budget source. Deductions of allowances for compliance purposes will be made from the compliance account. Allowances may be banked without discount until deducted for compliance. The CO<sub>2</sub> AAR may specify the allowances by serial number to be deducted for compliance purposes in the compliance certification report or utilize the first in, first out protocols in the regulation. In order to meet the source's budget emissions limitation for the control period immediately preceding, CO<sub>2</sub> allowances must be submitted for recordation in a unit's compliance account by midnight of March 1st. After making the deductions for compliance, if a unit has excess emissions the department will deduct from the source's compliance account, allowances allocated for a subsequent control period, allowances equal to three times the unit's excess emissions. If the source has insufficient CO<sub>2</sub> allowances to cover three times the number of allowances in its compliance account, the source shall be required to immediately transfer sufficient allowances into its compliance account.

Part 242 will provide for the award of CO<sub>2</sub> offset allowances to sponsors of CO<sub>2</sub> emissions offset projects or CO<sub>2</sub> emission credit retirements that have reduced or avoided atmospheric loading of CO<sub>2</sub>, CO<sub>2</sub> equivalent (a metric measure used to compare the emissions from various greenhouse gases based upon their global warming potential) or sequestered carbon as demonstrated in accordance with the offset consistency application and monitoring and verification report requirements of the program. Offsets can be obtained from eligible landfill methane capture and destruction projects, reduction in emissions of sulfur hexafluoride, sequestration of carbon due to afforestation, reduction or avoidance of CO<sub>2</sub> emissions from natural gas, oil or propane end-use combustion due to end-use energy efficiency, and from avoided methane from agricultural manure management operations. CO<sub>2</sub> retirements include the permanent retirement of GHG allowances or credits issued pursuant to any governmental mandatory carbon constraining program outside of the United States that

places a specific tonnage limit on GHG emissions, or certified GHG emissions reduction credits issued pursuant to the United Nations Framework Convention on Climate Change (UNFCCC) or protocols adopted through the UNFCCC process.

For CO<sub>2</sub> offset allowances, the number of CO<sub>2</sub> offset allowances that are available to be deducted for compliance with a CO<sub>2</sub> budget source's CO<sub>2</sub> budget emissions limitation for a control period may not exceed the number of tons representing 3.3 percent of the CO<sub>2</sub> budget source's CO<sub>2</sub> emissions for that control period. If the department determines that there has been a stage one trigger event, five percent will be allowed and if the department determines that there has been a stage two trigger event, offset up to 10 percent will be allowed. A stage one trigger event is the occurrence of any 12 month period that completely transpires following the market settling period and is characterized by an average CO<sub>2</sub> allowance price that is equal to or greater than the stage one threshold price (\$7.00 adjusted annually by the consumer price index). A stage two trigger event is the occurrence of any 12 month period that completely transpires following the market settling period and is characterized by an average CO<sub>2</sub> allowance price that is equal to or greater than the stage two threshold price (\$10.00 adjusted annually by the consumer price index plus two percent).

Part 200 cites the portions of Federal statute and regulations that are incorporated by reference into Part 242.

**Substantial revisions were made in sections:** 242-1.2(b)(3), (5), (7), (11), (14)-(16), (24), (38), (41)-(43), (55), (58), (59), (63), (66), (69), (76), (80), (81), 242-1.4(b)(1), 242-1.5(a)(1), 242-3.2, 242-3.3(1), 242-5.3(a)(3)(i), (ii), (d)(2), (3), (3)(ii)-(iv), (4)-(6), 242-6.4(c), 242-6.5(a), (a)(3), (c)(2)(i), (ii), 242-6.8(b), 242-8.1, (a)(1), (c)(3), 242-8.2(c), 242-8.6(a), (b), 242-8.7, 242-8.8(g), 242-10.3(a)(2), (g), 242-10.4(c)(3), (d), 242-10.7(a)(1), (2), (c)(3), (d) and (e).

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Michael P. Sheehan, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3261, (518) 402-8396, e-mail: 242rggi@gw.dec.state.ny.us

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

**Public comment will be received until:** 10 days after the last public hearing.

**Additional matter required by statute:** Pursuant to article 8 of the State Environmental Quality Review Act, a short environmental assessment form, a positive declaration and a draft generic environmental impact statement are on file. (The Supplemental DGEIS is currently being prepared.) A coastal assessment form is also on file. This rule must be approved by the Environmental Board.

#### **Revised Regulatory Impact Statement**

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO<sub>2</sub>) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.<sup>1</sup> In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO<sub>2</sub> Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The statutory authority to promulgate Part 242 in the State derives primarily from the Department's obligation to prevent and control air pollution, as set out in the Environmental Conservation Law (ECL) at Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 71-2103, 71-2105. The Department's obligation to preserve and protect the other natural resources and public health in the State as it relates to climate change extends beyond the control of air pollution, however, as set out in ECL Sections 11-0303, 11-0305, 11-0535, 13-0105, 15-0109, 15-1903, 16-0111, 17-0303, 24-0103, 25-0102, 34-0108, and 49-0309. The promulgation of the Program is also consistent with the Department's obligations under Energy Law 3-101 and Energy Law 3-103. The general powers of the New York State Energy Research and Development Authority (NYSERDA) that are relevant to the Program's ability to sell allowances in a transparent auction are set forth in the Public Authorities Law Sections 1850, 1851, 1854 and 1855.

Mitigating the impacts of New York's warming climate represents one of the most pressing environmental challenges for the State, the nation and the world. Extensive scientific work demonstrates the need for immediate world-wide action to reduce emissions from burning fossil fuels, as well as

the great benefits that will accrue if the emissions are reduced through programs like RGGI. This section outlines the Department's analysis of the needs and the considerable benefits of the Program.

A naturally occurring greenhouse effect has regulated the earth's climate system for millions of years. Solar energy from the sun that reaches the surface of the earth is radiated back out into the atmosphere as long wave or infrared radiation. CO<sub>2</sub> and other naturally occurring GHGs trap heat in our atmosphere, maintaining the average temperature of the planet approximately 50 degrees Fahrenheit (°F) above what it would be otherwise. An enhanced greenhouse effect, and associated climate change, results as large quantities of anthropogenic GHGs, especially CO<sub>2</sub> from the burning of fossil fuels, are added to the atmosphere.

Atmospheric concentrations of CO<sub>2</sub> and other GHGs have substantially increased since the mid-1700s due to human activities. In addition, ice core samples spanning thousands of years have proven that CO<sub>2</sub> concentrations far exceed pre-industrial values. These global increases in CO<sub>2</sub> concentration are due primarily to fossil fuel use and land-use change.<sup>2</sup>

While there is strong evidence that the climate is warming, there is also clear scientific consensus that anthropogenic emissions of CO<sub>2</sub> from the burning of fossil fuels are contributing to observed warming of the planet. The evidence comes from direct measurements of rising surface air and subsurface ocean temperatures, increases in sea levels, retreating glaciers and changes to many physical and biological systems.

Scientists have already observed significant warming in New York's climate due in part to increased concentrations of GHGs in the atmosphere.<sup>3</sup> Since 1970, the Northeast United States has been warming at a rate of 0.5°F per decade. Winter temperatures have risen even faster, at a rate of 1.3°F per decade from 1970 to 2000. Temperature increases in the coastal areas of the state have been more dramatic. In summary, scientists have concluded that the New York climate has already begun migrating south, taking on the characteristics of the climate formerly found in the states south of New York.<sup>4</sup>

Scientific literature confirms that reducing emissions of GHGs like CO<sub>2</sub> will help to mitigate the impacts of climate change. It is clear that these projections about New York's potential future will have adverse impacts on New York's environment and human health. It is also clear that reducing GHG emissions will reduce those impacts. More intense and prolonged periods of summertime heat can result in increased mortality and heat illnesses, especially in cities that experience the heat island effect. The term "heat island" refers to urban air and surface temperatures that are higher than nearby rural areas. Many U.S. cities and suburbs have air temperatures up to 10°F warmer than the surrounding natural land cover.<sup>5</sup> The United States Environmental Protection Agency (EPA) reports that a one degree Fahrenheit increase in average temperature could more than double heat related fatalities in New York City from 300 to 700 per year.<sup>6</sup> Increased GHG emissions contribute to conditions that enhance the formation of ground-level ozone, specifically by increasing temperature through global climate change. Increased temperature and precipitation levels also produce conditions favorable to the introduction or spread of vector-borne illnesses such as Lyme Disease, Equine Encephalitis, West Nile Virus, and other diseases spread by mosquitoes, ticks, and wild rodents.<sup>7</sup>

New York has approximately 2,625 miles of coastline including barrier islands, coastal wetlands, and bays that could also be affected by a warming climate.<sup>8</sup> The major contributor to sea level rise is thermal expansion and melting of glaciers and ice sheets. In New York City for example, sea level has risen 0.27 cm/year on average over the last hundred years and is expected to increase over the next century to an average of approximately 0.60 cm/year.<sup>9</sup> Accelerated sea level rise due to global climate change is expected to increase the frequency and magnitude of storms such as the 100 year storm, which would result in increased flood damage. The return period of the resulting 100 year flood could be reduced to once every 50 years by the 2080s, and as often as once every four years in worst case scenarios.<sup>10</sup>

New York's public water supply could also be stressed by changes in temperature and precipitation. The majority of drinking water is obtained from surface flow, which can be highly variable. The New York City water supply comes from a 2,000 square mile watershed area in upstate New York that is greatly influenced by temperature and precipitation levels.<sup>11</sup> Lake Erie and Lake Ontario are critical water sources to New York State which would also be threatened by global climate change. New York relies on these Great Lakes for drinking water, hydroelectric power, commercial shipping, and recreation, including boating and fishing. New York State has approximately 331 miles of shoreline along Lake Ontario and approximately 77 miles along Lake Erie.<sup>12</sup>

Agriculture and forests in New York will also be affected by global climate change. The majority of crops grown in New York may be able to withstand a warmer climate with the exception of cold weather crops which include apples, potatoes, and others which would shift to the north or have reduced growing seasons. Dairy farmers would also be impacted since milk production is maximized under cooler conditions ranging from 41°F to 68°F.<sup>13</sup> Global climate change could also affect the current forest mix in New York. New York State's Adirondack Park is the largest forested area east of the Mississippi and it consists of six million acres including 2.6 million acres of state-owned forest preserve.<sup>14</sup> Climate change would also negatively impact New York's maple syrup industry since specific temperature conditions are required in order for the sugar maples to produce sap. As forest species change, the dulling of fall foliage will likely have a negative impact on regional tourism.<sup>15</sup> Distribution of wildlife is also likely to change due to increased temperature and changes in precipitation. As a result, cold-water salmon and trout fisheries and migratory birds could be adversely impacted due to loss or changes in habitat.

The global community must reduce its GHG emissions well below 1990 levels within a few decades if we are to stabilize atmospheric concentrations of CO<sub>2</sub> at acceptable levels. The burning of fossil fuels in power plants in New York is a major contributor to increased atmospheric concentrations of CO<sub>2</sub>. In 2005, power plants in New York burned fossil fuels to produce approximately 61 million tons of CO<sub>2</sub> and significant amounts of other harmful pollutants that impact the health and welfare of New Yorkers. This represents approximately one-quarter of the State's total GHG emissions. Any effort to curb the State's contribution to atmospheric concentrations of CO<sub>2</sub>, therefore, must address CO<sub>2</sub> pollution from power plants.

Offsets are an integral part of RGGI and the Program. An "offset" is a project-based GHG reduction (or sequestration) occurring at sources that are not subject to the Program that may be used by regulated sources for the purpose of compliance with the Program. Offsets not only provide flexibility for regulated sources, but also provide significant environmental and or economic co-benefits. Offsets allowed under the Program are from: Landfill Gas; SF<sub>6</sub>; reduction of fugitive emissions from electricity transmission and distribution infrastructure; Afforestation; Agricultural methane; and Natural gas and oil/ end-use energy efficiency. The Program also incorporates an energy efficiency and clean energy technology allocation (the "EE & CET Allocation"). The EE & CET Allocation will be administered by NYSEERDA and allowances in the account will be sold in a transparent allowance auction or auctions. This will better achieve the emissions reduction goals of the Program by promoting or rewarding investments in energy efficiency, renewable or non-carbon-emitting technologies, innovative carbon emissions abatement technologies with significant carbon reduction potential, and/or the administration of the Program.

The allowance auctions will include a Reserve Price. The Reserve Price represents the price below which no allowances will be sold at the auction. Its use is important for mitigating the potential for auction prices to clear significantly below current market prices, due to tacit or explicit collusion, weak competition, or to maintain a minimum rate of progress in reducing emissions below business as usual. Setting a Reserve Price can be accomplished in a variety of ways, including mechanisms that are, or are not, directly linked to current market prices.

NYSEERDA currently administers similar energy efficiency and clean energy technology programs, and the addition of the EE & CET Allocation, should be readily accomplished. The EE & CET Allocation will increase the emissions reduction benefits of the Program while simultaneously reducing impacts on consumers. The Department will also include a voluntary renewable energy market and long term contract set-aside allocation. Accordingly, the Department shall allocate 700,000 and 1,500,000 tons to the voluntary renewable energy market and long term contract set-aside accounts, respectively, from the CO<sub>2</sub> Budget Trading Program annual base budget.

The Department sought input from NYSEERDA and the New York State Department of Public Service (DPS) with respect to the costs and other impacts associated with compliance of the Program. The analysis provided by NYSEERDA includes modeling of the electricity sector showing the impacts of RGGI. ICF International (ICF) was contracted by NYSEERDA to perform the modeling analysis. ICF utilized the Integrated Planning Model (IPM®), a nationally recognized modeling tool that is used by the EPA, state energy and environmental agencies, and private sector firms such as utilities and generation companies. The Department also analyzed the costs associated with state and local governments' com-

pliance with the Program and considered analysis of the impacts the program may have on the state economy.<sup>16</sup>

CO<sub>2</sub> allowance prices (the cost of complying with RGGI) are projected to increase from approximately \$2/ton in 2009 to about \$3.00/ton in 2015 and about \$4.45/ton in 2021. Under the Program, New York's wholesale electricity prices (including both energy and capacity costs) are projected to be \$1.04/MWh higher in 2015 and \$1.51/MWh higher in 2021. RGGI is projected to increase wholesale electricity prices by about 1.6 percent in 2015 and 2.4 percent in 2021. For a typical New York residential customer (using 750 KWh per month), the projected increase in wholesale electricity prices in 2015 (1.6 percent) translates into a monthly retail bill increase of about 0.7 percent or \$0.78. In 2021, the projected increase in wholesale electricity prices (2.4 percent) translates into a monthly residential retail bill increase of about 1.0 percent or \$1.13. For commercial customers, the projected retail price impact of RGGI is about 0.9 percent in 2015 and 1.2 percent in 2021. For industrial customers, the projected retail price impact of RGGI is about 1.7 percent in 2015 and 2.4 percent in 2021.<sup>17</sup> A macro-economic impact study of the Program was also conducted at the direction of the RGGI state agencies through the Massachusetts Division of Energy Resources to estimate the potential impact of the Program on the economies of participating states.<sup>18</sup> The study used a computer model called the Regional Economic Models, Inc. (REMI) model. The study concluded that the economic impacts of RGGI on the economies of the participating states, including New York, were very small and generally positive.

There will also be costs associated with the administration of the Program. First and foremost, the Department will incur costs associated with the implementation of the Program. The Department estimates that between five and eight person years (the full time equivalent of working 100 percent on a project for a full work year expressed as 220 days) will be required to implement all aspects of the Program at a cost of \$110,000 per person year or up to \$880,000 annually. The Department will also need to reimburse its agent for its costs in administering the emission and allowance tracking and reporting system. Based on contractor costs associated with the administration of the Acid Deposition Reduction Program (ADRP) under Parts 237 and 238, the Department estimates that the capital start up costs for designing and implementing a regional system for tracking CO<sub>2</sub> allowance transactions will be between \$500,000 and \$950,000. The Department is currently contracting with an agent to administer the ADRP program and the annual operating costs for the administration of the emission and allowance tracking and reporting system under that program are approximately \$160,000. The Department estimates that administration of a regional system will be between \$150,000 and \$300,000.

The owners and operators of each source subject to the Program and each unit at the source shall keep each of the following documents for a period of 10 years from the date the document is created: account certificate of representation form; all emissions monitoring information; copies of all reports, compliance certifications, and other submissions and all records made or required under the Program; copies of all documents used to complete a permit application and any other submission under the Program or to demonstrate compliance with the Program; copies of all documents used to complete a consistency application and monitoring and verification report to demonstrate compliance with the offset provisions of the Program.

For each control period in which one or more units at a source are subject to the CO<sub>2</sub> budget emission limitation, the CO<sub>2</sub> authorized account representative of the source shall submit to the Department, a compliance certification report for each source covering all such units. This must be submitted by the March 1st following the relevant control for the units subject to the Program.

The Department examined the alternative of an emission rate based program for CO<sub>2</sub> to the cap-and-trade structure of the Program that could conceivably be used to achieve equivalent emissions reductions. This alternative is a command-and-control regulatory structure which the Department concluded is less cost-effective and more difficult for sources to implement than the Program. The Department also determined that an emission rate program would be no more protective of the public health and the environment.

The Department also considered a number of variations of the emissions cap-and-trade construct that could share many or most of the features of the Program as proposed. These alternatives included: (1) a New York only trading program; (2) allocating allowances to generators at no cost; and (3) applicability to smaller sources.

In carrying out its statutory obligation to assess all relevant factors in developing an appropriate control program that is most cost-effective, the Department determined that emissions cap-and-trade programs are the

most appropriate programs for the control of CO<sub>2</sub> emissions from the subject sources.

There are currently no Federal standards that limit CO<sub>2</sub> emissions from the electricity generating sector. The Program will reduce CO<sub>2</sub> emission from electric generating sources to 10 percent below current levels by 2018. In response to the need to reduce GHG and the lack of a national program, the Department has determined that fossil fuel-fired electricity generators will have to reduce emissions of CO<sub>2</sub>.

The Program will require affected sources and units to comply with the emission limitations of the Program beginning with the first three year control period (2009, 2010 and 2011). In order to meet the necessary permit requirements, the CO<sub>2</sub> authorized account representative of the source must submit to the Department by the March 1st following the relevant control period, a compliance certification report for each source covering all such units. Each year, the owners and operators of each source subject to the Program shall hold a number of CO<sub>2</sub> allowances available for compliance deductions, as of the CO<sub>2</sub> allowance transfer deadline not less than the total tons of CO<sub>2</sub> emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2009 or date the unit commences operation.

<sup>1</sup> In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

<sup>2</sup> IPCC WGI Fourth Assessment Report, Climate Change 2007: The Physical Science Basis, February 2007, and available at: <http://www.ipcc.ch>

<sup>3</sup> Climate Change in the U.S. Northeast, A Report of the Northeast Climate Impacts Assessment (2006), available at: [http://www.climatechoices.org/ne/resources\\_ne/jump.jsp?path=/assets/documents/climatechoices/NECIA\\_climate\\_report\\_final.pdf](http://www.climatechoices.org/ne/resources_ne/jump.jsp?path=/assets/documents/climatechoices/NECIA_climate_report_final.pdf).

<sup>4</sup> Id.

<sup>5</sup> <http://www.epa.gov/hiri/about/index.html>

<sup>6</sup> United States Environmental Protection Agency. "Climate Change and New York." September 1997. Page 3.

<sup>7</sup> National Assessment Synthesis Team (NAST), 2001: Climate Change Impacts On The United States, The Potential Consequences of Climate Variability and Change. Page 450.

<sup>8</sup> National Oceanic and Atmospheric Administration (NOAA). Treasure Our New York Coasts and Estuaries. June 2003. Page 1.

<sup>9</sup> Goddard Institute for Space Studies Institute on Climate and Planets (GISS ICP). Climate Impacts in New York City: Sea Level Rise and Coastal Floods. 2002. Page 3.

<sup>10</sup> GISS ICP. Rising Seas: A View From New York City. August 2000. Page 2.

<sup>11</sup> NAST. Page 123.

<sup>12</sup> Michigan Department of Environmental Quality: Shorelines of the Great Lakes. [http://www.michigan.gov/deq/0,1607,7-135-3313\\_3677-15959-,00.html](http://www.michigan.gov/deq/0,1607,7-135-3313_3677-15959-,00.html)

<sup>13</sup> Garcia, Alvaro. Dealing With Heat Stress In Dairy Cows. South Dakota Cooperative Extension Service. September 2002. Page 1.

<sup>14</sup> New York State Adirondack Park Agency (APA). [http://www.apa.state.ny.us/About\\_Park](http://www.apa.state.ny.us/About_Park)

<sup>15</sup> NAST. Page 125.

<sup>16</sup> "REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF" by the Economic Development Research Group, dated November 17, 2005.

<sup>17</sup> Typical customer usage numbers from U.S. Department of Energy, Energy Information Administration (EIA). Average electricity prices from NYSERDA, *Patterns and Trends* (December 2005).

<sup>18</sup> "REMI Impacts for RGGI Policies based on the td REF & Hi-Emission REF" by the Economic Development Research Group, dated November 17, 2005.

#### **Revised Regulatory Flexibility Analysis**

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO<sub>2</sub>) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.<sup>1</sup> In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO<sub>2</sub> Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO<sub>2</sub>, the principal GHG. Overwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State—the very same resources and public health the Legislature has charged the Department to preserve and protect. The warming climate threatens the State's air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats. Not only will the Program help counter the threat of a warming climate, it will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

1. Effects on Small Businesses and Local Governments. No small businesses will be directly affected by the adoption of new Part 242 and the amendments to Part 200.

The only local government affected by the Programs is the Jamestown Board of Public Utilities (JBPU), a municipally owned utility which owns and operates the S. A. Carlson Generating Station (SACGS). The emissions monitoring at SACGS currently meets the monitoring provisions of the Program, 40 CFR part 75. Therefore, no additional monitoring costs will be incurred. The costs associated with the Program will be dictated by how JBPU decides to comply with the provisions of the regulation.

2. Compliance Requirements. The JBPU, as owner and operator of the SACGS, will need to comply with the provisions of the Program, as described below.

The Program will require affected sources and units to comply with the emission limitation of the Program beginning with the 2009-2011 control period. In order to meet the necessary permit requirements, the authorized account representative of each CO<sub>2</sub> subject unit shall submit to the Department a complete CO<sub>2</sub> Budget permit application, by January 1, 2009 or 12 months before the date the unit commences operation.

Each year, the owners and operators of each source subject to the Program shall hold a number of CO<sub>2</sub> allowances available for compliance deductions, as of the CO<sub>2</sub> allowance transfer deadline (Midnight of March 1 or, if March 1 is not a business day, midnight of the first business day thereafter), in the source's compliance account that is not less than the total tons of CO<sub>2</sub> emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2009 or date the unit commences operation.

For each control period in which one or more units at a source are subject to the Program, the authorized account representative of the source must submit to the Department by the March 1st following the relevant control period, a compliance certification report for each source covering all such units.

3. Professional Services. The only local government affected by the Program, the JBPU, may need to hire outside professional consultants to comply with the Program and the amendments to Part 200. This work would likely be associated with any analyses of the Program. If it is determined that capital investments are needed to comply, design and construction management services will likely need to be procured.

4. Compliance Costs. In addition to the costs identified for regulated parties and the public, state and local governments will incur costs. The Jamestown Board of Public Utilities (JBPU), a municipally owned utility, owns and operates the S.A. Carlson Generating Station (SACGS). Since the emissions monitoring at SACGS currently meets the monitoring provisions of the Program, no additional monitoring costs will be incurred.

Notwithstanding this, the JBPU will need to purchase allowances equal to the number of tons emitted. The Department limited the analysis of control costs to the purchase of allowances to comply with the Program and assumed the costs of allowances will be \$3 per ton for CO<sub>2</sub>.<sup>2</sup> To estimate total costs for SACGS under the Program, the Department reviewed 2002 through 2004 emissions from Jamestown's affected unit. The highest emissions from the affected unit during that time frame were approximately 41,772 tons. Purchasing allowances to cover emissions will result in estimated costs of approximately \$125 thousand annually. These costs will eventually be passed on to the consumers of electricity from the JBPU.

The JBPU has a range of compliance options open to it and can utilize the flexibility inherent under the Program to comply. Since the Program has a three year control period with the compliance obligation at the end of the control period, the emission peaks associated with electricity generation will be averaged out and more long term planning options will be

available to SACGS. In addition, the Program allows affected sources to offset up to 3.3 percent of their emissions utilizing reductions from emission categories outside of the regulated sector.

5. Minimizing Adverse Impact. The promulgation of the Program and the amendments to Part 200 do not directly affect small businesses. Only one local government is affected by the Program, the JBPU. The Program constitutes an emissions allowance based cap and trade program. Cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the Program in such a manner, the Department will minimize the adverse economic impacts of the Program on the JBPU.

6. Small Business and Local Government Participation. The JBPU actively participated in the public forums established by the Department to discuss the Program with interested parties.

7. Economic and Technological Feasibility. The JBPU has the option to do any combination of the following to comply with the Program: increase the efficiency of the natural gas-fired turbine, co-fire biofuel; purchase allowances, or purchase offsets. It has never been demonstrated that any or all of these options are technologically or economically infeasible to apply to SACGS.

<sup>1</sup> In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

<sup>2</sup> Regional Greenhouse Gas Initiative (RGGI): New York Electricity Sector Modeling Results, September 15, 2006, DRAFT.

#### **Revised Rural Area Flexibility Analysis**

On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO<sub>2</sub>) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.<sup>1</sup> In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO<sub>2</sub> Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO<sub>2</sub>, the principal GHG. Overwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State—the very same resources and public health the Legislature has charged the Department to preserve and protect. The warming climate threatens the State's air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats. Not only will the Program help counter the threat of a warming climate, it will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

#### **TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED**

The promulgation of the Program and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations regardless of location, including those in rural areas, will be affected.

#### **REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS**

The promulgation of the Program and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations, that are located in rural areas, will be subject to the reporting, record keeping and compliance requirements detailed below.

The Program will require affected sources and units to comply with the emission limitation of the Program beginning with the 2009 - 2011 control period. In order to meet the necessary permit requirements, the authorized account representative of each Program unit shall submit to the Department a complete CO<sub>2</sub> Budget permit application by January 1, 2009 or 12 months before the unit commences operation.

The owners and operators and, to the extent applicable, the authorized account representative of each source subject to the Program and each unit

at the source shall comply with the monitoring and reporting requirements thereof.

Each control period, the owners and operators of each source shall hold a number of CO<sub>2</sub> allowances available for compliance deductions, as of the CO<sub>2</sub> allowance transfer deadline (midnight of March 1st, or if March 1st is not a business day, midnight of the first business day thereafter), in the source's compliance account that is not less than the total tons of CO<sub>2</sub> emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2009 or date the unit commences operation.

For each control period in which one or more units at a source are subject to the Program, the authorized account representative of the source must submit to the Department by the March 1st following the relevant control period, a compliance certification report for each source covering all such units.

## COSTS

### Introduction

The Department sought input from the New York State Energy Research and Development Authority (NYSERDA) and the New York State Department of Public Service (DPS) with respect to the costs and other impacts associated with compliance with the Program. The analysis provided by NYSERDA includes modeling of the electricity sector showing the impacts of RGGI. ICF International (ICF) was contracted by NYSERDA to perform the modeling analysis. ICF utilized the Integrated Planning Model (IPM®), a nationally recognized modeling tool that is used by the EPA, state energy and environmental agencies, and private sector firms such as utilities and generation companies. The Department also analyzed the costs associated with state and local governments' compliance with the Program and considered analysis of the impacts the Program may have on the state economy.<sup>2</sup>

### Costs to the Regulated Sources and the Public

The modeling analysis and review process was coordinated by NYSERDA staff, working closely with the Department and DPS staff, as well as staff from each regional Independent System Operator (ISO, a federally regulated regional organization which coordinates, controls and monitors the operation of the electrical power system of a particular state) staff and the RGGI Staff Working Group, consisting of energy and environmental representatives from all of the states participating in the Program.

To estimate the potential impacts of the Program, IPM® was used to compare a future with the Program (Program Case) to a business-as-usual (BAU) Case that projects what the electricity system would look like if the Program were not implemented. The modeling assumptions and input data were developed through an extensive stakeholder process with representatives from the electricity generation sector, business and industry, environmental advocates and consumer interest groups. Modeling results were presented to stakeholders for review and comment throughout the process of developing the RGGI proposal.

Assumptions and sources of input data are specified in detail in the "Assumption Development Document: Regional Greenhouse Gas Initiative Analysis."<sup>3</sup> Key assumptions and data include regional electricity demand, load shapes, transmission system capacities and limits, generation unit level operation and maintenance costs and performance characteristics, fuel prices, new capacity and emission control technology costs and performance characteristics, zonal reliability requirements, reserve margins, Renewable Portfolio Standard requirements, national and state environmental regulations, and financial market assumptions. All estimates are based on 2003 dollars. Regional electricity demand growth projections, transmission capacities and limits, and near-term expected infrastructure additions/retirements were provided by the regional ISOs. Long range Henry Hub natural gas prices, based on forecast data from Energy and Environmental Analysis, Inc. were projected to be approximately \$7/MMBtu (constant 2003 dollars).

Building new coal-fired and nuclear plants were precluded as an economic choice to meet projected capacity shortfalls within the RGGI region. However, a 600 MW Integrated Gasification Combined Cycle (IGCC) coal plant with 50 percent carbon capture capability was assumed to be operational in upstate New York by 2018 in response to the State's Advanced Clean Coal Power Plant Initiative. New nuclear units were also precluded outside the RGGI region. A national 3-pollutant policy (SO<sub>2</sub>, NO<sub>x</sub> and mercury) that approximates the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule (CAMR) is assumed as well as the achievement of RPS in individual states.

Under the BAU Case, generation from new gas-fired combined cycle units is projected to supply most of the growing electricity demand. Gener-

ation from gas-fired plants is projected to approximately double from 36,307 Gigawatt hours (GWh) in 2006 to 64,934 GWh in 2021. (However, note that as recently as 1999, New York's gas-fired generation reached as high as 46,000 GWh.) Generation from new renewable resources (primarily wind units) is projected to increase significantly in response to RPS requirements. While nuclear generation is projected to increase by about two percent between 2006 and 2021 due to capacity up-rates at existing plants, generation from coal-fired plants is projected to increase by about 17 percent between 2015 and 2018 with the addition of the new proposed IGCC plant. Finally, generation from existing oil/gas steam units is projected to decrease over time, as a result of displacement by lower-cost electricity from new gas-fired units.

Net imports of electricity into New York are projected to decrease from approximately 21,000 GWh in 2006 to approximately 10,000 GWh in 2021. Underlying the projected decrease in net imports to New York is the increasing reliance on generation from new gas-fired units in neighboring Mid-Atlantic States. Generally, electricity flows from one region to another because of price differentials between those regions. As gas-fired generation increasingly sets market-clearing electricity prices in neighboring states, their electricity prices increasingly approach those of New York, where electricity prices are already largely determined by gas-fired generation.

CO<sub>2</sub> emissions in the BAU Case are projected to increase from approximately 52.9 million tons in 2006 to about 58.6 million tons in 2021. This increase is due primarily to the addition of new gas-fired power plants to meet projected load growth, but also includes the emissions from the new IGCC coal plant. There are several factors that contribute to the result showing that BAU emissions from the model in 2006 are lower than actual CO<sub>2</sub> emissions reported to both the EPA and the Department over the period 2000 through 2004. The first is the use of total on-site emissions from cogeneration. Actual emissions reports to EPA and the Department are inclusive of on-site emissions while the modeling analysis reflects only the emissions associated with the electricity provided to the grid. A second contributing factor is an upward bias in emissions recorded by continuous emissions monitoring systems as reported to EPA.<sup>4</sup> As a result, it is expected that emissions reported to EPA are on the order of two to 10 percent higher than actual emission. In contrast the modeling analysis was based on carbon emissions factors that are not subject to systematic errors in measurement. Lastly, significant changes to the electricity sector also contribute to the difference between BAU emissions and 2000 to 2004 actual emissions. These include the addition of new natural gas-fired combined cycle capacity and new renewable resources as well as the updating of existing nuclear units.

Several assumptions were made to project the impacts of the Program in the Program Case. The Program was applied to electricity generators 25 MW and larger in nine northeastern and mid-Atlantic states including New York, Maine, New Hampshire, Vermont, Connecticut, New Jersey, Massachusetts, Rhode Island, and Delaware. For modeling purposes, the proposed initial CO<sub>2</sub> cap is assumed to be "current" emission levels. The initial cap level, stabilizing emissions at current levels, is implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. The Program Case allows a limited number of emission offsets to be purchased by affected generators and used for compliance. The Program Case assumes that all RGGI states extend current annual levels of public benefit expenditures on end-use energy efficiency programs through 2025. Further, the public benefit programs are assumed to continue to deliver annual electricity end-use reductions at the same incremental cost as reported in most recent years. This assumption results in regional electricity demand in each year being lower in the Program Case than in the BAU Case.

Several types of results between the Program Case and the BAU Case are compared including generation mix, net electricity imports, changes in generation capacity, CO<sub>2</sub> emissions, CO<sub>2</sub> allowance prices, and wholesale and retail electricity price impacts.

The generation mix in New York under the Program Case reflects the continuation of energy efficiency projects and the change in build mix. Electricity generation from gas-fired units in 2021 is about 10,600 GWh or 16 percent lower in the Program Case than in the BAU Case. Net imports into New York in 2021 are projected to be about 4,000 GWh or 40 percent higher in the Program Case than in the BAU Case. However, the projected imports in 2021 in the Program Case are about 7,000 GWh or 33 percent lower than BAU Case imports in 2006. The total electricity requirement (generation plus net imports) is lower in the Program Case by about 7,000

GWh (3.7 percent) in 2021, due to the higher level of end-use energy efficiency expenditures assumed in the Program Case.

Relative to the BAU Case, total capacity additions in the Program Case are 757 megawatts lower (10 percent) in 2015 and 918 megawatts lower (eight percent) in 2021. The block of avoided capacity additions due to RGGI is comprised almost entirely of gas-fired combined-cycle units.

CO<sub>2</sub> emissions from New York generators are projected to be 5.1 million tons (8.7 percent) lower in 2021 for the Program Case as compared to the BAU Case. The initial cap level, which stabilizes emissions at current levels, is proposed to be implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. CO<sub>2</sub> emissions from the electricity sector are projected to remain approximately flat between 2006 and 2021, rather than decreasing, as might be suggested by the decreasing cap level over the last five years of this period. This result is expected because RGGI-affected sources are allowed to bank emission allowances in the early years of the policy for use in later years when the cap becomes more stringent. Further, a portion of the cap is projected to be achieved by the use of offsets based on emission reduction projects implemented in sectors outside the electricity sector. Through 2021, about 70 percent of the CO<sub>2</sub> emission reductions resulting from RGGI are projected to be achieved by on-system reductions by the electricity sector, while about 30 percent are projected to be achieved by purchasing emission offsets.

Under the Program Case, New York's wholesale electricity prices (including both energy and capacity costs) are projected to be \$1.04/MWh higher in 2015 and \$1.51/MWh higher in 2021, than the BAU Case. RGGI is projected to increase wholesale electricity prices by about 1.6 percent in 2015 and 2.4 percent in 2021. For a typical New York residential customer (using 750 kWh per month), the projected increase in wholesale electricity prices in 2015 (1.6 percent) translates into a monthly retail bill increase of about 0.7 percent or \$0.78. In 2021, the projected increase in wholesale electricity prices (2.4 percent) translates into a monthly residential retail bill increase of about 1.0 percent or \$1.13. For commercial customers, the projected retail price impact of RGGI is about 0.9 percent in 2015 and 1.2 percent in 2021. For industrial customers, the projected retail price impact of RGGI is about 1.7 percent in 2015 and 2.4 percent in 2021.<sup>5</sup>

The analysis conducted by ICF did not identify any New York generation facilities as candidates for retirement due to the costs imposed by the Program. DPS, NYSEDA and the Department developed a two phase analysis to test that result. The analyses focused on generating units that are considered necessary to the reliable operation of New York State's bulk power system. The selection of those units was based on provisions in the New York State Reliability Council's reliability rules which require their operation under certain conditions.

The first phase of the analysis was performed by DPS using plant specific data, combined with zone-specific modeling output (i.e. projected kWh, energy prices, etc.) from IPM®. This assessment predicted that the Program would result in small decreases in net operating revenue for certain of the units being studied while others actually did better under a future with RGGI, and supported ICF's conclusion that the units would not retire. The second phase of the analysis conducted by the DPS consisted of more detailed modeling with General Electric's MAPS model. The second phase analysis confirmed the results of the first phase analysis. In summary, the two-phase reliability analysis concluded that the Program would not adversely affect system reliability.

A macro-economic impact study of the Program was also conducted at the direction of the RGGI state agencies through the Massachusetts Division of Energy Resources to estimate the potential impact of the Program on the economies of participating states.<sup>6</sup> The study used a computer model called the Regional Economic Models, Inc. (REMI) model. The study concluded that the economic impacts of RGGI on the economies of the participating states, including New York, were very small and generally positive.

#### MINIMIZING ADVERSE IMPACT

The promulgation of the Program and the amendments to Part 200, apply to affected sources statewide, including those located in rural areas. Since the regulations apply equally to affected facilities statewide, rural areas are not impacted any differently than other areas in the State. The Department is implementing the Program through a cap-and-trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources, therefore the Department has attempted to minimize the adverse economic impacts of the Program to all sources on a statewide basis.

#### RURAL AREA PARTICIPATION

Since the announcement of the Regional Greenhouse Gas Initiative in September of 2003, Department staff held numerous stakeholder meetings with affected parties and various representative coalitions and consultants to the electric industry. Copies of the draft regulations were forwarded to all affected parties prior to initiating the promulgation of the regulations and interested parties afforded informal opportunities for public comment.

<sup>1</sup> In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

<sup>2</sup> "REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF", by the Economic Development Research Group, dated November 17, 2005.

<sup>3</sup> The modeling assumptions document and the tabular results for each modeling run are located at <http://www.rggi.org/documents.htm>

<sup>4</sup> Russel S. Berry and Jack C. Martin (RMB Consulting and Research, Inc.) and Charles E. Dene (Electric Power Research Institute). "CEMS Analyzer Bias and Linearity Effects Study." [rmb-consulting.com/newpaper/cable/cable.htm](http://rmb-consulting.com/newpaper/cable/cable.htm)

<sup>5</sup> Typical customer usage numbers from U.S. Department of Energy, Energy Information Administration (EIA). Average electricity prices from NYSEDA, 'Patterns and Trends' (December 2005).

<sup>6</sup> REMI.

#### Revised Job Impact Statement

1. Nature of Impact: On December 20, 2005, New York State entered into a historic regional agreement to reduce greenhouse gas (GHG) emissions from power plants, an important step to protect our environment and meet the significant challenge of climate change. Under the agreement, the governors of 10 Northeastern and Mid-Atlantic states have committed to propose the Regional Greenhouse Gas Initiative (RGGI), a program to cap and reduce carbon dioxide (CO<sub>2</sub>) emissions from power plants in the region by 10 percent by 2019, for adoption in their states.<sup>1</sup> In order to carry out the State's commitment, the Department of Environmental Conservation (the Department) is proposing to establish the CO<sub>2</sub> Budget Trading Program (the Program) by promulgating 6 NYCRR Part 242, and to revise 6 NYCRR Part 200, General Provisions.

The burning of fossil fuels to generate electricity is a major contributor to a warming climate because fossil-fuel generators emit large amounts of CO<sub>2</sub>, the principal GHG. Overwhelming scientific evidence suggests that a warming climate poses a serious threat to the environmental resources and public health of New York State—the very same resources and public health the Legislature has charged the Department to preserve and protect. The warming climate threatens the State's air quality, water quality, marine and freshwater fisheries, salt and freshwater wetlands, surface and subsurface drinking water supplies, river and stream impoundment infrastructure, and forest species and wildlife habitats. Not only will the Program help counter the threat of a warming climate, it will also produce significant environmental co-benefits in the form of improved local air quality, forest preservation, improved agricultural manure handling practices leading to better water and air quality in rural areas of the State, and a more robust, diverse and clean energy supply in the State.

Based on analyses conducted for the RGGI states by the Economic Development Research Group, the Program is expected to have a very modest net positive impact on economic growth in New York and in the region.<sup>2</sup> As such, the Program will have minimal positive impacts on overall job and employment opportunities. Electricity generators will incur costs related to the requirements of the Program and based on the modeling this will translate into modest increases in electricity costs.

2. Categories and Numbers Affected: The Department sought input from the New York State Energy Research and Development Authority (NYSEDA) and the New York State Department of Public Service (DPS) with respect to the costs and other impacts associated with compliance with the Program. The analysis provided by NYSEDA includes modeling of the electricity sector showing the impacts of RGGI. ICF International (ICF) was contracted by NYSEDA to perform the modeling analysis. ICF utilized the Integrated Planning Model (IPM®), a nationally recognized modeling tool that is used by the EPA, state energy and environmental agencies, and private sector firms such as utilities and generation companies. The Department also analyzed the costs associated with state and local governments' compliance with the Program and considered analysis of the impacts the Program may have on the state economy.<sup>3</sup> In addition, a jobs impact analysis has been provided based on NYSEDA's experience with the Energy Smart Program and their administration of energy efficiency programs that are very similar to those that will be funded with auction proceeds.

### Costs to the Regulated Sources and the Public

The modeling analysis and review process was coordinated by NYSERDA staff, working closely with the Department and DPS staff, as well as staff from each regional Independent System Operator (ISO, a federally regulated regional organization which coordinates, controls and monitors the operation of the electrical power system of a particular state) staff and the RGGI Staff Working Group, consisting of energy and environmental representatives from all of the states participating in the Program.

To estimate the potential impacts of the Program, IPM® was used to compare a future with the Program (Program Case) to a business-as-usual (BAU) Case that projects what the electricity system would look like if the Program were not implemented. The modeling assumptions and input data were developed through an extensive stakeholder process with representatives from the electricity generation sector, business and industry, environmental advocates and consumer interest groups. Modeling results were presented to stakeholders for review and comment throughout the process of developing the RGGI proposal.

Assumptions and sources of input data are specified in detail in the "Assumption Development Document: Regional Greenhouse Gas Initiative Analysis."<sup>4</sup> Key assumptions and data include regional electricity demand, load shapes, transmission system capacities and limits, generation unit level operation and maintenance costs and performance characteristics, fuel prices, new capacity and emission control technology costs and performance characteristics, zonal reliability requirements, reserve margins, Renewable Portfolio Standard requirements, national and state environmental regulations, and financial market assumptions. All estimates are based on 2003 dollars. Regional electricity demand growth projections, transmission capacities and limits, and near-term expected infrastructure additions/retirements were provided by the regional ISOs. Long range Henry Hub natural gas prices, based on forecast data from Energy and Environmental Analysis, Inc. were projected to be approximately \$7/MMBtu (constant 2003 dollars).

Building new coal-fired and nuclear plants were precluded as an economic choice to meet projected capacity shortfalls within the RGGI region. However, a 600 MW Integrated Gasification Combined Cycle (IGCC) coal plant with 50 percent carbon capture capability was assumed to be operational in upstate New York by 2018 in response to the State's Advanced Clean Coal Power Plant Initiative. New nuclear units were also precluded outside the RGGI region. A national 3-pollutant policy (SO<sub>2</sub>, NO<sub>x</sub> and mercury) that approximates the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule (CAMR) is assumed as well as the achievement of RPS in individual states.

Under the BAU Case, generation from new gas-fired combined cycle units is projected to supply most of the growing electricity demand. Generation from gas-fired plants is projected to approximately double from 36,307 Gigawatt hours (GWh) in 2006 to 64,934 GWh in 2021. (However, note that as recently as 1999, New York's gas-fired generation reached as high as 46,000 GWh.) Generation from new renewable resources (primarily wind units) is projected to increase significantly in response to RPS requirements. While nuclear generation is projected to increase by about two percent between 2006 and 2021 due to capacity up-rates at existing plants, generation from coal-fired plants is projected to increase by about 17 percent between 2015 and 2018 with the addition of the new proposed IGCC plant. Finally, generation from existing oil/gas steam units is projected to decrease over time, as a result of displacement by lower-cost electricity from new gas-fired units.

Net imports of electricity into New York are projected to decrease from approximately 21,000 GWh in 2006 to approximately 10,000 GWh in 2021. Underlying the projected decrease in net imports to New York is the increasing reliance on generation from new gas-fired units in neighboring Mid-Atlantic States. Generally, electricity flows from one region to another because of price differentials between those regions. As gas-fired generation increasingly sets market-clearing electricity prices in neighboring states, their electricity prices increasingly approach those of New York, where electricity prices are already largely determined by gas-fired generation.

CO<sub>2</sub> emissions in the BAU Case are projected to increase from approximately 52.9 million tons in 2006 to about 58.6 million tons in 2021. This increase is due primarily to the addition of new gas-fired power plants to meet projected load growth, but also includes the emissions from the new IGCC coal plant. There are several factors that contribute to the result showing that BAU emissions from the model in 2006 are lower than actual CO<sub>2</sub> emissions reported to both the EPA and the Department over the period 2000 through 2004. The first is the use of total on-site emissions

from cogeneration. Actual emissions reports to EPA and the Department are inclusive of on-site emissions while the modeling analysis reflects only the emissions associated with the electricity provided to the grid. A second contributing is an upward bias in emissions recorded by continuous emissions monitoring systems as reported to EPA.<sup>5</sup> As a result, it is expected that emissions reported to EPA are on the order of two to 10 percent higher than actual emission. In contrast the modeling analysis was based on carbon emissions factors that are not subject to systematic errors in measurement. Lastly, significant changes to the electricity sector also contribute to the difference between BAU emissions and 2000 to 2004 actual emissions. These include the addition of new natural gas-fired combined cycle capacity and new renewable resources as well as the updating of existing nuclear units.

Several assumptions were made to project the impacts of the Program in the Program Case. The Program was applied to electricity generators 25 MW and larger in nine northeastern and mid-Atlantic states including New York, Maine, New Hampshire, Vermont, Connecticut, New Jersey, Massachusetts, Rhode Island, and Delaware. For modeling purposes, the proposed initial CO<sub>2</sub> cap is assumed to be "current" emission levels. The initial cap level, stabilizing emissions at current levels, is implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. The Program Case allows a limited number of emission offsets to be purchased by affected generators and used for compliance. The Program Case assumes that all RGGI states extend current annual levels of public benefit expenditures on end-use energy efficiency programs through 2025. Further, the public benefit programs are assumed to continue to deliver annual electricity end-use reductions at the same incremental cost as reported in most recent years. This assumption results in regional electricity demand in each year being lower in the Program Case than in the BAU Case.

Several types of results between the Program Case and the BAU Case are compared including generation mix, net electricity imports, changes in generation capacity, CO<sub>2</sub> emissions, CO<sub>2</sub> allowance prices, and wholesale and retail electricity price impacts.

The generation mix in New York under the Program Case reflects the continuation of energy efficiency projects and the change in build mix. Electricity generation from gas-fired units in 2021 is about 10,600 GWh or 16 percent lower in the Program Case than in the BAU Case. Net imports into New York in 2021 are projected to be about 4,000 GWh or 40 percent higher in the Program Case than in the BAU Case. However, the projected imports in 2021 in the Program Case are about 7,000 GWh or 33 percent lower than BAU Case imports in 2006. The total electricity requirement (generation plus net imports) is lower in the Program Case by about 7,000 GWh (3.7 percent) in 2021, due to the higher level of end-use energy efficiency expenditures assumed in the Program Case.

Relative to the BAU Case, total capacity additions in the Program Case are 757 megawatts lower (10 percent) in 2015 and 918 megawatts lower (eight percent) in 2021. The block of avoided capacity additions due to RGGI is comprised almost entirely of gas-fired combined-cycle units.

CO<sub>2</sub> emissions from New York generators are projected to be 5.1 million tons (8.7 percent) lower in 2021 for the Program Case as compared to the BAU Case. The initial cap level, which stabilizes emissions at current levels, is proposed to be implemented in 2009 through 2015. From 2015 until 2019, the cap is reduced linearly so that emission levels in 2019 are capped at 10 percent below current levels. CO<sub>2</sub> emissions from the electricity sector are projected to remain approximately flat between 2006 and 2021, rather than decreasing, as might be suggested by the decreasing cap level over the last five years of this period. This result is expected because RGGI-affected sources are allowed to bank emission allowances in the early years of the policy for use in later years when the cap becomes more stringent. Further, a portion of the cap is projected to be achieved by the use of offsets based on emission reduction projects implemented in sectors outside the electricity sector. Through 2021, about 70 percent of the CO<sub>2</sub> emission reductions resulting from RGGI are projected to be achieved by on-system reductions by the electricity sector, while about 30 percent are projected to be achieved by purchasing emission offsets.

CO<sub>2</sub> allowance prices (the cost of complying with RGGI) are projected to increase from approximately \$2/ton in 2009 to about \$3.00/ton in 2015 and about \$4.45/ton in 2021. The availability of emissions offsets to meet a limited portion of the emission reduction requirement (as allowed by the Program) contributes significantly to maintaining CO<sub>2</sub> allowance prices below the \$7/ton offset expansion threshold specified.

Under the Program Case, New York's wholesale electricity prices (including both energy and capacity costs) are projected to be \$1.04/MWh

higher in 2015 and \$1.51/MWh higher in 2021, than the BAU Case. RGGI is projected to increase wholesale electricity prices by about 1.6 percent in 2015 and 2.4 percent in 2021. For a typical New York residential customer (using 750 kWh per month), the projected increase in wholesale electricity prices in 2015 (1.6 percent) translates into a monthly retail bill increase of about 0.7 percent or \$0.78. In 2021, the projected increase in wholesale electricity prices (2.4 percent) translates into a monthly residential retail bill increase of about 1.0 percent or \$1.13. For commercial customers, the projected retail price impact of RGGI is about 0.9 percent in 2015 and 1.2 percent in 2021. For industrial customers, the projected retail price impact of RGGI is about 1.7 percent in 2015 and 2.4 percent in 2021.<sup>6</sup>

The analysis conducted by ICF did not identify any New York generation facilities as candidates for retirement due to the costs imposed by the Program. DPS, NYSEERDA and the Department developed a two phase analysis to test that result. The analyses focused on generating units that are considered necessary to the reliable operation of New York State's bulk power system. The selection of those units was based on provisions in the New York State Reliability Council's reliability rules which require their operation under certain conditions.

The first phase of the analysis was performed by DPS using plant specific data, combined with zone-specific modeling output (i.e. projected kWh, energy prices, etc.) from IPM®. This assessment predicted that the Program would result in small decreases in net operating revenue for certain of the units being studied while others actually did better under a future with RGGI, and supported ICF's conclusion that the units would not retire. The second phase of the analysis conducted by the DPS consisted of more detailed modeling with General Electric's MAPS model. The second phase analysis confirmed the results of the first phase analysis. In summary, the two-phase reliability analysis concluded that the Program would not adversely affect system reliability.

A macro-economic impact study of the Program was also conducted at the direction of the RGGI state agencies through the Massachusetts Division of Energy Resources to estimate the potential impact of the Program on the economies of participating states.<sup>7</sup> The study used a computer model called the Regional Economic Models, Inc. (REMI) model. The study concluded that the economic impacts of RGGI on the economies of the participating states, including New York, were very small and generally positive.

NYSEERDA currently administers, through the New York Energy Smart Program, energy efficiency and clean energy technology programs that are very similar to those that will be funded with auction proceeds under the CO<sub>2</sub> Allowance Auction Program. A 2006 Macroeconomic Impact Analysis of the New York Energy Smart Program concluded that expenditures under that program created approximately 4.8 new sustained jobs per \$1 million of program funds spent. The following chart illustrates the breakdown of jobs created per sector:

2006 Update

Economic Sector	% of Total Added Jobs Through 2006
Agriculture, Forestry, and Mining	0.60%
Construction	10.52%
Products Manufacturing	5.07%
Equipment and Instrument Manufacturing	6.46%
Transportation, Communication, and Other Public Services	3.30%
Wholesale and Retail Trade	30.86%
Personal and Business Services	52.81%
Electric utilities	-9.63%
Total	100%

The results of the Macroeconomic Impact Analysis were published in the March 2007 New York Energy Smart Evaluation Report, which is available on NYSEERDA's website at: [http://www.nyserda.org/Energy\\_Information/evaluation.asp](http://www.nyserda.org/Energy_Information/evaluation.asp).

3. Regions of Adverse Impact: A statewide analysis was performed for the Program and the modeling predicts that the statewide average increase in wholesale electricity prices will be 1.6 percent in 2015 and 2.4 percent in 2021.

4. Minimizing Adverse Impact: The Department is implementing the Program through a cap-and-trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the Program through an allowance based cap and trade system, the Department has

attempted to minimize the adverse economic impacts including the adverse employment impacts of the Program.

5. Self-Employment Opportunities: Not applicable.

<sup>1</sup> In addition to New York, the other states participating in RGGI are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

<sup>2</sup> REMI Impacts for RGGI Policies based on the Std REF & Hi-Emission REF" by the Economic Development Research Group, dated November 17, 2005.

<sup>3</sup> REMI.

<sup>4</sup> The modeling assumptions document and the tabular results for each modeling run are located at <http://www.rggi.org/documents.htm>

<sup>5</sup> Russel S. Berry and Jack C. Martin (RMB Consulting and Research, Inc.) and Charles E. Dene (Electric Power Research Institute). "CEMS Analyzer Bias and Linearity Effects Study." [rmb-consulting.com/newpaper/cable/cable.htm](http://rmb-consulting.com/newpaper/cable/cable.htm)

<sup>6</sup> Typical customer usage numbers from U.S. Department of Energy, Energy Information Administration (EIA). Average electricity prices from NYSEERDA, *Patterns and Trends* (December 2005).

<sup>7</sup> REMI.

**Summary of Assessment of Public Comment**

The New York State Department of Environmental Conservation (Department) is proposing to establish 6 NYCRR Part 242, CO<sub>2</sub> Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of carbon dioxide (CO<sub>2</sub>), a greenhouse gas (GHG), from CO<sub>2</sub> budget sources in an economically efficient manner. The New York State Energy Research and Development Authority (Authority) is proposing to establish 21 NYCRR Part 507, CO<sub>2</sub> Allowance Auction Program, which implements essential segments of the CO<sub>2</sub> Budget Trading Program.

The Department proposed Part 242, and the Authority proposed Part 507, on October 24, 2007. Hearings were held in Albany, NY on December 10, 2007, in Ray Brook, NY on December 11, 2007, in New York City, NY on December 12, 2007, and in Avon, NY on December 13, 2007. The comment period closed on December 24, 2007. The Department and the Authority received written and oral comments from approximately 10,000 commenters on the proposed regulations. All of these comments have been reviewed, summarized, and responded to by the Department and the Authority.

Commenters generally support the Department's and the Authority's adoption of the CO<sub>2</sub> Budget Trading Program and CO<sub>2</sub> Allowance Auction Program (collectively "the Program"), although many, primarily electric generators and those affiliated with the energy industry, are opposed to the Program for various reasons. Comments address legal issues, proposed revisions to the regulations, implementation, and the potential benefits and impacts of the Program.

Several commenters challenge the Department's and the Authority's statutory authority to establish the Programs. Specifically, it is asserted that the Department and the Authority cannot establish the Program without legislative expression of a statewide policy addressing global climate change. In response, the Department and the Authority cite extensive statutory authority which overwhelmingly supports the Department's and the Authority's statutory authority to establish the Programs. Principally, the Department has the authority to enact the Program pursuant to New York State Environmental Conservation Law (ECL) Sections 19-0103 and 19-0301. The Department's broad authority to develop regulatory programs derives primarily from its obligation to prevent and control air pollution, as set out in the ECL at Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 71-2103, 71-2105. Further, the Department's obligation to preserve and protect natural resources and public health in the State as it relates to climate change also extends beyond the control of air pollution, as set out in ECL Sections 11-0303, 11-0305, 11-0535, 13-0105, 15-0109, 15-1903, 16-0111, 17-0303, 24-0103, 25-0102, 34-0108, and 49-0309 and the Energy Law Sections 3-101 and 3-103.

Similarly, the general powers of the Authority that are relevant to the Program's ability to sell allowances in an auction are set forth in the Public Authorities Law (PAL) Sections 1851, 1854 and 1855. Under the Program, the Authority's activities would include the conduct of allowance auctions and the administration of the Energy Efficiency and Clean Energy Technology Account (Account). The statutory provision relevant to the Authority's statutory authority to accept the allowances allocated to it by the Department is PAL Section 1855, subsections 10, 14 and 17.

Commenters also argue that although the Legislature has never authorized the Authority to issue or sell regulatory licenses/permits, the Program

purports to empower the Authority to auction allowances, which constitute licenses/permits under New York State law. The Department and the Authority disagree with this contention and believe that the allowances themselves are not permits or licenses under New York Law. Rather, an allowance is a condition of an operating permit that constitutes a limited authorization to emit up to one ton of CO<sub>2</sub>.

Another significant comment states that the Program constitutes taxation in contravention of the New York State Constitution. Alternatively, commenters argue that if the Program does not impose a tax, the Program is ultra vires because the Department and the Authority lack the statutory authority to create fees.

The Department and the Authority do not believe that the Program constitutes a tax. The primary purpose of this measure is to discourage the emissions of CO<sub>2</sub>. The sale and auction of allowances will help create CO<sub>2</sub> allowance price signals at a level sufficient to cause investment in technologies and strategies that would reduce or avoid emissions of CO<sub>2</sub>. Similarly, the Program does not implement a fee. Rather, the Department is requiring owners and operators of each CO<sub>2</sub> budget unit at the source to acquire allowances either at an auction or in the secondary market.

Regarding reliability, many commenters suggest that the Program might have an impact on electric system reliability; some further allege that the modeling conducted to assess potential impacts on reliability is inadequate. Notwithstanding this, the New York Independent System Operator (NYISO), ICS Consulting, and the Department of Public Service (DPS) each concluded that reliability would not be impacted. Based on their research, these entities all found that no generating facility would be forced to retire as a result of the Program.

Several commenters expressed concern over the potential for leakage. Concerns regarding cost effectiveness, price increases for energy in RGGI states, utility diminishment, and importation of energy from non-RGGI states are also expressed. In response, the Department submitted a final report of the RGGI Emissions Leakage Workgroup dated March 31, 2008. Among other things, the report includes: 1) information about the tracking of potential leakage, 2) a number of possible leakage mitigation policies, and 3) information about the current political momentum towards a national cap-and-trade program.

Although the Department and the Authority provided an unprecedented amount of public comment on the model rule, pre-proposal and the proposed Program and Draft Generic Environmental Impact Statement (DGEIS), some commenters note that the comment period was insufficient. The Department and the Authority strongly disagree with this comment because the public had ample opportunity over several years to engage in the unprecedented stakeholder process. RGGI included an extensive stakeholder process in which an expert Resource Panel was assembled to provide the RGGI states with assistance in the development of a framework for a regional carbon cap-and-trade program.

To supplement the regional stakeholder process, New York carried out its own stakeholder process which was designed to afford additional opportunities to provide input directly to New York's representatives. On December 5, 2006, the Department released a pre-proposal draft of the Program after which it held a public meeting. The Department allowed stakeholders and the public the opportunity to provide written comments which were then reviewed and considered in the development of the Program. On October 24, 2007, the Department and the Authority formally proposed the Program which was also followed by public hearings. In response to these comments, the Department and the Authority are proposing revised rules.

Comments were also received requesting additional offset categories, including tail pipe emissions projects, biomass, and forest products, among others. The Department responded that it will not deviate from the five categories included in the original proposal, but it will work with the other RGGI states to determine additional categories in the future.

In addition to the offset comments, several comments regarding the auction component of the Program were received which center on the structure of the auction system, the transparency of its operation, the pricing and allocation of allowances and the implementation of the Account. Many comments are directed at the perceived potential for manipulating the auction process, and the need for a "robust" oversight and monitoring system. The Department and the Authority responded by amending the rule to provide for an independent monitor to observe the conduct and outcome of each auction and activity among and between the allowance accounts looking for collusion, price manipulation or unfair market power.

Concern is also voiced about the use of a reserve price in the auctions. Several comments expressed concern that allowances not sold would be

taken out of the market or have their market entry delayed. Others said that a reserve price creates an artificial floor. The Department's and the Authority's decision to use a reserve price was based upon extensive analysis by the Authority's research team with stakeholder input. Both the Authority and the Department agree that the reserve price protects against the possibility of collusion and provides a price signal that supports a minimum rate of investment in technologies and strategies that reduce CO<sub>2</sub> emissions.

Several comments are directed at the structure and implementation of the Account. Furthermore, while many support the Authority as the appropriate manager of auction proceeds and suggest that an oversight committee to assist with distribution issues would also be appropriate, some make specific requests that the auction proceeds flow back to certain entities or for specific purposes, including rate payer relief.

The Authority responded that the proceeds raised through the sale of allowances will be used to promote and implement programs for energy efficiency, renewable or non-carbon emitting technologies, and innovative carbon emissions abatement technologies with significant carbon reduction potential. The Authority will periodically convene an advisory group of stakeholders representing a broad array of energy and environmental interests to advise it on how to best utilize the funds to achieve the goals of the Account. As part of initial program development, the Authority will outline draft program guidelines and funding criteria for the Account. Stakeholders will have an opportunity to provide input and comment on these guidelines through the stakeholder advisory group and open public comment. Subsequently, a draft multi-year operating plan will be presented to the stakeholder advisory group for comment. An annual program evaluation and progress report will be prepared and shared with the stakeholder advisory group and the public.

In response to several comments, Part 507.6 of the Auction Program has been revised to accommodate quarterly auctions. The rule now provides that they will be held at least quarterly or "as often as necessary to effectuate the objectives of the budget trading program." Further, in response to several comments, the Department and Authority state that they are committed to making nearly 100 percent of the allowances for sale.

A majority of comments voice support for a regional auction that uses a uniform price auction formula. Accordingly, Part 507 has been revised to provide that participation in a multi state auction is the preferred approach. New York State will not take place in the first scheduled auction in September, but plans to participate in the December multi State auction.

Concerns regarding the potential participation of eligible companies in the auction were also expressed. In response, the revised regulations allow the Authority to limit the participation of any applicant or bidder found to have violated any rule, regulation or law associated with any commodity market. The Authority also may limit eligibility to participate in any auction to the level of security provided. Finally, the Program was revised to require public disclosure of auction related auction results.

Apart from the auctions, some commenters allege that the Department and the Authority did not comply with the requirements of the State Environmental Quality Review Act (SEQRA) because the DGEIS was incomplete. To address this concern, the Department and the Authority are preparing a Supplemental DGEIS to consider aspects of the Program that were not fully developed at the time the initial DGEIS was prepared.

Some commenters are concerned about the possible costs of the Program to both regulated facilities and electricity consumers. They oppose the decision to auction nearly 100 percent of the allowances, rather than allocate the allowances for free; they also claim that a price cap is needed in order to protect consumers. The Department and the Authority responded that a price cap would have no impact on the cost to consumers because it would not affect the price of allowances on the secondary market. Moreover, the investment of auction proceeds in energy efficiency will reduce electricity demand and thus lessen any increase in cost to consumers caused by the Program.

Several comments were received regarding the behind-the-meter exemption. Some commenters express an opinion that there should be no such exemption, while others feel that the exemption is not large enough. The Department included this provision to create a limited exemption for industrial sources, not typically regulated in New York as electric generators, that provide little or no electrical output to the grid.

Most comments received regarding the voluntary renewable set-aside support this provision, while a small number oppose it. In particular, commenters addressed the 700,000 ton amount of the set-aside. Adjustments to the amount of the set-aside can be made through amendments to the regulation if the set-aside is determined to be over or under subscribed.

A number of commenters recommend that a sunset provision be included that is contingent upon the enactment of a Federal cap and trade or other climate change program. The Department and the Authority anticipate that they will repeal or amend the regulations to comport with the Federal program, in the event such a program is established.

Several comments address the Department's inclusion of a Long-term Contract (LTC) set-aside of 1.5 million allowances. The vast majority of these comments are opposed to the set-aside, while a small number of commenters urged an increase in the size of the set-aside. The Department created the set-aside to accommodate the small number of generators able to demonstrate a financial hardship created by having to purchase allowances. The Department made revisions to the Program to further limit the use of the set-aside, including requiring that the allowances be used for compliance only.

A substantial number of comments were received that express support for the Program and New York's participation and leadership in RGGI. The Department acknowledged that adequately addressing climate change issues will eventually require economy-wide regulation.

Many commenters suggest that the emissions cap is set too high and request that the Department consider re-evaluating the numbers to reflect the reduction in emissions since 2005. Other commenters note that if the cap is too high in 2009, an artificially low market would be created. The Department maintains that the base budget will be used and will not be revisited at this time; however, there will be annual updates that may be used to adjust the cap if necessary.

Finally, many comments were received that provided specific recommendations for changes to or clarifications of the regulatory language, such as definitions and permitting requirements. In each instance, the Department and the Authority explained the reasoning behind the inclusion of the particular language, and in some cases made the suggested changes to the regulations.

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## Department of Health

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### EMERGENCY RULE MAKING

#### DRGs, SIWs, Trimpoints and the Mean LOS

**I.D. No.** HLT-19-08-00002-E

**Filing No.** 352

**Filing date:** April 22, 2008

**Effective date:** April 22, 2008

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

**Action taken:** Amendment of sections 86-1.55, 86-1.62 and 86-1.63 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2803(2), 2807(3), 2807-c(3) and (4)

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

**Specific reasons underlying the finding of necessity:** 86-1.55 Development of Outlier Rates of Payment

The Department of Health and Human Services (HHS), Office of Inspector General, has issued to the New York State Department of Health a final audit report (A-02-04-01022, June 2006) on the State's hospital outlier payment methodology. This report addressed vulnerabilities in the methodology that may result in excessive payments to certain hospitals. HHS noted that NYS does not use the most accurate cost-to-charge data in determining the outlier payments, and that if it had done so there could be savings for the Medicaid program. After reviewing the report and HHS's recommendations, the Department of Health concurs with the findings and has agreed to update the outlier payment methodology to reflect a calculation based on cost-to-charge data from the year of the patient discharge. However, revised regulations need to be adopted in order to implement the HHS recommendations because current regulation does not provide for the use of updated data.

86-1.62 Service Intensity Weights and Group Average Arithmetic Lengths of Stay

86-1.63 Non-Medicare Trim Points

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.

In addition, the SIWs and group average inlier length of stays (LOS) were updated to reflect 2004 costs and statistics reported to the Department for a representative sample of hospitals. The current SIWs and LOS are based on twelve year old data and need to be updated for hospital payment to reflect prevailing patterns of health use and services. This update ensures a reflection of more current clinical practices, advances in technology, changes in patient resource consumption, and changes in hospital length of stay patterns.

The SIWs and non-Medicare trimpoints are an integral part of the 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:** DRGs, SIWs, trimpoints and the mean LOS.

**Purpose:** To update the calculation of outlier payments based on HHS audit findings and recommendations.

**Substance of emergency rule:** 86-1.55 - Development of Outlier Rates of Payment

The proposed amendment of section 86-1.55 of Title 10 (Health) NYCRR is intended to update the calculation of cost outlier payments to reflect a cost to charge ratio which is based on data for the year in which the discharge occurred. Currently the payments are calculated based on the most recent information available, generally two year old cost to charge data.

This amendment is the result of a final audit report by the Department of Health and Human Services on Medicaid hospital outlier payments.

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.

In addition, the SIWs and group average inlier length of stays were updated to reflect 2004 costs and statistics reported to the Department for a representative sample of hospitals. This update ensures a reflection of more current clinical practices, advances in technology, changes in patient resource consumption, and changes in hospital length of stay patterns. The revised service intensity weights based on 2004 data are being phased-in over a three year period. The weights effective for the period January 1, 2008 through December 31, 2008 will be based on 75% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 25% of the service intensity weights based on 2004 data. The service intensity weights effective for the period January 1, 2009 through December 31, 2009, will be based on 33% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 67% of the service intensity weights based on 2004 data. Effective January 1, 2010 and thereafter, the service intensity weights will be based on 2004 data.

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 to be based on 2004 data.

#### General Summary for 86-1.62 and 1.63

The changes in the DRG classification system and service intensity weights 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.

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.

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 this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire July 20, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Katherine E. Ceroalo, Department of Health, Office of Regulatory Affairs, Corning Tower, Rm. 2438, Empire State Plaza, Albany, NY 12237-0097, (518) 473-7488, fax: (518) 473-2019, 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) and 2807(4) 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. Chapter 58 of the Laws of 2007 authorizes the SHRPC and the Commissioner to update the cost and statistical base used to determine the SIWs and trimpoints to calendar year 2004 data and to provide for a phase-in of the new weights. PHL section 2807-c (4) authorizes the SHRPC to adopt rules, subject to the Commissioner's approval, for exceptions to case based payments for cost outliers.

##### 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 amendment to section 86-1.55 of Title 10 (Health) NYCRR is intended to revise the methodology for calculating hospital cost outlier payments. The proposed methodology is based on more current and appropriate cost to charge ratios for determining the outlier expense, which is consistent with the method used in Medicare reimbursement. The proposal will provide for an update to the ratio from the initial payments based on two year old data, to data from the year in which the discharge occurred. This will cause the outlier payments to more accurately reflect reasonable costs incurred by each hospital, and address the problem of excessive over payments.

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) NYCRR 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. Additionally, the SIWs and trimpoints are updated from the current 1992 cost and statistic base to 2004 data reported to the Department and being phased-in over a three year period.

The SIWs and non-Medicare trimpoints are an integral part of the 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, and to incorporate the 2004 cost and statistical basis, thus creating new values for the SIWs and trimpoints in sections 86-1.62 and 86-1.63. Lastly, 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 amendment to 86-1.55, development of outlier payments, is estimated to produce savings to the State.

The amendments to 86-1.62 and 86-1.63 revising the DRGs, SIWs and trimpoints has been legislated as budget neutral; therefore there is no additional costs to the State as a result of these regulation changes.

##### Costs of Local Government:

No increase or decrease 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:

The change to the outlier payment methodology is based on an audit by the Department of Health and Human Services. The Department concurs with the findings of the audit and HHS's recommended methodology change; therefore alternatives were not considered.

Based upon suggestions/recommendations received from hospital industry representatives, the Department has included adjustments that provide more appropriate recognition of the costs related to current clinic practices new medical technologies, changes in patient resource consumption, and changes in hospital length of stay patterns. Two alternatives were considered for the means of adjusting the revised SIWs to ensure budget neutrality.

##### 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, 2008; there is no period of time necessary for regulated parties to achieve compliance.

Contact Person: Katherine Ceroalo, Department of Health, Bureau of House Counsel, Regulatory Affairs Unit, Corning Tower Building, Room 2438, Empire State Plaza, Albany, NY 12237, (518) 473-7488, (518) 473-2019 (FAX), 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, record keeping or other compliance requirements are being imposed as a result of these rules.

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 outlier payments; 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, and the new cost and statistical base.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.55, there may be a decrease to specific hospitals' revenues. In the aggregate, as a result of the amendments to 86-1.62 and 86-1.63 there will be no anticipated increases or decreases in hospitals' Medicaid revenues. However, 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 these proposals by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its December 6, 2007 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, record keeping, 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. As a result of the amendment to 86-1.55, there may be a decrease to specific hospitals' revenues. In the aggregate, as a result of the amendments to 86-1.62 and 86-1.63 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 December 6, 2007 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 rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the calculation of cost outlier payments and update the diagnosis related group (DRG) classification system for inpatient hospital services as well as the corresponding service intensity weights and length of stay standards. The cost outlier payments are exceptions to the case payment rates for high cost or long stay cases and have been in effect since 1988 in New York State. The DRG classification system, which also has been in effect since 1988, is utilized to reimburse hospitals for inpatient services rendered to Medicaid beneficiaries. The proposed regulations have no implications for job opportunities.

## Insurance Department

### EMERGENCY RULE MAKING

#### Market Stabilization Mechanisms for Individual and Small Group Market

**I.D. No.** INS-41-07-00005-E

**Filing No.** 354

**Filing date:** April 22, 2008

**Effective date:** April 22, 2008

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

**Action taken:** Amendment of sections 361.5 and 361.7(a), renumbering of sections 361.6-361.7 to sections 361.7-361.8 and addition of new section 361.6 to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 3233; L. 1992, ch. 501, L. 1995, ch. 504

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

**Specific reasons underlying the finding of necessity:** The first filing for the new pooling methodology was November 10, 2006, and the second filing was January 31, 2007.

**Subject:** Market stabilization mechanisms for individual and small group market.

**Purpose:** To create a new market stabilization process in the individual and small group market, to share among plans substantive cost variations attributable to high cost medical claims.

**Text of emergency rule:** The title of Section 361.5 is amended to read as follows:

Section 361.5 Pooling of variations in costs attributable to variations in specified medical conditions (SMC) beginning in 1999 through 2006.

Section 361.5 is hereby amended to add a new subdivision (k) to read as follows:

(k) Reporting requirements, payments to the pools, or collections from the pools under this section shall not be required in 2005 or 2006.

Sections 361.6 and 361.7 are hereby renumbered 361.7 and 361.8 and a new section 361.6 is added to read as follows:

361.6 Pooling of variations of costs attributable to high cost claims beginning in 2006 for individual and small group policies, other than Medicare supplement and Healthy New York policies.

(a) In each pool area a risk adjustment pool is established in connection with individual and small group health insurance policies, other than Medicare supplement insurance policies and Healthy New York health insurance policies. Each pool shall operate independently; that is, all calculations and payments described below are made for each pool independently of any other pool.

(b) The annual funding amount for all pool areas combined is as follows:

(1) \$80,000,000 for 2007;

(2) \$120,000,000 for 2008; and

(3) \$160,000,000 for 2009 and each calendar year thereafter.

(c) The annual funding amount for each pool area is in proportion to the annualized premiums in that pool area. For 2007 and each calendar year thereafter, each pool participant shall provide to the superintendent annualized premium information on or before February 28. The superintendent shall advise carriers of the funding amount for each pool area within sixty days of receipt of annualized premium information from all carriers.

(d)(1) Each carrier's share of the total funding payable to or from the pools shall be determined based on the carrier's high cost claims in its areas of operation.

(2) In order to implement the phase in of the new specified medical condition pooling process, on or before November 10, 2006 each carrier shall report to the superintendent its annualized premium amount as of December 31, 2005 and its cumulative calendar year claims paid in 2005 for individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, using the form in subdivision (h) of this section for each

pool area. The superintendent will provide carriers with an estimate of potential pool receivables or liabilities using this 2005 data for advisory purposes only.

(3) Each following year, beginning in 2007, on or before February 28, each carrier shall report to the superintendent its annualized premium amount as of December 31 of the preceding year and its cumulative calendar year claims paid in the preceding year for individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, using the form in subdivision (h) of this section for each pool area. In 2007, the superintendent provided carriers with a second estimate of potential pool receivables or liabilities using 2006 data, for advisory purposes. Payments to the pools, or collections from the pools, shall be required beginning in 2008 and shall be based upon the data from the preceding calendar year.

(4) Cumulative calendar year claims paid shall include the total of all claim payments on behalf of an insured individual from January 1 through December 31 of the preceding year, regardless of when the services were provided.

(5) Cumulative calendar year claims paid shall include payments for hospital and medical services, prescription drug payments, capitation payments, and regional covered lives assessments paid pursuant to section 2807-t of the Public Health Law or percentage surcharges paid pursuant to section 2807-j or section 2807-s of the Public Health Law. Carriers that include the covered lives assessments shall convert the family covered lives assessment into a per member assessment component in order to be included with claims expenses attributable to any one member.

(6) Cumulative calendar year claims paid shall not include amounts paid in satisfaction of the percentage surcharge requirement set forth in section 2807-j(2)(b)(i)(B) of the Public Health Law or interest paid out by a carrier pursuant to section 3224-a(c) of the Insurance Law.

(7) Each carrier's submission shall be signed by an officer of the carrier certifying that the information is accurate.

(8) If a carrier makes a submission after February 28 and the carrier is a pool payer, the carrier's payment into the pool will be increased by one percent interest per month. If a carrier makes a submission after February 28 and the carrier is a pool receiver, the carrier's distribution will be reduced by one percent per month.

(e) The superintendent shall calculate each carrier's share of the total funding payable to or from the pools pursuant to the example in subdivision (i) of this section for each pool area as follows:

(1) Identify the total claims paid by each carrier for the following types of policies: individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, other than Medicare supplement and Healthy New York insurance policies.

(2) Identify the total claims paid in excess of \$20,000 for each insured by type of policy.

(3) For each carrier for each type of policy, divide the claims paid in excess of \$20,000 by the total claims paid (the amount specified in paragraph (2) of this subdivision divided by the amount specified in paragraph (1) of this subdivision) to determine the high cost claim ratio.

(4) Calculate the average high cost claim ratio for all carriers for all types of policies combined and multiply that ratio by the total claims paid for each carrier for each type of policy (a carrier's amount specified in paragraph (1) of this subdivision multiplied by the average high cost claim amount specified in paragraph (3) of this subdivision.)

(5) Subtract the amount calculated in paragraph (4) of this subdivision from the amount in paragraph (2) of this subdivision for each carrier for each type of policy to determine the adjustment needed to equalize high cost claims and determine if the carrier is a net contributor or receiver.

(6) Sum the net contributions of all carriers who are net contributors in the pool area to determine the total net contribution.

(7) Divide the pool area funding amount by the total of paragraph (6) of this subdivision and multiply by the amount identified for each carrier for each type of policy in paragraph (5) of this subdivision to determine the carrier's net pool contribution or distribution.

(f) Billings will be done by the superintendent beginning in 2008 within thirty days of receipt of submissions from all carriers, and payments will be due from carriers within five business days from the date billed. Payments made after the due date shall include interest at a rate of one percent per month. Subsequent to the billing date, but within the calendar year, carrier data that formed the basis of the billing will be audited. In the event audits necessitate post-billing adjustments, the adjustments will be

charged or credited in the next year's billing or distribution. Additional payments due from any carrier whose data errors caused it to underpay, or refunds due back from any carrier whose data errors caused it to be overpaid, shall include a one percent interest charge per month from the original due date or payment date.

(g) A carrier shall, with respect to distributions from the pools attributable to each type of policy, as determined in paragraph (7) of subdivision (e) of this section, without reduction for contributions owed on other types of policies:

(1) refund the distributions directly to insureds based upon the type of policy that caused the payments to be received without consideration of minimum loss ratio provisions; or

(2) submit a detailed plan to the superintendent for approval:

(i) demonstrating how the distribution will be applied to reduce future premium rates for the type of policy whose insureds caused the payments to be received, or

(ii) providing a detailed explanation as to how the distribution was considered in the development of premium rates for that year.

(h) Claim Submission Form.

Claims Paid From January 1 - December 31, (\_\_\_\_)

Carrier: \_\_\_\_\_

Pool Area: \_\_\_\_\_

Total annualized premium for individual standardized direct payment health maintenance organization (HMO) policies, individual standardized direct payment point of service (POS) policies, other individual health insurance policies, and small group policies: \_\_\_\_\_.

Cumulative Total Claims Paid Above Listed Amounts (Attachment Point)	Direct Payment HMO	Direct Payment POS	Direct Payment Other	Small Group	Total
ZERO					
\$10,000					
\$15,000					
\$20,000					
\$25,000					
\$30,000					
\$35,000					
\$40,000					
\$45,000					
\$50,000					
\$60,000					
\$70,000					
\$80,000					
\$90,000					
\$100,000					

**Instructions:**

\* Do not include Medicare Supplement Policies or Healthy New York Policies.

\*\* For each insured determine the cumulative claims paid from January 1 through December 31 and report the total claims paid for all insureds for each type of policy listed above.

\*\*\*At each dollar level (Attachment Point), report all claims paid over that attachment point level amount from January 1 through December 31 for any insured. Cumulative total claims paid above the ZERO attachment point level would equal the total claims paid by the carrier for all insureds for the period.

(i) Chart for calculation of pool amounts.

1	2	3	4	5	6
Albany Region Total Claims Paid	Claims Paid in Excess of \$20,000	High Cost Claims Claim Ra- tio (Col- umn 2 Di- vided by Column 1)	High Cost Paid Mul- tiplied by Average High Cost Claims (Col- umn 1 Multiplied by Col- umn 3 Av- erage)	Adjust- ment to Equalize High Cost Claims (Column 2 Minus Column 4)	Pool Amount Owed or Re- ceivable (Pre- determined Total Pool Amount Di- vided by Col- umn 5 Total Net Contribu- tions of All Net Contribu- tors Multiplied by Column 5)

Carrier A  
Dir Pay HMO  
Dir Pay POS  
Dir Pay Other  
Small Group  
Carrier A  
Net  
Contribution  
or  
Distribution  
Carrier B  
Dir Pay HMO  
Dir Pay POS  
Dir Pay Other  
Small Group  
Carrier B  
Net  
Contribution  
or  
Distribution  
Total Net  
Contributions  
All Net  
Contributors  
Total Net  
Distributions  
All Net  
Receivers

Section 361.6 is renumbered to be 361.7 and the opening paragraph of subdivision (a) is amended to read as follows:

361.7(a) The pools shall be administered *either directly* by the superintendent, or *in conjunction with a firm*, performing at least the following functions:

**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. INS-41-07-00005-P, Issue of October 10, 2007. The emergency rule will expire June 20, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Andrew Mais, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2285, e-mail: Amais@ins.state.ny.us

**Regulatory Impact Statement**

1. Statutory authority: The superintendent's authority for the fifth amendment to 11 NYCRR 361 is derived from Sections 201, 301, 1109, 3233 and Chapter 501 of the Laws of 1992 and Chapter 504 of the Laws of 1995.

Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations interpreting the provisions of the Insurance Law, as well as effectuate any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise make regulations.

Section 1109 authorizes the superintendent to promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to contracts between a health maintenance organization and its subscribers.

Section 3233 authorizes the superintendent to promulgate regulations to create a pooling process involving insurer contributions to, or receipts from, a fund designed to share the risk of or equalize high cost claims with respect to individual and small group health insurance.

Chapter 501 of the Laws of 1992 amended the insurance law and public health law to require that individual and small group health insurance be made available on an open enrollment basis; community rating of individual and small group health insurance policies; portability of health insurance coverage; continuation of hospital, surgical or medical expense insurance; and that the superintendent promulgate regulations to assure an orderly implementation and ongoing operation of open enrollment and community rating.

Chapter 504 of the Laws of 1995 amended the insurance law and the public health law to establish standardized direct payment contracts for individual health insurance and to provide that regulations promulgated by the superintendent shall include only reinsurance or a pooling process involving insurer or health maintenance organization contributions to, or receipts from, a fund which shall be designed to share the risk of high cost claims or the claims of high cost persons.

2. Legislative objectives: The statutory sections cited above provide a framework for the establishment of a market stabilization process in the individual and small group health insurance markets. The proposed amendment to Regulation 146 is consistent with legislative objectives in that it would effectuate the Legislature's direction in Section 3233 to

establish a pooling process involving health maintenance organization and insurer contributions to, or receipts from, a fund that shall be designed to share the risk of or equalize high cost claims or claims of high cost persons, and to protect insurers and health maintenance organizations from disproportionate adverse risks of offering coverage to all applicants.

3. Needs and benefits: The proposed amendment will modify the pooling methodology established in the Fourth Amendment to Regulation 146 (11 NYCRR 361.5) to provide a simplified approach and to increase uniformity and consistency in the methodologies used by insurers and health maintenance organizations when determining their contributions and/or distributions from the pools, and should help insurers and health maintenance organizations avoid reporting errors. The proposed amendment is needed because of the widely differing methodologies used by insurers and health maintenance organizations, and the inconsistencies and resulting confusion as to how to apply the distributions and/or contributions to premium rates. This amendment also simplifies and makes more straightforward the eligibility criteria for reporting claims data to the pools, which pool participants indicated was very complicated, difficult to ascertain, and time consuming under the Fourth Amendment to Regulation 146.

This amendment is the result of comments and suggestions received by the Department from health maintenance organizations and insurers with regard to the current market stabilization pools. As a result of the comments and suggestions, the current market stabilization pools are being phased-out. Payments, collections and data reports were not required in 2005 or 2006, and the new pooling methodology will be transitioned into operation over a three year period. In 2007, the pools will be funded at \$80 million, which is half of the funding amount of the prior specified medical condition pools established under the Fourth Amendment to Regulation 146. In 2008, the funding level of the pools will be increased to \$120 million, and in 2009, the funding level of the pools will be increased to the full funding amount of \$160 million. This phase-in will ensure that health maintenance organizations and insurers have sufficient time to account for the impact of this amendment. In addition, modeling of the pool calculations using 2006 claims data indicates that, at the \$20,000 high cost claim threshold established in this amendment, and with consideration for estimated medical cost and health insurance claim inflation, the phase-in amounts above are the approximate amounts that the pool calculations are expected to produce over the three-year period.

Comparable to all prior pooling methodologies established pursuant to Section 3233 of the Insurance Law, the Fifth Amendment to Regulation 146 continues to pool individual and small group policies in order share the risk of, or equalize, high cost claims or high cost persons. The pooling of individual and small group policies is necessary to provide meaningful distribution of high cost persons and claims across the community rated markets.

4. Costs: This amendment imposes no compliance costs upon state or local governments. The amendment does not impose any significant additional compliance costs to insurers or health maintenance organizations. Insurers and health maintenance organizations may have to modify their internal policies and procedures for compliance with the new pooling methodology, and if insurers or health maintenance organizations fail to comply with statutory or regulatory pooling requirements, a penalty could be imposed. In addition, similar to the previous pooling methodology, insurers and health maintenance organizations with healthier lives will have to pay money into the market stabilization pools, and those with unhealthy lives will receive money from the pools. There will be a cost to insurers and health maintenance organizations with healthier lives; however, the purpose of any market stabilization mechanism is to share risk and equalize claim costs. There should be no additional costs to the Insurance Department, as existing personnel are available to assist insurers and health maintenance organizations with the transition to the new market stabilization process.

5. Local government mandates: The proposed amendment imposes no new programs, services, duties or responsibilities on local government.

6. Paperwork: The proposed amendment imposes new reporting requirements. However, insurers and health maintenance organizations are currently reporting similar information to the superintendent for the pooling requirements set forth in the specified medical condition pools established by the Fourth Amendment to Regulation 146 (11 NYCRR 361.5). Insurers and health maintenance organizations will report annually to the superintendent under this amendment, while under the Fourth Amendment to Regulation 146 they were required to report biannually. Therefore, this proposed amendment will decrease the amount of paperwork for the insurers and health maintenance organizations compared to the amount required under the Fourth Amendment to Regulation 146.

7. Duplication: Section 3233 directs the superintendent to promulgate regulations to create a pooling process to establish stabilization in the individual and small group markets. There is no duplication with federal or state laws.

8. Alternatives: The Insurance Department has met extensively with the Health Plan Association and the Conference of BlueCross BlueShield Plans to discuss this amendment. A suggestion was made to take payments from the Direct Payment Stop Loss Funds into consideration when determining amounts owed or received under the new pooling methodology. The Direct Payment Stop Loss Funds were established in 1999 pursuant to Sections 4321-a and 4322-a of the Insurance Law, which establishes a separate statutory mandate from Section 3233 of the Insurance Law, which first provided for the establishment of the market stabilization pools in 1992. The Direct Payment Stop Loss Funds were created to provide additional state subsidies to the individual direct payment market, and were not meant to replace the market stabilization pools. Although the previous market stabilization pools did not take the direct payment stop loss recoveries into consideration, the Department reviewed the suggestion of taking the payments from the Direct Payment Stop Loss Funds into consideration under this proposed amendment. The Department determined that if the stop loss recoveries were taken into consideration, the standardized individual HMO policies could become payors, which would undermine the intent of Section 3233 of the Insurance Law. That statute is meant to equalize the risk of high cost persons throughout the individual and small group markets by encouraging each HMO and insurer to insure high cost persons (who are mostly found in the individual direct payment market). If direct payment policies become payers, HMOs could be discouraged from insuring high cost persons - a circumstance that would run counter to the statutory intent.

Another suggestion was made to increase the claim threshold from \$20,000 to \$100,000. The Insurance Department found that the risk sharing and market stabilization would be significantly diminished, by up to 80%, if the claim threshold were increased. If this were to occur, the risk adjustment would be so nominal that the statutory requirement for risk adjustment could not be accomplished.

Interested parties also expressed concern that when the individual and small group policies are pooled together, that the market stabilization pools could involve the small group market subsidizing the individual market. The Department has previously pooled individual and small group policies together under all prior pooling methodologies established pursuant to Section 3233 of the Insurance Law in order to accomplish the legislative goals. Moreover, if individual and small group coverage were not pooled, there would not be appropriate risk adjustment in the individual market.

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

10. Compliance schedule: The provisions of this amendment will take effect immediately. However, implementation will be gradual, with the market stabilization pools reaching full funding only after three years. Insurers and health maintenance organizations were required to submit initial reports to the superintendent by November 10, 2006 and January 31, 2007 for advisory purposes only, and payments under the new pooling process will begin in 2008. The Insurance Department has had several meetings with representatives of insurers and health maintenance organizations to discuss this amendment, and insurers and health maintenance organizations should be aware of the requirements established by this amendment.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: This amendment will affect all health maintenance organizations (HMOs) and insurers licensed to do business in New York State. Based upon information provided by these companies in annual statements filed with the Insurance Department, HMOs and insurers licensed to do business in New York do not fall within the definition of "small business" found in Section 102(8) of the State Administrative Procedures Act because none of them are both independently owned and have under 100 employees.

Some of the small businesses in New York purchase health insurance from HMOs and insurers. This amendment modifies and simplifies the current pooling methodology for the individual and small group health insurance markets established by the Fourth Amendment to Regulation 146. Similar to all prior pooling methodologies, the new pooling methodology establishes a risk adjustment mechanism so that insurers covering persons with higher cost claims will receive monies from the market stabilization pools, and insurers covering persons with lower cost claims will pay money into the pools. Also similar to all prior pooling methodologies, the Fifth Amendment to Regulation 146 continues to pool individual

and small group policies together in order share the risk of or equalize high cost claims or high cost persons, as required by Section 3233 of the Insurance Law. As has been the experience under prior pooling methodologies, the Department estimates that some small groups will see a premium reduction, while others will see a nominal increase. In order to mitigate the initial impact of the amendment, the Department has established a gradual three-year implementation period until the pools become fully funded. In 2007, the pools will be funded at \$80 million, which is half of the funding amount of the prior specified medical condition pools established under the Fourth Amendment to Regulation 146. In 2008, the funding level of the pools will be increased to \$120 million. And in 2009, the funding level of the pools will be increased to the full funding amount of \$160 million. This amendment does not apply to or affect local governments.

2. Compliance requirements: This amendment will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

3. Professional services: Small businesses or local governments should not need professional services to comply with the amendment.

4. Compliance costs: This amendment will not impose any compliance costs upon small businesses or local governments.

5. Economic and technological feasibility: Small businesses or local governments should not incur an economic or technological impact as a result of the amendment.

6. Minimizing adverse impact: This amendment simplifies the market stabilization methodology for individual and small group coverage established by the Fourth Amendment to Regulation 146. The same requirements will apply uniformly to individual and small group insurance coverage offered by HMOs and insurers, similar to the Fourth Amendment to Regulation 146, and should not impose any adverse or disparate impact. As has been the experience under prior pooling methodologies, the Department estimates that some small groups will see a premium reduction, while others will see a nominal increase. The amendment also is being transitioned into full effect over three years in order to moderate any impact.

7. Small business and local government participation: These regulations are directed at HMOs and insurers licensed to do business in New York State, none of which fall within the definition of "small business" as found in Section 102(8) of the State Administrative Act. Notice of the proposal was previously published in the Insurance Department's Regulatory Agenda. That notice was intended to provide small businesses with the opportunity to participate in the rulemaking process. Interested parties were also consulted through direct meetings during the development of the proposed regulations.

#### **Rural Area Flexibility Analysis**

1. Effect of the rule: This amendment will affect all health maintenance organizations (HMOs) and insurers licensed to do business in New York State. Insurers and HMOs to which the amendment applies do business in all counties of the state, including rural areas as defined under State Administrative Procedure Act Section 102(13). This amendment may also affect small business and individuals that purchase health insurance coverage, some of which are located in rural areas across the state. This amendment modifies and simplifies the current pooling methodology for the individual and small group health insurance markets established by the Fourth Amendment to Regulation 146. Similar to all prior pooling methodologies, the new pooling methodology establishes a risk adjustment mechanism so that insurers covering persons with higher cost claims will receive monies from the market stabilization pools, and insurers covering persons with lower cost claims will pay money into the pools. Also similar to all prior pooling methodologies, the Fifth Amendment to Regulation 146 continues to pool individual and small group policies together in order share the risk of or equalize high cost claims or high cost persons, as required by Section 3233 of the Insurance Law. As has been the experience under prior pooling methodologies, the Department estimates that some small groups will see a premium reduction, while others will see a nominal increase. In addition, persons covered under the individual standardized direct payment policies will on average likely see a decrease in their premiums. In order to mitigate the initial impact of the amendment, the Department has established a gradual three-year implementation period until the pools become fully funded. In 2007, the pools will be funded at \$80 million, which is half of the funding amount of the prior specified medical condition pools established under the Fourth Amendment to Regulation 146. In 2008, the funding level of the pools will be increased to \$120 million. And in 2009, the funding level of the pools will be increased to the full funding amount of \$160 million.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The proposed amendment imposes new reporting

requirements for insurers and health maintenance organizations. However, insurers and health maintenance organizations are currently reporting similar information to the Superintendent for the pooling requirements set forth in the specified medical condition pools established by the Fourth Amendment to Regulation 146 (11 NYCRR 361.5). Therefore, this proposed amendment should not create more paperwork, recordkeeping or other compliance requirements or professional services for insurers and health maintenance organizations than are currently in place.

3. Costs: As under all prior pooling methodologies, some small businesses will see a premium reduction, while others will see a nominal increase. These small businesses may be located in rural or urban areas across the state. Individuals covered under the standardized direct payment policies will likely see a reduction in their premiums. These individuals may be located in rural or urban areas across the state.

4. Minimizing adverse impact: This amendment simplifies the market stabilization methodology for individual and small group coverage established by the Fourth Amendment to Regulation 146. The same requirements will apply uniformly to individual and small group insurance coverage offered by HMOs and insurers, similar to the Fourth Amendment to Regulation 146. The impact on small businesses and individuals who purchase health insurance in the individual or small group market and who may be located in rural areas, should be comparable to the impact on small businesses or individuals who are located in urban areas. The amendment is being transitioned into full effect over the course of three years in order to mitigate any impact.

5. Rural area participation: These regulations are directed at HMOs and insurers licensed to do business in New York State, which do businesses in every county in New York. Notice of the proposal was previously published in the Insurance Department's Regulatory Agenda. That notice was intended to provide small businesses or individuals who are located in rural areas with the opportunity to participate in the rulemaking process. Interested parties were also consulted through direct meetings during the development of the proposed regulations.

#### **Job Impact Statement**

This amendment to Regulation 146 will not adversely impact job or employment opportunities in New York. The proposed amendment is likely to have no measurable impact on jobs. Insurers and health maintenance organizations will need to annually report to the Superintendent their annualized premium amount and their cumulative calendar year claims paid. However, it is anticipated that such responsibilities will be handled by existing personnel because these reporting requirements are similar to the existing reporting requirements set forth in the Fourth Amendment to Regulation 146 (11 NYCRR 361.5). Costs to the Insurance Department will also be minimal, as existing personnel are available to assist insurers and health maintenance organizations in implementing the new pooling methodology.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### **Transfer of Water Supply Assets by Peek'n Peak Water Services, Inc. and Kiebler Water Services, Inc.**

**I.D. No.** PSC-28-06-00016-A

**Filing date:** April 22, 2008

**Effective date:** April 22, 2008

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

**Action taken:** The commission, on March 19, 2008, adopted an order in Case 06-W-0558, approving the joint petition of Peek'n Peak Water Services, Inc. and Kiebler Water Services, Inc. for Kiebler Water Services, Inc. to acquire all of the water supply assets of Peek'n Peak Water Services, Inc.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and 89-h

**Subject:** Transfer of water supply assets.

**Purpose:** To approve the transfer of the water supply assets of Peek'n Peak Water Services, Inc. to Kiebler Water Services, Inc.

**Substance of final rule:** The Commission approved a joint petition by Peek'n Peak Water Services, Inc. and Kiebler Water Services, Inc. for the transfer of all the water supply assets of Peek'n Peak Water Services, Inc. to Kiebler Water Services, Inc., subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0558SA1)

**PROPOSED RULE MAKING  
HEARING(S) SCHEDULED**

**Major Rate Filing by Orange and Rockland Utilities, Inc.**

**I.D. No.** PSC-19-08-00010-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 or modify, in whole or in part, a proposal filed by Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 2. The statutory suspension period of the filing runs through July 6, 2008.

**Statutory authority:** Public Service Law, section 80(10)

**Subject:** Major rate filing.

**Purpose:** To consider a proposal to increase annual electric revenues by approximately \$47.8 million which represents a 7.7 percent average increase including an estimated supply cost. The average transmission and delivery rate increase would be approximately 25.5 percent.

**Public hearing(s) will be held at:** 3:00 p.m., May 21, 2008\* at Ramapo Town Hall, Council Rm., 237 Rte. 59, Suffern, NY; 7:30 p.m., May 21, 2008\* at Rockland County Legislative Chamber, 11 New Hempstead Rd., New City, NY; 7:00 p.m., May 22, 2008\* at Middletown Thrall Library, Meeting Rm., 11-19 Depot St., Middletown, NY; and 1:00 p.m., May 27, 2008\* at Orange County Legislative Chamber, 255 Main St., 3rd Fl., Goshen, NY.

\*On occasion there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS Web Site ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 07-E-0949.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Interpreter Service:** Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Substance of proposed rule:** On August 10, 2007, Orange and Rockland Utilities, Inc. (O&R) made a tariff filing to increase its annual electric revenues by approximately \$47.8 million which represents a 7.7% average increase over total electric revenues including those for commodity. The average transmission and delivery rate increase would be approximately 25.5%. O&R also proposed provisions for a multi-year rate plan that addresses revenue requirement for an additional two-year period: \$10.0 and \$5.1 million for the years ending June 30, 2010 and June 30, 2011.

O&R and several other parties filed a document on April 18, 2008 reflecting their common contention that O&R needs additional annual electric delivery revenues of \$23.287 million, \$9.526 million, and \$4.057 million for the three years starting July 1, 2008, July 1, 2009 and July 1, 2010. They propose that the additional needed revenue be recovered gradually over three years, allowing annual revenue increases of \$15.591 million per year. The recent proposal also includes terms concerning all aspects of revenue requirement, the allocation of revenue requirement among classes, the design of rates within customer classes, and increases to service fees and other charges in tariffs. Proposals for an energy service

company referral program, a low-income program, an energy efficiency program, and customer service and reliability programs are also included.

The statutory suspension period for the August 2007 filing runs through July 6, 2008. The Commission may adopt in whole or in part or reject terms set forth in O&R's August 2007 proposal and in the parties' April 18, 2008 proposal.

**Text of proposed rule may be obtained from:** Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660

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

**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.

(07-E-0909SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Merger between KeySpan Communications Corp. and Light Tower Fiber LLC**

**I.D. No.** PSC-19-08-00007-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 deny a petition seeking its consent and approval to a merger between KeySpan Communications Corp. and Light Tower Fiber LLC.

**Statutory authority:** Public Service Law, section 108(1)

**Subject:** Merger of two companies.

**Purpose:** To determine whether the certificate of merger should be approved.

**Substance of proposed rule:** On April 8, 2008, Light Tower Fiber LLC and KeySpan Communications Corp. filed a Petition seeking approval of the acquisition of KeySpan Communications Corp. by Light Tower Fiber LLC and the endorsement of the consent and approval of the Public Service Commission on the Certificate of Merger to be filed with the Department of State.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, 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.

(08-C-0363SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Interconnection Agreement between Verizon New York Inc. and Telephone Operating Company of Vermont LLC**

**I.D. No.** PSC-19-08-00008-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 Verizon New York Inc. and Telephone Operating Company of Vermont LLC for approval of an interconnection agreement executed on April 1, 2008.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Interconnection of the networks between Verizon New York Inc. and Telephone Operating Company of Vermont LLC for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement.

**Substance of proposed rule:** Verizon New York Inc. and Telephone Operating Company of Vermont LLC have reached a negotiated agreement whereby Verizon New York Inc. and Telephone Operating Company of Vermont LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until March 31, 2010, or as extended.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, 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.

(08-C-0404SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Consolidated Edison Company of New York, Inc.'s Report on 2007 Performance under Electric Service Reliability Performance Mechanism**

**I.D. No.** PSC-19-08-00009-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 (commission) is considering Consolidated Edison Company of New York, Inc.'s (Con Edison or the company) report on 2007 performance under electric service reliability performance mechanism (2007 RPM Report). Specifically, the commission will consider whether Con Edison has met all of the performance standards as prescribed by the commission in the company's rate plan.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** Con Edison's 2007 RPM Report.

**Purpose:** To consider whether Con Edison has met all of the performance standards as prescribed by the commission in the company's rate plan.

**Substance of proposed rule:** The Public Service Commission (Commission) is considering Consolidated Edison Company of New York, Inc.'s (Con Edison or the company) Report on 2007 Performance under Electric Service Reliability Performance Mechanism (2007 RPM Report). Specifically, the Commission will consider whether Con Edison has met all of the required performance standards set forth in the Joint Proposal of the company's current Rate Plan. Con Edison has stated that a revenue adjustment of \$9 million is applicable for failure to meet threshold standards for interruption frequency for its network system and interruption duration for its radial system. The company states that it has met all other threshold targets, including targets for interruption duration for its network system, interruption frequency for its radial system, major outages, pole repairs, shunt removal, no current streetlight repairs, and over duty circuit breaker replacement.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, 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-0572SA14)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Submetering of Electricity by Riverstone Residential NE, LLC**

**I.D. No.** PSC-19-08-00011-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 grant, deny or modify, in whole or part, the petition filed by Riverstone Residential NE, LLC to submeter electricity at One City Place, White Plains, NY.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of Riverstone Residential NE, LLC to submeter electricity at One City Place, White Plains, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Riverstone Residential NE, LLC to submeter electricity at One City Place, White Plains, New York, located in the territory of Consolidated Edison Company of New York, Inc.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, 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.

(08-E-0389SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Submetering of Electricity by 138 Court Street, LLC**

**I.D. No.** PSC-19-08-00012-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 grant, deny or modify, in whole or part, the petition filed by 138 Court Street, LLC to submeter electricity at 138 Court St., Brooklyn, NY.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of 138 Court Street, LLC to submeter electricity at 138 Court St., Brooklyn, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 138 Court Street, LLC to submeter electricity at 138 Court Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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. (08-E-0394SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Submetering of Electricity by 194 Atlantic Ave., LLC**

**I.D. No.** PSC-19-08-00013-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 grant, deny or modify, in whole or part, the petition filed by 194 Atlantic Ave., LLC to submeter electricity at 194 Atlantic Ave., Brooklyn, NY.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of 194 Atlantic Ave., LLC to submeter electricity at 194 Atlantic Ave., Brooklyn, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 194 Atlantic Ave., LLC to submeter electricity at 194 Atlantic Avenue, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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. (08-E-0395SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Submetering of Electricity by 2130 George Investors LLC**

**I.D. No.** PSC-19-08-00014-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 grant, deny or modify, in whole or part, the petition filed by 2130 George Investors LLC to submeter electricity at 2130-2138 Adam Clayton Powell Jr. Blvd., New York, NY.

**Statutory authority:** Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of 2130 George Investors LLC to submeter electricity at 2130-2138 Adam Clayton Powell Jr. Blvd., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 2130 George Investors LLC to submeter electricity at 2130-2138 Adam Clayton Powell Jr. Blvd., New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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. (08-E-0396SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Transfer of Water Supply Assets of Davenport Water Company to the Town of Davenport**

**I.D. No.** PSC-19-08-00015-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, or modify, a joint petition filed by Davenport Water Company and the Town of Davenport for approval to transfer all of the water supply assets of Davenport Water Company to the town of Davenport.

**Statutory authority:** Public Service Law, sections 89-c(1), (10), 89-h, 4(1) and 5(1)(f)

**Subject:** Transfer of water supply assets.

**Purpose:** To transfer the water supply assets of Davenport Water Company to the Town of Davenport.

**Substance of proposed rule:** On March 21, 2008, the Davenport Water Company (Davenport Water) and the Town of Davenport (Town) filed a joint petition requesting approval to transfer the water supply assets of Davenport Water to the Town. Davenport Water currently provides water service to 55 residential customers in the Town of Davenport, Delaware County. The Commission may approve or reject, in whole or part, or modify the petition.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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. (08-W-0317SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Petition for Rehearing by Cablevision of Southern Westchester, Inc.**

**I.D. No.** PSC-19-08-00016-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 approve or reject, in whole or in part, a petition for rehearing filed by Cablevision of Southern Westchester, Inc. (Cablevision) of the commissioner's order approving renewal of Cablevision's cable television franchise agreement with the City of Rye. In the alternative, Cablevision requests clarification

of the order and certificate of confirmation in Case 07-V-1352, Verizon New York Inc.'s franchise with the City of Rye regarding audit of the Cablevision's books.

**Statutory authority:** Public Service Law, sections 215(2), 216(1) and (5)

**Subject:** Petition for rehearing regarding auditing of Cablevision's books.

**Purpose:** To consider Cablevision's petition regarding an auditing provision in the franchise agreement.

**Substance of proposed rule:** The Commission is considering whether to approve or reject, in whole or in part, a Petition for Rehearing filed by Cablevision of Southern Westchester, Inc. (Cablevision) of the Commissioner's Order Approving Renewal of Cablevision's cable television franchise agreement with the City of Rye. In the alternative, Cablevision requests clarification of the Order and Certificate of Confirmation in Case 07-V-1352, Verizon New York Inc.'s franchise with the City of Rye regarding audit of the Cablevision's books.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(05-V-1430SA1)

basis. This rule is being adopted on an emergency basis so that it can remain in effect until it is adopted on a permanent basis.

**Subject:** Licensed home inspectors.

**Purpose:** To establish standards for continuing education courses for licensed home inspectors.

**Text of emergency rule:** An Amendment to 19 NYCRR Part 197 is adopted to read as follows:

**SUBPART 197-3. HOME INSPECTION CONTINUING EDUCATION COURSES**

**Section 197-3.1 General requirements.**

(a) *Renewals.* For all home inspection licenses that expire prior to December 31, 2008, no renewal license shall be issued unless said licensee has completed 6 hours of approved continuing education within the two-year period immediately preceding such renewal. For all home inspection licenses that expire on or after December 31, 2008, no renewal license shall be issued unless said licensee has completed 24 hours of approved continuing education within the two-year period immediately preceding such renewal.

(b) *Course approval.* No offering of a course of study in the home inspection field for the purpose of compliance with the continuing education requirements of subdivision (a) of this section shall be acceptable for credit unless such course of study has been approved by the Department of State under the provisions of this Part.

**Section 197-3.2 Approved entities.**

Continuing education home inspection courses (herein referred to as "sponsors") may be given by any college or university accredited by the Commissioner of Education of the State of New York or by a regional accrediting agency approved by the Commissioner of Education; public or private schools; and home inspection related professional societies and organizations. Types of instruction which shall not be acceptable as meeting continuing education requirements include such courses as:

(a) offerings in basic computer skills training, instructional navigation of the Internet, instructional use of generic computer software or industry specific report writing software, instruction in personal motivation, business marketing, salesmanship, radon and pests, and any other instruction that is unrelated to home inspection.

**Section 197-3.3 Request for approval of course of study.**

The following applies to courses to be presented in a class-room setting where the instructor is present with the class. Requests for approval of courses of study in the home inspection field to be given to satisfy the requirements for continuing education under the provisions of this Part shall be made 60 days before the proposed course is to be given. The request shall include the following:

(a) name, address and telephone number of the applicant;

(b) if applicant is a partnership, the names of the partners in the entity; if a corporation, the names of any persons who own five percent or more of the stock of the entity;

(c) title of each course to be offered;

(d) location of each course offered;

(e) duration and time of each course offered;

(f) procedure for taking attendance;

(g) a detailed outline of the subject matter of each course or seminar. The outline shall contain the amount of time each segment of the course or seminar lasts, as well as the teaching techniques used in each segment. Each course or seminar will contain at least one hour of instruction, and at most 24 hours of instruction; and

(h) description of materials to be distributed to the participants.

**Section 197-3.4 Program Approval.**

Sponsors delivering a course may file an application for approval within 30 days of the completion of that course. The sponsor must advise registrants that approval is not guaranteed.

**Section 197-3.5 Successful completion of course.**

(a) Any course for continuing education shall be accepted for credit on the basis of attendance only. For those courses that have received pre-instruction approval from the Department of State, the course administrator must submit to the Department of State within 15 days of completion of the class, the names of all individuals who successfully complete the approved course together with the unique identification number assigned by the Department of State to all such individuals. For those courses that have received post-instruction approval from the Department of State pursuant to 19 NYCRR 197-3.4, the course administrator must submit this information to the Department of State within 15 days of having been granted post-instruction approval by the Department of State.

(b) Evidence of successful completion of the course must be furnished to students in certificate form. The certificates must indicate the following:

## Department of State

### EMERGENCY RULE MAKING

#### Licensed Home Inspectors

**I.D. No.** DOS-19-08-00001-E

**Filing No.** 337

**Filing date:** April 16, 2008

**Effective date:** April 16, 2008

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

**Action taken:** Addition of Subpart 197-3 to Title 19 NYCRR.

**Statutory authority:** Real Property Law, section 444-f

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

**Specific reasons underlying the finding of necessity:** This rule was adopted on an emergency basis to preserve and enhance the public welfare. Article 12-B of the Real Property Law (Home Inspection Professional Licensing Act, which became effective December 31, 2005), requires that no person shall conduct a home inspection for compensation unless that person is licensed as a home inspector in accordance with requirements set forth in the statute, including meeting specific standards for education and experience. Further, § 444-f(1) of Article 12-B, requires that applicants for renewal of a license as a home inspector must complete a course of continuing education approved by the Secretary of State. Accordingly, to ensure that prospective applicants continue to meet the educational standards required for their profession, this rule has been adopted on an emergency basis. As such, it is similar to those required by other regulatory statutes, and provides a greater measure of assurance to the general public that home inspectors are qualified for licensure. As part of fulfilling its ongoing obligation to provide appropriate guidelines and standards for the profession, the state home inspection council has only recently adopted the number of course hours required for meeting the continuing education requirement, thus necessitating the adoption of this rule on an emergency

the name of the approved entity, the name of the course, the code number of the course, and that the student who shall be named has satisfactorily completed a continuing education course approved by the Department of State and the number of hours earned. The certificate must be signed and dated by the person authorized to sign certificates. For those courses that have received post-instruction approval from the Department of State pursuant to 19 NYCRR 197-3.4, the course administrator shall provide this course certificate to qualified course attendees within 30 days of having received Department of State course approval.

#### Section 197-3.6 Equivalency Credit.

(a) A licensee who teaches an approved home inspection course pursuant to Subpart 197-2 of this Part or an approved course offered for continuing education shall be credited with two hours for each hour of actual teaching performed. Records of such teaching shall be maintained by the person or organization presenting the course and certified on forms prescribed by the Department of State. The records of such teaching shall be deemed records of attendance for all purposes of these rules. Credit shall not be awarded for teaching the same course more than once in a license cycle. Instructors must submit evidence of such teaching experience with an equivalency application as prescribed by the Department of State.

(b) Individuals who complete a course of study offered outside of the State of New York, which course has not been approved by the Department of State, may file a request to the Department to have such course count as credit toward their New York continuing education requirement. All applications for such consideration must be submitted with official documentation of satisfactory completion and the official descriptions of the course of study as prescribed by the Department of State. Upon receipt of such a request, the Department of State will review and evaluate the out-of-state course to determine if all or a portion of the course may be credited toward the applicant's New York continuing education requirement. Within 30 days of receipt of a request, the Department of State will approve or deny the request for New York continuing education credit.

(c) All applications for and evidence of equivalency credit must be submitted to the Department of State for consideration at least 30 days prior to the expiration of the license.

#### Section 197-3.7 Extension of time to complete courses.

The Department of State may grant an extension to any licensee who evidences bona fide hardship precluding completion of the continuing education requirements prior to the time the renewal application is to be filed. A licensee seeking such an extension shall submit a written request, together with the evidence demonstrating such hardship. Within 30 days of receipt of a request, the Department of State will notify the licensee whether their request for an extension has been granted or denied.

#### Section 197-3.8 Computation of instruction time.

To meet the minimum statutory requirement, attendance shall be computed on the basis of an hour equaling 60 minutes.

#### Section 197-3.9 Attendance and Record Retention.

(a) No licensed person shall receive credit for any course presented in a class-room setting if he or she is absent from the class room, during any instructional period, for a period or periods totaling more than 10 percent of the time prescribed for the course pursuant to section 197-3.3(g) of this Part, and no licensed person shall be absent from the class room except for a reasonable and unavoidable cause.

(b) The person or organization conducting the course shall certify to the Department of State the name of each licensed person who successfully completed the course of study and his or her unique identification number as assigned by the Department of State, and shall maintain its attendance records and a copy of such report for three years and, in addition, shall maintain the following records concerning the course:

(1) the approval number issued by the Department of State for the course;

(2) title and description of the course;

(3) the dates and hours the course was given; and

(4) the names and Unique Identification numbers of the persons who took the course and whether they completed it successfully.

Section 197-3.10 Policies concerning course cancellation and tuition refund.

Any educational institution or other organization requesting from the Department of State approval for home inspection courses must have a policy relating to course cancellation and tuition refunds. Such policy must be provided in writing to prospective students prior to the acceptance of any fees.

#### Section 197-3.11 Auditing.

A duly authorized designee of the Department of State may audit any course offered and may verify attendance and inspect the records of attendance of the course at any time during its presentation or thereafter.

#### Section 197-3.12 Change in approved course of study.

There shall be no change or alteration in any approved course of study without prior written notice to, and approval by, the Department of State.

#### Section 197-3.13 Suspensions and denials of school approval.

The Department of State may deny, suspend or revoke the approval of a home inspection school, if it is determined that they are not in compliance with the law and rules. If disciplinary action is taken, a written order of suspension, revocation, or denial of approval will be issued. Anyone who objects to such denial, suspension or revocation shall have the opportunity to be heard by the Secretary of State or his or her designee.

#### Section 197-3.14 Open to public.

All courses approved pursuant to this Part shall be open to all members of the public regardless of the membership of the prospective student in any home inspection professional society or organization.

#### Section 197-3.15 Facilities.

Each course shall be presented in such premises and in such facilities as shall be necessary to properly present the course.

#### Section 197-3.16 Faculty.

(a) Each instructor for an approved home inspection course of study must be approved by the Department of State. To be approved, an instructor must submit an application along with a resume reflecting three years of experience as a home inspector during which time the applicant has completed at least 250 home inspections.

(b) An instructor who does not qualify under subdivision (a) of this section may be approved as a technical expert if the instructor submits an application and resume establishing, to the satisfaction of the Department of State, that the applicant is an expert in and has at least three years' experience in a specific technical subject related to home inspection. Approval by the Department of State shall specify the subject(s) within the home inspection course or course module for which approval is given.

#### Section 197-3.17 Continuing education credit.

No continuing education course will be considered for continuing education credit more than once within the two year cycle of renewal.

#### Section 197-3.18 Registration period.

Each registration or renewal period for approved programs or courses shall be for 12 months or a part thereof, said period to commence on January 1 or date thereafter and to continue until December 31.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire July 14, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Whitney A. Clark, Esq., Department of State, Division of Licensing Services, P.O. Box 22001, Albany, NY 12231-0001, (518) 473-2728, e-mail: whitney.clark@dos.state.ny.us

#### Regulatory Impact Statement

##### 1. Statutory authority:

Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law, enacted as Chapter 461 of the Laws of 2004, and amended by the Laws of 2005, ch. 225, provides that no person shall perform a home inspection for compensation unless that person is licensed as a home inspector. The statute sets forth minimum standards of education and experience required to obtain a license as a home inspector. These include the successful completion of an extensive course of study of not less than one hundred forty hours, including at least forty hours of field-based inspections in the presence of a licensed home inspector, professional engineer or architect; performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination.

Real Property Law, § 444-f (1) provides that licenses for home inspectors shall be valid for two years, and are subject to renewal only after successful completion of a course of continuing education approved by the Secretary of State in consultation with the home inspection council. This rule fulfills that obligation by outlining the continuing education requirements for home inspectors, and setting appropriate standards for approval of home inspection courses. Accordingly, the Secretary of State has express authority to adopt this rule.

##### 2. Legislative objectives:

In enacting Article 12-B of the Real Property Law, the legislature emphasized the significant role played by home inspectors, and the reliance consumers place upon their reports in purchasing homes, especially when encouraged to do so by mortgage lenders. Recognizing that not all

persons providing this service may be reliable, this legislation was enacted to provide additional assurance to consumers that those individuals performing such inspections are qualified to do so. The statute sets minimum standards for the home inspection profession, which include an extensive course of study of not less than one hundred forty hours, including at least forty hours of field based inspections in the presence of a licensed home inspector, professional engineer or architect; the performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination. In addition, all applicants for renewal of a license must have successfully completed a course of continuing education approved by the Secretary of State.

Thus, Article 12-B was designed to "protect the public," especially from those who present themselves as qualified professionals, but without the necessary education and experience.<sup>1</sup> This rule re-enforces the stated objectives of the Legislature when it enacted Article 12-B, by providing appropriate standards for maintaining the skills required by professional home inspectors.

### 3. Needs and benefits:

Real Property Law § 444-f(1) requires all home inspectors seeking renewal of their licenses to have successfully completed a course of continuing education approved by the Secretary of State, in consultation with the home inspection council. Created by statute, the home inspection council is an advisory board that advises the Secretary of State on the need for certain regulatory action, including continuing education. The home inspection council has advised the Secretary of State that this rule making is necessary to ensure that all home inspectors who apply for renewal of their licenses will have had the opportunity to meet the statutory continuing education requirement.

The rule making will pro rate the continuing education requirement for certain licensees. Licensees whose licenses expire prior to December 31, 2008 will have to complete six hours of approved continuing education. Those whose licenses expire on or after December 31, 2008 will be required to complete the full 24 hours of continuing education.

In addition, consumers benefit from the assurance that persons hired to inspect the homes they purchase continue to meet the qualifications and experience needed to render professional service.

### 4. Costs:

#### a. Costs to regulated parties:

Licensees seeking renewal will be required to pay the cost of attending and completing an approved course of study for the required number of hours. The Department has conferred with several education providers throughout the State and estimates that course providers will charge an average of \$480 for 24 hours of continuing education courses. Based on a review of continuing education fees currently being charged by course providers, the Department of State determined that each continuing education unit costs a student approximately \$20.00 per credit; or \$480 for 24 hours of continuing education.

#### b. Costs to the Department of State:

The Department of State anticipates that the cost and implementation will be minimal, and administration of this rule will be accomplished using existing resources.

#### c. Costs to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

### 5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

### 6. Paperwork:

The rule requires that each applicant seeking renewal of a home inspector's license obtain and retain certificates as evidence of the successful completion of the required number of hours of continuing education.

### 7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

### 8. Alternatives:

During regular meetings, the state home inspection council reviewed and considered various proposals for compliance with the statutory mandate for continuing education standards, ultimately recommending approval of the number of hours, courses of study, and methods of ensuring compliance adopted by this rule. The home inspection council considered waiving the continuing education requirement completely, or reducing the requirement to a de minimus amount. The Department, in consultation with the council determined that six hours of continuing education was appropriate insofar as it provides an accommodation to licensees whose

licenses expire prior to December 31, 2008, while providing protections to consumers by guaranteeing that all licensed home inspectors complete an appropriate amount of continuing education.

### 9. Federal standards:

There are currently no federal standards requiring continuing education courses for licensed home inspectors.

### 10. Compliance schedule:

Applicants for renewal of a home inspector's license have two years in which to comply with the continuing education requirement, with a pro-rated reduction for renewal of licenses expiring less than two years from the effective date of this rule. The Department of State maintains a list on its website of approved continuing education providers, with their relevant contact information to assist licensees to locate approved continuing education courses. Therefore, regulated parties will be on notice of, and have adequate time to comply with the requirements imposed by the proposed rule making.

<sup>1</sup> McKinney's Session Laws of New York, 2005, p. 1951

## **Regulatory Flexibility Analysis**

### 1. Effect of rule:

The rule affects all licensed home inspectors (individuals, firms, companies, partnerships, limited liability companies, or corporations) who seek renewal of a home inspector's license. Each such applicant will be required to expend the time and incur the costs of attending the required number of hours needed for successful completion of an approved course of continuing education, and obtain a certificate as evidence of successful completion of that requirement. However, it is not anticipated that this requirement will place an undue financial burden, or impose a hardship for those applicants seeking to maintain their qualifications for providing professional services to consumers.

The rule does not apply to local governments.

### 2. Compliance requirements:

Applicants seeking renewal of their licenses will be required to attend and complete an approved course of study of continuing education, and obtain certificates as proof of the successful completion of these courses.

### 3. Professional services:

Small businesses will not need professional services in order to comply with this rule.

### 4. Compliance costs:

It is anticipated that small businesses will incur only the costs of any fees required for attending and completing an approved course of continuing education. It is estimated that the cost of completing 24 hours of continuing education will be \$500 per licensee.

### 5. Economic and technical feasibility:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs or require technical expertise as a result of implementation of this rule.

### 6. Minimizing adverse economic impact:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs as a result of implementation of this rule.

### 7. Small business and local government participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continuing education adopted by this rule. Members of the home inspection council are diverse and include owners of small businesses. The subject matter of the proposed rule was further discussed at meetings of the home inspection council which were open to public comment.

## **Rural Area Flexibility Analysis**

### 1. Types and estimated numbers of rural areas:

This rule applies equally to all licensed home inspectors in all areas of the state-urban, suburban and rural. The rule does not apply to public entities located in rural areas.

### 2. Reporting, record-keeping and other compliance requirements:

Reporting and record-keeping requirements include the obligation of all applicants seeking renewal of their licenses to maintain course completion certificates as proof of completing the required continuing education. Applicants for renewal of a home inspector's license in rural areas will not need to employ any additional professional services in order to comply with this rule.

### 3. Costs:

Other than the estimated cost of \$500 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any costs of compliance as a result of this rule.

4. Minimizing adverse impact:

Other than the estimated cost of \$500 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any additional costs of compliance.

5. Rural area participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continuing education adopted by this rule. Members of the home inspection council represent geographically diverse areas including rural areas of New York State. In addition, the subject matter of the proposed rule was discussed during open meetings of the home inspection council and which were open to public comment.

**Job Impact Statement**

This rule will not have any substantial adverse impact on jobs and employment opportunities. As a result of enactment of Article 12-B of the Real Property Law, which became effective December 31, 2005, any person performing a home inspection for compensation in this state must obtain a license. Licenses are valid for two years, and may be renewed only upon successful completion of an approved course of continuing education. Inasmuch as this rule affects only those licensed home inspectors who seek renewal of license, it promotes employment opportunities by ensuring that only those qualified to provide this service, will be licensed.

**NOTICE OF ADOPTION**

**Technical Corrections to Coastal Regulations**

**I.D. No.** DOS-06-08-00003-A

**Filing No.** 356

**Filing date:** April 23, 2008

**Effective date:** May 7, 2008

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

**Action taken:** Amendment of sections 600.1 and 600.2, and Parts 601, 602 and 603 of Title 19 NYCRR.

**Statutory authority:** Executive Law, art. 42

**Subject:** Technical corrections to coastal regulations.

**Purpose:** To make technical corrections to existing regulations.

**Text or summary was published** in the notice of proposed rule making, I.D. No. DOS-06-08-00003-P, Issue of February 6, 2008.

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

**Text of rule and any required statements and analyses may be obtained from:** Nathan A. Hamm, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231, (518) 474-6740, e-mail: Nathan.Hamm@dos.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Qualifying Experience and Education for Real Estate Brokers and Salespeople**

**I.D. No.** DOS-19-08-00017-P

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

**Proposed action:** Amendment of sections 176.3, 176.4, 176.11, 176.15, 176.16, 176.20; and addition of sections 176.22, 176.23, 176.24 and 176.25 to Title 19 NYCRR.

**Statutory authority:** Real Property Law, section 442-k

**Subject:** Qualifying experience and education for real estate brokers and salespeople.

**Purpose:** To amend current regulations in order to conform said regulations with recent statutory amendments to article 12-A of the Real Property Law.

**Text of final rule:** Section 176.3 is amended to read as follows:

176.3 Subjects for study- real estate salespersons

(a) The following are the required subjects to be included in the course of study in real estate for licensure as a real estate salesperson, and the required number of hours to be devoted to each such subject:

[Salesperson's Course	
Subject Matter Hours	
License law and regulations .....	3
Law of agency .....	8
Real estate instruments and estates and interests .....	10
• Estates and interests .....	2.0
• Liens and easements .....	1.5
• Deeds .....	1.5
• Leases .....	2.0
• Contracts .....	2.0
• Title closing and costs .....	1.0
Real estate finance (mortgages) .....	5
Land use regulations .....	2
Introduction to construction .....	3
Valuation process .....	3
Human rights and fair housing .....	4
Environmental issues .....	3
Real estate mathematics .....	3
Real estate salesperson (independent contractor/employee) .....	1
Instruction .....	45 hours
Final examination .....	3 hours
.....	448 hours]

<i>Salesperson's Course</i>	
<i>Subject Matter:</i>	
<i>License Law and Regulations</i>	<i>Hours:</i> 3
<i>Law of Agency</i>	11
<i>Legal Issues</i>	10
<i>The Contract of Sales and Leases</i>	3
<i>Real Estate Finance</i>	5
<i>Land Use Regulations</i>	3
<i>Construction and Environmental Issues</i>	5
<i>Valuation Process and Pricing Properties</i>	3
<i>Human Rights and Fair Housing</i>	4
<i>Real Estate Mathematics</i>	1
<i>Municipal Agencies</i>	2
<i>Property Insurance</i>	2
<i>Taxes and Assessments</i>	3
<i>Condominiums and Cooperatives</i>	4
<i>Commercial and Investment Properties</i>	10
<i>Income Tax Issues in Real Estate Transactions</i>	3
<i>Mortgage Brokerage</i>	1
<i>Property Management</i>	2
<i>Instruction</i>	75 hours
<i>Final Examination</i>	3 hours
<b>TOTAL</b>	<b>78 hours</b>

(b) All approved courses must use this course syllabus in conducting their programs.

Section 176.4 is amended to read as follows:

176.4 Subjects for study- real estate broker

The education qualifications for real estate broker's license requires the completion of:

(a) an approved real estate salesperson's course except that a salesperson who was licensed prior to November 1, 1979, may substitute 75 [45] hours of approved continuing education in lieu of a salesperson's course; and

(b) an approved real estate broker's course. Before enrolling a student into an approved broker's course, the education coordinator must be provided with evidence of a signed statement from the student indicating that he/she has successfully completed the salesperson's course. Proof of the student's completion of the prerequisite course must be kept on file by the education coordinator. The following are the required subjects to be included in the course of study in real estate for licensure as a real estate broker and the required number of hours to be devoted to each subject:

Broker's Course	
Subject Matter Hours	
Broker's office—operation, management and supervision .....	10
Real estate agency disclosure (review) .....	4
General Business Law .....	5
Real estate finance II .....	5
Real estate investment .....	5
Real property management .....	5
Conveyance of real property and title closing and costs (review) .....	3



(b) if applicant is a partnership, the names and home addresses of the partners in the entity; if a corporation, the names and home addresses of any persons who own five percent or more of the stock of the entity

(c) the name, home and business address and telephone number of the education coordinator that will be responsible for administering the regulations contained in this part;

(d) locations where the final examination will be conducted;

(e) title of each course to be conducted;

(f) final examination to be presented for each course, including the answer key;

(g) all times included on each test form must be consistent with content specifications indicated for each course. Weighing of significant content areas should fall within the weight ranges indicated. All reference sources used to support each correct answer must be included. Linkage to each answer must be indicated with a footnote showing page number, subject matter, etc.;

(h) the books that will be used for the outline and the final exams;

(i) an explanation of the means for monitoring and verifying each student's active participation, on an ongoing basis, during each module of instruction;

(j) a brief description of the hardware and software to be used by the student;

(k) a plan for providing technical support to the student;

(l) a detailed course outline divided into major units; the contents of major units must be divided into modules of instruction;

(m) a detailed outline for local concerns when applying for broker course approval.

Section 176.25 is added as follows:

*Section 176.25 Course completion for distance learning courses*

(a) The student must successfully complete a distance learning course within 12 months of starting the program. This includes the passing of the school's final examination.

(b) A list of the names of students who successfully complete each course of study must be submitted to the Department of State within 15 days of completion.

(c) The school or other person offering the program must provide evidence of successful completion of the course to each student in certificate form. The certificate must indicate the following: name of the entity; Real Estate Salesperson's Course, 75 hours, or Real Estate Broker's Course, 45 hours; code number of the entity; a statement that the student, who shall be named, has satisfactorily completed a course of study in real estate subjects approved by the Secretary of State in accordance with the provisions of chapter 868 of the Laws of 1977, and that his or her attendance record was satisfactory and in conformity with the law, and that such course was completed on a stated date. The certificate must be signed by the owner or course coordinator and dated, and must have affixed thereto the official seal of the school or entity.

Section 177.1 is amended to read as follows:

*Section 177.1 General requirement.*

(a) Renewals. No renewal license shall be issued to any real estate broker or salesperson for any license period commencing on or after 11/1/95 unless such licensee shall provide evidence of completion of 22½ hours of approved continuing education within the two-year period immediately preceding such renewal. However, such continuing education requirement shall not apply to any licensed real estate broker who is engaged full-time in the real estate business and who has been licensed prior to July first, two thousand eight for at least 15 consecutive years immediately preceding such renewal.

(b) Course approval. No offering of a course of study in the real estate field for the purpose of compliance with the continuing education requirements of subdivision 3 of section 441 of the Real Property Law shall be acceptable for credit unless such course of study shall have been approved by the department under the provisions of this Part.

Section 177.14 is amended to read as follows:

*Section 177.14 Suspensions and denials of course approval.*

Within 45 [30] days after the receipt of the application for approval of an offering, the department shall inform the entity as to whether the offering has been approved, denied, or whether additional information is needed to determine the acceptability of the offering. The department may deny, suspend or revoke the approval of a real estate course or a real estate instructor, if it is determined that they are not in compliance with the law and rules or if the offering does not adequately reflect and present current real estate knowledge as a basis for a level of real estate practice. If disciplinary action is taken, a written order of suspension, revocation, or denial of approval will be issued. Anyone who objects to such denial,

suspension or revocation shall have the opportunity to be heard by the Secretary of State or his designee.

**Text of proposed rule and any required statements and analyses may be obtained from:** Whitney A. Clark, Department of State, Division of Licensing Services, Alfred E. Smith State Office Bldg., 80 S. Swan St., P.O. Box 22001, Albany, NY 12201-2001, (518) 473-2728, e-mail: wclark@dos.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.

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Real Property Law (RPL) Article 12-A, Real Estate Brokers and Salesmen, prescribes requirements for individuals and business entities to act as a real estate salesperson and/or real estate broker. RPL § 440-a, among other provisions, requires that an individual or entity possess a license from the Department to operate as a real estate salesman or broker. RPL § 441, Application for license, prescribes the qualifications to be licensed as a real estate broker or real estate salesperson, including satisfactory completion of a real estate course program that has been approved by the Department. RPL § 441(1)(b), as amended by Chapter 183 of the Laws of 2006, effective July 1, 2008, increased from 90 to 120 the required minimum number of hours of course work to obtain a real estate broker's license; RPL § 441(1-A)(d) as amended by Chapter 183 of the Laws of 2006, effective July 1, 2008, increased from 45 to 75 the required minimum number of hours of course work to obtain a real estate salesperson's license. RPL § 442-k(1) authorizes the New York State Real Estate Board to promulgate regulations to administer and effectuate the purposes of Article 12-A of the Real Property Law. RPL § 442-k(1) provides that the Secretary of State shall adopt rules to administer the provisions of RPL § 441. Chapter 183 of the Laws of 2006 also amended RPL § 441 to authorize computer-based and distance-learning courses. To fulfill these purposes, the Department of State, in conjunction with the New York State Real Estate Board, has issued rules and regulations which are found at Part 176 of Title 19 NYCRR and is proposing the rule making.

##### 2. Legislative objectives:

Real Property Law, Article 12-A, requires the Department of State to license and regulate real estate licensees. One of the purposes of Article 12-A is to ensure that licensed real estate brokers and salespeople ("real estate licensees") are properly educated and trained. The rule making advances this legislative intent by conforming the education regulations to the statutory changes concerning the requirements for licensure.

##### 3. Needs and benefits:

The rule is necessary to conform the existing education regulations to the 2006 statutory amendments. Consistent with the statutory changes, the increased educational requirements will apply to all applicants seeking licensure on and after July 1, 2008. The proposed rule also is necessary to prescribe regulatory requirements applicable to computer-based and distance-learning programs. The recent statutory amendment provides the Department of State with greater latitude to approve new technologies for the delivery of real estate qualifying education courses, including computer-based 'distance-learning.' After discussing the issue with the New York State Real Estate Board and the public at meetings of the Board, the Department of State is proposing to permit distance learning courses in order to expand the educational options available to licensees.

In addition, the existing rules provide that the Department will review an application for course curriculum or instructor approval within 30 days of its receipt. Because of staffing issues, the Department has occasionally been unable to complete the required review within 30 days. The proposed rule would increase the review time to 45 days, thereby affording an additional 15 days to the review period, which is intended to help ensure timely and thorough review of submissions.

The New York State Real Estate Board is a regulatory board established by Article 12-A of the Real Property Law. The Board is composed of real estate licensees and members of the public. It shares regulatory authority with the Department of State and is authorized to promulgate regulations including those pertaining to the education of real estate licensees. The Board has recommended the rule making and reported to the Secretary that the same is crucial for the protection of consumers and for meeting the legislative intent in enacting the amendments to Article 12-A.

##### 4. Costs:

###### a. Costs to regulated parties:

Prospective licensees will face increased education costs due to a greater number of required course hours. Prospective licensees will have to complete an additional 30 hours of education. Real estate brokers will have

to complete 120 hours of education, instead of the previously mandated 90 hours. Real estate salespersons will have to complete 75 hours of education instead of the previously mandated 45 hours. It is anticipated that the average cost of qualifying education for real estate salespeople will increase from approximately \$300 to approximately \$500.

b. Costs to the Department of State:

The rule does not impose any costs to the agency, the state or local governments for the implementation and continuation of the rule.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

The rule does not impose any new paperwork requirements. Insofar as prospective licensees are already required to satisfactorily complete qualifying education, conforming the regulations to the recent statutory amendments will not result in additional paperwork requirements.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The New York State Real Estate Board formed a subcommittee to prepare the allocation of course hours within the new, statutorily mandated increase in required study. The subcommittee met with representatives of the New York State Association of Realtors (NYSAR) and the Real Estate Board of New York (REBNY) to discuss and consider alternative allocations. NYSAR, specifically, recommended a different allocation of course hours within the new syllabus. After due consideration of this and other alternatives, the subcommittee determined that the proposed course allocation was the preferred option and recommended said proposal to the New York State Real Estate Board. After deliberation, the New York State Real Estate Board approved the course allocation that is reflected in the rule making. During the public comment period, the Department of State and New York State Real Estate Board will receive and consider all recommended alternatives.

9. Federal standards:

There are no federal standards regulating the registration of real estate licensees. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

Prospective licensees will be required to comply with the rule on July 1, 2008, the effective date of the statutory amendments.

**Regulatory Flexibility Analysis**

1. Effect of rule:

The rule will apply to prospective real estate brokers and salespeople ("real estate licensees") who are applying for licensure pursuant to Article 12-A of the Real Property Law. Chapter 183 of the Laws of 2006 increased the education requirement for brokers from 90 to 120 hours, increased the education requirement for salespersons from 45 to 75 hours, and authorized the Department to approve computer based and distance learning courses. The rule making merely conforms existing education regulations to the new statutory amendments and will not have any foreseeable impact on jobs or employment opportunities for real estate licensees.

The rule does not apply to local governments.

2. Compliance requirements:

Insofar as the existing statute and regulations already require minimum age, education and experience requirements for licensure, the rule making will not add any new reporting, record-keeping or other compliance requirements, outside of the statutorily-mandated increase in the education requirement.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Real estate licensees will not need to rely on any new professional services in order to comply with the rule. Licensees are already required to complete qualifying education pursuant to Article 12-A of the Real Property Law. Insofar as licensees must already attend and complete approved education courses, conforming the regulations to the statute in order to

increase the number of hours of education required for licensure and permitting distance learning for some of these courses will not result in the need to rely on any new professional services. The Department expects existing education providers to begin offering new approved courses in accordance with the amended statute and the rule making.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The rule making will result in increased costs to prospective licensees due to the statutorily mandated increase in hours for qualifying education. It is anticipated that the average cost of qualifying education for real estate salespeople will increase from approximately \$300 to approximately \$500. The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the rule does not impose any new record keeping requirements on prospective licensees, it will be technologically feasible for these persons to comply with the rule.

6. Minimizing adverse economic impact:

The rule making will result in increased costs to prospective licensees due to the statutorily mandated increase in hours for qualifying education. It is anticipated that the average cost of qualifying education for real estate salespeople will increase from approximately \$300 to approximately \$500. Insofar as these costs are the result of a statutory increase in the number of education hours required to become licensed as a real estate salesperson or broker, the Department of State cannot minimize the adverse economic impact of the rule.

7. Small business participation:

Prior to proposing the rule, the Department discussed the proposal at numerous public meetings of the New York State Real Estate Board and at public hearings, the minutes of which were posted on the Department's website. The public was given an opportunity to issue comments during the public comment period of these meetings and during public hearings. In addition, the Notice of Proposed Rule Making will be published by the Department of State in the State Register. The publication of the rule in the State Register will provide notice to local governments and additional notice to small businesses of the proposed rule making. Additional comments will be received and entertained.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any new reporting, record keeping or other compliance requirements on public or private entities in rural areas. By making distance learning courses available, the rule should help residents of rural areas comply with the new education requirements.

Article 12-A of the Real Property Law was amended during the 2006 legislative session to, in relevant part, increase the education requirements for those applying for licensure as a real estate broker or salesperson. The legislation, which takes effect on July 1, 2008, also authorizes the Department to approve computer based and distance learning courses. The rule making is required to conform the existing agency regulations to the statutory amendments to Article 12-A of the Real Property Law. Insofar as the existing statute and regulations already require minimum age, education and experience requirements for licensure, the rule making will not add any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, outside of the statutorily mandated increase in the education requirement.

**Job Impact Statement**

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for licensed real estate brokers or salespeople ("real estate licensees").

Chapter 183 of the Laws of 2006 increased the education requirement for brokers from 90 to 120 hours, increased the education requirement for salespeople from 45 to 75 hours, and authorized computer based and distance learning courses. The rule making merely conforms existing education regulations to the new statutory amendments and will not have any foreseeable impact on jobs or employment opportunities for real estate licensees.

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## Department of Taxation and Finance

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### NOTICE OF ADOPTION

#### **Treatment of Certain Allocations in Partnership Agreements Designed Principally to Avoid or Evade Personal Income Tax**

**I.D. No.** TAF-05-08-00021-A

**Filing No.** 351

**Filing date:** April 22, 2008

**Effective date:** May 7, 2008

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

**Action taken:** Amendment of section 3-13.5(a)(1), repeal of section 117.5 and addition of new section 117.5 to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First, 697(a) and 1096(a)

**Subject:** Treatment of certain allocations in partnership agreements designed principally to avoid or evade personal income tax.

**Purpose:** To update the provisions to conform to Internal Revenue Code section 704(b) and continue consistency with Federal statutes.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TAF-05-08-00021-P, Issue of January 30, 2008.

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

**Text of rule and any required statements and analyses may be**

**obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: tax\_regulations@tax.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### **Supplemental Schedule for Distributors of Tobacco Products to Account for Roll-Your-Own Cigarette Tobacco in New York State**

**I.D. No.** TAF-10-08-00004-A

**Filing No.** 353

**Filing date:** April 22, 2008

**Effective date:** May 7, 2008

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

**Action taken:** Addition of section 89.4 to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subdivisions First and Fourteenth and 475 (not subdivided); Public Health Law, section 1399-oo, subdivision (10)

**Subject:** Supplemental schedule for distributors of tobacco products to account for roll-your-own cigarette tobacco in New York State.

**Purpose:** To codify in regulation reporting requirements for distributors of roll-your-own cigarette tobacco.

**Text or summary was published** in the notice of proposed rule making, I.D. No. TAF-10-08-00004-P, Issue of March 5, 2008.

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

**Text of rule and any required statements and analyses may be**

**obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: tax\_regulations@tax.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.