

RULE MAKING ACTIVITIES

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

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

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

Office of Children and Family Services

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Office of Children and Family Services publishes a new notice of proposed rule making in the *NYS Register*.

Standards for the Provision of Adolescent Services for Foster Care Youth

I.D. No.	Proposed	Expiration Date
CFS-41-09-00008-P	October 14, 2009	October 14, 2010

Division of Criminal Justice Services

NOTICE OF ADOPTION

Handling of Ignition Interlock Cases Involving Certain Criminal Offenders

I.D. No. CJS-31-10-00014-A

Filing No. 1081

Filing Date: 2010-10-19

Effective Date: 2010-11-03

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

Action taken: Addition of Part 358 to Title 9 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 1193(1) and 1198(5)(a); L. 2009, ch. 496; L. 2010, ch. 56

Subject: Handling of Ignition Interlock Cases Involving Certain Criminal Offenders.

Purpose: To provide public/traffic safety, offender accountability and quality assurance through the establishment of minimum standards.

Substance of final rule: This adopted rule, entitled Handling of Ignition Interlock Cases Involving Certain Criminal Offenders, adds a new Part 358 to 9 NYCRR, and is necessitated by Chapter 496 of the Laws of 2009, commonly referred to as Leandra's Law and Chapter 56 of the Laws of 2010 which now empowers the Division of Criminal Justice Services (DCJS) to promulgate rules and regulations with respect to ignition interlock devices and judicial waiver of costs and establishing monitoring standards relative to any defendant sentenced for a DWI misdemeanor or felony. Chapter 56 specifically merged the former Division of Probation and Correctional Alternatives (DPCA), which originally had such rulemaking authority, with DCJS and transferred and assigned to DCJS former DPCA rules and regulations. Below is a brief summary of the regulatory provisions.

Section 358.1 sets forth the Objective which is to promote public/traffic safety, offender accountability, and quality assurance through the establishment of minimum standards for the usage and monitoring of ignition interlock devices imposed by a criminal court for a felony or misdemeanor under the Vehicle and Traffic Law or Penal Law.

Section 358.2 governs applicability and establishes that it shall be applicable to every county, monitor, and operator, and shall govern qualified manufacturers and installation/service providers as to use, installation, and reporting with respect to ignition interlock devices imposed upon the aforementioned criminal court population within New York State.

Section 358.3 is the definitional section. This section defines over twenty-five key operational terms to ensure consistency statewide with respect to language interpretation. Among these are the definition of "county" to clarify that it refers to every county outside of the city of New York, and the city of New York, and that a "qualified manufacturer" shall mean a manufacturer or distributor of an ignition interlock device certified by the New York State Department of Health who has satisfied the specific operational requirements herein and has been approved as an eligible vendor by DCJS in the designated region where the county is located.

Additionally, other terms, such as "failed tasks", "failed tests" "lockout mode", and "monitor" are defined to ensure there is universal understanding of what is meant by these terms in New York State.

Section 358.4 sets forth parameters of a county ignition interlock program plan which must be submitted by every county executive to DCJS by June 15, 2010. Rule procedures require consultation with certain officials or individuals as to plan development which will ensure that procedures are in place prior to the effective date to foster statutory and regulatory compliance and timely notification of critical information. In an effort to provide greater uniformity with respect to similar cases, yet provide certain flexibility where consistent with public safety and offender accountability, additional language distinguishes between probation and conditional discharge cases in terms of monitor and decision-making as to specific classes and features of devices required. Additional language states that where any available funding is earmarked for such purpose, the plan shall establish a distribution formula for probation supervision and/or monitoring purposes. This language contemplates DCJS efforts in securing federal grant monies to support local programmatic and/or administrative staff resources to perform monitoring functions for this offender population.

Section 358.5 governs the approval process and responsibilities of qualified manufacturers. It sets forth a procedural application mechanism for a manufacturer of ignition interlock devices to become a qualified manufacturer and requires at the outset that a manufacturer must have a

certified ignition interlock device approved by the Department of Health as necessitated by VTL § 1198. Other noteworthy provisions require that any interested applicant agree to adhere and certify that they and their installation/service providers will abide by all germane regulatory procedures governing their devices and services (including specific technical device provisions with respect to vehicle operation), reporting requirements that must be met to safeguard the public and promote greater offender accountability, submission of specific documentation, selection of one or more regions of the state to conduct business, adherence to training and enhanced service delivery requirements, establishment of maximum fee/charge schedules, pay for the cost of devices where a judicial waiver has been granted, and willingness to enter into a three-year contractual agreement with DCJS. On or after August 15, 2010, only a qualified manufacturer may conduct business in New York State with respect to any operator. While an initial application deadline of May 12, 2010 is established for those seeking to do business on August 15, 2010 and thereafter, DCJS permits an open-ended application process for manufacturers seeking to do business in New York State after August 15, 2010, in consideration of the time required for device certification, application approval and contract execution.

Section 358.6 enumerates factors which may lead to cancellation, suspension, and revocation of qualified manufacturers, and installation/service providers, and certified ignition interlock devices.

Section 358.7 establishes monitoring standards. Monitoring functions associated with DWI operators with ignition interlock devices are statutorily required pursuant to the aforementioned 2009 Chapter law. DCJS' regulatory language has been carefully streamlined to afford considerable flexibility where feasible, yet emphasizes that upon learning of specific events, that the applicable monitor shall take appropriate action consistent with public safety. Where under probation supervision, the county probation department shall adhere to DCJS' Graduated Sanctions and Violation of Probation rule. With respect to any operator sentenced to conditional discharge, the monitor shall take action in accordance with the provisions of its county ignition interlock program plan, consistent with the goals of public safety. At a minimum, however in all cases, it necessitates swift and certain notification to the sentencing court and district attorney as to specific failed tasks and failed tests. Overall, DCJS' rule places specific responsibilities upon qualified manufacturers, installation/service providers, as well as operators to provide timely information and/or reports to monitors so as to assist them in managing their caseload and to better guarantee offender accountability and safeguard the public. Other language establishes parameters with respect to case records and record sharing and establishes more stringent access requirements and confidentiality protections surrounding particular records.

Section 358.8 governs costs and maintenance. It recognizes that any operator shall pay the cost of installing and maintaining the ignition interlock device, unless the operator has been determined by the sentencing court to be financially unable to afford the cost of the device, whereupon such cost may be imposed pursuant to a payment plan or waived. If an operator claims financial inability to pay for the device, regulatory provisions establish that the operator shall submit three copies of a financial disclosure report on a form prescribed by DCJS to the sentencing court which shall distribute copies to the district attorney and defense counsel. This report enumerates factors to assist the sentencing court with respect to financial inability of the operator to pay for the device and whether to impose a payment plan or waive the fee/charge.

Section 358.9 governs record retention and disposition and establishes that records retention and disposition of all records of the county, any qualified manufacturer, and installation/service provider with respect to this rule Part shall be in accordance with the applicable Records Retention and Disposition Schedule promulgated by the State Education Department.

Section 358.10 relates exclusively to liability and establishes that nothing contained in this Rule Part shall impose liability upon DCJS, the State of New York, or any county for any damages related to the installation, monitoring or maintenance of an ignition interlock device or an operator's use or failure to use such devices.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 358.1 and 358.3.

Text of rule and any required statements and analyses may be obtained from: Linda J. Valenti, NYS Division of Criminal Justice Services, 4 Tower Place - 3rd Floor, Albany, New York 12203, (518) 457-8413, email: linda.valenti@dcjs.state.ny.us

Revised Regulatory Impact Statement

1. Statutory authority:

Chapter 496 of the Laws of 2009 (Leandra's Law), was a Governor's Program Bill that unanimously passed by both houses of the State Legislature. New York State joins nine other states mandating the use of ignition interlocks for all individuals sentenced for Driving While Intoxicated (DWI) misdemeanor or felony offenses. Significantly, this

measure greatly expanded the former Division of Probation and Correctional Alternatives (DPCA) regulatory oversight with respect to mandatory ignition interlock compliance in a strategic effort to combat and deter drunk driving and better safeguard the welfare of child passengers. Pursuant to Chapter 56 of the Laws of 2010, the former DPCA has been merged with the Division of Criminal Justice Services (DCJS) which has resulted in the complete transfer of the former agency's functions and continuation of its rules and regulations and contractual agreements and transfer of rulemaking authority to the Commissioner of DCJS. Specifically, Vehicle and Traffic Law (VTL) § 1193(1)(g) directs said agency "to promulgate regulations governing the monitoring of compliance by persons ordered to install and maintain ignition interlock devices to provide standards for monitoring by departments of probation, and options for monitoring of compliance by such persons, that counties may adopt as an alternative to monitoring by a probation department." While VTL § 1198(5)(a) authorizes a court to allow the costs of the ignition interlock device to be paid through a payment plan or to waive the costs, upon a determination of "financial unaffordability" of the defendant, it further states that in the event of such waiver, the cost of the device shall be borne in accordance with DCJS regulations "or pursuant to such other agreement as may be entered into for provision of the device." Thus, it is the intent that DCJS address the method of payment if the costs of the ignition interlock device were waived or if the DWI offender was afforded a payment plan.

2. Legislative objectives:

This rule serves both the Governor's and the State Legislature's underlying objective of Leandra's Law, to further strengthen DWI laws and penalties through statewide implementation of ignition interlock conditions so as to better enhance public/traffic safety, achieve greater offender accountability, and guarantee quality assurance through the establishment of minimum standards for the usage and monitoring of ignition interlock devices imposed by a criminal court for a felony or misdemeanor under the Vehicle and Traffic Law or Penal Law.

3. Needs and benefits:

This rule is needed to achieve successful implementation of Leandra's Law and address the challenges in achieving statewide implementation of ignition interlock conditions upon the DWI offender population, and establish minimum statewide monitoring standards to achieve uniformity in handling of certain failed tasks and failed tests, better safeguard the public, especially child passengers, and better guarantee operator accountability. DCJS' guidance in providing options for monitoring of compliance in lieu of probation, in conditional discharge cases and plan development and structure provisions will foster better collaboration and communication within jurisdictions and enable alternative monitoring arrangements so as to not burden probation departments with monitoring the entire DWI population subject to ignition interlock restrictions.

Its intent is to safeguard the public, optimize traffic safety, and guarantee accountability with respect to new penalties. In order to ensure timely implementation of the provisions which require DWI misdemeanants and felons sentenced on or after August 15, 2010 be subject to statewide ignition interlock conditions and DCJS regulations governing monitoring standards, handling of cases involving judicial waiver of costs, and to assure availability of devices in every jurisdiction, it is imperative that these regulations which establish a planning framework and core responsibilities of qualified manufacturers, installation/service providers, monitors, and operators be enacted immediately to guarantee implementation, establish training, and ensure compliance.

4. Costs:

a. It is anticipated that there will be some fiscal impact arising from Leandra's law. Chapter 496 of the Laws of 2009 requires monitoring of all DWI defendants subject to ignition interlock devices as a result of sentencing on and after August 15, 2010. This chapter requires, in addition to any other disposition that may be imposed, that a defendant receive a sentence of probation or conditional discharge with an ignition interlock condition. Where probation is imposed, probation departments are responsible for monitoring. Jurisdictions may designate alternative monitors for conditional discharge cases in lieu of probation. Thus, this Chapter and not DCJS rule is the source of any increased administrative costs. DCJS rule provides every jurisdiction with the flexibility to select one or more persons or entities responsible for monitoring conditional discharge cases. A variety of potential designees are listed for consideration so probation departments will not absorb such responsibilities by omission. Due to the former DPCA, DCJS, DMV and the State's efforts to strengthen ignition interlock laws to deter drunk driving and promote greater offender accountability, the former DPCA was invited and submitted a one year seed grant application to the Governor's Traffic Safety Committee in an amount of three (3) million dollars in National Highway Safety Traffic Administration (NHTSA) monies to offset local government costs in performing monitoring services. The application has been recently approved and will enable DCJS, which former DPCA has been merged with, to distribute monies pursuant to a formula of DWI convictions to support local monitoring responsibilities for activities occurring on and after October 1, 2010.

b. DCJS' regulatory requirements with respect to qualified manufacturers or their installation/service providers will not impose costs upon either beyond normal operating costs. A qualified manufacturer may incur additional costs associated with providing payment plans or devices at no charge where judicial waiver has occurred as provided in law. It is not possible to determine precisely such costs. The new law establishes that the court, upon determining financial "unaffordability" to pay the cost of the device, may impose a payment plan with respect to the device or waive the fee. New Vehicle and Traffic law statutory provisions require that where the cost is waived, DCJS through its regulation shall determine who bears the costs of the device or through such other agreement which may be entered into. Accordingly, DCJS' regulation requires qualified manufacturers, and not local governments or taxpayers to bear such costs. Effective August 15, 2010, while the decision to waive the fee is reserved to the court, DCJS speculates based upon experience of other states that approximately ten (10) percent of cases will result in waivers. In view of the significant market and profit for ignition interlock manufacturers qualified to do business in New York State, it is reasonable to require manufacturers supply devices free of charge where a judicial waiver has been ordered. Accordingly, interested manufacturers in their applications must provide a maximum fee/charge schedule taking into consideration an estimated 10% waiver.

Statutory provisions require that operators are responsible for costs of installation and maintenance of the ignition interlock devices where no judicial waiver has been granted due to financial inability. DCJS documentation of fee structure received from interested qualified manufacturers indicates an average \$75-\$100 installation charge and a similar monthly maintenance charge.

c. Although DCJS must approve each county plan, this approval process was accomplished using existing staff and resources. As the former statewide oversight agency, with extremely limited staffing resources, the former DPCA pursued some administrative monies in connection with the aforementioned grant to better manage compliance with the statutory and regulatory requirements of this new law.

5. Local government mandates:

This rule establishes that every jurisdiction must submit for DCJS approval an ignition interlock plan for monitoring the use of ignition interlock devices by June 15, 2010. The County Plan content is straightforward, simple, and largely prescriptive to ease any burden on localities. Monitoring functions associated with DWI operators with ignition interlock devices are statutorily required. DCJS' rule has been carefully streamlined to afford considerable flexibility, yet guarantee swift and certain sentencing court and district attorney notification as to certain failed tasks and failed tests. Additionally, it places specific responsibilities upon qualified manufacturers, installation/service providers, as well as operators to provide timely information and/or reports to monitors so as to assist them in managing their caseload. Nationally, fewer than 10% of persons with an ignition interlock installed on their motor vehicle violate the conditions relating to the ignition interlock program.

6. Paperwork:

This rule establishes that every jurisdiction submit an ignition interlock program plan to DCJS for approval meeting certain regulatory requirements. The former DPCA distributed a model simple form, largely prescriptive, to assist jurisdictions in satisfying this requirement. A manufacturer wishing to conduct business in New York State relative to ignition interlock devices will be required to apply to DCJS. The former DPCA distributed and posted an application for interested manufacturers. Other data report requirements imposed upon qualified manufacturers and installation/service providers are routine business activities and essential to offender accountability and community safety. The former DPCA developed approximately fifteen (15) reporting forms to facilitate exchange of information and promote consistency, which will greatly benefit all jurisdictions in implementation and compliance with this new law. The former DPCA solicited considerable input from constituents, including the Courts in developing the financial disclosure report required of operators applying for judicial waiver. Further efforts at the state level will lead to the availability of Spanish forms.

7. Duplication:

This rule does not duplicate any other existing State or federal requirements. While the Department of Health (DOH) certifies ignition interlock devices, DOH through regulations has transferred certain regulatory responsibilities to DCJS to achieve a more workable solution with respect to oversight of key areas.

8. Alternatives:

The former DPCA and DCJS weighed several approaches with respect to rule-making, but were required at a minimum to include certain aforementioned statutory components. A plan submission process was viewed essential to ensure that all jurisdictions are prepared to fulfill statutory requirements. An application process for manufacturers with stronger operational requirements was also determined critical to improve statewide

service delivery and promote public safety and operator accountability. In crafting rule content and developing the financial disclosure report, a working group which included local prosecutorial and probation representation was formed, with representation from former DPCA, DCJS and various other local and state agencies. DPCA had publicized and convened a manufacturer's roundtable in March 2010 to solicit additional information from probation departments and manufacturers. The Office of Court Administration (OCA), Department of Motor Vehicles, the Office of Alcoholism and Substance Abuse Services, the former DPCA, and DCJS, were all actively involved in rule formation and implementation. Further, the Offices of General Services, State Comptroller, Attorney General, and Division of the Budget were consulted as to the request for application. The former DPCA provided the State Probation Commission, probation departments, and manufacturers two separate draft regulations in this area which incorporated numerous suggestions. The regulation reflects many other recommendations to minimize impact, clarify the law, and achieve more sound workable provisions, consistent with public safety.

9. Federal standards:

There are no federal standards governing the monitoring of convicted DWI offenders ordered to use an ignition interlock device although the National Highway Traffic Safety Administration (NHTSA) published model specifications for breath alcohol ignition interlock devices in the Federal Register on April 7, 1992 (57 FR 11772) and this rule requires that any device used meets these standards. Both the former DPCA and DCJS, in consultation with DOH and the Traffic Research Injury Foundation, incorporated additional device operation and monitoring standards that are consistent with good professional practice and have been well-received and which are likely to be embraced as future model provisions.

10. Compliance schedule:

Every county and the city of New York were required to submit an ignition interlock program plan to the former DPCA for approval by June 15, 2010 to ensure smooth and successful implementation of the mandatory ignition interlock statutory and regulatory provisions on August 15, 2010. Every county submitted an application which was internally reviewed. DPCA distributed two earlier regulatory drafts to probation departments and disseminated these to the New York State Association of Counties and conducted a web air conference on the subject.

The State's efforts in conducting a preliminary roundtable for manufacturers and sharing draft regulations and draft request for application and incorporating many business comments has proven beneficial in terms of advance notification of regulatory terms and conditions, making the application process manageable to interested manufacturers, and readiness to achieve timely compliance with regulations.

To foster better understanding and guarantee compliance of the law and its regulations, DCJS undertook OCA training initiatives to ensure the judiciary and other interested parties are sufficiently knowledgeable on the new law and regulatory features.

The majority of feedback with respect to the rule has been well-received and it is expected that all affected parties will be able to comply with the rule.

Additionally, all interested qualified manufacturer's applications have been reviewed and approved and all six (6) State contracts have been executed.

Revised Regulatory Flexibility Analysis

1. Effect of rule:

This rule will affect every county and the city of New York as a whole, ignition interlock manufacturers and their approved installation/service providers. As of April 2010 there were approximately thirteen (13) manufacturers of ignition interlock devices currently established in the United States and six (6) doing business in New York State with approximately 175 installation/service providers within the state. The latter are typically automobile repair businesses and automobile sound system installers. Since then, six (6) have been approved as qualified manufacturers and there has been an increase of approximately fifty (50) additional installation/service providers, with more anticipated in the immediate future.

2. Compliance requirements:

This rule would require that every jurisdiction submit an ignition interlock program plan to the Division of Criminal Justice Services (DCJS) for approval relative to usage of ignition interlock devices and monitoring the compliance of operators subject to such device as directed by the sentencing court. The regulation enumerates parameters with respect to the development, scope, and content of the plan so as to promote consistent application, foster greater local collaboration and coordination within the criminal justice system, guarantee monitoring of all operators subject to the installation of such devices on their motor vehicles, and optimize compliance with Chapter 496 of the Laws of 2009, commonly referred to as Leandra's law, which strengthens various laws to combat and deter drunk driving. The County Plans required by DCJS were simple and largely prescriptive to ease any burden on localities.

Further, a manufacturer wishing to do business in New York State would be required to apply to DCJS to become a qualified manufacturer, agree to meet our regulatory requirements as to service delivery and enter into a contractual agreement with DCJS. Among relevant information sought in the application are a description of the certified ignition interlock device approved by the New York State Department of Health (DOH), maximum fee/charge schedules, specific service performance measures, a commitment to conduct business in one or more of the four designated regions of the state, certification of installation/service providers, verification of liability coverage and a signed statement that the manufacturer or its representative will indemnify and hold harmless the State of New York and local government from particular claims, demands and actions which might arise out of any act or omission with respect to installation, service, inspection, maintenance, repair, use and/or removal of the device. While DCJS requires that any qualified manufacturer provide for a payment plan or in certain cases agree to provide a device free of charge to an operator who has been determined financially unable to afford the device, this language is consistent with Vehicle and Traffic Law § 1198(5)(a). Further, there exist certain compliance requirements which installation/service providers must satisfy with respect to installation, service delivery, training, and reporting. Moreover, the majority of qualified manufacturer and installation/service provider requirements are similar in nature to what has been previously required by DOH regulations. Due to the new leadership role with respect to ignition interlock programmatic implementation, the former Division of Probation and Correctional Alternatives, which subsequently has been merged with DCJS, jointly worked with DOH to strengthen existing DOH regulations in this area, including transfer of certain regulatory responsibilities to DCJS.

DCJS has incorporated other expanded requirements consistent with other state's best practices and operational provisions to improve service delivery, ensure availability throughout the state, and promote greater accountability. At the same time, DCJS has afforded greater flexibility in certain pre-existing DOH requirements and other new regulatory provisions wherever feasible without compromising ignition interlock performance integrity and public safety. DCJS has recognized differences in technology through special provisions which reflect classification categories and features, and operational differences with respect to servicing certain devices.

3. Professional services:

It is not anticipated that any particular professional services will be required to comply with the rule.

4. Compliance costs:

Chapter 496 of the Laws of 2009 requires monitoring of all defendants subject to ignition interlock devices as a result of sentencing on and after August 15, 2010 involving a DWI misdemeanor or felony. This chapter requires, in addition to any other disposition that may be imposed, that a defendant receive a sentence of probation or conditional discharge with an ignition interlock condition. Where probation is imposed, probation departments are responsible for monitoring. It further permits designation of an alternative person with respect to conditional discharge cases in lieu of probation. The rule provides each county and the city of New York as a whole, with the flexibility to choose one or more persons or entities responsible for monitoring conditional discharge cases where a defendant has been required to install and maintain a functioning ignition interlock device in any vehicle which they own or operate. Potential designees are listed to better guarantee active consideration and not result in probation departments absorbing such responsibilities by omission. Due to the State's and national efforts to strengthen ignition interlock laws to deter drunk driving and promote greater offender accountability, the former DPCA advocated and was invited to submit a grant application to the Governor's Traffic Safety Committee in an amount up to three (3) million dollars in National Highway Safety Traffic Administration (NHTSA) monies to offset local government costs in performing monitoring services. The application has been recently approved and will enable DCJS, which former DPCA has merged with pursuant to Chapter 56 of the Laws of 2010, to distribute monies to jurisdictions pursuant to a formula of DWI convictions to support local programmatic and/or clerical staff resources to perform monitoring functions for this offender population.

DCJS believes that the regulatory requirements with respect to qualified manufacturers or their installation/service providers will not impose costs upon either beyond normal operating costs. The manufacturer wishing to do business in the State may incur some additional business associated with the regulatory requirement that such manufacturer provide devices at no charge or through a payment plan when ordered by a court. It is not entirely possible to estimate such costs. Currently, any operator subject to the installation of an ignition interlock device is required to pay such costs. Noteworthy, the aforementioned Chapter law establishes that the court, upon determining financial "unaffordability" to pay the cost of the device, may impose a payment plan with respect to the device or waive

the fee. New Vehicle and Traffic law statutory provisions require that where the cost is waived, DCJS through its regulation shall determine who bears the costs of the device or through such other agreement which may be entered into. It was decided preferable to require qualified manufacturers, and not local governments to bear such costs. While the decision to waive the fee is reserved to the court and will take effect on August 15, 2010, DCJS speculates based upon other state's experience in this area that approximately ten (10) percent of cases will result in waivers. Due to the significant potential of increase in profits for a manufacturer due to the expansion of the use of ignition interlock devices, DCJS believes that it is reasonable to hold manufacturers responsible for supplying the device free of charge where a judicial waiver has been secured. Further, as interested manufacturers in their applications must provide a maximum fee/charge schedule taking into consideration an estimated 10 % waiver, the costs in this area will likely be absorbed in the fee/charge schedule submitted to DCJS.

5. Economic and technological feasibility:

From feedback that former DPCA received with respect to the proposed and finalized application and regulation which was sent to all ignition interlock manufacturers throughout the nation, manufacturers currently providing certified ignition interlock devices for use in New York State (with respect to offenders already subject to ignition interlock condition as part of their sentence or release) expressed willingness to satisfy compliance with the regulation and all including one additional manufacturer applied and were approved as qualified manufacturers. Moreover, it should be noted that the majority of manufacturers of ignition interlock devices are located in other states. At this time, only two (2) qualified manufacturers are located in New York State. All current installation/service providers within New York State were previously required to satisfy specific installation, training and reporting requirements established in DOH regulations in the area of ignition interlock devices and the transfer of these regulatory requirements to DCJS have resulted in continuation of similar provisions. As to any additional requirements, qualified manufacturers have assured the state through their respective applications and contractual agreements that installation/service providers which they have selected will be able to comply with regulatory requirements.

As to specific technological feasibility features in this rule, the former DPCA and DCJS reviewed other states requirements and existing and anticipated future national standards, worked with DOH to update its regulations with respect to best practices, and incorporated several programmatic and legal suggestions obtained from feedback of manufacturers, probation practitioners with ignition interlock caseloads, prosecutors, along with various professional associations and organizations, including the Council of Probation Administrators, the NYS STOP-DWI Coordinators Association, and the Traffic Safety Research Foundation.

6. Minimizing adverse impact:

Both the former DPCA and DCJS were steadfast in its efforts to minimize adverse impact of this proposed regulation upon small business and local government. As noted earlier, a DCJS application, earlier submitted by former DPCA, is pending to secure federal funding to reduce any local government costs associated with monitoring as a result of Leandra's Law statutory responsibilities and our related regulations. The regulations have been crafted to offer guidance and structure in plan development and implementation. Other features with respect to monitoring have carefully balanced substantive provisions to afford considerable flexibility as to particular actions where feasible, yet ensure swift and certain action where necessary to achieve uniformity in handling of certain failed tasks and failed tests, safeguard the public and better guarantee offender accountability. There has been added several regulatory provisions as to operator responsibility to assist the judiciary's consideration of financial "unaffordability" and minimize unnecessary waivers, and to ensure operators convey timely information to monitors, the courts, and installation/service providers.

With respect to manufacturers, former DPCA and DCJS examined other state's statutory and/or regulatory requirements, sought input of DOH authorities, the Traffic Safety Research Foundation, and experience of other states as to their laws in this area and convened a roundtable for manufacturer participation which was well-attended that provided a candid and meaningful dialogue and exchange as to issues and concerns.

Overall, through circulating two prior draft regulations in this area and a draft of the request for application, the former DPCA received additional feedback which led to numerous edits to address concerns and provide where appropriate greater flexibility. Additionally, the Director of Probation and Correctional Alternatives and program and legal staff of the former DPCA participated in a web air conference with the New York State Association of Counties to foster better understanding of Leandra's Law and the draft regulation.

7. Small business and local government participation:

Interested small businesses and local government participated in several ways in crafting and refining this rule. Specifically, a workgroup

which included local prosecutorial and probation representation was formed along with representation from former DPCA, DCJS and various other state agencies. DPCA had publicized and convened a manufacturer's roundtable in March 2010 to solicit more information from probation departments and manufacturers of ignition interlock devices and establish a meaningful dialogue of issues and concerns with implementation of Leandra's Law provisions governing ignition interlock. The Office of Court Administration, Department of Motor Vehicles, the Office of Alcoholism and Substance Abuse Services, former DPCA, and DCJS, were all actively involved in rule formation and implementation to gain their professional insight. Further, the Office of General Services, the Office of State Comptroller, the Attorney General's office and the Division of the Budget have been consulted as to the request for application which mirror key regulatory provisions. DPCA provided probation departments and manufacturers two separate draft regulations in this area which incorporated numerous suggestions. The final regulation reflects many other recommendations to minimize impact, clarify the law, and achieve more sound workable provisions.

Revised Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Forty-four of the 57 local probation departments outside of New York City are located in rural areas and will be affected by the regulation.

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

The regulation implements Chapter 469 of the Laws of 2009, commonly referred to as Leandra's Law, in relation to the monitoring of the use of court-ordered ignition interlock devices ordered upon defendants sentenced for a DWI misdemeanor or felony. Rule provisions require that each county and the city of New York adopt an ignition interlock program plan for the monitoring of such devices and successful implementation of this new law. Such plan must be submitted to the Division of Criminal Justice Services (DCJS) for approval and contain certain enumerated components to ensure a smooth transition, uniformity in handling of similar cases, and optimize compliance with statutory and regulatory provisions to combat and deter drunk driving. For example, such plan must designate the agency or entity that will monitor conditional discharge cases, establish certain procedures to ensure the monitor receives timely notification of those defendants subject to interlock conditions, including advance notification of DWI defendants when released from state or local imprisonment, judicial waiver of cost of devices, intrastate transfers, and interstate transfers. Specific regulatory provisions govern monitoring services. Flexibility is provided to local jurisdictions to establish other procedures governing failure report recipients, including method and timeframe and specific notification and circumstances. In the interest of public safety and offender accountability, other regulatory provisions require court and district attorney notification by all monitors when certain failed tasks or failed tests occur and appropriate notification with respect to intrastate transfers and interstate transfers. Monitors have been given the authority to issue certificates of completions and letters of de-installation. Consistent with state laws governing record retention and disposition, regulatory language requires that all local governmental records shall be retained and disposed of in accordance with the applicable Records Retention and Disposition Schedule promulgated by the New York State Education Department. Lastly, it is not anticipated that any special professional services will be required to adopt and administer such plan.

3. Costs:

Chapter 496 of the Laws of 2009 requires monitoring of all defendants subject to ignition interlock devices as a result of sentencing on and after August 15, 2010 involving a DWI misdemeanor or felony. This chapter requires, in addition to any other disposition that may be imposed, that a defendant receive a sentence of probation or conditional discharge with an ignition interlock condition. Where probation is imposed, probation departments are responsible for monitoring. It further permits designation of an alternative person with respect to conditional discharge cases in lieu of probation. The rule provides each county and the city of New York as a whole, with the flexibility to choose one or more persons or entities responsible for monitoring conditional discharge cases where a defendant has been required to install and maintain a functioning ignition interlock device in any vehicle which they own or operate. Potential designees are listed to better guarantee active consideration and not result in probation departments absorbing such responsibilities by omission. Due to the State's and national efforts to strengthen ignition interlock laws to deter drunk driving and promote greater offender accountability, the former Division of Probation and Correctional Alternatives (DPCA) advocated and was invited to submit a grant application to the Governor's Traffic Safety Committee in an amount up to three (3) million dollars in National Highway Safety Traffic Administration (NHTSA) monies to offset local government costs in performing monitoring services. The application was recently approved and will enable DCJS, which former DPCA has merged with pursuant to Chapter 56 of the Laws of 2010, to distribute monies to

jurisdictions pursuant to a formula of DWI convictions to support local programmatic and/or clerical staff resources to perform monitoring functions for this offender population.

Currently, any operator subject to the installation of an ignition interlock device is required to pay such costs. Noteworthy, Chapter 496 of the Laws of 2009 establishes that the court, upon determining financial "unaffordability" to pay the cost of the device, may impose a payment plan with respect to the device or waive the fee. New Vehicle and Traffic law statutory provisions require that where the cost is waived, DCJS through its regulation shall determine who bears the costs of the device or through such other agreement which may be entered into. DCJS regulations require qualified manufacturers, and not local governments to bear such costs. Moreover, DCJS does not foresee substantial cost variances between rural, suburban, and urban jurisdictions as costs associated with this new law will be impacted upon number of sentenced DWI misdemeanants and DWI felons and this does not necessarily correspond to population size of a jurisdiction.

4. Minimizing adverse impact:

Both the former DPCA and DCJS were steadfast in its efforts to minimize adverse impact of this proposed regulation upon local government, especially rural counties. As noted earlier, a DCJS application, earlier submitted by former DPCA, is pending to secure federal funding to reduce any local government costs associated with monitoring as a result of Leandra's Law statutory responsibilities and our related regulations. The regulations have been crafted to offer guidance and structure in plan development and implementation. Other features with respect to monitoring have carefully balanced substantive provisions to afford considerable flexibility as to particular actions where feasible, yet ensure swift and certain action where necessary to achieve uniformity in handling of certain failed tasks and failed tests, safeguard the public and better guarantee offender accountability. There has been added several regulatory provisions as to operator responsibility to assist the judiciary's consideration of financial "unaffordability" and minimize unnecessary waivers, and to ensure operators convey timely information to monitors, the courts, and installation/service providers. Further, our regulatory language requires that in the event of judicial waiver of the cost of the device, the qualified manufacturer not the county government bears the costs associated with installation and maintenance of the ignition interlock device for any person convicted of a DWI misdemeanor or felony and required to have installed a functioning ignition interlock device on any vehicle which he/she owns or operates.

DCJS does not anticipate that these new regulations will have any adverse impact on rural areas. Although rural counties may have fewer resources at their disposal than more populated counties, many rural counties also have the advantage of a smaller population and typically a correspondingly smaller number of operators required to install an ignition interlock device. Further, through the establishment of regions, which include both rural and non-rural counties, this regulation will require that a manufacturer doing business with a non-rural county must do business with rural counties within the region upon the same favorable terms which will ensure service availability and further that installation/service providers be available to operators within 50 miles of their homes statewide.

Lastly, at the state level there has been developed approximately fifteen model forms which will greatly benefit all jurisdictions in implementation and compliance with this new law, especially numerous rural counties with limited staff resources to undertake form development. These forms have been disseminated to all jurisdictions and have been well-received.

5. Rural area participation:

This rule was developed by the former DPCA prior to its merger with DCJS with the input of a number of entities including probation departments from rural counties. Specifically, a workgroup which included rural probation representation was formed along with representation from former DPCA, DCJS and various other state agencies. DPCA had publicized and convened a manufacturer's roundtable in March 2010 to solicit more information from probation departments and manufacturers of ignition interlock devices and establish a meaningful dialogue of issues and concerns with implementation of Leandra's Law provisions governing ignition interlock. Several rural probation departments attended this roundtable meeting. DPCA provided all probation departments two separate draft regulations in this area which incorporated numerous suggestions. The Council of Probation Administrators (COPA), the statewide professional association of probation executives in New York State, selected two rural probation directors to be part of our aforementioned workgroup. Additionally a separate committee within COPA, comprised of rural probation director membership, reviewed the last regulatory draft and DPCA originally incorporated certain/several amendments that were consistent with public safety, statutory language and intent, and/or otherwise feasible. Additionally, the Director of Probation and Correctional Alternatives directly communicated with officials within the New York State Association of Counties (NYSAC) as to the new law

and disseminated the last draft regulatory revision, prior to finalizing the first emergency regulation, for feedback and he previously conducted a NYSAC web air conference on the subject which had large representation from jurisdictions across the state. The final regulation reflects many other recommendations to minimize impact, clarify the law, and achieve more sound workable provisions which will greatly assist rural jurisdictions on implementation of the new law and this rule.

Revised Job Impact Statement

1. Nature of impact:

This rule will increase employment opportunities for manufacturers of ignition interlock devices certified by the New York State Department of Health and approved as a qualified manufacturer by the Division of Criminal Justice Services (DCJS) and for businesses in New York State which are designated installation/service providers of these devices. Based on arrest and conviction rates from 2008, the number of convicted drivers who will be required to install an ignition interlock device is projected to be approximately 25,000 per year. As of April 2010, approximately 2,400 ignition interlock devices are in use in New York State and there were approximately 175 approved installation/service providers, mainly small automotive shops specializing in the installation of automobile stereo systems, mufflers, automobile repair, and automobile dealers. Since six (6) manufacturers are now approved as qualified manufacturers to conduct business in New York State, the demand for devices and installation and maintenance-related services has grown dramatically and is anticipated to continue, leading to increased employment opportunities in our state.

2. Categories and numbers affected:

This rule will affect manufacturers of certified ignition interlock devices and their respective installation/service providers. Based on the projected number of defendants who will be required to install an ignition interlock device as a sentencing condition upon any vehicle which they own or operate, the number of current ignition interlock users and installation/service providers, the requirement that a manufacturer commit to servicing one or more designated region(s), and the anticipated geographical distribution of future defendants sentenced on Driving While Intoxicated (DWI) misdemeanor(s) and/or felony(ies), subject to such devices, it is projected that there will be increased employment opportunities for manufacturers and installation/service providers. In April 2010, prior to the first emergency rule, there were six (6) manufacturers in New York State and thirteen (13) throughout the nation. One additional has expressed interest and it is anticipated that others doing business outside of New York may apply in the future to conduct business in New York State. As a result of being approved as qualified manufacturers, which includes a commitment to service one or more designated region(s) of New York State, DCJS is aware that approximately fifty (50) additional installation/service providers have been selected by manufacturers to handle the increased service demand resulting from this new law, and more are expected in the near future. This has resulted and will continue to result in corresponding increase in employment opportunities throughout the state.

While counties and New York City, in particular probation departments and other alternative monitors who may be designated to handle conditional discharge cases may be affected by this regulation, the regulation is designed to provide a flexibility wherever feasible consistent with public safety and accountability in order to minimize the effect of the regulation upon local government. Under this new law, where probation is imposed, probation departments are responsible for monitoring. It further permits designation of an alternative person with respect to conditional discharge cases in lieu of probation. The rule itself provides every jurisdiction with the flexibility to choose one or more persons or entities responsible for monitoring conditional discharge cases. A variety of potential designees are listed to better guarantee active consideration and not result in probation departments absorbing such responsibilities by omission. Due to the State's and national efforts to strengthen ignition interlock laws to deter drunk driving and promote greater offender accountability, DCJS has advocated and been invited to submit a grant application to the Governor's Traffic Safety Committee in an amount up to three (3) million dollars in National Highway Safety Traffic Administration (NHTSA) monies to offset local government costs in performing monitoring services. The grant application was recently approved and will enable our agency to distribute monies pursuant to a formula of DWI convictions to support local programmatic and/or clerical staff resources to perform monitoring functions for this offender population. In some jurisdictions, new employment opportunities may be available with respect to monitoring services.

3. Regions of adverse impact:

This rule will have no adverse or disproportionate impact on jobs or employment opportunities.

4. Minimizing adverse impact:

This rule will have no adverse impact on jobs or employment opportunities. As noted in paragraph 2, this rule will instead increase employment opportunities throughout the State. With respect to jobs, the new law specifically requires monitoring be performed at the local level.

DCJS' rule in this area has provided considerable flexibility and options to local government with respect to monitoring. Further, our rule places specific responsibilities upon qualified manufacturers, installation/service providers, as well as operators to provide timely information and/or reports to monitors so as to assist them in managing their caseload.

5. Self-employment opportunities:

Many manufacturers of ignition interlock devices are independent businesses and designated installation/service providers are typically small, owner-operated businesses. The increase in the number of qualified manufacturers has led to increased installation/service providers throughout the state and it is anticipated that there is a potential for self-employment opportunities where such businesses can meet manufacturer agreements and State regulatory requirements governing training, installation, maintenance of services, and other operational provisions.

Assessment of Public Comment

The Division of Criminal Justice Services (DCJS) received one written comment relative to the proposed regulatory Part 358 governing handling of ignition interlock cases involving certain criminal offenders from the New York State Defenders Association, Inc. (NYSDAI) during the official public comment period. Highlighted below, is a summary of issues raised, DCJS position, and any agreed upon agency amendments:

NYSDAI questions certain rule definitions contained in Rule Section 358.3. DCJS has made certain revisions in this area. DCJS has removed the definition of "conviction" as we have determined it is not necessary to define this term for purposes of this rule. Additionally, DCJS has streamlined the definition of "operator" and also similarly amended the objective section, Rule Section 358.1, in a consistent manner. Further, the definition of "service visit" found in Section 358.3(x) was revised so as to allow additional flexibility and permit another driver to bring the vehicle in for a service visit with the understanding that the operator is responsible for making sure service visits are satisfied.

In Rule Sections 358.3(k), 358.4(d)(6), and 358.7(d)(1), NYSDAI raises several issues relative to failure report recipients and notification of violations and argues that defense counsel notification is essential. This issue was earlier raised by NYSDAI when an initial draft rule was disseminated for input. The definition of "failure report recipient" and language as to notification of violations were carefully weighed, however inclusion of defense counsel was viewed unnecessary, impracticable, burdensome, and costly in terms of maintenance. Instead, the adopted rule in Rule Section 358.5(c)(6) establishes a mechanism whereby an operator may monthly request from the qualified manufacturer of its ignition interlock device, his/her usage history, which includes any report of failed tasks, failed tests, circumvention, or tampering. In this way, the operator may share such information with his/her attorney as he/she deems necessary or appropriate. DCJS believes this approach is fair and reasonable and more sound and effective, especially since legal representation may change.

NYSDAI registers some issues with development and implementation of county ignition interlock program plans. In reviewing and approving plans, the Office of Probation and Correctional Alternatives (OPCA) within DCJS incorporated in all approval letters a standard paragraph with respect to observations regarding the new statewide ignition interlock initiative, which touched upon first time offenders, Class of devices, waivers, costs, and concluded with the recommendation that monitors of both probation and conditional discharge cases be allowed the flexibility to choose the Class of device for each operator. We are aware that probation departments and monitors were consulted in plan development and were directly involved in crafting plan submissions in terms of content. OPCA pointed out plan language which was inconsistent/contrary with statutory and/or regulatory provisions or missing certain plan component provisions and several jurisdictions subsequently submitted corrective language and/or modified plans. It would therefore appear that their plan content concerns have been sufficiently/adequately addressed. As to plan consultation, there was a tight timeframe in which plans were to be submitted and there may have been instances where a representative of an agency providing legal services to those unable to afford counsel in criminal cases, was not timely appointed by the county executive or otherwise not available. Clearly, most designated representatives had input and while full representation was sought, DCJS acknowledges time constraints/demands led to some participatory omissions. DCJS will continue to work with jurisdictions to ensure statutory and regulatory compliance. As to NYSDAI's objection to Rule Section 358.4(d)(5) as to probation departments receiving notification of imposition of an ignition interlock condition on a conditional discharge case where it is not designated a monitor, this rule language is reasonable and appropriate in light of Vehicle and Traffic Law § 1198(4) where an operator must provide proof of compliance to the court and the probation department whenever such person is under probation or conditional discharge supervision. Due to this statutory language, prompt notification of imposition of the condition in all conditional discharge cases is warranted so that the department can make timely notification of violations in this area.

DCJS disagrees with NYSDAI's assertion in Rule Section 358.5(c)(4) that a qualified manufacturer who provides mobile servicing at the convenience of the operator ought not to be able to charge a mobile installation/service fee. DCJS has required disclosure of any such fees from manufacturers and known maximum costs are viewed as reasonable. Further, our agency believes that language found in Rule Section 358.5(c)(10)(5) as to providing hands-on training to the operator, any member of the same family or household, or any owner of a motor vehicle in which a device is installed is adequate/sufficient and that NYSDAI's expectation that it be provided to anyone "at any time" is not workable/realistic for any business operation. As to availability of training and training material in multiple language or to handle hearing impaired individuals, most training material and device instruction can satisfy issues that surface in this area and further regulation appears unnecessary. DCJS also does not see the need to establish a specific public complaint regulatory provision as complaints are to be reported by a manufacturer to DCJS by Rule Section 358.5(c)(15)(vi) and past experience with respect to probationers is that it is unnecessary to require information be distributed as to how to file a complaint with the monitoring agency and/or oversight state agency.

As to issues of confidentiality and record access, DCJS disagrees with NYSDAI's assertion that Rule Sections 358.5(d)(13)(iii) and 358.7(c)(3)(iii) are problematic as access to certain information will better guarantee that the installation/service provider conducts hands-on training to such persons. Additionally, DCJS disputes NYSDAI's contention that Rule Section 358.7(e) is vague and overbroad. It is similar in content with DCJS Case Record Management Rule, specifically Rule Section 348.4(c)(2), and the regulatory provisions, including underlying purpose, who may be recipients of certain information and under what circumstances, are consistent with a monitor's responsibility and serves the interest of justice while setting forth parameters as to re-disclosure to safeguard inappropriate access to information.

As to installation of the device, NYSDAI questions certain regulatory provisions. While there is statutory authorization of intrastate transfer of probation, there is no formal intrastate transfer of conditional discharges cases and because there will be coordination among monitors to ensure the receiving county monitor is aware of the imposition of the condition, said monitor will determine the class of the device and in probation cases, the specific features. Consequently, no change appears necessary. NYSDAI is correct as to the analysis that an operator must request installation within 3 business days to ensure installation within the 10 day period in light of an installation/service provider having up to 7 business days to install the device upon an operator's request. Ignition Interlock Device Units are calibrated by the manufacturer and sent to installation service centers upon request. As to any extension of the time-frame to install the device where repairs or adjustments are necessitated, DCJS believes that typically there is time between conviction and sentencing for such to be undertaken and therefore it is unnecessary to revise language at this time.

With respect to monitoring, Rule Section 358.7, DCJS has regulatory language recognizing that a monitor may under certain instances issue a letter of de-installation and has developed a model form with collaboration of the Department of Motor Vehicles as to de-installation to assist jurisdictions. However, we find it unnecessary to expand upon the process in this area. Should there be a failed test that has not been backed up by a successful re-test, it is appropriate that the monitor be notified for approval before removal is made.

Lastly, DCJS disagrees with NYSDAI's interpretation of certain statutory provisions relative to DCJS regulatory authority in the area of waivers of ignition interlock devices or imposition of a payment plan and the regulatory process by which an interested operator who claims financial inability may seek to secure a court determination. Noteworthy, our emergency regulations in this area, including the financial disclosure report form, were crafted with considerable input of the Office of Court Administration, both our agencies have jointly trained the judiciary throughout the state over the past several months, and there has not been interagency disagreement as to DCJS regulatory authority or the provisions in this area. Significantly, OPCA has on its public website the aforementioned financial disclosure report form available in English and Spanish versions. Further, any such claim of financial inability is relevant to sentencing and therefore DCJS believes it is appropriate that the district attorney obtain any financial disclosure report.

Education Department

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Age and Four-Year Limitations for Participation in Senior High School Athletic Competition

I.D. No. EDU-32-10-00009-RP

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

Proposed Action: Amendment of section 135.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1) and (2), 803(not subdivided), 3204(2) and (3)

Subject: Age and four-year limitations for participation in senior high school athletic competition.

Purpose: To provide a waiver for a student with a disability to participate in certain high school sports for a fifth year.

Text of revised rule: 1. Subclause (1) of clause (b) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended, effective October 26, 2010, as follows:

(1) Duration of competition. A pupil shall be eligible for senior high school athletic competition in a sport during each of four consecutive seasons of such sport commencing with the pupil's entry into the ninth grade and prior to graduation, except as otherwise provided in this subclause, *or except as authorized by a waiver granted under clause (d) of this subparagraph to a student with a disability*. If a board of education has adopted a policy, pursuant to subclause (a)(4) of this subparagraph, to permit pupils in the seventh and eighth grades to compete in senior high school athletic competition, such pupils shall be eligible for competition during five consecutive seasons of a sport commencing with the pupil's entry into the eighth grade, or six consecutive seasons of a sport commencing with the pupil's entry into the seventh grade. A pupil enters competition in a given year when the pupil is a member of the team in the sport involved, and that team has completed at least one contest. A pupil shall be eligible for interschool competition in grades 9, 10, 11 and 12 until the last day of the school year in which he or she attains the age of 19, except as otherwise provided in subclause (a)(4) *or clause (d)* of this subparagraph, or in this subclause. The eligibility for competition of a pupil who has not attained the age of 19 years prior to July 1st may be extended under the following circumstances:

(i) If sufficient evidence is presented by the chief school officer to the section to show that the pupil's failure to enter competition during one or more seasons of a sport was caused by illness, accident, or similar circumstances beyond the control of the student, such pupil's eligibility shall be extended accordingly in that sport. In order to be deemed sufficient, the evidence must include documentation showing that is a direct result of the illness, accident or other circumstance beyond the control of the student, the pupil will be required to attend school or one or more additional semesters in order to graduate.

(ii) If the chief school officer demonstrates to the satisfaction of the section that the pupil's failure to enter competition during one or more seasons of a sport is caused by such pupil's enrollment in a national or international student exchange program or foreign study program, that as a result of such enrollment the pupil will be required to attend school for one or more additional semesters in order to graduate, and that the pupil did not enter competition in any sport while enrolled in such program, such pupil's eligibility shall be extended accordingly in such sport.

2. Clause (d) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is added, effective October 26, 2010, as follows:

(d) *Waiver from the age requirement and four-year limitation for interschool athletic competition for students with disabilities in senior high school grades 9, 10, 11, and 12. For purposes of this clause, the term non-contact sport shall include swimming and diving, golf, track and field, cross country, rifle, bowling, gymnastics, skiing and archery, and any other such non-contact sport deemed appropriate by the Commissioner. A student with a disability, as defined in section 4401 of the Education Law, who has not yet graduated from high school may be eligible to participate in a senior high school noncontact athletic competition for a fifth year under the following limited conditions:*

(1) *such student must apply for and be granted a waiver to*

the age requirement and four-year limitation prescribed in subclause (b) (1) of this subparagraph. A waiver shall only be granted upon a determination by the superintendent of schools or chief executive officer of the school or school system, as applicable, that the given student meets the following criteria:

(i) such student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more;

(ii) such student is otherwise qualified to compete in the athletic competition for which he or she is applying for a waiver and the student must have been selected for such competition in the past;

(iii) such student has not already participated in an additional season of athletic competition pursuant to a waiver granted under this subclause;

(iv) such student has undergone a physical evaluation by the school physician, which shall include an assessment of the student's level of physical development and maturity, and the school physician has determined that the student's participation in such competition will not present a safety or health concern for such student; and

(v) the superintendent of schools or chief executive officer of the school or school system has determined that the given student's participation in the athletic competition will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

(2) Such student's participation in the additional season of such athletic competition shall not be scored for purposes of such competition.

Revised rule compared with proposed rule: Substantial revisions were made in section 135.4(c)(7)(ii)(d).

Text of revised proposed rule and any required statements and analyses may be obtained from Chris Moore, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Avenue, Albany, New York 12234, (518) 473-8296

Data, views or arguments may be submitted to: John B. King, Jr., Senior Deputy Commissioner of P-12, State Education Department, Office of P-12 Education, State Education Building, Room 125, 89 Washington Avenue, Albany, New York 12234, (518) 474-3862, email: NYSEDP12@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on August 11, 2010, the proposed rule has been substantially revised as follows:

Section 135.4(c)(7)(ii)(d)(3) has been omitted for clarification purposes given that the New York State Public High School Athletic Association would only be authorized to review a decision regarding a waiver from the age and four-year limitations to senior high school athletic competition made by a school that is a member of the Association.

The aforementioned changes require that the Needs and Benefits section and the Local Government Mandates section of the previously published Regulatory Impact Statement be revised as follows:

3. NEEDS AND BENEFITS:

The proposed amendment will provide a waiver for a student with a disability to participate in senior high school athletic competition for an additional season despite the age and four-year limitations prescribed in section 135.4 of the Commissioner's regulations. The proposed amendment will advance initiatives of inclusion by allowing students with disabilities who would otherwise not be able to participate in interscholastic athletic competition due to their age or years in school to participate in a sport for an additional season if they have not graduated as a result of their disability delaying their education. This amendment will offer these students continued socialization with teammates and continued opportunity to develop the skills and abilities associated with his or her participation in such sport.

4. COSTS:

(a) Costs to State government: It is anticipated that the waiver provided by the proposed amendment will be exercised in limited circumstances and that appeals from a decision regarding a waiver will be limited, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff.

(b) Costs to local government: It is anticipated that the waiver provided by the proposed amendment will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for making similar decisions under existing regulations relating to a student's ability to participate in a sport.

(c) Costs to private regulated parties: For the same reasons as discussed in (b) above, it is anticipated that costs to private schools will be minimal and capable of being absorbed using existing staff and resources.

(d) Costs to the regulating agency for implementation and administration of this rule: There will be minimal costs imposed on the State Education Department to implement and enforce the regulations. These costs will be absorbed by existing staff.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment will require local school districts to implement a process for granting waivers to students with disabilities to participate for an additional season in high school athletic competition if such a student meets certain criteria. Specifically, the amendment requires that (1) the student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more, (2) the student previously was selected for and competed in the sport which he or she is applying for a waiver, (3) the student is otherwise qualified to compete in such sport, (4) the student has not previously been granted such a waiver, (5) the student has undergone and passed an evaluation by the school physician, and (6) the superintendent of schools or chief executive officer, as applicable, has determined that the student's participation will not adversely affect the opportunity of the other students to successfully compete in the competition.

The superintendent of schools or the chief executive officer of a private school will be required to determine whether the given student meets all such criteria and whether the student will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

It is anticipated that where applicable, a decision regarding a waiver may be appealed to the New York State Public High School Athletic Association in accordance with the Association's rules. As applicable in accordance with Education Law section 310, such a decision may be appealed to the Commissioner of Education.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on August 11, 2010, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith:

The aforementioned changes require that the Compliance Requirements section of the previously published Regulatory Flexibility Analysis be revised as follows:

2. COMPLIANCE REQUIREMENTS:

The proposed amendment will provide a waiver for a student with a disability to participate in senior high school athletic competition for an additional season despite the age and four-year limitations prescribed in section 135.4 of the Commissioner's regulations. The proposed amendment will require local school districts to implement a process for granting waivers to students with disabilities to participate for an additional season in such competition if such student meets certain eligibility criteria. Specifically, the amendment requires that (1) the student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more, (2) the student previously was selected for and competed in the sport which he or she is applying for a waiver, (3) the student is otherwise qualified to compete in such sport, (4) the student has not previously been granted such a waiver, (5) the student has undergone and passed an evaluation by the school physician, and (6) the superintendent of schools or chief executive officer, as applicable, has determined that the student's participation will not adversely affect the opportunity of the other students to successfully compete in the competition.

The superintendent of schools or the chief executive officer of a private school will be required to determine whether the given student meets such criteria and whether the student will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

It is anticipated that where applicable, a decision regarding a waiver may be appealed to the New York State Public High School Athletic Association in accordance with the Association's rules. As applicable in accordance with Education Law section 310, such a decision may be appealed to the Commissioner of Education.

The proposed amendment is expected to only impose minimal reporting, recordkeeping and other compliance requirements associated with reviewing and deciding a student's application for a waiver. It is anticipated that the waiver will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for making similar decisions under existing regulations relating to a student's ability to participate in a sport.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on August 11, 2010, the proposed rule

has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith:

The aforementioned changes require that the Reporting, Recordkeeping and Other Compliance Requirements, and Professional Services section of the previously published Rural Area Flexibility Analysis be revised as follows:

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

The proposed amendment will provide a waiver for a student with a disability to participate in senior high school athletic competition for an additional season despite the age and four-year limitations prescribed in section 135.4 of the Commissioner's regulations. The proposed amendment will require local school districts to implement a process for granting waivers to students with disabilities to participate for an additional season in such competition if such student meets certain eligibility criteria. Specifically, the amendment requires that (1) the student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more, (2) the student previously was selected for and competed in the sport which he or she is applying for a waiver, (3) the student is otherwise qualified to compete in such sport, (4) the student has not previously been granted such a waiver, (5) the student has undergone and passed an evaluation by the school physician, and (6) the superintendent of schools or chief executive officer, as applicable, has determined that the student's participation will not adversely affect the opportunity of the other students to successfully compete in the competition.

The superintendent of schools or the chief executive officer of a private school will be required to determine whether the given student meets such criteria and whether the student will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

It is anticipated that where applicable, a decision regarding a waiver may be appealed to the New York State Public High School Athletic Association in accordance with the Association's rules. As applicable in accordance with Education Law section 310, such a decision may be appealed to the Commissioner of Education.

The proposed amendment is expected to only impose minimal reporting, recordkeeping and other compliance requirements associated with reviewing and deciding a student's application for a waiver. It is anticipated that the waiver will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for making similar decisions under existing regulations relating to a student's ability to participate in a sport.

The proposed amendment imposes no additional professional service requirements on school districts.

Revised Job Impact Statement

The proposed amendment provides a waiver for a student with disability to participate for a fifth year in senior high school athletic competition despite the age and four-year limitations prescribed in Section 135.4 of the Commissioner's regulations, if the student with disability meets certain criteria.

The proposed rule will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts 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 the Notice of Emergency Adoption and Proposed Rule Making in the State Register on August 11, 2010, the Department received the following comments on the proposed rule.

1. COMMENT:

The New York State Public High School Athletic Association does not have authority to review a decision regarding a waiver made by a school that is not a member of the Association.

DEPARTMENT RESPONSE:

For clarification purposes, the proposed rule has been revised to omit section 135.4(c)(7)(ii)(d)(3) providing for an appeal through the New York State Public High School Athletic Association given that the Association would only be authorized to review a decision regarding such a waiver made by a school that is a member of the Association. It is still anticipated, however, that the New York State Public High School Athletic Association will review decisions regarding such waivers, where applicable, based on a school's membership status.

2. COMMENT:

The rule does not sufficiently define a student with a disability who would be eligible for this waiver.

DEPARTMENT RESPONSE:

The rule expressly provides that a student is eligible for a waiver if he or she is a student with a disability as defined in section 4401 of the Education Law. Section 4401 of the Education Law provides that a "student with a disability" is a student receiving special education services. This rule further provides that a student is eligible for a waiver if he or she has not graduated from high school as a result of his or her disability delaying his or her education. Although the Department believes that the rule sufficiently defines a student with a disability who is eligible for a waiver, any other necessary clarification can be best addressed in guidance.

3. COMMENT:

The waiver eligibility requirement that the superintendent of schools or chief executive officer of a nonpublic school must determine that "the given student's participation in the sport will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition" is ambiguous.

DEPARTMENT RESPONSE:

The Department believes that any necessary clarification relating to this eligibility requirement can best be addressed in guidance.

4. COMMENT:

The rule may result in legal challenges and expose the New York State Public High School Athletic Association to litigation.

DEPARTMENT RESPONSE:

Although comments regarding potential exposure to litigation are purely speculative, the rule has been carefully drafted to address the specific situations intended to be addressed by this rule and in consideration of student safety and fair athletic competition. Any other necessary clarification may be addressed through guidance.

Department of Environmental Conservation

NOTICE OF ADOPTION

Endangered and Threatened Species of Fish and Wildlife

I.D. No. ENV-31-10-00020-A

Filing No. 1078

Filing Date: 2010-10-19

Effective Date: 2010-11-03

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

Action taken: Amendment of Part 182 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, section 11-0535

Subject: Endangered and threatened species of fish and wildlife.

Purpose: To clarify process and procedures for handling listed species issues in New York.

Substance of final rule: The Department of Environmental Conservation (the department) proposes to amend the regulations pertaining to endangered, threatened and special concern species under Part 182 of 6 NYCRR. Under the New York State Endangered Species Law, endangered and threatened species may not be taken except under permit by the department. These amendments clarify the department's jurisdiction pertaining to listed species, delineate an application and review process for addressing proposals that will take listed species and establish standards for permit issuance. An incidental take permitting program for projects that will result in a take of listed species as part of otherwise legal activities is described in detail. A process consistent with Uniformed Procedures Act procedures is established for the issuance of incidental take permits when proposed actions are anticipated to result in the taking of listed species. The standard for permit issuance is that the proponent of an action that will take listed species must also take actions that ensure that the affected species will be afforded a net conservation benefit. This requirement ensures that the applicant's actions will have an overall positive affect on the status of the affected species, even if some portions of the project may be detrimental to the listed species or its habitat. Further clarification is also provided by the inclusion of several new definitions of terms associated with listed species project review.

Final rule as compared with last published rule: Nonsubstantive changes were made in Part 182.

Text of rule and any required statements and analyses may be obtained from: Daniel Rosenblatt, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8884, email: wildliferegs@gw.dec.state.ny.us

Additional matter required by statute: SEQR documentation including an EAF and Negative Declaration are on file with the department.

Revised Regulatory Impact Statement

The original Regulatory Impact Statement as published in the Notice of Proposed Rule-making remains valid, and does not need to be amended to reflect the changes made to the text of the regulation.

Revised Regulatory Flexibility Analysis

1. Effect of rule: This rule making will provide businesses and local governments with a better understanding of the types of projects that fall under the jurisdiction of Article 11-0535 and the requirements and procedures for projects to follow once such jurisdiction has been determined.

2. Compliance requirements: Compliance requirements are not altered over existing regulations. As already required under SEQR and Article 11-0535, listed species impacts must already be addressed. Compliance with this requirement is made easier through the issuance of better guidance and the creation of a predictable, transparent process for evaluating the need for permits and the regulatory requirements necessary for the issuance of said permits.

3. Professional services: As is the case under the existing regulations, environmental consultant services will continue to be necessary for projects subject to the jurisdiction of this rule making.

4. Compliance costs: This regulation does not impose any additional burden on affected local governments and small businesses. Instead, it provides a better defined process for project proponents to follow when they fall under the jurisdiction of this rule making. Those entities that pursue projects subject to the jurisdiction of this rule making will continue to adjust their projects to avoid the taking of listed species. This rule making makes the alternative process explicit, creating an opportunity for project proponents to proceed by preparing and funding an effective listed species mitigation plan and obtaining a permit to authorize the planned activity.

5. Economic and technological feasibility: The implementation of this rule making is both economically and technologically feasible.

6. Minimizing adverse impact: These regulations are clarifications of the existing law and regulation based on over 30 years of program implementation under the existing regulations and supplemented with legal decisions relevant to this regulation. As such, this rule making is not anticipated to create any new or additional impacts on local government or small business, as the existing rule already established the prohibitions and permit needs that are clarified in this rule making. The focus of the rule making is on avoidance. Projects that are able to achieve avoidance of impacts do not require permits at all. Minimization of adverse environmental impacts is accomplished through permitting standards. Permits will only be issued when projects achieve a net conservation benefit, which requires that status of impacted listed species and/or their occupied habitats are improved over pre-project conditions.

7. Small business and local government participation: The State Administrative Procedures Act requires agencies to provide public and private interests the opportunity to participate in the rule making process and/or public hearings. The Department will provide the opportunity to participate in the rule making process via a 45 day public comment period. Listed species issues will also still primarily be addressed through the SEQR process, with local governments continuing to frequently be lead agencies.

Revised Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Part 182 applies statewide and this rule making will not alter that. However, a new exemption for routine and ongoing agricultural activities may reduce the extent of application of this regulation in some rural areas.

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

The changes that the department is proposing will establish a predictable and transparent process for the implementation of the State's Endangered Species Law. Existing law and regulation requires permits for activities that result in harm to listed species, but the current regulations do not provide any relevant guidance on how the

department will review projects or permits. This rule provides guidance and procedures to assist project proponents assess and avoid impacts to listed species. Permit procedures are established for those projects that can not avoid such impacts. These regulations codify the existing process utilized by the department and make that process open and accessible to the public.

3. Costs:

The proposed rule does not create any new requirement for land-owners or municipalities, as it provides clarification to existing regulations where little guidance currently exists. The impact of this rule making on rural communities may actually reduce any costs associated with this rule as an exemption is provided for routine and ongoing agricultural activities, where none previously existed.

4. Minimizing adverse impact:

These regulations are clarifications of the existing law and regulation based on over 30 years of program implementation under the existing regulations and supplemented with legal decisions relevant to this regulation. As such, this rule making is not anticipated to create any new or additional impacts on rural communities, as the existing rule already established the prohibitions and permit needs that are clarified in this rule making. Additionally, there are explicit exemptions for routine and ongoing agricultural activities which should mitigate the likelihood of adverse impacts in rural farming communities.

5. 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 via the mandated 45 day public comment period.

Revised Job Impact Statement

The original Job Impact Statement as published in the Notice of Proposed Rule-making remains valid, and does not need to be amended to reflect the changes made to the text of the regulation.

Assessment of Public Comment

The Department accepted public comments on the proposed regulations for a period of 45 days. This assessment provides specific responses to substantive comments received; general comments expressing either support for or opposition to the regulations are on file at the Department, but are not addressed here. In addition, the Department has prepared "FAQs" for the regulations, which are posted on the DEC website (<http://www.dec.ny.gov/regulations/34113.html#part182>).

Comment: The regulations impermissibly expand the Department's jurisdiction and impose a new regulatory burden on developers, forestland managers and other landowners.

Response: The Department disagrees. Existing law (ECL § 11-0535) and regulations (Part 182) already prohibit the "take" of endangered and threatened species without a DEC permit. The regulations clarify under what circumstances a permit is required, how to apply for a permit, and how DEC will review and make decisions on permit applications.

Comment: The term "action" is not clear; the regulations should make clear that "action" has the meaning set forth in SEQR.

Response: The term "action" is defined in SEQR to include only those activities directly undertaken, funded or approved by state or local agencies. Because ECL § 11-0535 and these regulations apply to activities by non-governmental individuals and entities as well as to activities by state and local agencies, the SEQR definition of "action" is too narrow for purposes of these regulations.

Comment: The term "activity" should have a minimum threshold of 1/4 acre so that the proposed regulations do not apply to small, routine actions.

Response: A minimum size threshold would be inconsistent with ECL § 11-0535 because take of a protected species may occur on relatively small land parcels.

Comment: The definition of "adverse modification of habitat" exceeds the Department's lawful authority.

Response: The Department disagrees. ECL § 11-0535 has been interpreted by appellate courts to authorize the Department to regulate

the adverse modification of habitat utilized by endangered and threatened species. It is important to note that the regulations limit the Department's jurisdiction to activities that are likely to adversely modify "occupied habitat," which is defined as the area within which a listed species exhibits one or more essential behaviors.

Comment: The term "movement" in the definition of "essential behavior" is too broad.

Response: The Department agrees and the term has been removed.

Comment: The definition of "net conservation benefit" exceeds the Department's lawful authority.

Response: The Department disagrees. Pursuant to ECL § 11-0535, the Department cannot issue a permit for an activity that may jeopardize the continued survival or recovery of endangered or threatened species. Consequently, the Department cannot issue a permit allowing the take of an endangered or threatened species unless the take is offset by an enhancement of the subject population, the overall population of that species in the State, or a contribution to the recovery of the species. Every incidental take permit issued by the Department to date has included a specific finding that the mitigation measures undertaken by the applicant will result in a net conservation benefit to the species at issue.

Comment: The definition of "net conservation benefit" is not quantified and too vague.

Response: The Department disagrees. The definition is purposefully written to provide applicants flexibility in demonstrating a net conservation benefit. Generally, a net conservation benefit is achieved when the adverse impacts of a proposed activity on a protected species or its occupied habitat will be outweighed by the positive impacts anticipated from the mitigation measures proposed by the applicant. The definition does not impose rigid requirements because it is DEC's intention to provide applicants with flexibility in devising ways to achieve a net conservation benefit. Flexibility is also necessary in order to account for the variability among project types and locations, and in the particular habitat and life history needs of protected species. In the incidental take permits issued to date, DEC has found a diverse array of mitigation measures to achieve a net conservation benefit, including the purchase and protection by conservation easement of occupied habitat; permanent protection of migration corridors; creation of new suitable breeding habitat; construction of vegetated berms to avoid vehicle collisions; and other land management activities designed to enhance survival and recovery of the protected species.

Comment: It is unrealistic for the Department to require every applicant to achieve a net conservation benefit because a single project cannot enhance the statewide population of a species.

Response: The Department agrees that as originally written the definition of "net conservation benefit" could be read to imply that in all cases an applicant must demonstrate enhancement of the overall statewide population of a species. The Department has clarified the definition of "net conservation benefit" to include a successful enhancement of the subject population as one of the ways in which a net conservation benefit may be demonstrated. Thus, the revised definition provides an applicant with the option of demonstrating a net conservation benefit through (i) a successful enhancement of the subject population; (ii) a successful enhancement of the overall (statewide) population; or (iii) a contribution towards the recovery of the species.

Comment: The definition of "occupied habitat" is too broad. It should be restricted to a specific area required for species survival and should be similar to the federal definition for "critical habitat."

Response: The definition of "occupied habitat" is limited to those areas where a protected species exhibits one or more essential behaviors. In contrast to the designation and mapping of critical habitat under the federal Endangered Species Act, the Department has chosen not to formally designate or map occupied habitat because the determination of whether suitable habitat is occupied (i.e., whether a species exhibits one or more essential behaviors in that habitat) is best made on a case-by-case basis.

Comment: The regulations should require that the Department provide notice and an opportunity to be heard to any landowner whose lands are designated "occupied habitat."

Response: The regulations do not provide for the Department to formally designate or map occupied habitat. Rather, the identification of occupied habitat will occur on a case-by-case basis, usually in response to a jurisdictional inquiry.

Comment: The definition of person does not appear to cover state agencies.

Response: The proposal defined "person" as including state agencies because they fall within the category of "any other legal entity whatsoever." However, the definition has been amended to explicitly state that state agencies are included.

Comment: The definition of the term "take" should be revised because it is confusing, does not address habitat loss, and is too broad.

Response: "Take" is defined in ECL § 11-0103, and the Department has adopted the statutory definition in the regulations. Habitat loss is addressed in the regulatory definition of "lesser acts."

Comment: The use of the term "category 1 species" is obsolete.

Response: The final text has been changed to use the term "candidate species," consistent with federal usage.

Comment: The listing criteria are too vague.

Response: The Department does not agree. The listing criteria accommodate consideration of a wide variety of conditions that may justify threatened or endangered species status. All listing proposals are subject to public comment pursuant to the State Administrative Procedures Act, and will account for available information on species status, distribution, life history and threats to populations.

Comment: The regulations will have an adverse effect on falconry, wildlife rehabilitation, nuisance wildlife problems and other previously authorized uses of listed species.

Response: The final regulations have no effect on activities affecting listed species that are authorized and licensed elsewhere under the ECL. This includes giving aid to distressed wildlife (ECL § 11-0919), wildlife rehabilitation (ECL § 11-0515), response to wildlife nuisance problems (ECL §§ 11-0521, 11-0523, and 11-0524), and falconry (Title 10 of the Fish and Wildlife Law). To avoid confusion, the language regarding the removal of species of special concern from the wild has been eliminated from the final regulation.

Comment: The proposed regulations do not adequately protect species of special concern.

Response: By definition, these species are not at risk of extinction or endangerment, and do not warrant the full protections afforded in the proposed regulation.

Comment: In section 182.8 of the proposal, the term "likely to" should be changed to "may" or "reasonably likely to."

Response: The Department believes that "likely to" is appropriate, as it will ensure that the Department exercises jurisdiction where there is sufficient scientific information to conclude that the risk of a take is real and not speculative.

Comment: Recovery plans should be prepared before the Department implements the regulations so that applicants have some guidance on how to achieve a net conservation benefit.

Response: The Department is preparing recovery plans for several listed species. However, the Department does not agree that permits should not be issued until recovery plans are completed. Incidental take permits have already been issued for a variety of listed species without DEC recovery plans, including Indiana bat, tiger salamander, bald eagle, Henslow's sparrow, upland sandpiper, northern harrier, and short-eared owl.

Comment: A maximum time period should be established for the Department to respond to "Requests for Determination."

Response: The Department anticipates being able to respond to the vast majority of requests within the 30 day time frame. However, depending on the time of year and the availability of data for a specific location, it may not be possible to make the determination within the 30 day time frame due to seasonal changes in species distributions and habitat cover.

Comment: The regulations make reference to "minor projects" but do not provide any guidance for how they will be treated.

Response: The reference to "minor projects" has been removed from the final regulation.

Comment: The regulations should require that all mitigation measures occur in the same habitat where the incidental take will occur.

Response: The Department does not agree. Mitigation measures designed to achieve a net conservation benefit need to be flexible, and must include the option of improving or creating habitat off-site. Also, mitigation may include measures other than habitat management. For example, in appropriate situations acceptable mitigation measures could include critical research necessary to develop management guidance on the listed species, or development of innovative technologies or business practices that reduce or remove known threats to the species. Consequently, a requirement that all mitigation measures must occur on-site would be unduly constraining.

Comment: The regulations should be changed to eliminate the requirement that applicants for an incidental take permit assess cumulative impacts from other projects.

Response: The Department agrees, and this requirement has been eliminated.

Comment: The regulations should account for federal programs to protect federally listed species, and incorporate federal guidelines for permit issuance.

Response: The Department agrees, and the final regulation provides the department with the discretion to accept a completed "federal habitat conservation plan," or "safe harbor agreement" as an incidental take permit application.

Comment: The following activities should be exempt from the regulations: forest management, mining, local government activities, maintenance of utilities, and emergency actions to protect public health and safety.

Response: The regulations exempt existing, routine, and on-going agricultural activities from the incidental take permit requirement because the habitat types associated with active farming practices are usually temporary, heavily disturbed, and are generally not utilized by listed species. In contrast, forest management, mining, local government activities, and utility maintenance may occur in occupied habitat for listed species. Emergency actions to protect public health and safety are already addressed in section 182.13(a)(5) of the regulations.

Comment: Existing activities and those proposed prior to adoption of the regulations should be "grandfathered."

Response: The regulations do not impose a new regulatory requirement, and "grandfathering" is therefore neither necessary nor desirable. As noted above, existing law (ECL § 11-0535) and regulations (Part 182) already prohibit the "take" of endangered and threatened species without a DEC permit. The regulations clarify under what circumstances a permit is required, how to apply for a permit, and how DEC will review and make decisions on permit applications.

Comment: The regulations should specify penalties for non-compliance.

Response: Penalties are established by law, in ECL Article 71 (Enforcement).

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Ambulatory Patient Groups (APGs) Payment Methodology

I.D. No. HLT-44-10-00002-P

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

Proposed Action: Amendment of Subpart 86-8 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807(2-a)(e)

Subject: Ambulatory Patient Groups (APGs) Payment Methodology.

Purpose: To refine the APG payment methodology.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): The amendments to Part 86 of Title 10 (Health) NYCRR are required to update the Ambulatory Patient Groups (APGs) methodology, implemented on December 1, 2008, which governs reimbursement for certain ambulatory care fee-for-service (FFS) Medicaid services. APGs group procedures and medical visits that share similar characteristics and resource utilization patterns so as to pay for services based on relative intensity.

86-8.1 - Scope

The proposed amendments to section 86-8.1 of Title 10 (Health) NYCRR add a new subdivision (a) paragraph (6) to establish new rates of payment for ambulatory care services for hospital-based mental hygiene services for the following categories of facilities: mental retardation clinics, mental health clinics, alcoholism and drug abuse clinics, and methadone clinics.

86-8.2 - Definitions

The proposed amendments to section 86-8.2 of Title 10 (Health) NYCRR amend subdivision (q) to revise the definition of peer group so that it may include facility licensure and add a new subdivision (v) that defines a patient-specific peer group consisting of those persons designated as mentally retarded, developmentally disabled, or suffering from traumatic brain injury.

86-8.7 - APGs and relative weights

The proposed revision to section 86-8.7 of Title 10 (Health) NYCRR repeals all of section 86-8.7 effective July 1, 2010 and replaces it with a new section 86-8.7 that includes revised APG weights and procedure-based weights, adds two new procedures and procedure-based weights for D9248 Sedation (non-iv) and T1013 Sign Lang/Oral Interpretation.

86-8.8 Base rates

The proposed revision to section 86-8.8 of Title 10 (Health) NYCRR amends subdivision (a) and subdivision (b) to establish base rates for a new MR/DD/TBI peer group effective July 1, 2010. Additionally, the proposed revision adds a new subdivision (f) that establishes a licensure-specific, provider-specific methodology for calculating blend rates for hospitals operating under the Mental Hygiene Law and establishes a schedule for implementation of the new blend rates.

86-8.9 Diagnostic coding and rate computation

The proposed revision to section 86-8.9 of Title 10 (Health) NYCRR amends subdivision (e) to remove APG 322 Medication Administration and Observation from the list of no blend APGs.

86-8.10 Exclusions from payment

The proposed revision to section 86-8.10 of Title 10 (Health) NYCRR amends subdivisions (h) and (i) to remove APG 312 Full Day Partial Hospitalization for mental illness, APG 320 Case Management - Treatment Plan Development - Mental Health or Substance Abuse, and 427 Biofeedback and Other Training from the never pay APG list and removes APG 414 Level I Immunization and Allergy Immunotherapy, APG 415 Level II Immunization and APG 416 Level III Immunization, and APG 280 Vascular Radiology Except Venography of Extremity from the if stand alone do not pay list and adds APG 448 After Hours Services to the if stand alone do not pay list.

86-8.13 Out of state providers

The proposed revision to section 86-8.13 of Title 10 (Health) NYCRR amends subdivisions (a) paragraph (1) to correct the spelling of Middlesex.

Text of proposed rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.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

Statutory Authority:

Authority for the promulgation of these regulations is contained in section 2807(2-a)(e) of the Public Health Law, as amended by Part C of Chapter 58 of the Laws of 2008 and Part C of Chapter 58 of the Laws of 2009, which authorize the Commissioner of Health to adopt and amend rules and regulations, subject to the approval of the State Director of the Budget, establishing an Ambulatory Patient Groups methodology for determining Medicaid rates of payment for diagnostic and treatment center services, free-standing ambulatory surgery services and general hospital outpatient clinics, emergency departments and ambulatory surgery services.

Legislative Objective:

The Legislature's mandate is to convert, where appropriate, Medicaid reimbursement of ambulatory care services to a system that pays differential amounts based on the resources required for each patient visit, as determined through Ambulatory Patient Groups ("APGs"). The APGs

refer to the Enhanced Ambulatory Patient Grouping classification system which is owned and maintained by 3M Health Information Systems. The Enhanced Ambulatory Group classification system and the clinical logic underlying that classification system, the EAPG software, and the Definitions Manual associated with that classification system, are all proprietary to 3M Health Information Systems. APG-based Medicaid Fee For Service payment systems have been implemented in several states including: Massachusetts, New Hampshire, and Maryland.

Needs and Benefits:

The proposed regulations are in conformance with statutory amendments to provisions of Public Health Law section 2807(2-a), which mandated implementation of a new ambulatory care reimbursement methodology based on APGs.

This reimbursement methodology provides greater reimbursement for high intensity services and relatively less reimbursement for low intensity services. It also allows for greater payment homogeneity for comparable services across all ambulatory care settings (i.e., Outpatient Department, Ambulatory Surgery, Emergency Department, and Diagnostic and Treatment Centers). By linking payments to the specific array of services rendered, APGs will make Medicaid reimbursement more transparent. APGs provide strong fiscal incentives for health care providers to improve the quality of, and access to, preventive and primary care services.

These amendments include updated APG and/or procedure-based weights which will provide greater procedure level reimbursement precision and specificity. Additionally, these amendments add new MR/DD/TBI base rates for hospitals which reflect the greater resource requirements associated with providing care to the MR/DD/TBI populations. Medication Administration and Observation was removed from the no blend APG list; certain mental health and substance abuse procedures (i.e., Full Day Partial Hospitalization, Case Management and Treatment Plan Development, and Biofeedback and Other Training) were removed from the Never Pay APG list; certain APGs were removed from the If Stand Alone Do not Pay list (e.g., APG 280 Vascular Radiology Except Venography of Extremity, 414 Immunization and Allergy Immunology, and 415 Level II Immunology) and APG 448 After Hours Services was added to the If Stand Alone Do Not Pay list to meet primary care enhancement policy objectives and the conversion of mental hygiene facilities to APGs; and a technical revisions were made to correct the spelling of two counties impacted by the implementation of APGs.

COSTS

Costs for the Implementation of, and Continuing Compliance with this Regulation to the Regulated Entity:

There will be no additional costs to providers as a result of these amendments.

Costs to Local Governments:

There will be no additional costs to local governments as a result of these amendments.

Costs to State Governments:

There will be no additional costs to NYS as a result of these amendments. All expenditures under this regulation are fully budgeted in the SFY 2009-10 and 2010-11 enacted budgets.

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:

There are no local government mandates.

Paperwork:

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

Duplication:

This regulation does not duplicate other state or federal regulations.

Alternatives:

These regulations are in conformance with Public Health Law section 2807(2-(a)(e)). Although the 2009 amendments to PHL 2807 (2-a) authorize the Commissioner to adopt rules to establish alternative payment methodologies or to continue to utilize existing payment methodologies where the APG is not yet appropriate or practical for certain services, the utilization of the APG methodology is in its relative infancy and is otherwise continually monitored, adjusted and evaluated for appropriateness by the Department and the providers. This rulemaking is in response to this continually evaluative process.

Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed amendment will become effective upon publication of the Notice of Adoption in the New York State Register.

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, diagnostic and treatment centers, and free-standing ambulatory surgery centers. Based on recent data extracted from providers' submitted cost reports, seven hospitals and 245 DTCs were identified as employing fewer than 100 employees.

Compliance Requirements:

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of 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 further reform the outpatient/ambulatory care fee-for-service Medicaid payment system, which is intended to benefit health care providers, including those with fewer than 100 employees.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery centers. 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 that this reimbursement system is mandated in statute.

Small Business and Local Government Participation:

Local governments and small businesses were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department's issuance in the State Register of federal public notices on February 25, 2009, June 10, 2009 and January 20, 2010.

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments apply to certain services of general hospitals, diagnostic and treatment centers and freestanding ambulatory surgery

centers. The Department of Health considered approaches specified in section 202-bb (2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given that the reimbursement system is mandated in statute.

Opportunity for Rural Area Participation:

Local governments and small businesses were given notice of these proposals by their inclusion in the SFY 2009-10 enacted budget and the Department's issuance in the State Register of federal public notices on February 25, 2009, June 10, 2009 and January 20, 2010.

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 regulations, that they will not have a substantial adverse impact on jobs or employment opportunities.

Insurance Department

EMERGENCY RULE MAKING

Life Settlements

I.D. No. INS-44-10-00001-E

Filing No. 1071

Filing Date: 2010-10-14

Effective Date: 2010-10-14

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

Action taken: Addition of Part 381 (Regulation 198) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2137, 7803 and 7804, as added by L. 2009, ch. 499; and L. 2009, ch. 499, section 21

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

Specific reasons underlying the finding of necessity: This part sets forth the license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries and financial accountability requirements for life settlement providers as required under sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009. These sections, along with other sections of the new life settlement legislation, became effective May 18, 2010.

These sections of the Insurance Law require licensing and registration of life settlement providers, life settlement intermediaries and life settlement brokers. In order to license and register these persons, the fees associated with the licensing and registration, as well as financial accountability requirements which life settlement providers must demonstrate at licensing, must first be established by regulation as required by the legislation. The licensing of these entities is a critical aspect of the new life settlement law in order to properly safeguard the public in life settlement transactions.

Section 21 of Chapter 499 of the Laws of 2009 permits a person lawfully operating as a life settlement provider, life settlement intermediary, or life settlement broker in this state with respect to life settlement transactions not heretofore regulated under the Insurance Law to continue to do so pending approval or disapproval of the person's application for license or registration, if such person files the appropriate application with the Superintendent not later than 30 days after the Superintendent publishes the application on the Department's website and certifies that the applicant shall comply with all applicable provisions of the Insurance Law and regulations promulgated thereunder. Because the law provides that the Superintendent must establish the application filing fees for licensing of life settlement providers and brokers, and the registration of life settlement intermediaries, and financial accountability requirements for life settlement providers, and such constitutes rulemaking under the State Administrative Procedure Act, it is critical that these fees be established and maintained in effect on an emergency basis to facilitate the processing of these applications. Otherwise, life settlement providers, life settlement intermediaries and life settlement brokers will be able to continue to operate in New York without applying for licensing or registration

and thereby engaging in life settlement transactions without being licensed by or registered with the Superintendent, which will not adequately protect the public. It is also critical that the fees established by this emergency regulation remain in effect in order for the Department to continue to accept new applications for licensure by life settlement providers, life settlement intermediaries and life settlement brokers. If the Department was unable to accept new applications for licensure, a competitive disadvantage for new applicants seeking such licensure could result.

The Department is still focused on the issues that need to be addressed regarding licensing (e.g., processing of submitted licensing applications; establishing internal procedures, processes and systems; responding to life settlement issues and inquiries). The Department also continues to be engaged in outreach to interested parties to get their input regarding the additional provisions to be added to the regulation.

For the reasons stated above, an emergency adoption of Regulation No. 198 is necessary for the general welfare.

Subject: Life Settlements.

Purpose: To implement Chapter 499 of the Laws of 2009's provisions of license fees and financial accountability requirements.

Text of emergency rule: Chapter XV of Title 11 is renamed "Life Settlements".

Section 381.1 License fees and financial accountability requirements for life settlement providers.

(a) *The application for a license as a life settlement provider shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$10,000.*

(b) *The financial accountability of a life settlement provider required in accordance with section 7803(c)(2)(E) of the Insurance Law, to assure the faithful performance of its obligations to owners and insureds on life settlement contracts subject to Article 78 of the Insurance Law, shall be in an amount at least equivalent to \$250,000, shall be maintained at all times and may be evidenced in one of the following manners:*

(1) *Assets in excess of liabilities in an amount at least equal to \$250,000 as reflected in the applicant's financial statements;*

(2) *A surety bond in an amount at least equal to \$250,000 placed in trust with the superintendent issued by an insurer licensed in this State to write fidelity and surety insurance under section 1113(a)(16) of the Insurance Law; or*

(3) *Securities placed in trust with the superintendent consisting of securities of the types specified in section 1402(b)(1) and (2) of the Insurance Law, estimated at an amount not exceeding their current market value, but with a total par value not less than \$250,000; provided that:*

(i) *If the life settlement provider is incorporated in another state, the securities allowed for placement in the trust may consist of direct obligations of that state; and*

(ii) *If the aggregate market value of the securities in trust falls below the required amount, the superintendent may require the life settlement provider to deposit additional securities of like character.*

(c) *The application for the biennial renewal of a life settlement provider license shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$5,000.*

Section 381.2 License fees for life settlement brokers.

(a) *The application for a license as a life settlement broker shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee for each individual applicant and for each proposed sub-licensee of forty dollars for each year or fraction of a year in which a license shall be valid.*

(b) *The application for the biennial renewal of a life settlement broker license shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee for each individual applicant and for each proposed sub-licensee of forty dollars for each year or fraction of a year in which a license shall be valid.*

Section 381.3 Registration fees for life settlement intermediaries.

(a) *The application for registration as a life settlement intermediary shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$7,500.*

(b) *The application for the biennial renewal of a life settlement intermediary registration shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$2,500.*

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 January 11, 2011.

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201 and 301 of the Insurance Law, sections 2137, 7803 and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009, and section 21 of Chapter 499 of the Laws of 2009.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to the Superintendent by the Insurance Law and prescribe regulations interpreting the Insurance Law.

Section 2137, as added by Chapter 499 of the Laws of 2009, sets forth the licensing requirements for life settlement brokers. Section 2137(h)(8) requires licensing and renewal fee be determined by the Superintendent, provided that such fees do not exceed that which is required for the licensing and renewal of an insurance producer with a life line of authority.

Section 7803, as added by Chapter 499 of the Laws of 2009, sets forth the licensing requirements for life settlement providers. Section 7803(c)(1) requires the application for a life settlement provider's license be accompanied by a fee in an amount to be established by the Superintendent. Section 7803(h)(1) provides that an application for renewal of the license be accompanied by a fee in an amount to be established by the Superintendent. Section 7803(c)(2)(E) requires a life settlement provider to demonstrate financial accountability as evidenced by a bond or other method for financial accountability as determined by the Superintendent pursuant to regulation.

Section 7804, as added by Chapter 499 of the Laws of 2009, sets forth the registration requirements for life settlement intermediaries. Section 7804(c)(1) requires the application for a life settlement intermediary registration be accompanied by a fee in an amount to be established by the Superintendent. Section 7804(i)(1) provides that an application for renewal of the registration be accompanied by a fee in an amount to be established by the Superintendent.

Pursuant to State Administrative Procedure Act Section 202, the implementation of the fee requirements under Sections 2137, 7803 and 7804 requires the promulgation of regulations.

Section 21(6) of Chapter 499 of the Laws of 2009 authorizes the Superintendent to promulgate rules and regulations necessary for the implementation of its provisions.

2. Legislative objectives: Sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009, which will become effective May 18, 2010, require the licensing of life settlement providers and life settlement brokers and the registration of life settlement intermediaries. Such sections also provide that the license and registration fees charged these persons and the financial accountability requirements that life settlement providers must demonstrate at licensing shall be established by the Superintendent.

Section 21(6) of Chapter 499 of the Laws of 2009 authorizes the Superintendent to promulgate rules and regulations necessary for the implementation of its provisions. This rule is necessary to implement Sections 2137, 7803 and 7804 of the Insurance Law.

3. Needs and benefits: Section 21 of Chapter 499 of the Laws of 2009 permits a person lawfully operating as a life settlement provider, life settlement intermediary or life settlement broker in this state with respect to life settlement transactions not heretofore regulated under

the Insurance Law to continue to do so pending approval or disapproval of the person's application for license or registration, if such person files the appropriate application with the Superintendent not later than 30 days after the Superintendent publishes the application on the Department's website and certifies that the applicant shall comply with all applicable provisions of the Insurance Law and regulations promulgated thereunder. Because the law provides that the Superintendent must establish the application filing fees for licensing of life settlement providers and brokers, and the registration of life settlement intermediaries, and financial accountability requirements for life settlement providers, and such constitutes rulemaking under the State Administrative Procedure Act, it is critical that these fees be established on an emergency basis to facilitate the processing of these applications. Otherwise, life settlement providers, life settlement intermediaries and life settlement brokers will be able to continue to operate in New York without applying for licensing or registration and thereby continue to engage in life settlement transactions without being licensed by or registered with the Superintendent, which will not adequately protect the public. It is also critical that the fees established by this emergency regulation remain in effect in order for the Department to accept new applications for licensure by life settlement providers, life settlement intermediaries and life settlement brokers. If the Department was unable to continue to accept new applications for licensure, a competitive disadvantage for new applicants seeking such licensure could result.

Adoption of this rule establishing license and registration fees and financial accountability requirements is necessary for the timely implementation of the life settlement legislation.

4. Costs: The rule requires an initial license application fee of \$10,000 for life settlement providers and an initial registration application fee of \$7,500 for intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in the amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must meet financial accountability requirements by demonstrating its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

In developing the license and renewal fees for life settlement providers, life settlement intermediaries and life settlement brokers, the following were considered:

- New York Insurance Law Section 332 provides that the expenses of the Department for any fiscal year, including all direct and indirect costs, shall be assessed by the Superintendent pro rata upon all domestic insurers and licensed United States branches of alien insurers domiciled in New York. Life settlement providers and life settlement intermediaries are not subject to this assessment. As a result, these expenses will be borne by insurers through the Section 332 assessments, since fees collected by the Superintendent are turned over to the State's general fund, and do not directly reimburse the expenses of the Department. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration. Several factors were considered in arriving at appropriate fees:

- Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

- Initial and renewal licensing fees charged to life settlement providers are set at rates greater than initial and renewal registration fees charged to life settlement intermediaries. The differences in such fees reflect the lesser time-based expenses associated with the registration of intermediaries than associated with provider licensing.

- New Insurance Law Sections 2137 provides that the licensing or renewal fees prescribed by the Superintendent for a life settlement broker shall not exceed the licensing or renewal fee for an insurance producer with a life line of authority. In accordance with the statute, this rule sets the licensing and renewal fee for a life settlement broker at \$40, which is equal to the current licensing or renewal fee of an insurance producer with a life line of authority.

In developing the financial accountability requirements that a life settlement provider must comply with, the Superintendent considered the cash outlay of each offered compliance option. The establishment of a surety bond requires the purchase of the surety bond. The deposit of securities with the Superintendent requires the establishment of a custodian account and incurrence of the associated expenses. The maintenance of a required level of assets in excess of liabilities may require the addition of capital where such level is not currently maintained.

The rule does not impose additional costs to the Insurance Department or other state government agencies or local governments.

5. Local government mandates: The rule imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: No additional paperwork should result from the provisions set by this rule.

7. Duplication: This rule will not duplicate any existing state or federal rule.

8. Alternatives: In the development of the licensing and registration fees imposed on life settlement providers and life settlement intermediaries, the Department's draft proposal was premised on the Superintendent retaining the fees to cover Department costs, and the fees were significantly higher than as included in the emergency regulation. However, as noted, such fees are turned over to the State's general fund and thus do not directly reimburse the Department for its expenses.

The Department solicited comments from interested parties on the draft rule, which contained the higher fees. An outreach draft of the rule was posted on the Department's website for a two-week public comment period and a meeting was held at the Department on April 6, 2010 to discuss the rule with interested parties. The Life Insurance Settlement Association (LISA), a life settlement industry trade association, and other life settlement interested parties commented that the intended fees would present a financial barrier for some life settlement providers wishing to compete in the New York marketplace. LISA, as well as other interested parties, took the position that a decreased number of licensed providers in New York inhibits fair competition and industry growth, which would ultimately harm New York policyholders seeking the assistance of the secondary market for life insurance because of the lack of competition. In response to these comments, the initial license fee for life settlement providers was reduced from \$20,000 to \$10,000 and the initial registration fee for life settlement intermediaries was reduced from \$10,000 to \$7,500.

The Life Insurance Council of New York (LICONY), a life insurance trade association, has expressed support of a licensing and registration fee structure set at a level that is sufficient so that participating entities are paying for the regulation of their industry. The Superintendent attempted to balance the competing interests discussed above to arrive at a fee schedule that would be fair and equitable.

With regard to financial accountability requirements, the outreach draft posted to the Department's website for public comment had provided two options - surety bond and security deposit - to comply with such demonstration. After consideration of the comments received from LISA and other life settlement industry interested parties indicating that these options would create a financial barrier for some providers wishing to enter and operate in the New York market, the Superintendent added a third option that provides a less costly and

less capital restrictive compliance alternative. The third option allows a life settlement provider to satisfy the financial accountability requirements by demonstrating that its assets exceed its liabilities by an amount no less than \$250,000. These financial accountability requirements are on a par with the requirements in many other states.

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

10. Compliance schedule: The emergency adoption of this regulation ensures that the fees and financial accountability requirements can be included immediately in the license application for life settlement providers and life settlement brokers and registration application for life settlement intermediaries. To ensure the timely implementation of Sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009, the license application forms for life settlement providers and life settlement brokers and the registration form for life settlement intermediaries need to be published on the Department's website as soon as possible.

The emergency regulation was necessary in order to establish fees and financial accountability standards in order to commence licensing life settlement providers, intermediaries and brokers. Since the emergency regulation went into effect in April, 2010, the Department has focused on the issues that needed to be addressed regarding licensing (e.g., development of licensing applications and processing of submitted applications; establishing internal procedures, processes and systems; responding to life settlement issues and inquiries). The Department continues to be engaged in outreach to interested parties to get their input regarding the additional provisions to be added to the regulation.

Regulatory Flexibility Analysis

1. Effect of the rule: This rule sets license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries, and financial accountability requirements for life settlement providers.

This rule is directed to life settlement providers, life settlement brokers and life settlement intermediaries. Some of these entities may come within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

This rule should not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at the entities allowed to conduct life settlement business, none of which are local governments.

2. Compliance requirements: The affected parties will need to accompany their applications along with fees as prescribed by this rule. Also, each life settlement provider applying for license has to comply with financial accountability requirements by demonstrating that its assets exceeds its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

3. Professional services: None is required to meet the requirements of this rule.

4. Compliance costs: The regulation requires a license fee of \$10,000 for life settlement providers and a registration fee of \$7,500 for life settlement intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must comply with financial accountability requirements by demonstrating that its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

5. Economic and technological feasibility: The affected parties will need to pay licensing and registration fees as prescribed by the rule.

6. Minimizing adverse impact: The initial and renewal licensing and registration fees and financial accountability requirements for life settlement providers and life settlement intermediaries prescribed by

the rule may present a financial barrier for some small-business life settlement providers and life settlement intermediaries wishing to compete in the New York market. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration.

Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

With regard to the licensing and registration fees, alternatives (such as the direct billing of expenses, an assessment based allocation of expenses, or a reduction of licensing and registration fees charged to small-business life settlement providers and life settlement intermediaries) that may have reduced the impact of such fees on small-business life settlement providers and intermediaries were considered. However, such alternatives would require legislative authority, which could not be secured in a timeframe necessary for the timely implementation of the life settlement legislation.

With regard to the financial accountability requirements imposed on life settlement providers, after consideration of the public comment received by the Department from interested parties in response to the posting of a draft of the rule on the Department website and a meeting held with such parties to discuss the rule, the Superintendent did include in the rule an additional compliance method - demonstration of assets in excess of liabilities by an amount no less than \$250,000 - which provides a less costly and less capital restrictive alternative to the other two methods of compliance in the rule.

7. Small business and local government participation: Affected small businesses had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period starting March 19, 2010 and to participate (in person or by conference call) in a meeting held at the Department on April 6, 2010 to discuss the rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: There may be some life settlement providers, life settlement brokers, and life settlement intermediaries that do business in rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This rule will not impose any reporting or recordkeeping requirements on public or private entities in rural areas. The affected parties that do business in rural areas will need to comply with the license and registration fees and financial accountability requirements imposed by the rule.

3. Costs: The rule requires a license fee of \$10,000 for life settlement providers and a registration fee of \$7,500 for life settlement intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in the amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must meet financial accountability requirements by demonstrating its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

4. Minimizing adverse impact: The initial and renewal licensing and registration fees and financial accountability requirements for life settlement providers and life settlement intermediaries prescribed by

the rule may present a financial barrier for some life settlement providers and life settlement intermediaries doing business in rural areas that wish to compete in the New York market. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration.

Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

With regard to the fees, alternatives (such as the direct billing of expenses, an assessment based allocation of expenses, or a reduction of licensing and registration fees charged to rural area life settlement providers and life settlement intermediaries) that may have reduced the impact of such fees on life settlement providers and intermediaries doing business in rural areas were considered. However, such alternatives would require legislative authority, which could not be secured in a timeframe necessary for the timely implementation of the life settlement legislation.

With regard to the financial accountability requirements imposed on life settlement providers, after consideration of the public comments received from interested parties by the Department in response to the posting of a draft of the rule on the Department website and a meeting held with such parties to discuss the rule, the Superintendent did include in the rule an additional compliance method - demonstration of assets in excess of liabilities by an amount no less than \$250,000 - which provides a less costly and less capital restrictive alternative to the other two methods of compliance included in the rule.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period starting March 19th and participate (in person or by teleconference) in the Department meeting on April 6th with interested parties to discuss the rule.

Job Impact Statement

The Insurance Department finds that this rule should have no impact on jobs and employment opportunities. This rule sets license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries, and financial accountability requirements that life settlement providers must demonstrate at licensing. Additional licensing and registration requirements will be established by related rulemakings in the near future.

Department of Labor

NOTICE OF ADOPTION

Public Employees Occupational Safety and Health Standards

I.D. No. LAB-32-10-00008-A

Filing No. 1077

Filing Date: 2010-10-20

Effective Date: 2010-11-03

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

Action taken: Amendment of section 800.3 of Title 12 NYCRR.

Statutory authority: Labor Law, section 27-a(4)(a)

Subject: Public Employees Occupational Safety and Health Standards.

Purpose: To incorporate by reference updates to OSHA standards into the State Public Employee Occupational Safety and Health Standards.

Text or summary was published in the August 11, 2010 issue of the Register, I.D. No. LAB-32-10-00008-P.

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

Text of rule and any required statements and analyses may be obtained from: Michael Paglialonga, NYS Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-1938, email: michael.paglialonga@labor.ny.gov

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

NOTICE OF ADOPTION

Water Rates and Charges

I.D. No. PSC-52-08-00012-A

Filing Date: 2010-10-14

Effective Date: 2010-10-14

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

Action taken: On 10/14/10, the PSC adopted an order approving The Chaffee Water Works Company's amendments to PSC 2—Water, effective November 1, 2010 on a temporary basis, to increase its tariff rates to provide additional annual revenues of \$17,754 or 105%.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: To approve amendments to PSC 2—Water, effective November 1, 2010 on a temporary basis, to increase its tariff rates.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving The Chaffee Water Works Company's amendments to PSC 2—Water, effective November 1, 2010 on a temporary basis, to increase its tariff rates to provide additional annual revenues of \$17,754 or 105%, subject to refunds and reparations under Sections 113 and 114 of Public Service Law pending a review of usage data for eight quarters by Commission Staff, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(08-W-1407SA1)

NOTICE OF ADOPTION

Adjustment of System Benefits Charge Payments to NYSEDA

I.D. No. PSC-16-09-00007-A

Filing Date: 2010-10-15

Effective Date: 2010-10-15

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

Action taken: On 10/14/10, the PSC adopted an order approving the petition of Rochester Gas and Electric Corporation to adjust its System Benefits Charge payments to NYSEDA.

Statutory authority: Public Service Law, sections 2, 5, 65 and 66

Subject: Adjustment of System Benefits Charge Payments to NYSEDA.

Purpose: To approve the adjustment of System Benefits Charge Payments to NYSEDA.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving the petition of Rochester Gas and Electric Corporation to reduce its electric System Benefits Charge (SBC) payments to the New York State Energy Research and Development Authority (NYSEDA) by \$2,233,176 and to retain such funds as reimbursement for the costs of its long-term energy efficiency bidding contracts that exceed the budgeted estimates, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(05-M-0090SA5)

NOTICE OF ADOPTION

Recovery of Carrying Charges on the American Reinvestment and Recovery Act (ARRA) Projects

I.D. No. PSC-18-09-00014-A

Filing Date: 2010-10-19

Effective Date: 2010-10-19

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

Action taken: On 10/14/10, the PSC adopted an order establishing recovery mechanisms for Smart Grid Projects for six major New York Utilities.

Statutory authority: Public Service Law, sections 4, 5, 6, 65 and 66

Subject: Recovery of carrying charges on the American Reinvestment and Recovery Act (ARRA) Projects.

Purpose: To approve the recovery of carrying charges on the ARRC Projects.

Substance of final rule: The Commission, on October 14, 2010, adopted an order establishing recovery mechanisms for Smart Grid Projects for six major New York Utilities; Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., Niagara Mohawk Power Corporation d/b/a National Grid, Central Hudson Gas and Electric Corporation, New York State Electric and Gas Corporation, Rochester Gas and Electric Corporation, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(09-E-0310SA2)

NOTICE OF ADOPTION

Minor Rate Filing

I.D. No. PSC-10-10-00005-A

Filing Date: 2010-10-14

Effective Date: 2010-10-14

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

Action taken: On 10/14/10, the PSC adopted an order approving, with modifications the Village of Springville's amendment to PSC 1—Electricity, effective August 1, 2010 and postponed to November 1, 2010, to increase annual electric revenues by \$232,911, or 6.7%.

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

Subject: Minor rate filing.

Purpose: To approve, with modifications, amendments to PSC 1—Electricity to increase annual electric revenues by \$232,911, or 6.7%.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving, with modifications the Village of Springville's amendments to PSC 1—Electricity, effective August 1, 2010 and postponed to November 1, 2010, to increase annual electric revenues by \$232,911, or 6.7%, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(10-E-0087SA1)

NOTICE OF ADOPTION

Disburse Funds in the Low Income Discount Program Balancing Account to Enhance the Program

I.D. No. PSC-14-10-00009-A

Filing Date: 2010-10-15

Effective Date: 2010-10-15

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

Action taken: On 10/14/10, the PSC adopted an order approving, with modifications, the petition of KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island to disburse funds in its Low Income Discount Program Balancing Account to enhance the program.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Disburse funds in the Low Income Discount Program Balancing Account to enhance the program.

Purpose: To approve the disbursement of funds in the Low Income Discount Program Balancing Account to enhance the program.

Substance of final rule: The Commission on October 14, 2010, adopted an order approving, with modifications, the petition of KeySpan Gas East Corporation d/b/a National Grid (National Grid-LI, formerly KeySpan Energy Delivery Long Island) to disburse funds in its Low Income Discount Program Balancing Account to enhance its Low Income Discount Program, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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-G-1186SA7)

NOTICE OF ADOPTION

Recovery of Carrying Charges on the American Reinvestment and Recovery Act (ARRA) Projects

I.D. No. PSC-16-10-00019-A

Filing Date: 2010-10-19

Effective Date: 2010-10-19

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

Action taken: On 10/14/10, the PSC adopted an order approving, Niagara Mohawk Power Corporation d/b/a National Grid's amendments to PSC 220—Electricity, effective 11/1/10 to establish recovery mechanisms for Smart Grid Projects.

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

Subject: Recovery of carrying charges on the American Reinvestment and Recovery Act (ARRA) Projects.

Purpose: To approve the recovery of carrying charges on the ARRC Projects.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving, Niagara Mohawk Power corporation d/b/a National Grid's amendments to PSC 220—Electricity, effective November 1, 2010 to establish recovery mechanisms for Smart Grid Projects, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(09-E-0310SA4)

NOTICE OF ADOPTION

Recovery of Carrying Charges on the American Reinvestment and Recovery Act (ARRA) Projects

I.D. No. PSC-16-10-00021-A

Filing Date: 2010-10-19

Effective Date: 2010-10-19

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

Action taken: On 10/14/10, the PSC adopted an order approving, Central Hudson Gas and Electric Corporation's amendments to PSC 15—Electricity, effective 11/1/10 to establish recovery mechanisms for Smart Grid Projects.

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

Subject: Recovery of carrying charges on the American Reinvestment and Recovery Act (ARRA) Projects.

Purpose: To approve the recovery of carrying charges on the ARRC Projects.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving Central Hudson Gas and Electric Corporation's amendments to PSC 15—Electricity, effective November 1, 2010 to establish recovery mechanisms for Smart Grid Projects, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(09-E-0310SA3)

NOTICE OF ADOPTION

Recovery of Carrying Charges on the American Reinvestment and Recovery Act (ARRA) Projects

I.D. No. PSC-16-10-00022-A

Filing Date: 2010-10-19

Effective Date: 2010-10-19

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

Action taken: On 10/14/10, the PSC adopted an order approving, Consolidated Edison Company of New York, Inc.'s amendments to PSC 9—Electricity, PASNY No. 4 and EDDS No. 2, eff. 11/1/10 to establish recovery mechanisms for Smart Grid Projects.

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

Subject: Recovery of carrying charges on the American Reinvestment and Recovery Act (ARRA) Projects.

Purpose: To approve the recovery of carrying charges on the ARRC Projects.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving, Consolidated Edison Company of New York, Inc.'s amendments to PSC 9—Electricity, PASNY No. 4 and EDDS No. 2, effective November 1, 2010 to establish recovery mechanisms for Smart Grid Projects, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(09-E-0310SA5)

NOTICE OF ADOPTION

Recovery of Carrying Charges on the American Reinvestment and Recovery Act (ARRA) Projects

I.D. No. PSC-16-10-00023-A

Filing Date: 2010-10-19

Effective Date: 2010-10-19

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

Action taken: On 10/14/10, the PSC adopted an order approving, Orange and Rockland Utilities Inc.'s amendments to PSC 2—Electricity, effective 11/1/10 to establish recovery mechanisms for Smart Grid Projects.

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

Subject: Recovery of carrying charges on the American Reinvestment and Recovery Act (ARRA) Projects.

Purpose: To approve the recovery of carrying charges on the ARRC Projects.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving Orange and Rockland Utilities, Inc.'s amendments to PSC 2—Electricity, effective November 1, 2010 to establish recovery mechanisms for Smart Grid Projects, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(09-E-0310SA6)

NOTICE OF ADOPTION

Major Water Rate Filing

I.D. No. PSC-17-10-00014-A

Filing Date: 2010-10-15

Effective Date: 2010-10-15

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

Action taken: On 10/14/10, the PSC adopted an order approving the terms and conditions of a joint proposal establishing a four-year rate plan for United Water New Rochelle, Inc.'s to become effective on November 1, 2010.

Statutory authority: Public Service Law, sections 89-c(1) and (10)

Subject: Major water rate filing.

Purpose: To approve the terms of a joint proposal establishing a four-year rate plan to become effective on November 1, 2010.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving the terms and conditions of a joint proposal establishing a four-year rate plan for United Water New Rochelle, Inc.'s to become effective on November 1, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(09-W-0824SA1)

NOTICE OF ADOPTION

Recovery of Carrying Charges on the American Reinvestment and Recovery Act (ARRA) Projects

I.D. No. PSC-21-10-00015-A

Filing Date: 2010-10-19

Effective Date: 2010-10-19

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

Action taken: On 10/14/10, the PSC adopted an order approving, New York State Electric & Gas Corporation's amendments to PSC Nos. 120 and 121—Electricity, effective 11/1/10 to establish recovery mechanisms for Smart Grid Projects.

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

Subject: Recovery of carrying charges on the American Reinvestment and Recovery Act (ARRA) Projects.

Purpose: To approve the recovery of carrying charges on the ARRC Projects.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving New York State Electric & Gas Corporation's amendments to PSC Nos. 120 and 121—Electricity, effective November 1, 2010 to establish recovery mechanisms for Smart Grid Projects, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(09-E-0310SA7)

NOTICE OF ADOPTION

Recovery of Carrying Charges on the American Reinvestment and Recovery Act (ARRA) Projects

I.D. No. PSC-21-10-00016-A

Filing Date: 2010-10-19

Effective Date: 2010-10-19

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

Action taken: On 10/14/10, the PSC adopted an order approving, Rochester Gas and Electric Corporation's amendments to PSC Nos. 18 and 19—Electricity, effective 11/1/10 to establish recovery mechanisms for Smart Grid Projects.

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

Subject: Recovery of carrying charges on the American Reinvestment and Recovery Act (ARRA) Projects.

Purpose: To approve the recovery of carrying charges on the ARRC Projects.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving, Rochester Gas and Electric Corporation's amendments to PSC Nos. 18 and 19—Electricity, effective November 1, 2010 to establish recovery mechanisms for Smart Grid Projects, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(09-E-0310SA8)

NOTICE OF ADOPTION

Approving Consolidation and Revision of Technical Manuals

I.D. No. PSC-21-10-00019-A

Filing Date: 2010-10-18

Effective Date: 2010-10-18

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

Action taken: On 10/14/10, the PSC adopted an order approving "New York Standard Approach for Estimating Energy Savings - Residential, Multi-Family and Commercial/Industrial Measures" dated October 15, 2010.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Approving consolidation and revision of technical manuals.

Purpose: Consolidation and revision of technical manuals.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving "New York Standard Approach for Estimating Energy Savings - Residential, Multi-Family and Commercial/Industrial Measures" dated October 15, 2010, to become effective on January 1, 2011, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(07-M-0548SA22)

NOTICE OF ADOPTION

Waiver of 16 NYCRR 602.10(b) Regarding the Distribution of the White Pages Telephone Directories

I.D. No. PSC-22-10-00007-A

Filing Date: 2010-10-19

Effective Date: 2010-10-19

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

Action taken: On 10/14/10, the PSC adopted an order approving Verizon

New York Inc.'s request for waiver of 16 NYCRR 602.10(b) regarding the distribution of its white pages telephone directories.

Statutory authority: Public Service Law, section 94(2)

Subject: Waiver of 16 NYCRR 602.10(b) regarding the distribution of the white pages telephone directories.

Purpose: To approve the waiver of 16 NYCRR 602.10(b) regarding the distribution of the white pages telephone directories.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving Verizon New York Inc.'s request for waiver of 16 NYCRR 602.10(b) regarding the distribution of its white pages telephone directories, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(10-C-0215SA1)

NOTICE OF ADOPTION

Financing Services for Commercial Customers Participating in Business Direct Install EEPS Programs

I.D. No. PSC-27-10-00015-A

Filing Date: 2010-10-18

Effective Date: 2010-10-18

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

Action taken: On 10/14/10, the PSC adopted an order approving the petition of Central Hudson Gas & Electric Corporation for a zero percent financing option for customers participating in the Small & Mid-Size Commercial Business Direct Install EEPS program.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Financing services for commercial customers participating in Business Direct Install EEPS Programs.

Purpose: To approve financing services for commercial customers participating in Business Direct Install EEPS Programs.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving the petition of Central Hudson Gas & Electric Corporation (company) for a zero percent financing option for customers participating in the company's Small Commercial Business Direct Install and Mid-Size Commercial Business Energy Efficiency Portfolio Standard (EEPS) programs, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(07-M-0548SA23)

NOTICE OF ADOPTION

Disburse Funds in the Low Income Discount Program Balancing Account to Enhance the Program

I.D. No. PSC-28-10-00010-A

Filing Date: 2010-10-15

Effective Date: 2010-10-15

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

Action taken: On 10/14/10, the PSC adopted an order approving the petition of The Brooklyn Union Gas Company, d/b/a KeySpan Energy Delivery New York to disburse funds in its Low Income Discount Program Balancing Account to enhance its Low Income Discount Program.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Disburse funds in the Low Income Discount Program Balancing Account to enhance the program.

Purpose: To approve the disbursement of funds in the Low Income Discount Program Balancing Account to enhance the program.

Substance of final rule: The Commission on October 14, 2010, adopted an order approving the petition of The Brooklyn Union Gas Company, d/b/a National Grid (National Grid-NY, formerly KeySpan Energy Delivery New York) to disburse funds in its Low Income Discount Program Balancing Account to enhance its Low Income Discount Program, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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-G-1185SA11)

NOTICE OF ADOPTION

Building Billing Data

I.D. No. PSC-29-10-00008-A

Filing Date: 2010-10-14

Effective Date: 2010-10-14

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

Action taken: On 10/14/10, the PSC adopted an order approving Consolidated Edison Company of New York Inc.'s amendments to PSC 9—Electricity, eff. 9/27/10 to provide aggregate information concerning a building's most recent 24 months of usage to a building owner.

Statutory authority: Public Service Law, section 67(1)

Subject: Building billing data.

Purpose: To approve the provision of aggregate information concerning a building's most recent 24 months of electric usage.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving Consolidated Edison Company of New York Inc.'s amendments to PSC 9—Electricity, effective September 27, 2010 to provide aggregate information concerning a building's most recent 24 months of electric usage to a building owner or its authorized agent.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(09-E-0428SA2)

NOTICE OF ADOPTION

Building Billing Data

I.D. No. PSC-29-10-00010-A

Filing Date: 2010-10-14

Effective Date: 2010-10-14

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

Action taken: On 10/14/10, the PSC adopted an order approving Consolidated Edison Company of New York Inc.'s amendments to PSC 9—Gas, eff. 9/27/10 to provide aggregate information concerning a building's most recent 24 months of gas usage to a building owner.

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

Subject: Building billing data.

Purpose: To approve the provision of aggregate information concerning a building's most recent 24 months of gas usage.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving Consolidated Edison Company of New York Inc.'s amendments to PSC 9—Gas, effective September 27, 2010 to provide aggregate information concerning a building's most recent 24 months of gas usage to a building owner or its authorized agent.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(10-G-0314SA1)

NOTICE OF ADOPTION

Lightened and Incidental Regulation

I.D. No. PSC-31-10-00013-A

Filing Date: 2010-10-14

Effective Date: 2010-10-14

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

Action taken: On 10/14/10, the PSC adopted an order approving the petition of Connecticut Municipal Electric Energy Cooperative for financing and lightened regulation for the construction and operation of a 2.5 MW generator on a leased parcel on Fishers Island.

Statutory authority: Public Service Law, sections 4(1) and 66(13)

Subject: Lightened and incidental regulation.

Purpose: To approve financing and lightened regulation for the construction and operation of a 2.5 MW generator.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving the petition of Connecticut Municipal Electric Energy Cooperative for financing and lightened regulation for the construction and operation of a 2.5 MW generator within the existing utility yard of Fishers Island Electric Corporation, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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.

(10-E-0281SA1)

NOTICE OF ADOPTION

Implementation of Small Commercial Natural Gas Energy Efficiency Rebate Programs

I.D. No. PSC-32-10-00010-A

Filing Date: 2010-10-18

Effective Date: 2010-10-18

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

Action taken: On 10/14/10, the PSC adopted an order authorizing St. Lawrence Gas Company, Inc. and Corning Natural Gas Corporation to implement small commercial natural gas energy efficiency rebate programs.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Implementation of small commercial natural gas energy efficiency rebate programs.

Purpose: To approve the implementation of small commercial natural gas energy efficiency rebate programs.

Substance of final rule: The Commission, on October 14, 2010, adopted an order authorizing St. Lawrence Gas Company, Inc. and Corning Natural Gas Corporation to implement small commercial natural gas energy efficiency rebate programs, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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. (07-M-0548SA25)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-32-10-00012-A

Filing Date: 2010-10-15

Effective Date: 2010-10-15

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

Action taken: On 10/14/10, the PSC adopted an order approving the petition of HANAC Astoria Housing Redevelopment Associates, LP to submeter electricity at 27-40 Hoyt Avenue, South Queens, New York.

Statutory authority: Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To approve HANAC Astoria Housing Redevelopment Assoc., LP to submeter electricity at 27-40 Hoyt Ave., So. Queens, NY.

Substance of final rule: The Commission, on October 14, 2010, adopted an order approving the petition of HANAC Astoria Housing Redevelopment Associates, LP to submeter electricity at 27-40 Hoyt Avenue, South Queens, New York located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us 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. (10-E-0338SA1)

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

Third and Fourth Stage Gas Rate Increase by Corning Natural Gas Corporation

I.D. No. PSC-44-10-00003-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 adopt, modify, or reject, in whole or in part, a request by Corning Natural Gas Corporation to implement a third and fourth stage gas rate increase.

Statutory authority: Public Service Law, sections 65 and 66(12)

Subject: Third and fourth stage gas rate increase by Corning Natural Gas Corporation.

Purpose: To consider Corning Natural Gas Corporation's request for a third and fourth stage gas rate increase.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, a request by Corning Natural Gas Corporation to implement a third and fourth stage gas rate increase which would extend the terms of the Gas rates Joint Proposal dated March 27, 2009 and approved by the Commission on August 20, 2009.

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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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-G-1137SP5)

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

Water Rates, Charges and Regulations

I.D. No. PSC-44-10-00004-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 Birch Hill Water Company's Revision 1 to Leaf 12 in its electronic tariff schedule to change its billing structure from quarterly in advance to quarterly in arrears.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10) and 89-i

Subject: Water rates, charges and regulations.

Purpose: To approve findings with respect to the rates, charges, rules and regulation of Birch Hill Water Company.

Substance of proposed rule: On September 13, 2010, Birch Hill Water Company (BHCW or company) filed Revision 1 to Leaf 12 in its electronic tariff schedule, to go into effect on January 1, 2011, to change its billing structure from quarterly in advance to quarterly in arrears. The company provides flat rate water service to approximately 17 residential customers in the Town of Brewster, Putnam County. The Commission may approve or reject, in whole or in part, or modify the BHCW's rates and charges.

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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: secretary@dps.state.ny.us

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. (09-W-0402SP2)

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Utility Repayment Agreements

I.D. No. TDA-19-10-00010-A

Filing No. 1080

Filing Date: 2010-10-19

Effective Date: 2010-11-03

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

Action taken: Amendment of section 352.5(e) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 131(1), 131-s(1); and L. 2009, ch. 318

Subject: Utility Repayment Agreements.

Purpose: Extend the repayment term of utility repayment agreements from one year to two years to meet the requirements of Chapter 318 of the Laws of 2009.

Text or summary was published in the May 12, 2010 issue of the Register, I.D. No. TDA-19-10-00010-P.

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

Text of rule and any required statements and analyses may be obtained from: Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@otda.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Workers' Compensation Board

NOTICE OF ADOPTION

Medical Treatment Guidelines

I.D. No. WCB-26-10-00013-A

Filing No. 1072

Filing Date: 2010-10-18

Effective Date: 2010-12-01

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

Action taken: Amendment of sections 300.23(d), 325-1.2, 325-1.3, 325-1.4 and 325-1.24; addition of Part 324 and section 325-1.25; and repeal of section 325-1.6 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 141, 13, 13-a, 13-b, 13-k, 13-l and 13-m

Subject: Medical Treatment Guidelines.

Purpose: Requires use of Medical Treatment Guidelines to treat neck, back, knee & shoulder, and provides processes surrounding such use.

Substance of final rule: The proposed adopts and mandates the use of treatment guidelines for workers' compensation injuries or illnesses to the neck, back, shoulder, and knee, and amends other provisions to support the guidelines.

Section 300.23(d) is amended to state that it does not apply when a request for a variance is denied.

A new Part 324 is added to Subchapter C regarding Medical Treatment Guidelines.

Section 324.1 defines relevant terms used in this Part including "Maximum Medical Improvement," "Medical Treatment Guidelines," "Review of Records," and "Treating Medical Provider."

Section 324.2 mandates treatment in accordance with the Medical Treatment Guidelines for the mid and low back, neck, knee, and shoulder,

which are incorporated by reference, for all work related injuries or illnesses on an after December 1, 2010, regardless of the date of accident or date of disablement. Establishes a list of pre-authorized procedures pursuant to Workers' Compensation Law § 13-a(5), which includes all medical care consistent with the Medical Treatment Guidelines except for 12 treatments or procedures. Provides that variances from the Medical Treatment Guidelines are only allowed as provided in § 324.3.

Section 324.3 sets forth what is required to request a variance, that the burden of proof is on the treating medical provider that a variance is medically necessary and appropriate, the requirements related to a response to a variance, including the time period in which a response must be made, and how denials of variances are resolved.

Section 324.4 sets for an optional prior approval process whereby a treating medical provider can request approval from the insurance carrier or Special Fund that the treatment is consistent with the Medical Treatment Guidelines before it is performed. This section establishes how providers can opt-in to the program and makes a request, how insurance carriers can opt-out of the process, how insurance carriers who participate respond to a request, and how denials are resolved.

Section 324.5 provides that if the Medical Treatment Guidelines do not address a condition, treatment or diagnostic test for a part of the body covered by the Medical Treatment Guidelines, then the factors in necessary to request a variance shall be used to determine whether the insurance carrier or Special Fund is obligated to pay for the medical care at issue.

Section 324.6 requires insurance carriers and Special Fund to incorporate the Medical Treatment Guidelines and relevant regulatory provisions into their policies, procedures, and practices, and certify that this has been completed within 120 days of the effective date of Part 324.

Section 325-1.2 is amended to require specialists and consultants to file the same medical report forms used by treating providers.

Section 325-1.3 is amended to require medical reports of attending physicians be filed on the correct version of the form or forms prescribed by the chair for such purpose and that medical reports must be filed when a follow-up visit is necessary except the time between follow-up visits cannot exceed 90 days.

Section 325-1.4 regarding prior authorization for special services is amended to clarify and modify the procedure so it reflects the procedures actually used currently, make clear the ability of physical and occupational therapists to request prior authorization, clarify when prior authorization is necessary when multiple special services are to be performed, and incorporate the pre-authorized list from Section 324.2(d) of this Title.

Section 325-1.6 is repealed.

Section 325-1.24 is amended to limit its applicability to bills for medical services provided on and after October 1, 1994, and before December 1, 2010.

Section 325-1.25 is added to set forth the process for the submission of medical bills, the time in which medical bills must be paid and/or objected to, the objections that can be raised, and the resolution of objections.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 324.1(c), (g), 324.2(a), (b), 324.3(a), (b), (d), 324.4(d), (h), 324.5, 325-1.3(b), 325-1.4(a), (b), (d) and 325-1.24 and 325-1.25.

Text of rule and any required statements and analyses may be obtained from: Cheryl M Wood, NYS Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Summary of Revised Regulatory Impact Statement

1. Statutory Authority:

Workers' Compensation Law (WCL) § 117(1) authorizes the Chair to make regulations consistent with the WCL and the Labor Law. WCL § 141 authorizes the Chair to enforce all provisions of the chapter and make administrative regulations.

WCL § 13 establishes employer liability for medical treatment and authorizes the Chair to establish a fee schedule for medical treatment.

The Chair's authority to establish a fee schedule forms the basis for Medical Treatment Guidelines (Guidelines) which set the standards of appropriate treatment.

WCL § 13-b requires individuals providing medical care or conducting independent medical examinations (IMEs) of claimants to be authorized by the Chair, except for six enumerated exceptions. The Chair has the authority to temporarily suspend or revoke a physician's authorization to treat or conduct IMEs. WCL §§ 13-k, 13-l, and 13-m, respectively, allow the Chair to authorize podiatrists, chiropractors, and psychologists to treat and/or conduct IMEs, and to temporarily suspend or revoke their authorizations.

WCL § 13-a(5) requires prior authorization from the carrier for special procedures costing more than \$1,000, increased by Chapter 6 of the Law of 2007 from \$500. A denial by the carrier must be within 30 days and must be based upon a conflicting second opinion rendered by an authorized physician. The 2007 reform legislation also added a provision directing the Chair to issue a list of pre-authorized procedures costing over \$1,000.

Although the statutes do not specifically require the adoption of guidelines, it is clear that the absence of them has resulted in an inefficient system. Because all medical practitioners do not have consistent, up-to-date standards on which to base treatment, claimants may not be receiving the high quality care they deserve. Further, with no agreed upon standards on which to assess medical necessity, costly disputes and unnecessary treatment delays occur. In his oversight of oversight of the workers' compensation system, the Chair has an obligation to recommend procedures to rectify these problems. These guidelines should help to do so.

2. Legislative Objectives:

The purpose of the reform in chapter 6 of the Laws of 2007, effective March 13, 2007, was to increase benefits and improve delivery of services to injured workers while reducing costs. By letter dated March 13, 2007, the Governor directed the Superintendent of Insurance, with the assistance of the Board's Chair and the Commissioner of Labor, to design guidelines to account for modern diagnostic and treatment techniques and evidence-based standards of medical treatment in order to minimize litigation conflicts and speed return to employment. The Governor appointed an Advisory Committee of respected individuals in the industry to assist the Superintendent and who recommended to him proposed treatment guidelines for the shoulder, knee, neck, and back injuries that all providers would be required to use when treating injuries to those body parts. The Superintendent then recommended them to the Chair.

The goals of the Medical Treatment Guidelines (Guidelines) are three fold:

1. Improve the quality of treatment;
2. Improve the speed of delivery and reduce friction costs; and
3. Eliminate unnecessary medical treatments which do not contribute to a positive outcome.

These goals are consistent with the legislation and the Governor's directive in that they facilitate delivery of quality medical treatment to injured workers and provide a structure for that treatment based upon evidence-based standards and best practices.

WCL § 13-a(5), as amended by Chapter 6, increases the prior authorization threshold and requires a list of pre-authorized procedures. The pre-authorized list allows the Board appropriate regulatory flexibility to add or remove procedures depending on best practices, increases or decreases in costs, or various managed care approaches.

3. Needs and Benefits:

Because New York does not currently have treatment guidelines, all New York practitioners do not have up-to-date standards for the treatment of occupational injuries to the knee, shoulder, back and neck, which account for approximately 36% of the claims but nearly 60% of medical costs. Similarly, insurance carriers, self-insured employers, and the State Insurance Fund ("carriers") do not have standards to assess the medical necessity of treatment, which results in disputes over treatment, delayed care, and increase frictional costs.

The Guidelines set the standard of treatment. Carriers will only pay for treatment consistent with the Guidelines or approved through a

variance process. The Guidelines create criteria for timing and use of diagnostic testing and treatments, and controls utilization of some significant cost drivers such as chiropractic manipulations, physical therapy modalities, MRIs, therapeutic injections, and nerve blocks injections. It also places limitations on 12 procedures that are subject to abuse or are complex and invasive. It prohibits ineffective treatments such as use of Medex machines and electro-analgesic nerve blocks.

In other states, treatment guidelines have significantly reduced medical costs. In California, a 24 visit cap on chiropractic and physical therapy decreased chiropractic costs by 72% and physical therapy costs by 58% in 18 months.

The Guidelines will benefit participants by improving the quality of care. Treatment guidelines, grounded in evidence-based medicine and the sound clinical judgment of highly credentialed physicians, is a useable and practical tool for stakeholders.

Without treatment guidelines, biases may affect determinations of medically necessary care to the claimant's detriment. While denial of care to reduce costs is harmful, overuse of medical services does not necessarily improve outcomes. Treatment guidelines minimize the effects of bias by addressing sound treatment practices, providing better care at lower cost.

Carriers use utilization management to assess appropriateness of care to control costs and ensure quality. However, lack of uniformity in UR standards may lead to variations in the treatment and adds frictional costs by producing needless disputes.

Uniform UR standards based on treatment guidelines should significantly reduce variation in treatment, increase the transparency of the medical claim and payment process, lead to decisions based on sound, evidence-based medicine, and reduce disputes. When disputes do arise, adjudicators will have a standard to resolve them.

Instances will occur where the Guidelines are not appropriate for a particular claimant. In such situations the treating medical provider may request approval for a variance by submitting information on the form prescribed for this purpose. The burden of proof for a variance is on the claimant and treating medical provider. Carriers have 30 days to review the request and respond. If the variance is denied, and the claimant requests review of the denial, a determination will be made at an expedited hearing or, if both the claimant and the carrier agree in writing, by a medical arbitrator appointed by the Chair. If the dispute is resolved by a medical arbitrator, there is no further appeal. The variance process provides flexibility to ensure that claimants receive necessary care.

All the treatments outlined in the Guidelines comprise the pre-authorized list, except for 12 procedures which are subject to abuse or are complex and invasive. By adopting the Guidelines as the standard of care for the neck, back, shoulder, and knee, and making all but 12 procedures pre-authorized, medically sound, evidence based treatment will flow promptly which will improve recovery and expedite a return to work.

4. Costs:

The proposed rule will impose some additional costs on the regulated parties, the Board, the State, and local governments which are expected to be offset by the savings from use of the guidelines. Medical professionals, insurance carriers, self-insured employers, third party administrators, and the Board will be required to incorporate the guidelines into their procedures. Costs will vary depending on current practices, size of the entity, familiarity with and use of any treatment guidelines.

The Board will provide training on the Guidelines to stakeholders at no cost. Copies of the Guidelines will be available on the Board's website free of charge. The cost of a hard copy is \$10.00 per guideline or \$5.00 for a compact disc of the four Guidelines.

Treating providers will incur some cost when requesting a variance due to the need to complete the required form. Upon receiving a variance request, the carrier has the option of having it reviewed by its own medical staff, or seeking an IME opinion. If the carrier does not believe the variance request meets the burden of proof required, it may deny the variance request without a medical opinion; however,

for all other denials a medical opinion is necessary. Carriers will incur the costs if an IME or records review is obtained. The cost, however, will be offset by a reduction in IMEs due to the pre-authorized list.

If a variance is denied, the issue will be resolved at an expedited hearing or, if both parties consent, by a medical arbitrator. Parties will incur costs if the denial is resolved through the hearing process; however, these costs should be offset by the reduction in the number of denials. If the parties opt to use the medical arbitrator, the costs are nominal because there is no testimony or administrative appeal.

There will be some cost for providers who opt-in and those providers who do not opt-out of the optional prior approval process. This process provides an opportunity for the treating provider to seek the carrier's agreement, prior to providing treatment. If the carrier agrees that the treatment is consistent with the Guidelines, the provider can treat and bill, knowing that the carrier will not object. Providers will have costs associated with completing the optional approval form, and carriers will have costs associated with their responses. However, the cost is offset by the savings to the provider generated by prompt payment and fewer disputes. Carrier costs are offset by savings from eliminating the need for hearings to resolve treatment disputes.

Use of the Guidelines means that providers and carriers employ the same standards to determine if medical treatment is necessary, resulting in fewer disputes over medical bills which reduces costs and speeds payment. The pre-authorized list reduces delays in treatment and improves medical outcomes.

Use of the Guidelines is expected to result in millions of dollars of savings by eliminating unnecessary and excessive treatments and therapies which will offset any additional costs.

Except for adjustments to the proper fee schedule amount, the rule requires carriers to file with the Board on a prescribed form their valuation objections to medical bills. This submission will diminish disputes over whether an objection was filed and the timeliness of the objection. There will be nominal costs associated with filing the form which can be faxed, emailed, or filed by regular mail.

5. Local Government Mandates:

The rule only imposes a mandate on local governments that are self-insured or that own and/or operate a hospital. Those entities will need to comply with the requirements in the rule the same as a private self-insured employer or insurance carrier or private hospital.

On and after October 18, 2010, the rule requires that all claimants with injuries to the neck, back, shoulder, and/or knee be treated in accordance with the Guidelines. Self-insured local governments will be required to incorporate the Guidelines into their practices and certify that this has been done. Local governments who are self-insured will be required to pay for medical treatment that is consistent with the Guidelines, to respond to variance requests and to optional prior approval requests if they do not opt-out. Physicians employed by public hospitals will be required to use the Guidelines to treat injured workers, to request a variance, and follow all of the other rules.

6. Paperwork Requirements:

Treating medical providers, carriers, the State Insurance Fund, claimants, and others will have new paperwork requirements. Submissions relating to the Guidelines are on prescribed forms. Variance requests and responses, and requests for review of a denial and the election to opt-in to the medical arbitrator process require the use of one form. For those participating in the optional prior approval process, the requests and responses require the use of one form. Use of prescribed forms ensures easy identification and processing.

In addition to the two new forms, the regulations require use of three existing forms.

Carriers are required to certify that they have incorporated the Guidelines into their procedures. If they modify their practices, they must re-certify that the Guidelines are still incorporated.

7. Duplication:

The proposed regulation does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

The Board shared a draft of the regulations with the AFL-CIO, Busi-

ness Council of New York State, State Insurance Fund, New York Insurance Association, American Insurance Association, Property Casualty Insurers Association of America, Medical Society of the State of New York, New York Conference of Mayors, New York State Association of Counties, and the Association of Towns of the State of New York, and requested comments. With respect to the Guidelines, the Board solicited comments between August 13, 2009, and September 9, 2009. The Board's Medical Director reviewed the comments and incorporated some changes.

There are no practicable alternatives to adopting treatment guidelines. Currently, the Board has no treatment guidelines, which does not lend itself to uniform standards of quality treatment and containment of costs. A uniform system will encourage proper and timely treatment, and reduce unnecessary litigation and delay.

The rule provides that all treatment consistent with the Guidelines costing more than \$1,000, except for twelve procedures, is on the pre-authorized list. An alternative would be to not put medical care over \$1,000 on the pre-authorized list and require prior authorization. This was rejected because it impedes the delivery of care. Twelve procedures still require prior authorization because they are complex or high risk, invasive, or subject to abuse.

An alternative would be to require strict adherence to the Guidelines without the possibility of a variance. The ability to vary from the guidelines is necessary because claimants are different and all injuries do not always progress the same. Without a variance, some claimants would not receive the best medical care.

An alternative would be to have all denials reviewed by the Medical Director or medical arbitrator. However, as there is no statutory authority for such option, the rule allows the parties to opt-in to the arbitration process.

The rule requires that the claimant request review of the denial of a variance. An alternative would be to automatically schedule an expedited hearing, or if the parties both opt-in, to refer the dispute to the medical arbitrator, without any further action by the claimant or carrier. This alternative was not chosen because the claimant may not want to proceed with the variance request and undergo that specific procedure.

Another alternative would be to eliminate the optional prior approval process. However, the pilot survey shows that the process improves communications and reduces bill disputes.

The rule amends § 325-1.3 to increase the time between the submission of medical reports from forty-five days to ninety days. An alternative would be to leave the time period at forty-five days. However, by requiring reports only when a medically necessary visit is required, but no more than ninety days apart, fewer unnecessary office visits will be scheduled and costs reduced.

Another alternative would be to require that the prescribed form be used for all valuation objections. Originally, the rule had such a requirement, but the rule was changed to exempt objections that merely adjust the fee so that it reflects the appropriate fee schedule.

9. Federal Standards:

No federal standards are applicable to this proposed regulation.

10. Compliance Schedule:

The effected date of the regulation has been changed to December 1, 2010, from the original date of October 18, 2010, to provide participants with two additional months to comply with the regulation and take the training. This change was made based upon comments from some participants that the extra time was needed.

Revised Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis for Small Business and Local Governments is not required because the changes made to the last published rule do not necessitate revision to the previously published document. The changes to the text are not substantial, do not change the meaning of any provision and therefore do not change any statements in the document. Specifically the changes are to: 1) change the effective date to December 1, 2010; 2) correct typographical errors; 3) add clarifying language; and 4) reword provisions noted as being unclear in the comments on the proposed regulation to ensure that they are clearly understood.

Revised Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis is not required because the changes made to the last published rule do not necessitate revision to the

previously published document. The changes to the text are not substantial, do not change the meaning of any provision and therefore do not change any statements in the document. Specifically the changes are to: 1) change the effective date to December 1, 2010; 2) correct typographical errors; 3) add clarifying language; and 4) reword provisions noted as being unclear in the comments on the proposed regulation to ensure that they are clearly understood.

Revised Job Impact Statement

A revised Statement in Lieu of Job Impact Statement is not required because the changes made to the last published rule do not necessitate revision to the previously published document. The changes to the text are not substantial, do not change the meaning of any provision and therefore do not change the statement that the rule making will not have an adverse impact on jobs. Specifically the changes are to: 1) change the effective date to December 1, 2010; 2) correct typographical errors; 3) add clarifying language; and 4) reword provisions noted as being unclear in the comments on the proposed regulation to ensure that they are clearly understood.

Assessment of Public Comment

The Chair and Board received approximately 3,196 formal written comments. Approximately 3,110 were form letters from four groups: 1) chiropractors; 2) physical therapists; or 3) individuals stating they were claimants either receiving chiropractic or physical therapy treatment. The remaining 86 comments were submitted by associations representing business, insurance carriers, and medical providers, as well as one law firm, a labor union, individuals, medical professionals, and businesses.

All of the comments received were reviewed and assessed. The comments break down into three groups: 1) those addressing the regulations; 2) those addressing the medical treatment guidelines incorporated by reference; and 3) the form letters. The full Assessment of Public Comment summarized, analyzed, and responded to the comments received and it exceeds 2,000 words. This document is a summary of the full Assessment of Public Comment. A copy of the full assessment is posted on the Board's website at <http://www.wcb.state.ny.us/content/main/wclaws/newlaws.jsp>.

The comments on the regulations included numerous requests to delay the effective date of the regulations and the Guidelines, clarify provisions that were not interpreted the same by all readers, clarify provisions by explicitly stating black letter law implied by the provisions, and correct typographical errors. The following changes were made to the regulations: 1) a colon was added to the definition "Insurance carrier or Special Fund's medical professional" in § 324.1(c); 2) "subpart" was changed to "part" in the definition of "Medical Treatment Guidelines in § 324.1(g); 3) changed the date from "October 18, 2010" to "December 1, 2010" in §§ 324.2(a), 325-1.24, and 325-1.25; 4) clarified in § 324.2(b) that the fee for copies of the Guidelines must be included with request for the Guidelines, corrected the address where to send the request, clarified that the email address and telephone number are for information about the Guidelines as the fee cannot be sent with an email and the request must be in writing, and clarified that checks must be made payable to Chair, WCB; 5) clarified § 324.3(a)(1) by adding a statement that a variance is needed when treatment is not recommended by the Guidelines; 6) corrected the cite in § 324.3(b)(2)(i)(c) and in § 324.5; 7) clarified in § 324.3(b)(2)(ii)(a) that the only required action within five business days is to notify the chair; 8) added clarifying language to §§ 324.3(b)(4), 324.3(d)(7), 324.4(d) & (h), 325-1.4(b)(2) & (3); 9) clarified § 325-1.3(b)(3) that during continuing treatment a progress report must be filed for follow-up visits, which are scheduled when medically necessary but no more than 90 days apart; 10) clarified § 325-1.4(a)(9) that receipt is by the Board; 11) added missing cite to § 325-1.4(d) and changed "excepted" to "excluded"; and 12) modified § 325-1.25(c)(7) so there is no confusion that occupational & physical therapists can not request a variance.

Comments were received requesting changes to definitions, time frames, the list of pre-authorized procedures, and who resolves disputes over variances. The regulations set forth the best processes based upon the statutory authority available and, other than as described above, were not modified by the comments. In part this is due to the experience and feedback obtained through the pilot program and comments received prior to finalizing the regulations. The most

significant comments received from multiple commentators are discussed below, and all of the comments received are discussed in detail in the complete Assessment of Public Comments.

Some comments expressed a need for additional time before the regulations and medical treatment guidelines (Guidelines) took effect. In response the effective date of the regulations and Guidelines has been delayed until December 1, 2010.

Three comments raised concerns about the definition of "Maximum Medical Improvement (MMI)." The commentators found the definition, among other things, to be vague, too subjective, and lacking any time parameter, presents obstacles to classification, needs to be more uniform and objective, and that more concise definitions are available from other states and one such definition (Texas) should be adopted. No changes were made to this definition. The advisory committee developing impairment guidelines developed a definition of MMI that is basically the same as the definition in this rule. The recommended definition for the impairment guidelines starts with the exact same language used in the definition in this rule and then adds additional language, but the definitions are still consistent. It is not clear how the example from Texas suggested by this entity is any more precise as it uses phrases such as "no longer reasonably be anticipated."

Three comments objected to the list of pre-authorized procedures in § 324.2(d) and one objected to the reference to this list in § 325-1.4(a)(1). The objections included the belief that the statutory language added to Workers' Compensation Law (WCL) § 13-a(5) was never intended to allow every medical procedure as preauthorized, the language of WCL § 13-a(5) is vague or confusing, the proposed rule negates the due diligence implied in the bill memo to Chapter 6 of the Laws of 2007, and this provision conflicts with WCL § 13-a(5).

This provision was not changed as the Chair and Board disagree with the statutory interpretations in the comments. WCL § 13-a(5) was amended in 2007 to authorize the issuance and maintenance of a list of pre-authorized procedures, with the approval of the Superintendent of Insurance. Under this section, the only treatment that needs to be pre-authorized is special services costing more than \$1,000. Reading the whole subdivision it is clear that the authority exists for a list of pre-authorized special services costing more than \$1,000. The purpose of this change is to speed access to care. The creation of a pre-authorized list allows for regulatory flexibility to add and remove procedures based upon best practice. The Guidelines set up best practices for treatment and will be updated regularly to remain current. The regulation establishes the pre-authorized list as all tests, procedures, and treatment consistent with the Guidelines, except for 12 specifically identified procedures. The term "consistent with the guidelines" is defined in the regulations. If a provider is treating consistent with the Guidelines, so he is following the best practices set by the Board, it did not make sense to have him request approval for a test or procedure costing more than \$1,000.

Four comments objected to the amendment in § 325-1.3 extending the period between which reports on follow-up visits must be filed from 45 days to 90 days. The comments state that an additional six weeks of indemnity benefits will be provided during the additional 45 days, this change will prevent proper case management and meaningful application of the Guidelines, will prevent return to work, and will result in additional IMEs. Suggestions were received to retain the current 45 day time period and to reduce it to 30 days.

It was not the intent of this provision to state that physicians have 90 days after the examination of a claimant to submit a medical report. Rather, the intent was to require follow-up visits with the physician at medically necessary intervals, for which the physician would submit a medical report, except that the intervals between follow-up visits can be no more than 90 days. To ensure the provision is not misinterpreted, it has been reworded. Physicians have complained that they are forced to examine claimants when it is not medically necessary in order to file a medical report every forty-five days, which results in medical reports that are no different than the previous report, because nothing has changed medically. In addition, the provider is entitled to a fee for the office visit, which increases costs. By requiring reports only when a visit is medically necessary, but no more than ninety days apart, fewer unnecessary office visits will be scheduled and costs reduced.

Numerous comments were received about the medical treatment guidelines (Guidelines) themselves. The only changes to the Guidelines were to correct typographical errors, misspellings, and formatting, insert words that were accidentally left out, and to correct one section so it is now clinically feasible. Details on the changes to the Guidelines are set forth in the full assessment.

A number of the comments received challenged the statement that the Guidelines are evidence-based or took issue with the treatment guideline chosen as the base document. The Guidelines were developed by an advisory committee comprised of representatives from the Insurance Department, Board, and Labor Department, and highly qualified and respected medical professionals selected by labor, business, and the Insurance Department. The advisory committee was created to develop the Guidelines as directed by former Governor Spitzer in a letter dated March 13, 2007. On December 3, 2007, medical treatment guidelines for the neck, back, shoulder, and knee that all providers would be required to use when treating injuries to those body parts were sent to the Chair.

When developing the Guidelines, the advisory committee performed a thorough review of available state-developed workers' compensation treatment guidelines, the American College of Occupational and Environmental Medicine (ACOEM) guidelines, and two commercially available guidelines. Consideration was limited to guidelines used for treating work-related injuries and illnesses. For the mid and low back, the advisory committee chose Chapter 12, Low Back Disorders (Revised 2007), of the Occupational Medicine Practice Guidelines, 2nd Edition published and copyrighted by the ACOEM. For the neck, knee, and shoulder, the advisory committee chose the State of Colorado's treatment guidelines with charts from the Washington State guidelines to supplement the Knee and Shoulder guidelines. The guidelines chosen are nationally recognized medical treatment guidelines used for treating individuals with workplace injuries.

After the recommended guidelines were submitted to the Chair, various entities submitted comments and met with the Chair to discuss the guidelines. On August 13, 2009, the Chair issued a notice advising the public that comments on the Guidelines would be accepted through September 9, 2009. The notice also stated that after that date the Board's Medical Director and staff would evaluate all comments, as well as recent developments in medical treatment guidelines, and incorporate into the Guidelines those changes that are most important to patient well-being and supported by medical literature. Comments received after September 9th and comments received that were not incorporated, would be retained and considered during the regular process of review and updating of the Guidelines. The Medical Director and Board staff reviewed the comments, and on January 19, 2010, revised guidelines were released. Final guidelines were released on June 30, 2010.

Many of the comments requested changes to the Guidelines based on literature and offered evidence in support. However, as just explained a formal comment period on the Guidelines was conducted in 2009, which resulted in revisions to the Guidelines. It is recognized that medical science and practice will change over time and the Guidelines must keep pace with these changes. The Chair will implement a process to review and critique available medical literature and update the Guidelines as indicated. The comments that requested changes to the Guidelines recommendations based upon literature provided will be considered at that time. In addition, some of the requested changes were submitted and considered for the revised Guidelines released on January 19, 2010. The specific suggestions are addressed in the full assessment of public comment.

FORM LETTERS

Of the 3110 form letters, approximately 2096 were from individuals stating they were claimants receiving chiropractic treatment. These letters expressed concern about needing treatment outside the Guidelines which is addressed through the Variance process, and support for the comments and recommendations of the chiropractic profession which are fully discussed in the full assessment.

Approximately 364 of the form letters were from individuals stating they were chiropractors authorized to treat claimants. The letters expressed: 1) concern about perceived unanswered questions about

the implementation and applicability of the Guidelines, which are actually addressed in the regulations; 2) that the Guidelines may limit a chiropractor's ability to perform medically necessary services for which he or she is qualified, trained and licensed to perform, but no example is provided; and 3) concern about the manner in which chiropractors must bill for services provided to claimants, which is not the subject of this regulation. Finally, the letters express support for the comments of the New York State Chiropractic Association.

Approximately 548 form letters were submitted by patients receiving physical therapy services. The letters express two main concerns, reimbursement and access. The first concern regarding reimbursement is not the subject of this rule. The second concern relates to the maximum number of visits or modalities and the concern it will limit potentially needed care, which is addressed through the variance process.

Approximately 102 of the form letters were submitted by physical therapists and discussed three main concerns: 1) omission of the physical therapy professions current evidence based practice patterns; 2) reimbursement for physical therapy services and the RVU cap, which is not part of this regulation; and 3) the limits on visits or modalities set forth in the Guidelines. As stated above, the guidelines chosen were picked because they were the best of the guidelines available for work related injuries. As mentioned above, if additional visits or modalities are necessary then a variance can be requested by the treating physician ordering such additional visits or modalities.