RULE MAKING ACTIVITIES

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

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

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

Department of Civil Service

NOTICE OF ADOPTION

Supplemental Military Leave

I.D. No. CVS-35-03-00004-A
Filing No. 1166
Filing date: Oct. 22, 2003
Effective date: Nov. 12, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of sections 21.15 and 28-1.17 of Title 4 NYCRR.
Statutory authority: Civil Service Law, section 6(1); and Executive Order No. 125 of Governor George E. Pataki
Subject: Supplemental military leave.
Purpose: To extend the availability of supplemental military leave with pay, leave at reduced pay and annual grants of training leave at reduced pay for eligible New York State employees, through Dec. 31, 2004.
Text or summary was published in the notice of proposed rule making, I.D. No. CVS-35-03-00004-P, Issue of September 3, 2003.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us
Assessment of Public Comment
The agency received no public comment.

Department of Correctional Services

NOTICE OF ADOPTION

Merit Time and Earned Eligibility

I.D. No. COR-34-03-00001-P
Filing No. 1169
Filing date: Oct. 24, 2003
Effective date: Nov. 12, 2003

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of sections 280.1, 280.2 and 2100.3 of Title 7 NYCRR.
Statutory authority: Correction Law, sections 112, 803 and 805
Subject: Merit time and earned eligibility.
Purpose: To implement changes.
Text or summary was published in the notice of proposed rule making, I.D. No. COR-34-03-00001-P, Issue of August 27, 2003.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951
Assessment of Public Comment
The agency received no public comment.

Deferred Compensation Board

NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED

Establishment of Plan by a Local Employer

I.D. No. DCB-20-03-00004-C

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE of continuation is hereby given:
The notice of proposed rule making, I.D. No. DCB-2-03-00004-P was published in the *State Register* on May 21, 2003.
Subject: Establishment of plan by a local employer.
Purpose: To require that a public employer that is a school district, board of cooperative education services or county vocational education and

extension board (an educational employer), must solicit competitive proposals for plan services prior to adopting the deferred compensation plan sponsored by the State of New York (the State plan), except when such employer has elected to participate in the State plan prior to the effective date of the proposed rule or employs 100 or fewer employees.

Text of rule: Paragraphs (4) through (15) of subdivision (b) of Section 9000.2 are renumbered paragraphs (5) through (16) and a new paragraph (4) is added to read as follows:

(4) Educational employer means a local employer that is a school district, board of cooperative education services or county vocational education and extension board.

Subdivision (a) of Section 9001.2 is amended to read as follows:

(a) Except as specifically provided in this section 9001.2(a), a local employer may not establish or maintain more than one plan for its employees. *Except as provided herein for an educational employer, a* [A] local employer may establish a plan for its employees:

(1) by becoming a participating employer in the State plan as provided therein;

(2) by adopting the model plan in accordance with the procedures prescribed in Part 9002 of this Subtitle; or

(3) by adopting another plan which complies with all requirements of this Subtitle and section 457 of the Internal Revenue Code in accordance with the procedures prescribed in Part 9002 of this Subtitle.

A local employer which has previously established a plan may establish a plan in accordance with the requirements of this Subtitle so long as (i) all amounts held under the previously established plan have been distributed or otherwise paid out in accordance with the terms of such previously established plan and all other obligations of the previously established plan have been satisfied, or (ii) another local employer has been substituted as sponsor of the previously established plan.

Notwithstanding Section 9001.2(a)(1) above, in the case of an educational employer, such employer may establish a plan in accordance with the requirements of this Subtitle provided that competitive proposals have been previously solicited and reviewed in accordance with the procedures set forth in Part 9003 for adopting one of the three plans described in this Section 9001.2(a). Notwithstanding the previous sentence, no competitive proposals shall be required pursuant to this Section 9001.2(a) for an educational employer that (i) has elected to participate in the State plan prior to the effective date of this paragraph, or (ii) employs 100 or fewer employees.

Changes to rule: No substantive changes.

Expiration date: May 20, 2004.

Text of proposed rule and changes, if any, may be obtained from: Julian M. Regan, Empire State Plaza Station, P.O. Box 2103, Albany, NY 12220-2103, (518) 473-6619, e-mail: jregan@nysdcp.com

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

Assessment of Public Comment

As of October 23, 2003, the Board has received public comments pertaining to the proposed rule from the following parties: New York State Association of School Business Officials, New York State Council of School Superintendents, New York State School Boards Association, and New York State United Teachers. Copies of these comments may be obtained from the Board at the address included on this notice.

Department of Environmental Conservation

NOTICE OF ADOPTION

Architectural Coating VOC Limits

I.D. No. ENV-11-03-00016-A
Filing No. 1168
Filing date: Oct. 23, 2003
Effective date: 30 days after filing

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

Action taken: Amendment of Parts 200 and 205 of Title 6 NYCRR.

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

Subject: Architectural and industrial maintenance (AIM) coatings volatile organic compound content limits.

Purpose: To control emissions of the ozone precursors, VOCs so New York State may attain ozone National Ambient Air Quality Standards (NAAQS).

Substance of final rule: The revisions to 6 NYCRR Part 205, Architectural Surface Coatings, apply to any person who supplies, sells, offers for sale, or manufactures any architectural coating for use within the State of New York, as well as any person who applies or solicits the application of any architectural coating within the State of New York. The revisions to Part 205 do not apply to: (1) any architectural coating that is sold or manufactured for use outside the State of New York or for shipment to other manufacturers for reformulation or repackaging; (2) any aerosol coating product; or, (3) any architectural coating sold in a container of one liter (1.057 quart) or less.

The revisions include volatile organic compound (VOC) content limits in grams per liter for 52 separate categories of architectural coatings. No person shall manufacture, blend, or repackage for sale within the State of New York , supply, sell, or offer for sale within the State of New York or solicit for application or apply within the State of New York any architectural coating manufactured on or after January 1, 2005 which contains volatile organic compounds in excess of the limits specified in the following Table of Standards. Limits are expressed in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation, excluding the volume of any water, exempt compounds, or colorant added to tint bases. Manufacturer's maximum recommendation means the maximum recommendation for thinning that is indicated on the label or lid of the coating container.

Table of Standards

'Coating Category'	'VOC Content Limit (grams per liter)'
Flat Coatings	100
Nonflat Coatings	150
Nonflat - High Gloss Coatings	250
Antenna Coatings	530
Antifouling Coatings	400
Bituminous Roof Coatings	300
Bituminous Roof Primers	350
Bond Breakers	350
Calcimine Recoaters	475
Clear Wood Coatings	
• Clear Brushing Lacquers	680
• Lacquers (including lacquer sanding sealers)	550
• Sanding Sealers (other than lacquer sanding sealers)	350
• Varnishes	350
• Conversion Varnishes	725
Concrete Curing Compounds	350
Concrete Surface Retarders	780
Dry Fog Coatings	400
Faux Finishing Coatings	350
Fire Resistive Coatings	350
Fire-Retardant Coatings	
• Clear	650
• Opaque	350
Floor Coatings	250
Flow Coatings	420
Form-Release Compounds	250
Graphic Arts Coatings (Sign Paints)	500
High Temperature Coatings	420
Impacted Immersion Coatings	780
Industrial Maintenance Coatings	340
Low Solids Coatings	120
Magnesite Cement Coatings	450
Mastic Texture Coatings	300
Metallic Pigmented Coatings	500
Multi-Color Coatings	250
Nuclear Coatings	450
Pre-Treatment Wash Primers	420
Primers, Sealers, and Undercoaters	200

Quick-Dry Enamels	250
Quick-Dry Primers, Sealers and Undercoaters	200
Recycled Coatings	250
Roof Coatings	250
Rust Preventive Coatings	400
Shellacs:	
• Clear	730
• Opaque	550
Specialty Primers, Sealers, and Undercoaters	350
Stains	250
Swimming Pool Coatings and Swimming Pool Repair and Maintenance Coatings	340
Temperature-Indicator Safety Coatings	550
Thermoplastic Rubber Coatings and Mastics	550
Traffic Marking Coatings	150
Waterproofing Sealers	250
Waterproofing Concrete/Masonry Sealers	400
Wood Preservatives	350

If anywhere on the container of any architectural coating, or any label sticker affixed to the container, or in any sales, advertising, or technical literature supplied by a manufacturer or anyone acting on the manufacturer's behalf, including retailers who sell under a private label, representation is made that the coating meets the definition of or is recommended for use or may be used for more than one of the coating categories, then the most restrictive VOC content limit shall apply. This most restrictive limit provision does not apply to the following coating categories:

Lacquer coatings (including lacquer sanding sealers)
Metallic pigmented coatings
Shellacs
Fire-retardant coatings
Pretreatment wash primers
Industrial maintenance coatings
Low-solids coatings
Wood preservatives
High temperature coatings
Temperature-indicator safety coatings
Antenna coatings
Antifouling coatings
Flow coatings
Bituminous roof primers
Thermoplastic rubber coatings and mastics
Specialty primers, sealers, and undercoaters
Calcimine recoaters
Impacted immersion coatings
Nuclear coatings

Any person who applies architectural coatings shall ensure that all containers used to apply the contents therein to a surface directly from the container by pouring, siphoning brushing or rolling, padding, ragging or other means, shall be closed when not in use. These architectural coatings containers include, but are not limited to, drums, buckets, cans, pails, trays, or other application containers. Containers of any VOC-containing materials used for thinning and cleanup shall also be closed when not in use.

No person who applies or solicits the application of any architectural coating shall apply a coating that is thinned to exceed the applicable VOC content limit. No person shall apply or solicit the application of any rust preventive coating for industrial use, unless such a rust preventive coating complies with the industrial maintenance coating VOC content limit.

For any coating that does not meet any of the definitions for the specialty coatings categories listed in the regulation, the VOC content limit shall be determined by classifying the coating as a flat coating, nonflat coating, or nonflat-high gloss coating, and the corresponding flat or nonflat coating limit shall apply.

Each manufacturer of any architectural coatings subject to this rule manufactured on or after January 1, 2005 shall display the following information listed on the coating container (or label) in which the coating is sold or distributed:

(1) The date the coating was manufactured, or a date code representing the date. If the manufacturer uses a date code for any coating, an explanation of each code shall be filed with the director, Division of Air Resources, Department of Environmental Conservation by January 1, 2005 or within 90 days of the product being made available for sale in New York State.

(2) A statement of the manufacturers recommendation regarding thinning of the coating. This requirement does not apply to the thinning of architectural coatings with water. If thinning of the coating prior to use is not necessary, the recommendation must specify that the coating is to be applied without thinning.

(3) Either the maximum or the actual VOC content of the coating, as supplied, including the maximum thinning as recommended by the manufacturer. VOC content shall be displayed in grams of VOC per liter of coating. VOC content displayed shall be calculated using product formulation data, or shall be determined using the test methods in the regulation. The equations in the regulation shall be used to calculate VOC content.

(4) Each manufacturer of any industrial maintenance coating shall also display on the label or the lid of the container in which the coating is sold or distributed one or more of the following descriptions:

For industrial use only
For professional use only
Not for residential use or Not intended for residential use

(5) The labels of all clear brushing lacquers shall prominently display the statements "For brush application only," and "This product must not be thinned or sprayed."

(6) The labels of all rust preventive coatings shall prominently display the statement "For metal substrates only."

(7) The labels of all specialty primers, sealers and undercoaters shall prominently display one or more of the following descriptions:

For blocking stains
For fire-damaged substrates
For smoke-damaged substrates
For water-damaged substrates
For excessively chalky substrates

(8) The labels of all quick dry enamels shall prominently display the words "Quick dry" and the dry hard time.

(9) The labels of all non-flat - high gloss coatings shall prominently display the words "High gloss."

The following annual reports are required to be submitted to the director, Division of Air Resources, Department of Environmental Conservation on or before April 1st of each calender year beginning in the year 2006. For each architectural coating that contains perchloroethylene or methylene chloride, the manufacturer shall report the following information for products sold in the State during the preceding year: the product brand name; a copy of the product label with the legible usage instructions; the product category to which the coating belongs; the total sales in the State of New York during the calender year to the nearest gallon; and the volume percent, to the nearest 0.10 percent, of perchloroethylene and methylene chloride in the coating.

Manufacturers of recycled coatings must submit a letter signed by a responsible official to the director, Division of Air Resources, Department of Environmental Conservation certifying their status as a recycled paint manufacturer. The manufacturer shall submit an annual report that includes, for all recycled coatings, the total number of gallons distributed in the State during the preceding year, and shall describe the method used by the manufacturer to calculate State distribution.

Manufacturers will be required to maintain records for a period not less than five years, concerning the distribution and sales of their coatings. This includes, but is not limited to, the following information, and shall be made available to the Department within 90 days upon request: the product by name (and identifying number, if applicable) as shown on the product label and in applicable sales and technical literature; the VOC content; the name(s) and chemical abstract service (CAS) number of the VOC constituents in the product; the dates of the VOC content determinations; and the coating category and the applicable VOC content limit.

For the purpose of determining compliance with the VOC content limits, the VOC content of a coating shall be determined by using either the equations included in the regulation and U.S. Environmental Protection Agency (EPA) method 24 (40 CFR Part 60, appendix A, method 24) or the alternative test method, South Coast Air Quality Management District Method 304-91 (Revised February 1996). The exempt compounds content shall be determined by South Coast Air Quality Management District Method 303-91 (Revised August 1996).

To determine the VOC content of a coating, the manufacturer may also use other test methods demonstrated to provide results that are acceptable for purposes of determining compliance after such methods are reviewed and approved in writing by the director, Division of Air Resources, Department of Environmental Conservation and the EPA, formulation data, or any other reasonable means for predicting that the coating has been formulated as intended (e.g. quality assurance checks, recordkeeping). However, if there are any inconsistencies between the results of a 40 CFR Part 60, appendix A, method 24 test and any other methods for determining VOC content, the 40 CFR Part 60, appendix A, method 24 results will govern,

except when an alternative method is approved by the director of the Division of Air Resources and EPA. The director of the Division of Air Resources may require the manufacturer to conduct a 40 CFR Part 60, appendix A, method 24 analysis to determine the VOC content of coatings. For methacrylate traffic coating markings, the analysis shall be conducted according to a modification of 40 CFR Part 60, appendix A, method 24 found at 40 CFR Part 59, subpart D, appendix A.

Part 205 will include a limited exemption (coating specific) for those small AIM coatings manufacturers who can demonstrate their inability to meet the VOC content limits based on economic and/or technical feasibility. The limited exemption, if granted, may remain in effect no later than December 31, 2007, and at that time small AIM coatings manufacturers may request a three year extension to the exemption. Such exemption request is subject to the review and approval of the director, Division of Air Resources.

Part 200 is being amended to include those documents incorporated into Part 205 by reference. The documents incorporated by reference are:

(1) Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. Section 136 et.seq.).

(2) ASTM Designation E 119-00a.

(3) ASTM Designation E 84-01.

(4) ASTM Designation D 523-89(1999).

(5) South Coast Air Management District Method 318-95.

(6) ASTM Designation D4082-02.

(7) ASTM Designation D3912-95(2001).

(8) ASTM Designation D 1613-96(1999).

(9) ASTM Designation D1640-95(1999).

(10) ASTM Designation D 4214-98.

(11) 40 CFR Part, appendix A , method 24 (2000).

(12) South Coast Air Management District Method 304-91 (February 1996).

(13) South Coast Air Management District Method 303-91 (August 1996).

(14) 40 CFR Part 59, subpart D, appendix A.

6 NYCRR Part 200, section 200.9, is being amended to include documents incorporated by reference in Part 205.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 200.9, 205.2(o), (as), 205.3(a), 205.6, (a)(2), (b), (d), 205.7(e) and 205.8.

Text of rule and any required statements and analyses may be obtained from: Daniel S. Brinsko, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, e-mail: dsbrinsk@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to art. 8 of the State Environmental Quality Review Act, a short environmental assessment form, a negative declaration and a coastal assessment form have been prepared and are on file. Pursuant to art. 5 of the ECL, this rule has been approved by the State Environmental Board prior to adoption.

Summary of Revised Consolidated Regulatory Impact Statement

On December 16, 1999, the United States Environmental Protection Agency (EPA) issued a proposed rulemaking approving the November 1998 1-Hour Ozone Attainment Demonstration for the New York Metropolitan Area/Lower Orange County Metropolitan Area (NYMA/LOCMA). EPA finalized this approval on February 4, 2002. This approval required the State among other things to adopt sufficient measures to address the required level of reductions identified by the EPA for attainment.

The promulgation of revised 6 NYCRR Part 205, Architectural Surface Coatings, is authorized by sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301 and 19-0305 of the Environmental Conservation Law (ECL) which, taken together, clearly empower the New York State Department of Environmental Conservation (Department) to coordinate and interact with the federal government and other States in establishing and implementing the regulations.

This regulation will result in lower ambient ozone levels. Ozone is formed in the atmosphere by a variety of photochemical reactions involving volatile organic compounds (VOCs) and nitrogen oxides (NO_x) in the presence of sunlight and warm temperatures. Ground level ozone, a respiratory irritant, aggravates respiratory conditions like chronic lung and heart diseases, allergies and asthma. Ozone damages the lungs and may contribute to lung disease. Children, because of their developing respiratory systems and the fact that they play outdoors in the summer, are more susceptible to ozone pollution than adults.

Several other areas in the Northeast (Philadelphia and Baltimore) have been informed by EPA that their SIPs do not provide sufficient emission reductions to attain the one-hour ozone standard. To assist in the development of the SIP revisions needed for OTC States to meet the emission reduction shortfall identified by EPA, the Department entered into the "Memorandum of Understanding Among the States of the Ozone Transport Commission Regarding the Development of Specific Control Measures to Support Attainment and Maintenance of the Ozone National Ambient Air Quality Standards" (MOU) on June 1, 2000. The MOU was identified in the EPA rulemaking approving the ozone attainment demonstration for the NYMA/LOCMA. EPA recognized in its approval that regional control measures could best address the emission reduction shortfalls in the Northeast.

The MOU identified a list of "short term priority control measures" that have the potential to provide emission reductions and could be adopted in time to help Ozone Transport Commission (OTC) States meet the EPA identified emission reduction shortfall. The OTC Stationary/Area Source Committee (SAS) established workgroups made up of and headed by OTC member States to research and, if plausible, develop regional programs to achieve emission reductions to satisfy EPA's approval of the NYMA/LOCMA 1-Hour Ozone Attainment Demonstration. The Architectural and Industrial Maintenance (AIM) Coatings and Consumer Products Workgroup (workgroup) was set up to consider control measures to limit the emissions from AIM coatings and consumer products. The State of New York was chosen to lead the OTC workgroup.

The workgroup determined that a model rule that the States could use as a template for adopting their own regulations would be the best approach for moving forward with a regional strategy. Since the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials (STAPPA/ALAPCO) was developing a national AIM coatings model rule and some of the workgroup States had been participating in that effort, the workgroup decided to utilize the STAPPA/ALAPCO effort to fashion the OTC model rule. STAPPA/ALAPCO developed its model rule based on the California Air Resource Board (CARB) Suggested Control Measure (SCM) for Architectural Coatings that was approved by the CARB Executive Board in June 2000.

The workgroup and the OTC SAS Committee met with stakeholders on several occasions to discuss the above approach and to solicit comments on specific aspects of the control measures being considered. The OTC held a special meeting to review progress, get additional stakeholder comments and give direction to the Committees for future action. After reviewing the comments received and deliberating amending the STAPPA/ALAPCO AIM model rule, the OTC approved the use of the STAPPA/ALAPCO model rule as the OTC AIM model rule with several implementation options. The Department is basing the revisions to Part 205 on the OTC AIM model rule with the inclusion of the implementation options.

The Part 205 revisions mark the latest action in a sustained series of actions undertaken in an effort to control emissions of ozone precursors, NO_x and VOCs, so that the New York State may attain the one-hour ozone standard. The revisions set specific VOC limits (in grams per liter) for 52 coating categories and require compliance with those limits by January 1, 2005. These new limits are more stringent than the national AIM rule for 40 categories and 31 categories are more stringent than the current State rule. Compliance with the revised limits can be accomplished either through reformulation or substitution with existing complying coatings. The VOC limits in the revisions to Part 205 were chosen based in part on the known availability of complying products on the market. Therefore, the technology already exists to produce these coatings and is currently being used to produce complying AIM coatings.

Pursuant to the adoption of the SCM, CARB staff are required to provide updates on the status of their architectural coating regulatory activities. The most current information can be found in the memorandum "Update on the Architectural Coatings Suggested Control Measure" dated December 30, 2002, and the report "Status Report Architectural Coatings Suggested Control Measure" dated December 2002. As of December 2002, sixteen California air districts have adopted or amended their AIM rules, while six more districts are either working on, or are considering, adopting or amending an AIM rule based on the SCM. Districts that adopted/amended AIM rules, received minimal opposition (no lawsuits) and were able to address all comments without making major changes to the SCM. Furthermore, in carrying out the 2002 technology assessments for AIM coating limits effective on January 1, 2003, CARB utilized the 2001 AIM survey (2000 sales data), performance tests by National Technical Systems and KTA-Tator, and the South Coast Air Quality Management District's annual technology assessments. The December 2002 report concluded that all of the 2003 AIM coating limits are technically feasible with no significant adverse effects on small business.

Since Part 205 is very similar to the CARB SCM for AIM Coatings in most respects, the Department utilized cost information that supported the CARB action. All the details of the cost information may be found in the "Staff Report for the Proposed Suggested Control Measure for Architectural Coatings" dated June 2000 that accompanied the CARB SCM Executive Order. Though the Department undertook no independent cost analysis, it reviewed the information used by CARB to support the SCM. The CARB cost information does reflect information supplied by manufacturers who market AIM coatings nationally and, therefore, its conclusions are valid in New York State. Furthermore, the OTC performed an AIM coatings market survey which demonstrates that compliant coatings exist in the northeast (OTR States) that are comparable to California. Information on the AIM survey may be found in the E.H. Pechan & Associates report "Control Measure Development Support Analysis of Ozone Transport Commission Model Rules" dated March 31, 2001.

CARB evaluated and quantified the economic impact of the SCM on affected businesses and consumers. A cost survey was sent to the manufacturers that responded to a 1998 architectural coatings survey (the latest in a series of surveys conducted to track VOC emissions from architectural coatings). The data collected in the cost survey was used to perform a cost-effectiveness analysis to determine the cost of control relative to other programs and a business impact analysis to evaluate impacts on profitability, employment and competitiveness. CARB staff also performed research to identify typical non-complying and complying formulations for 11 coating categories. Costs were identified for these formulations.

CARB estimates that the overall cost-effectiveness of the proposed revisions to Part 205 range from $2.70 to $3.90 per pound of VOCs reduced ($5,400 to $7,800/ton) with the average cost-effectiveness of $2.79 per pound ($5,580/ton) using year 2000 dollars. CARB also determined that most manufacturers or marketers of AIM coatings would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability.

CARB determined that the maximum potential increase to consumers (all costs borne by the consumer) for reformulated coatings would range from 12 to 30 percent of the current retail price and that the majority of retail price increases, if any, would occur in the industrial maintenance and other commercial coatings areas. For household consumers, the projected maximum cost impacts would be less because the average consumers ordinarily buy flat and nonflat coatings. CARB estimated no increase in retail price for a typical reformulated flat paint ($17.00 per gallon) and a maximum potential increase of $3.70 (or 21 percent) for a typical reformulated nonflat paint ($17.80 per gallon). It should be noted that consumers that do not wish to purchase these reformulated at the increased price would still be able to purchase currently available complying coatings at significantly lower prices. Competition from these existing complying coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers as assumed in this analysis. This is likely to make the actual retail price increases less than the above CARB projections.

Part 205 includes labeling and reporting requirements. All coatings shall display a date or date code indicating the date of manufacture, the actual or maximum allowable VOC content, and any thinning recommendations. Industrial maintenance, clear brush lacquer, rust preventative, specialty primer, sealer and undercoater, quick-dry enamel, and non-flat high gloss coatings all have special labeling requirements specific to their uses.

The manufacturers of recycled coatings must certify (by letter) that they are a Recycled Coatings Manufacturer and submit to the Department an annual report by April 1st of each year specifying the number of gallons of recycled coatings distributed in the state during the preceding year and describing the method used to calculate state distribution.

The manufacturers of coatings sold in the state containing percholoroethylene or methylene chloride must submit an annual report to the Department by April 1st of each year that details: (1) the product brand name and a copy of the product label; (2) the coatings category under which it is regulated; (3) the total sales in the state in the preceding calendar year; and (4) the volume percent of percholoroethylene and methylene chloride in the coating.

The revisions to Part 205 regulate all of the architectural and industrial maintenance coatings regulated by the federal government under 40 CFR Part 59, National Volatile Organic Compound Emission Standards for Architectural Coatings. While the definitions in Part 205 are often somewhat different than that in the federal rule, the limits within Part 205 are at least as stringent and in 40 categories are more stringent than the federal rule. To avoid confusion with the federal rule, where Part 205 does not contain a VOC content limit that is more stringent than the federal rule, the federal VOC content limits and the Part 205 VOC content limits are identical. Therefore with the exception of coatings that contain post-consumer recycled content, a manufacturer need only comply with the limits in Part 205 to be in compliance with the architectural coatings VOC content limits for the New York State and the federal rule.

The OTC workgroup evaluated seven alternatives to the STAPPA/ALAPCO model rule in developing the OTC model rule. These are: (1) no action; (2) delay the effective date of the regulation; (3) relax VOC content limits; (4) eliminate the three year "sell through" provision; (5) various flexibility options; (6) streamline reporting requirements; and (7) a limited exemption for small AIM coatings manufacturers. The no action alternative was rejected because it could not provide the emission reductions EPA identified were necessary for attainment. As a result of comments received, the OTC included implementation options to: delay the effective date of the regulation to January 1, 2005 (CARB and STAPPA/ALAPCO recommended implementing the program on January 1, 2003); impose less stringent VOC limits for industrial maintenance coatings, conversion varnishes, thermoplastic rubber coatings and mastics, calcimine recoaters, concrete surface retarders, impacted immersion coatings, and nuclear coatings; eliminate the three year "sell through" provision; remove mandatory reporting requirements for bituminous coatings, clear brushing lacquers, rust preventative coatings and specialty primers, sealers and undercoaters; and include a limited exemption for small AIM coatings manufacturers.

Part 205 exceeds VOC content limits set by the federal government in 40 CFR Part 59, National Volatile Organic Compound Emission Standards for Architectural Coatings. Part 205 provides a portion of the VOC emission reductions needed to comply with proposed EPA rulemaking approving the November 1998 1-Hour Ozone Attainment Demonstration for the NYMA/LOCMA. EPA has identified these emission reductions as necessary for attainment of the health-based ozone national ambient air quality standard (NAAQS.)

Failure to comply with the provisions of the proposed approval will result in the imposition of two sanctions in the NYMA/LOCMA. The first sanction (2-to-1 offsets for new sources) would apply 18 months after EPA disapproves the SIP if the State fails to make the required submission. If a State still failed to submit an approvable SIP 6 months after the first sanction is imposed, the second sanction (a limitation on the receipt of federal highway funds) will apply. In addition to sanctions, if EPA finds that a State failed to submit the required SIP or disapproves the SIP, EPA must promulgate a federal implementation plan no later than 2 years from the date of the finding if the deficiency has not been corrected.

Revised Regulatory Flexibility Analysis

1. Effects on Small Businesses and Local Governments. No local governments will be directly affected by the revisions to 6 NYCRR Part 205, Architectural Surface Coatings. Small businesses that manufacture affected architectural coatings must comply with the VOC content limits and labeling and reporting requirements of Part 205. Small businesses that sell architectural coatings must offer for sale only complying coatings made after January 1, 2005. The effects on small businesses have been minimized by allowing any coatings made prior to January 1, 2005 to be sold without restriction. Small businesses and local governments that purchase affected architectural coatings will be affected by the increased price of coatings resulting from the revisions to Part 205.

In New York State there are approximately 27 small AIM coatings manufacturers (produce less than 3,000,000 gallons per year) that may be impacted by the VOC content limits in Part 205. Part 205 will include a limited exemption (coating specific) for those small AIM coatings manufacturers who can demonstrate their inability to meet the VOC content limits based on economic and/or technical feasibility. The limited exemption, if granted, may remain in effect until December 31, 2007 with the opportunity for a one-time three year extension to the exemption, if needed. Small manufacturers do not possess large research and development staffs to reformulate or develop new compliant products, and therefore, could be put at a competitive disadvantage with large manufacturers. This limited exemption will provide small manufacturers with additional time to acquire the technology for producing compliant coatings without permanently sacrificing the potential emission reductions to be gained by the regulation.

2. Compliance Requirements. Local governments are not directly affected by the revisions to 6 NYCRR Part 205. Small businesses directly affected by 6 NYCRR Part 205 will need to comply with the provisions of the Program, as described below. Small businesses that manufacture architectural coatings generally only one or a small number of affected coatings. Many small businesses apply the coatings regulated by Part 205. These

businesses need to only purchase and apply complying coatings and apply them in accordance with the instructions on the label or container.

Small businesses that manufacture affected architectural coatings will need to comply the VOC content limits of Part 205. These limits regulate the VOC content for 52 coating categories of which 40 are more stringent than the current federal requirements and 31 categories are more stringent than the current State rule. Manufacturers, including small businesses, need to document that the coatings comply with the VOC content limits contained in Part 205. This is done through the equations and test methods referenced in Part 205.

Small businesses that manufacture coatings must comply with the labeling requirements of Part 205. This entails displaying the information on the coating container (or label): the date the coating was manufactured or the date code representing the date of manufacture; the manufacturer's recommendations for thinning of the coating; the maximum or actual VOC content of the coating; and certain specific instructions for industrial maintenance coatings, clear brushing lacquers, rust preventive coatings, quick dry enamels, non-flat high gloss coatings and specialty primers, sealers, and undercoaters.

Small businesses that manufacture coatings may have to comply with the reporting requirements of Part 205. For each coating that contains perchloroethylene or methylene chloride, the manufacturer shall submit a report to the Division of Air Resources by April 1st of each year, starting in 2006, that includes: the product brand name and a copy of the label with the usage instructions; the product category to which the coating belongs; the total sales in the State for the preceding calendar year; and, the volume percent, to the nearest 0.10 percent, of perchloroethylene and methylene chloride in the coating.

Manufacturers of recycled coatings must submit a letter to the Director, Division of Air Resources, Department of Environmental Conservation certifying their status as a Recycled Paint Manufacturer. The manufacturer shall, on or before April 1st of each calendar year beginning with the year 2006, submit an annual report to the Director, Division of Air Resources, Department of Environmental Conservation. The report shall include, for all recycled coatings, the total number of gallons distributed in the State during the preceding year, and shall describe the method used by the manufacturer to calculate State distribution.

In an effort to further minimize any mandatory reporting requirements but to retain the right to acquire any pertinent information needed for compliance and/or enforcement, the Department will require manufacturers to maintain records concerning the distribution and sales of their AIM coatings. The Department may then ask the manufacturer upon request, to supply the following, but not limited to, within 90 days: (1) the name and mailing address of the manufacturer; (2) the name, address and telephone number of a contact person; (3) the name of the product as it appears on the label and the coating category under which it is regulated; (4) whether the product is marketed for interior or exterior use or both; (5) the number of gallons sold in New York State in containers greater than one liter and less than one liter (If containers less than one liter have a different VOC content than containers greater than one liter, list these products separately); (6) the actual VOC content and VOC content limit in grams per liter; (7) if thinning is recommended, the actual VOC content and VOC content limit after recommended thinning; (8) the names and CAS number of the VOC constituents in the product; (9) the names and CAS number of any compounds in the products specifically exempted; and (10) other information (as deemed necessary). Part 205 reporting requirements will require manufacturers to maintain accurate records in the event that the Department may ask for any related information.

3. Professional Services. It is not anticipated that small businesses that manufacture architectural coatings will need to contract out for professional services to comply with this regulation.

4. Compliance Costs. Since Part 205 is very similar to the California Air Resource Board (CARB) Suggested Control Measure (SCM) for AIM Coatings in most respects, the Department utilized cost information that supported the CARB action. CARB evaluated and quantified the economic impact of the SCM on affected businesses and consumers. All the details of the cost information may be found in the "Staff Report for the Proposed Suggested Control Measure for Architectural Coatings" dated June 2000 that accompanied the CARB SCM Executive Order. CARB staff updated the cost analysis based on the OTC option to implement a 340 gram per liter VOC content limit for industrial maintenance coatings. Though the Department undertook no independent cost analysis, it reviewed the information used by CARB to support the SCM. The CARB cost information does reflect information supplied by manufacturers who market AIM coatings nationally and, therefore, its conclusions are valid in New York State. Furthermore, the OTC performed an AIM coatings market survey which demonstrates that compliant coatings exist in the northeast (OTR States) that are comparable to California. Information on the AIM survey may be found in the E.H. Pechan & Associates report "Control Measure Development Support Analysis of Ozone Transport Commission Model Rules" dated March 31, 2001.

CARB determined that most manufacturers or marketers of AIM coatings would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or marketers of the coatings. This determination is based on the finding that the estimated change in return on owner's equity (ROE) ranged from negligible to a decline in ROE of about 2 percent. Since a decrease of 10 percent in ROE indicates a potentially significant impact on profitability, and the maximum predicted ROE decline here is far below that, noticeable changes in employment; business creation, elimination or expansion; and business competitiveness are not expected.

CARB estimated the costs of pollution controls by providing a general picture of the economic impacts that typical businesses might encounter. It is recognized that individual companies might experience economic impacts different than those projected in the CARB analysis. CARB estimates that the overall cost-effectiveness of the proposed revisions to Part 205 range from $2.70 to $3.90 per pound of VOC reduced ($5,400 to $7,800/ton) with the average cost-effectiveness of $2.79 per pound ($5,580/ton) using 2000 dollars.

CARB determined that the maximum potential increase to consumers (all costs borne by the consumer) for reformulated coatings would range from 12 to 30 percent of the current retail price and that the majority of retail price increases, if any, would occur in the industrial maintenance and other commercial coatings areas. CARB estimated no increase in retail price for a typical reformulated flat paint ($17.00 per gallon) and a maximum potential increase of $3.70 (or 21 percent) for a typical reformulated nonflat paint ($17.80 per gallon). It should be noted that consumers that do not wish to purchase these reformulated coatings at the increased price would still be able to purchase currently available complying coatings at significantly lower prices. Competition from these existing complying coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers as assumed in this analysis. This is likely to make the actual retail price increases less than the above CARB projections.

Other than reformulation costs for manufacturers, there are no direct costs to small businesses and local governments associated with this proposed regulation. However, small businesses and local governments will need to pay the increased prices for AIM coatings resulting from compliance with the new, more restrictive VOC limits. These costs range from no change or a slight reduction in price to $6.02 per gallon. The average cost increase per gallon is $1.02.

In New York State there are approximately 27 small AIM coatings manufacturers that may be impacted by the VOC content limits in Part 205. Part 205 will include a limited exemption (coating specific) for those small AIM coatings manufacturers who can demonstrate their inability to meet the VOC content limits based on economic and/or technical feasibility. The limited exemption, if granted, may remain in effect until December 31, 2007 with the opportunity for a one-time three year extension to the exemption, if needed. Small manufacturers do not possess large research and development staffs to reformulate or develop new compliant products, and therefore, could be put at a competitive disadvantage with large manufacturers. This limited exemption will provide small manufacturers with additional time to acquire the technology for producing compliant coatings without permanently sacrificing the potential emission reductions to be gained by the regulation.

5. Minimizing Adverse Impact. The OTC implementation options were included in Part 205 to minimize the impact of this regulation on the regulated parties, including manufacturers that are small businesses. Specifically, the January 1, 2005 implementation date and the choice to eliminate the three year sell-through provisions were at least partly included to minimize adverse impact on small businesses.

The January 1, 2005 implementation date allows additional time (as compared to the CARB SCM implementation date of January 1, 2003) for manufacturers to reformulate products to comply with the new VOC content limits. This will be especially helpful to small manufacturers who have limited research and development budgets and also allow these manufacturers time to apply for variances from the regulations if extraordinary circumstances prevent compliance. The elimination of the three year sell-through provision prevents small manufacturers and small retailers from

having to remove coatings manufactured prior to January 1, 2005 from their shelves on January 1, 2008. While only small amounts of product are likely to remain after three years, maintaining the sell-through provision could have caused small businesses economic hardship. The use of the separate conversion varnish category and limit was done solely to meet the needs of small businesses. Only three manufacturers of conversion varnishes were identified, of which at least one is a small business, and these products are almost solely used by professional craftsman, of which many are small businesses, therefore, not adopting a separate conversion varnish category could cause economic hardship for these small businesses. The other categories being adopted to further minimize any adverse impacts are calcimine recoaters, concrete surface retarders, impacted immersion coatings, and nuclear coatings.

In New York State there are approximately 27 small AIM coatings manufacturers that may be impacted by the VOC content limits in Part 205. Part 205 will include a limited exemption (coating specific) for those small AIM coatings manufacturers who can demonstrate their inability to meet the VOC content limits based on economic and/or technical feasibility. The limited exemption, if granted, may remain in effect until December 31, 2007 with the opportunity for a one-time three year extension to the exemption, if needed. Small manufacturers do not possess large research and development staffs to reformulate or develop new compliant products, and therefore, could be put at a competitive disadvantage with large manufacturers. This limited exemption will provide small manufacturers with additional time to acquire the technology for producing compliant coatings without permanently sacrificing the potential emission reductions to be gained by the regulation.

6. Small Business and Local Government Participation. Since local governments are not directly affected by this regulation, no input was sought during the regulatory development process. Small businesses were not directly contacted in the OTC model rule development process, but there was considerable involvement with the major industry group, the National Paint and Coatings Association (NPCA). As a result of the involvement with NPCA and through the posting of the OTC model rule on the OTC website, we received extensive input from coatings manufacturers, including small businesses.

The Department, in addition to the OTC process, held an informal meeting with the New York Paint Council and the small AIM coatings manufacturers located throughout the State. For those small AIM coatings manufacturers that did not attend the meeting, the Department contacted them directly by phone to discuss the proposal. Through its own outreach and the OTC process, the Department received extensive input from small business on the Part 205 proposal prior to undertaking this rulemaking.

7. Economic and Technological Feasibility. As mentioned under "compliance costs," the Department utilized cost information that supported the CARB action. All the details of the cost information may be found in the "Staff Report for the Proposed Suggested Control Measure for Architectural Coatings" dated June 2000 and the update done to consider the impact of the 340 gram per liter VOC content limit for industrial maintenance coatings to assess economic and technical feasibility. Though the Department undertook no independent cost analysis, it reviewed the information used by CARB to support the SCM. The CARB cost information does reflect information supplied by manufacturers who market AIM coatings nationally and, therefore, its conclusions are valid in New York State. Furthermore, the OTC performed an AIM coatings market survey which demonstrates that compliant coatings exist in the northeast (OTR States) that are comparable to California. Information on the AIM survey may be found in the E.H. Pechan & Associates report "Control Measure Development Support Analysis of Ozone Transport Commission Model Rules" dated March 31, 2001.

As stated under "compliance costs," CARB determined that most manufacturers or marketers of AIM coatings would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. Also, CARB estimated that the overall cost-effectiveness of the proposed revisions to Part 205 range from $2.70 to $3.90 per pound of VOC reduced ($5,400 to $7,800/ton) with the average cost-effectiveness of $2.79 per pound ($5,580/ton) using 2000 dollars. Nevertheless, not all the potential costs can be captured in any economic analysis as economic analyses are inherently imprecise. The analysis performed by CARB could easily overstate costs, especially given the unpredictable behavior of companies in a highly competitive market. Also adding to the uncertainty is the potential for pollution control innovations that can occur over time It is impossible to estimate how much of an impact, if any, emerging technologies may have in lowering compliance costs. There also is the uncertainty regarding future costs that exists due to the flexibility that is allowed under the proposed regulation.

The revisions to Part 205 include the implementation options in the OTC AIM model rule. These options also reduce the impact the regulations have on costs to the manufacturers and ultimately the price to consumers, including contractors who are often small businesses. As discussed under "minimizing adverse impact," the January 1, 2005 implementation date, elimination of the 3 year sell-through provision in the CARB SCM, the 550 gram per liter VOC limit for thermoplastic rubber coatings and mastics, 725 gram per liter VOC limit for conversion varnishes, 475 gram per liter VOC limit for calcimine recoaters, 780 gram per liter VOC limit for concrete surface retarders, 780 gram per liter VOC limit for impacted immersion coatings, 450 gram per liter VOC limit for nuclear coatings, and a 340 gram per liter VOC limit for industrial maintenance coatings also lower costs to manufacturers and retailers.

CARB evaluated the technical feasibility for achieving the VOC standards for each of the coating categories that we are proposing to adopt limits which are more stringent than current State or federal requirements. CARB found that the VOC content limits in the SCM are viable and are not necessarily technology-forcing because manufacturers are currently achieving these limits. This is evidenced by the fact that a substantial number of coatings exist that comply with the VOC content limits for each product category. This was verified for products available in the northeastern Untied States by the OTC and detailed in the report "Control Measure Development Support Analysis of Ozone Transport Commission Model Rules," dated March 31, 2001. Both the CARB and OTC reports found a significant portion of the coatings sold already comply with the VOC content limits in the revisions to Part 205. Therefore, the Department determined that the manufacture of complying coatings was technologically feasible.

In New York State there are approximately 27 small AIM coatings manufacturers that may be impacted by the VOC content limits in Part 205. Part 205 will include a limited exemption (coating specific) for those small AIM coatings manufacturers who can demonstrate their inability to meet the VOC content limits based on economic and/or technical feasibility. The limited exemption, if granted, may remain in effect until December 31, 2007 with the opportunity for a one-time three year extension to the exemption, if needed. Small manufacturers do not possess large research and development staffs to reformulate or develop new compliant products, and therefore, could be put at a competitive disadvantage with large manufacturers. This limited exemption will provide small manufacturers with additional time to acquire the technology for producing compliant coatings without permanently sacrificing the potential emission reductions to be gained by the regulation.

Revised Rural Area Flexibility Analysis

The Department of Environmental Conservation (the Department) proposes to revise 6 NYCRR Part 205, Architectural Coatings. In its December 16, 1999 proposed approval and February 4, 2002 final approval of the November 1998 1-Hour Ozone Attainment Demonstration for the New York Metropolitan Area/Lower Orange County Metropolitan Area (NYMA/LOCMA), the U. S. Environmental Protection Agency (EPA) identified additional emission reductions necessary for the State to attain the one-hour ozone national ambient air quality standard (NAAQS). To meet this emission reduction shortfall, the Department is revising Part 205 as well as undertaking several other regulatory initiatives. On July 18, 1997 the EPA promulgated the 8-hour ozone NAAQS. This NAAQS was challenged and the federal courts remanded but did not vacate the standard. The EPA subsequently set a schedule for designating the attainment status of areas under the 8-hour ozone NAAQS. Although the schedule has been delayed by federal legislation and the Supreme Court vacated EPA's implementation guidance, air quality data shows violations of the 8-hour ozone NAAQS in the NYMA/LOCMA and in areas in Upstate New York (Niagara Frontier, Rochester metropolitan area, Chautauqua and Jefferson counties, and the Hudson River Valley). Promulgation of these revisions to Part 205 is intended to reduce volatile organic compounds (VOCs) emissions from architectural coatings to address the emission reduction shortfalls in the NYMA/LOCMA ozone attainment demonstration and make progress towards reducing 8-hour ozone levels Statewide.

1. Types and estimated number of rural areas: The criteria and procedures in revised Part 205 apply statewide. Rural areas are not particularly affected, but in the few cases where they are, Part 205 does provide some additional regulatory flexibility with the VOC content limits. In New York State there are approximately 27 small AIM coatings manufacturers (produce less than 3,000,000 gallons per year) that may be impacted by the VOC content limits in Part 205. Part 205 will include a limited exemption

(coating specific) for those small AIM coatings manufacturers who can demonstrate their inability to meet the VOC content limits based on economic and/or technical feasibility. The limited exemption, if granted, may remain in effect until December 31, 2007 with the opportunity for a one-time three year extension to the exemption, if needed. Small manufacturers do not possess large research and development staffs to reformulate or develop new compliant products, and therefore, could be put at a competitive disadvantage with large manufacturers. This limited exemption will provide small manufacturers with additional time to acquire the technology for producing compliant coatings without permanently sacrificing the potential emission reductions to be gained by the regulation.

2. Reporting, recordkeeping and other compliance requirements: The criteria and procedures in revised Part 205 apply statewide. Reporting, recordkeeping and other compliance requirements are applicable to manufacturers, wholesalers, retailers and professional applicators of architectural coatings. Manufacturers of architectural coatings need to comply with the VOC content limits, the labeling requirements and the reporting requirements of Part 205. Wholesalers and retailers of architectural coatings must sell complying coatings and professional applicators must use complying coatings. Some of these entities may be located in rural areas, however, rural areas are not particularly affected. Professional services are not anticipated to be necessary to comply with this rule.

3. Costs: Since Part 205 is very similar to the California Air Resources Board (CARB) Suggested Control Measure (SCM) for AIM coatings in most respects, the Department utilized cost information that supported the CARB action. CARB evaluated and quantified the economic impact of the SCM on affected businesses and consumers. All the details of the cost information may be found in the "Staff Report for the Proposed Suggested Control Measure for Architectural Coatings" dated June 2000 that accompanied the CARB SCM Executive Order. CARB staff updated the cost analysis based on the OTC option to implement a 340 gram per liter VOC content limit for industrial maintenance coatings. Though the Department undertook no independent cost analysis, it reviewed the information used by CARB to support the SCM. The CARB cost information does reflect information supplied by manufacturers who market AIM coatings nationally and, therefore, its conclusions are valid in New York State. Furthermore, the OTC performed an AIM coatings market survey which demonstrates that compliant coatings exist in the northeast (OTR States) that are comparable to California. Information on the AIM survey may be found in the E.H. Pechan & Associates report "Control Measure Development Support Analysis of Ozone Transport Commission Model Rules" dated March 31, 2001. No special analysis was performed for rural areas as the costs associated with Part 205 are not expected to vary for rural areas.

CARB determined that most manufacturers or marketers of AIM coatings would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or marketers of the coatings. This determination is based on the finding that the estimated change in return on owner's equity (ROE) ranged from negligible to a decline in ROE of about 2 percent. Since a decrease of 10 percent in ROE indicates a potentially significant impact on profitability, and the maximum predicted ROE decline here is far below that, noticeable changes in employment; business creation, elimination or expansion; and business competitiveness are not expected.

CARB estimated the costs of pollution controls by providing a general picture of the economic impacts that typical businesses might encounter. It is recognized that individual companies might experience economic impacts different than those projected in the CARB analysis. CARB estimates that the overall cost-effectiveness of the proposed revisions to Part 205 range from $2.70 to 3.90 per pound of VOCs reduced ($5,400 to $7,800/ton) with the average cost-effectiveness of $2.79 per pound ($5,580/ton) using 2000 dollars.

CARB determined that the maximum potential increase to consumers (all costs borne by the consumer) for reformulated coatings would range from 12 to 30% of the current retail price and that the majority of retail price increases, if any, would occur in the industrial maintenance and other commercial coatings areas. CARB estimated no increase in retail price for a typical reformulated flat paint ($17.00 per gallon) and a maximum potential increase of $3.70 (or 21 percent) for a typical reformulated nonflat paint ($17.80 per gallon). It should be noted that consumers that do not wish to purchase these reformulated coatings at the increased price would still be able to purchase currently available complying coatings at significantly lower prices. Competition from these existing complying coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers as assumed in this analysis. This is likely to make the actual retail price increases less than the above CARB projections.

Other than reformulation costs for manufacturers, there are no direct costs to small businesses and local governments associated with this proposed regulation. However, small businesses and local governments will need to pay the increased prices for AIM coatings resulting from compliance with the new, more restrictive VOC limits. These costs range from no change or a slight reduction in price to $6.02 per gallon. The average cost increase per gallon is $1.02.

In New York State there are approximately 27 small AIM coatings manufacturers that may be impacted by the VOC content limits in Part 205. Part 205 will include a limited exemption (coating specific) for those small AIM coatings manufacturers who can demonstrate their inability to meet the VOC content limits based on economic and/or technical feasibility. The limited exemption, if granted, may remain in effect until December 31, 2007 with the opportunity for a one-time three year extension to the exemption, if needed. Small manufacturers do not possess large research and development staffs to reformulate or develop new compliant products, and therefore, could be put at a competitive disadvantage with large manufacturers. This limited exemption will provide small manufacturers with additional time to acquire the technology for producing compliant coatings without permanently sacrificing the potential emission reductions to be gained by the regulation.

4. Minimizing adverse impact: The promulgation of Part 205 has statewide applicability and does not particularly affect rural areas, but in the few cases where it may, Part 205 provides some additional regulatory flexibility with the VOC content limits. In New York State there are approximately 27 small AIM coatings manufacturers that may be impacted by the VOC content limits in Part 205. Part 205 will include a limited exemption (coating specific) for those small AIM coatings manufacturers who can demonstrate their inability to meet the VOC content limits based on economic and/or technical feasibility. The limited exemption, if granted, may remain in effect until December 31, 2007 with the opportunity for a one-time three year extension to the exemption, if needed. Small manufacturers do not possess large research and development staffs to reformulate or develop new compliant products, and therefore, could be put at a competitive disadvantage with large manufacturers. This limited exemption will provide small manufacturers with additional time to acquire the technology for producing compliant coatings without permanently sacrificing the potential emission reductions to be gained by the regulation.

5. Rural area participation: The Ozone Transport Commission (OTC) workgroup that developed the OTC model rule on which revised Part 205 is based held several informal regulatory development meetings with stakeholders and other interested parties, especially the National Paint and Coatings Association (NPCA). The NPCA represents architectural coatings manufacturers from around the country. The NPCA and its member companies provided the OTC workgroup comments during the development of the OTC model rules. The OTC Stationary/Area Source Committee established a public comment period and held a public stakeholder meeting to take comment on the draft model rules. Additionally, the OTC held a Special Meeting on Control Measure Development to review progress on model rule development and receive additional stakeholder comment. The workgroup continued to interact with stakeholders and receive comments and the OTC established another public comment period. Since the finalization of the OTC model rules, the OTC workgroup has continued to accept comment on the model rules to assist the States in the development of their individual regulations.

The Department held an informal meeting with the New York Paint Council and the small AIM coatings manufacturers from throughout the State to discuss and take comment on the draft revisions to Part 205. For those small AIM coatings manufacturers that did not attend the meeting, the Department was able to contact them by phone. This effort along with the OTC efforts provided the mechanism to reach out to the rural area community successfully in regards to the draft revisions to Part 205.

Revised Job Impact Statement

1. Nature of impact: The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 205, Architectural Surface Coatings, which will not have an adverse impact on job and employment opportunities in the State. The Department expects there to be slightly higher costs associated with the manufacture and/or marketing and the purchase of architectural and industrial maintenance coatings. Since the revisions to Part 205 are very similar to the California Air Resources Board (CARB) Suggested Control Measure (SCM) in most respects, the Department utilized cost information that supported the

CARB action. The CARB cost information does reflect information supplied by manufacturers who market AIM coatings nationally and, therefore, its conclusions are valid in New York State. CARB evaluated and quantified the economic impact of the SCM on affected businesses and consumers.

CARB determined that most manufacturers or marketers of AIM coatings would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or marketers of the coatings. This determination is based on the finding that the estimated change in return on owner's equity (ROE) ranged from negligible to a decline in ROE of about 2 percent. Since a decrease of 10 percent in ROE indicates a potentially significant impact on profitability, and the maximum predicted ROE decline here is far below that, noticeable changes in employment, business creation, elimination or expansion, and business competitiveness are not expected from this rule.

CARB estimated that the maximum potential increase in the retail price of architectural coatings (all costs borne by the consumer) for reformulated coatings would range from 12 to 30 percent of the current retail price and that the majority of retail price increases, if any, would occur in the industrial maintenance and other commercial coatings areas. CARB estimated no increase in retail price for a typical reformulated flat paint and a maximum potential increase of $3.70 per gallon (or 21 percent) for a typical reformulated nonflat paint. It should be noted that consumers not wanting to purchase these coatings at increased costs could buy currently available complying coatings. It also should be noted that existing complying coatings will likely constrain any price increases for reformulated coatings. Any cost increase for coatings used by professional applicators will be minor and those costs are likely to be passed on to the consumer.

2. Categories and numbers affected: Because of the lack of significant impact on ROE and the small increase in the price of coatings used by professional applicators which will likely be passed on to the consumer, the Department expects this regulation not to have any effect on employment.

3. Regions of adverse impact: Because of the lack of significant impact on ROE and the small increase in the price of coatings used by professional applicators which will likely be passed on to the consumer, the Department expects this regulation not to have any effect on employment.

4. Minimizing adverse impact: In New York State there are approximately 27 small AIM coatings manufacturers (produce less than 3,000,000 gallons per year) that may be impacted by the VOC content limits in Part 205. Part 205 will include a limited exemption (coating specific) for those small AIM coatings manufacturers who can demonstrate their inability to meet the VOC content limits based on economic and/or technical feasibility. The limited exemption, if granted, may remain in effect until December 31, 2007 with the opportunity for a one-time three year extension to the exemption, if necessary, upon a satisfactory showing of continued need. Small manufacturers do not possess large research and development staffs to reformulate or develop new compliant products, and therefore, could be put at a competitive disadvantage with large manufacturers. Because this limited exemption will provide small manufacturers with additional time to acquire the technology for producing compliant coatings without permanently sacrificing the potential emission reductions to be gained by the regulation, the Department expects this regulation not to have any effect on employment in the State.

5. Self-employment opportunities: Not applicable.

Assessment of Public Comment

The Department of Environmental Conservation (Department or DEC) published a notice of the proposed rulemaking for 6 NYCRR Part 205, the AIM Coatings regulation in the *State Register* and the *Environmental Notice Bulletin*on March 19, 2003. The Department held public hearings on the proposed revisions to 6 NYCRR Part 205, on April 28, 30 and May 2, 2003 in New York City, Buffalo, and Albany respectively to receive oral and written comments and accepted written comments until close of business May 12, 2003. The following is a brief summary of the comments received and the Department's response to those comments.

Several commenters stated that the weather conditions in the Northeast (lower temperatures) are different from California, and this will adversely affect the performance of the AIM coatings applied in New York under the proposed VOC content limits, which are modeled after the California Air Resources Board (CARB) Suggested Control Measure (SCM). The Department reviewed information by others and determined that the range of weather patterns and climate conditions depicted in California are similar to the Northeast and to the rest of the nation. As a result, the compliant products currently marketed in California (demonstrating technical feasibility) will exhibit the desirable performance characteristics throughout the nation and New York as well. The Department's analysis also reveals that compliant coatings are currently available and meeting consumer acceptance in the Northeast.

Several commenters stated that the proposed reporting requirements in Part 205 are unreasonable and go beyond what is necessary to ensure compliance with Part 205. They believe that these requirements do not serve the environment or the public and will place an additional cost burden on manufacturers. The Department undertook specific measures to streamline the reporting requirements to minimize the additional administrative burden to both the industry and to the Department. These recordkeeping requirements are consistent with other Department regulations and the Ozone Transport Commission (OTC) model AIM coatings rule, which a number of States are in the process of adopting or plan to propose soon.

Several commenters recommended having an "averaging provision" in revised Part 205 as an added flexibility measure for compliance. The Department in working with other States and organizations (the OTC AIM Workgroup led by New York) ultimately decided that averaging provisions are not necessary due to the current technical feasibility of AIM coatings with the proposed VOC content limits.

Commenters wanted to alter the proposed AIM coating category definitions, add new AIM coating categories, modify specific AIM coating category VOC content limits, maintain the federal standards, adopt the National Paint and Coatings Association (NPCA) table of standards presented to the Department, and include a variance/petition provision. The Department believes that the suggested changes could jeopardize the VOC emission reductions that this regulatory initiative is trying to achieve, and determined that the requested changes are not warranted.

One commenter expressed support for the Department's inclusion of the limited exemption for small AIM coatings manufacturers, but was concerned about the business sensitive information that they would be submitting which may be readily available to the regulated community. Another commenter wanted to see the limited exemption for small AIM coatings manufacturers be applied to all manufacturers regardless of size, allowing any manufacturer to seek an exemption based on economic or technical infeasibility for as long as the rule is in effect. The Department responded that pursuant to 6 NYCRR Part 616, a manufacturer can request that proprietary business information remain confidential as part of its exemption request. The Department disagrees that allowing any manufacturer to apply for the exemption for as long as the rule remains in effect constitutes a viable alternative which must be further considered. The Department could not rely on VOC reductions from the adoption of the proposed rule if every manufacturer could apply for an exemption that would never expire.

Several commenters expressed their views on the Department's use of the cost information that supported the CARB model rule making. Most notably, they feel that the rule is based on low product development cost estimations and that the analysis done by California and the OTC did not evaluate either the availability of, or the costs of implementing the limits proposed for all of the categories to which Part 205 would apply. CARB only looked at 11 AIM coating categories but New York is proposing to regulate 52 categories. The Department disagrees that the proposed revisions to Part 205 are based on low product development cost estimations and notes that the commenter did not provide adequate substantive cost data to counter the Department's conclusions. Since Part 205 is similar to the CARB SCM for AIM Coatings, the Department evaluated cost information that supported the CARB model rule making. While CARB's analysis focused on 11 AIM coating categories, the Department does not see substantial costs associated with adopting the VOC content limits for the remaining 36 AIM coating categories which have been in effect in California for fourteen years. The other categories are identical to the federal limits. The CARB analysis does reflect cost information supplied by manufacturers who market AIM coatings nationally and is therefore relevant to New York. It was further determined that consumers who do not wish to purchase these reformulated coatings at the increased price will still be able to purchase currently available complying coatings (from other coating categories) at significantly lower prices. Competition from existing complying coatings will likely constrain any price increases as manufacturers will not be able to pass on all of their costs to the consumers as assumed in this analysis. This is likely to make the actual retail price increase less than the CARB projections.

One commenter made several comments regarding the VOC emission reductions the Department expects to obtain from adopting the revisions to Part 205. After further review of this matter, the Department maintains that

the proposed revisions to Part 205 can only obtain 14 tons per ozone season day of VOC emission reductions. As stated accurately in the Pechan Report the total New York, New Jersey, Connecticut nonattainment area will realize approximately 42 tons per ozone season day of VOC emission reductions from implementing the OTC model AIM coatings rule.

Many commenters question the technical merits of the VOC content limits and question the performance test used by CARB in developing the SCM. The Department believes that quality AIM coatings are available in all of the proposed coating categories that meet or exceed the performance capabilities expected and that the promulgation of this rule will not result in diminished performance of AIM coatings. This belief is based on two CARB AIM coating surveys, four performance studies, a marketing survey performed by Pechan, and research done by the State of Delaware.

Several commenters claim that available alternatives were either not reviewed or reviewed in a superficial manner and that the rulemaking does not provide a rationale for going beyond the federal standards. The Department does not have to consider every conceivable alternative to the rulemaking proposal (McKinney's ECL § 8-0109, subds. 2(d), 4; 6 NYCRR § 617.14(f)(5)), but can focus on those alternatives which are consistent with the objectives of the rulemaking and can be implemented. Here, reasonable available alternatives include those alternative regulatory options which if implemented would still achieve the objectives of reducing VOC emissions by the required 14 tons per day. The Department included all reasonable alternatives it identified in the proposed rule.

One commenter wanted to know why the Department utilizes "mass-based" control strategies versus "reactivity-based" ones for regulating VOCs in AIM coatings. EPA has taken the position that the Clean Air Act does not require a reactivity-based approach for VOC regulation. The mass-based approach has been the acceptable method used by all States in submitting State Implementation Plans (SIPs) to EPA.

One commenter believes the USA needs to adopt the same method which was recently ratified by the European Union (EU). The EU looks at whatever is in a one-liter can and determines the grams of volatile organics in that can. The EU does not look at water or exempt solvents. Nothing is exempt and everything counts. The commenter would like to see a test method used that calculates the "actual" VOC content of coatings as opposed to the EPA approved test method "Method 24," which is also the method utilized pursuant to Part 205 to calculate the "regulatory" VOC content of AIM coatings. Method 24 is the test method established and required by EPA to calculate the VOC content of AIM coatings and has been used extensively in the SIP planning process since the 1970's. Part 205 will continue to use Method 24 as the main test method for compliance with the VOC content limits, but will allow for alternative test methods to be used upon review and approval by both the Department and EPA.

The States of New Jersey, Massachusetts, and Connecticut border downstate New York. One commenter wanted to know if there is going to be some kind of policing to ensure that competitors don't go cross State lines to buy materials that essentially would be illegal in New York. The intent of the OTC model AIM coatings rule was to provide the cost-effective VOC emission reductions needed for attainment while providing regional consistency to manufactures across the Northeast. New York, New Jersey, Massachusetts, Connecticut, and Pennsylvania have all entered into a Memorandum Of Understanding (MOU) indicating that they intend to adopt the OTC model AIM coatings rule. Manufacturers will then have to comply with only one set of standards which will make it easier for them to market and sell their AIM coatings. Likewise, this will aid the downstate region by diminishing most, if not all, noncompliant AIM coatings crossing State lines as only one standard should exist in New York, New Jersey, Massachusetts, and Connecticut .

One commenter claimed that the proposed rule would have the effect of creating a new type of paint that is much thicker than paints of today. The reformulated coating will not flow, level, or be easily applied. To make the paint flow, level, and work better, painters will begin to add solvents to the coatings in the field. The Department disagrees with the commenter's conclusions regarding field modification (solvent addition) to AIM coatings. As illustrated in our responses to comments there are currently compliant coatings available that meet the expected performance needs. This will diminish the need to thin coatings in the field. When thinning is required (usually in spray applications), painters refer to product data sheets, can labels and even the manufacturers themselves for the manufacturer's recommended levels.

NOTICE OF ADOPTION

Mechanically Propelled Vessels and Aircraft in the Forest Preserve

I.D. No. ENV-31-03-00005-A
Filing No. 1172
Filing date: Oct. 28, 2003
Effective date: Nov. 13, 2003

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

Action taken: Amendment of section 196.4 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101(3)(b), (d), 3-0301(1)(d), (i), (2)(m), 9-0105(1) and 11-0303

Subject: Operation of mechanically propelled vessels and aircraft in the Forest Preserve.

Purpose: To establish language consistent with the Adirondack Park State Land and Master Plan.

Text of final rule: Operation of mechanically propelled vessels and aircraft in the forest preserve

1. The introductory paragraph to subdivision (a) of 6 NYCRR Section 196.4 is amended to read as follows:

(a) Except as provided in subdivision (b) of this section, the [The] operation of mechanically propelled vessels and aircraft is prohibited on all the following bodies of water in the forest preserve:

2. A new subdivision (b) of 6 NYCRR Section 196.4 is added to read as follows:

(b) Notwithstanding the prohibitions set forth in subdivision (a) of this section:

(1) the use of mechanically propelled vessels and aircraft is permitted on water bodies specified in subdivision (a) of this section by or under the supervision of appropriate officials, in cases of sudden, actual and ongoing emergencies involving the protection or preservation of human life or intrinsic resource values, such as search and rescue operations, forest fires, or oil spills or similar, large-scale contamination of water bodies;

(2) the use of aircraft by administrative personnel on the water bodies specified in subdivision (a) of this section is permitted upon the written approval of the Commissioner for a specific major administrative, maintenance, rehabilitation, or construction project if that project involves conforming structures or improvements, or the removal of non-conforming structures or improvements, provided that such use of aircraft will be confined to off-peak seasons for the area in question and normally will be undertaken at periodic intervals of three to five years, unless extraordinary conditions, such as fire, major blow-down or flood, mandate more frequent work or work during peak periods;

(3) the use of aircraft on the water bodies specified in subdivision (a) of this section is permitted for a specific major research project conducted by or under the supervision of a state agency if such project is for purposes essential to the preservation of wilderness values and resources, no feasible alternative exists for conducting such research on other state or private lands, such use is minimized, and the project has been specifically approved in writing by the Commissioner after consultation with the Adirondack Park Agency;

(4) in the St. Regis Canoe Area mechanically propelled vessels and aircraft may be used by administrative personnel, in accordance with paragraphs 1, 2, and 3 of this subdivision, and for additional purposes designed to preserve or enhance the water or fishery resources of the area as specified in duly adopted unit management plans;

(5) on Little Green Pond and Little Clear Pond mechanically propelled vessels may be used by administrative personnel, in accordance with paragraphs 1, 2, and 3 of this subdivision, and for additional purposes designed to preserve, enhance, or otherwise manage the water or fishery resources of these areas associated with the Adirondack Hatchery;

(6) written logs will be kept by the Department recording the use of mechanically propelled vessels and aircraft as authorized by this subdivision and shall be filed with the Adirondack Park Agency as part of an annual report detailing motorized uses in wilderness areas and the reasons therefor.

3. A new subdivision (c) of 6 NYCRR Section 196.4 is added to read as follows:

(c) For restrictions with respect to the water bodies in the William C. Whitney Area see 6 NYCRR Section 190.33.

Final rule as compared with last published rule: Non substantive changes were made in section 196.4(b)(2).

Text of rule and any required statements and analyses may be obtained from: Robert Messenger, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4254, (518) 473-9518

Additional matter required by statute: A negative declaration has been prepared in compliance with art. 8 of the Environmental Conservation Law.

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

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement because the change to proposed Section 196.4(b)(2) was not substantive. This is because the interpretation of the proposed language is the same as the amended language which restates the APSLMP guideline more exactly. Therefore no change is required to the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Assessment of Public Comment

The Department of Environmental Conservation (DEC or "the Department") received one letter commenting on the proposed regulations regarding the operation of mechanically propelled vessels and aircraft in the forest preserve found at 6 NYCRR 196.4. This assessment groups the comments and responses to those comments according to specific sections of the proposed regulation and the proposed regulation in general.

SPECIFIC COMMENTS

Section 196.4(a)

Comment:

The list of water bodies presented in Section 196.4 does not provide sufficient precision to allow geographic location, making it impossible to accurately identify water bodies on which aircraft and mechanically propelled vessels are prohibited. Identification of waters should be made by referencing the Adirondack Park State Land Master Plan (APSLMP) to include both land and water bodies. Failure to address land area is a major discrepancy from the uses outlined in the APSLMP.

Response:

Incorporating the APSLMP and the associated Adirondack Park Land Use and Development Plan Map and State Land Map into the regulation by reference would be beyond the scope of the proposed rulemaking and would require the inclusion of the publication date of the map. Because the map is revised once every one to two years, the regulations would need to be amended at the same frequency, in order that the most recent and accurate map available were used for reference and identification of water bodies. Perpetuating the existing format eliminates the need to re-amend 196.4 every two years. The Department is working to improve the precision of the locational data of the water bodies on the list. The list will be updated in a future rulemaking to include the more precise data to improve the ability to identify locations. While the pond-by-pond list may be incomplete, it includes all of the larger water bodies where aircraft use is likely, i.e., waters that are also likely to be identified on maps used in aircraft. In contrast, land units and their boundaries are not readily identifiable from the air. Furthermore, the subject of the present and proposed rulemaking is the operation of mechanically propelled vessels and aircraft on specified water bodies in the forest preserve. To include both land and water bodies in this rulemaking would exceed the scope of 196.4.

Revision in response to comment: None

Comment:

Names of water bodies identified in the regulation do not always correspond to names used by the Division of Water.

Response: Names of larger water bodies where aircraft use is likely to occur are consistent with USGS maps, Division of Waters maps and the Bureau of Fisheries Database. The Department is working to improve the precision of the locational data of the water bodies on the list. The list will be updated in a future rulemaking to include the more precise data to improve the ability to identify locations.

Revision in response to comment: None

Section 196.4(b)(1)

Comment:

The use of aircraft to support fisheries surveys, removal of exotic and non-native fish species and restoration of native fish populations is essential and should be explicitly authorized in the regulations, since these activities protect intrinsic resource values.

Response:

The activities listed by commentor do not appear to constitute "sudden, actual and ongoing emergencies" and therefore do not appear to qualify under proposed 6 NYCRR Section 196.4(b)(1). However, the activities listed by commentor may qualify under proposed 6 NYCRR 196.4(b)(2) and (3).

Revision in response to comment: None

Section 196.4(b)(2)

Comment:

The regulation should recognize the need for fisheries work in support of unit management planning to take place during peak season, and should allow such work to be conducted at any time.

Response: The proposed language conforms to the provisions of the APSLMP. The regulation as written does allow sufficient flexibility to allow fisheries work to be conducted during peak season when extraordinary conditions exist, and such work is absolutely necessary and APSLMP compliant.

Revision in response to comment: None

Comment:

Proposed 6 NYCRR § 196.4(b)(2) does not accurately restate the language set forth in the APSLMP with respect to the use of aircraft by administrative personnel for specific major administrative, maintenance, rehabilitation, or construction projects where the project involves conforming structures or improvements, or the removal of non-conforming structures or improvements. The APSLMP language should be repeated verbatim in the regulation to ensure that the regulation does not alter what is allowed under the APSLMP.

Response:

Agreed. The Department will restate the APSLMP language relating to aircraft in the rule.

The proposed regulatory language was an attempt to more clearly state the intent of the relevant APSLMP guideline (APSLMP guideline 4 for Wilderness Areas) without changing its substantive requirements. Unfortunately, some who commented believed that the intent of the draft language was to make a substantive change to that guideline.

This change is not a substantive change from the draft which went out for public review, and should not be interpreted as such. The language proposed in the draft regulations was intended to have the same substantive requirements as those set forth in the APSLMP guideline. Under the APSLMP guideline, the administrative use of aircraft in areas classified as Wilderness is allowed for specific major administrative, maintenance, rehabilitation, or construction projects provided the project involves conforming structures or improvements and the use occurs at three to five year intervals. Further, an extraordinary condition, such as fire, major blowdown, or flood, is necessary for such use to occur at annual or biannual intervals (i.e., at an interval that is more frequent than the three to five year interval allowed by the APSLMP).

Revision in response to comment: The Department will restate the APSLMP language relating to aircraft in the rule to the following wording: "... such use of aircraft will be confined to off-peak seasons for the area in question and normally will be undertaken at periodic intervals of three to five years..."

Section 196.4(b)(3)

Comment:

The phrase "including unit management fisheries inventories and restorations" should be included in this sub-section, indicating that these activities are considered research which is essential to the preservation of wilderness values and resources. The regulation should also clarify that fish & wildlife management authority rests with the Department.

Response:

The language as proposed accurately conforms to the language of the APSLMP. It would be impossible for the Department to administer the regulations if the regulation includes language which is not consistent with the APSLMP. The Department maintains that the language in the proposed rulemaking provides sufficient clarity for DEC and Adirondack Park Agency (APA) staff to collaboratively decide which activities are permitted pursuant to this provision of the regulation. This collaborative decision making process was contemplated by the APSLMP language which is the basis for the regulation. The proposed regulation does provide that the use of aircraft requires written approval of the Commissioner, thereby clearly articulating that the authority to approve such use rests with the DEC.

Revision in response to comment: None

Section 196.4(b)(4)

Comment:

Commentor supports this sub-section of the rulemaking as written, except that the phrase: "St. Regis Canoe Area" should be stricken and replaced with: "in officially designated Canoe Areas."

Response:

The proposed alteration would require an incorporation of the APSLMP by reference. As explained in the response to the comment regarding section 194.6(a), this would require re-amending the regulation whenever the APSLMP were revised. Since designation of a new Canoe Area would require amendment of the APSLMP, the regulation would still need to be amended even if the proposed alteration were used. Therefore nothing is gained by making the proposed alteration. Furthermore, it is not appropriate to recognize or regulate canoe areas that do not currently exist, because regulations can only incorporate provisions of documents that have been published at the time of the adoption of the regulation. Therefore, referring to Canoe Areas that have not yet been designated is not appropriate.

Revision in response to comment: None

Section 196.4(b)(5)

Comment:

Commentor supports the intent of this sub-section of the rulemaking, but believes it may be superfluous given the authority granted in APSLMP.

Response:

Eventually the revised list of ponds will not include Little Clear and Little Green Ponds. However, the regulation must remain for the interim, to allow administrative work prior to the new list being developed.

Revision in response to comment: None

Sections 196.4(b)(1), 196.4(b)(4), 196.4(b)(5), 196.4(b)(6)

Comment:

Commentor supports the intent of this sub-section of the rulemaking, but believes the phrase "mechanically propelled vessels" should be replaced by "motorized vehicles, motorized equipment" because the term "mechanically propelled vessel" is not defined and because such change would maintain consistency with the APSLMP.

Response:

The term "mechanically propelled vessel" is defined in 6 NYCRR Section 190.0(b)(7), and applies to all sections of 6 NYCRR Chapter II. For organizational purposes, Part 196 was separated into Sections 196.1, 196.2 and 196.3, which pertain to the lands and frozen water bodies of the forest preserve, and Sections 196.4, 196.5 and 196.6, which pertain to the unfrozen water bodies of the forest preserve. It is therefore more appropriate to use the phrase "mechanically propelled vessels" in the entirety of Section 196.4 than the phrase "motorized vehicles and motorized equipment."

Revision in response to comment: None

GENERAL COMMENTS

Comment:

Commentor raises concerns that the proposed restrictions on aircraft and mechanically propelled vessels would result in a segmented environmental review. The commentor asserts that unit management plans (UMPs) that do not address the need for staff to gain access to interior lands could not possibly safeguard environmental concerns as required by the State Environmental Quality Review Act (SEQRA).

Response:

The commentor's concerns regarding SEQRA are misplaced. First, the existing regulatory language prohibits the operation of aircraft and mechanically propelled vessels on specified water bodies in the forest preserve. Therefore, the proposed language to make conforming changes consistent to the APSLMP to allow for the use of aircraft and mechanically propelled vessels on specified water bodies under limited circumstances and conditions provides for increased access, not less, by Department staff for fisheries activities than currently exists. Second, the proposed regulatory changes does not limit or otherwise impact the Department's ability to comply with SEQRA. The Department could only propose fisheries activities through the UMP process that are compliant with the APSLMP and Department regulations. Once the Department has developed such regulatory compliant fisheries activities, the subsequent environmental review is conducted on the UMP. The proposed regulatory language would define the scope of permitted fisheries activities as is currently the case with respect to the APSLMP and existing regulatory language; however, the proposed regulatory amendment does not limit or impact the Department's ability to fully comply with SEQRA.

Revision in response to comment: None

Comment:

Commenter asserts that the issues raised in the above comments are substantive and significant, and a public hearing should be convened to address them.

Response:

The State Administrative Procedure Act (SAPA) does not require a public hearing on Department rulemakings unless otherwise required by law. There is no legal requirement for a public hearing on Lands and Forest regulations that do not go before the Environmental Board. This proposal was not required to go before the Board; therefore, the decision to hold a public hearing on this rulemaking was at the discretion of the Department. The Department based its decision not to hold a public hearing on the rulemaking on the lack of public controversy later evidenced by the small number of comments received during the public comment period, which began on August 7, 2003 and ended on September 20, 2003.

Department of Health

EMERGENCY RULE MAKING

Smallpox Vaccine

I.D. No. HLT-34-03-00005-E
Filing No. 1167
Filing date: Oct. 23, 2003
Effective date: Oct. 23, 2003

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

Action taken: Amendment of section 2.1 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 225(4), (5)(a), (g), (h), 206(1)(d) and (e)

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

Specific reasons underlying the finding of necessity: Immediate adoption of this rule is necessary to accurately monitor the magnitude of adverse events among persons receiving smallpox vaccination, as well as the magnitude and scope of illness among their contacts. Smallpox vaccination of core hospital medical care teams and public health response teams began in February 2003. Expansion of this program to include voluntary vaccination of health care and public safety workers is under review. Monitoring vaccination complications is critical to evaluate appropriately a plan for continuation.

Complete and timely reporting by physicians to the city, county or district health officer of all cases of vaccinia complications will assist the Department of Health to achieve the earliest possible recognition of a problem, defining the incidence and clinical spectrum of illness, preparing an appropriate response to complications and obtaining necessary vaccinia immune globulin on a timely basis. Accurate reporting of complications of smallpox vaccinations will also assist in planning for future larger-scale programs. Planning for such programs needs to be based on epidemiologic and clinical information that can best be developed through the reportable disease system.

Subject: Communicable disease-smallpox vaccine-adverse events.

Purpose: To monitor for complications, and enable us to request on a timely basis vaccinia immune globulin, used to treat some adverse reactions, from the CDC.

Text of emergency rule: Subdivision (a) of Section 2.1 is amended to read as follows:

2.1 Communicable diseases designated: cases, suspected cases and certain carriers to be reported to the State Department of Health.

(a) When used in the Public Health Law and in this Chapter, the term infectious, contagious or communicable disease, shall be held to include the following diseases and any other disease which the commissioner, in the reasonable exercise of his or her medical judgment, determines to be communicable, rapidly emergent or a significant threat to public health, provided that the disease which is added to this list solely by the commissioner's authority shall remain on the list only if confirmed by the Public Health Council at its next scheduled meeting:

Amebiasis
Anthrax
Babesiosis
Botulism
Brucellosis
Campylobacteriosis
Chancroid
Chlamydia trachomatis infection

Cholera
Cryptosporidiosis
Cyclosporiasis
Diphtheria
E. coli 0157:H7 infections
Ehrlichiosis
Encephalitis
Giardiasis
Glanders
Gonococcal infection
Group A Streptococcal invasive disease
Group B Streptococcal invasive disease
Hantavirus disease
Hemolytic uremic syndrome
Hemophilus influenzae (invasive disease)
Hepatitis (A; B; C)
Hospital-associated infections (as defined in section 2.2 of this Part)
Legionellosis
Listeriosis
Lyme disease
Lymphogranuloma venereum
Malaria
Measles
Melioidosis
Meningitis
Aseptic
Hemophilus
Meningococcal
Other (specify type)
Meningococcemia
Mumps
Pertussis (whooping cough)
Plague
Poliomyelitis
Psittacosis
Q Fever
Rabies
Rocky Mountain spotted fever
Rubella
Congenital rubella syndrome
Salmonellosis
Shigellosis
Smallpox
Staphylococcal enterotoxin B poisoning
Streptococcus pneumoniae invasive disease
Syphilis, specify stage
Tetanus
Toxic Shock Syndrome
Trichinosis
Tuberculosis, current disease (specify site)
Tularemia
Typhoid
Vaccinia disease (as defined in section 2.2 of this Part)
Viral hemorrhagic fever
Yellow Fever
Yersiniosis

* * *

A new subdivision (g) is hereby added to Section 2.2 to read as follows:
2.2 Definitions.

* * *

(g) As used in this part, the term vaccinia disease shall mean:

(1) persons with vaccinia infection due to contact transmission; and

(2) persons with the following complications from vaccination: eczema vaccinatum, erythema multiforme major or Stevens-Johnson syndrome, fetal vaccinia, generalized vaccinia, inadvertent inoculation, ocular vaccinia, post-vaccinial encephalitis or encephalomyelitis, progressive vaccinia, pyogenic infection of the vaccination site, and any other serious adverse events (i.e. those resulting in hospitalization, permanent disability, life-threatening illness or death).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-34-03-00005-P, Issue of August 27, 2003. The emergency rule will expire December 21, 2003.

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

Regulatory Impact Statement

Statutory Authority:

Sections 225(4) and 225(5)(a) and (h) of the Public Health Law ("PHL") authorize the Public Health Council to establish and amend State Sanitary Code provisions relating to designation of communicable diseases dangerous to public health. PHL Section 206(1)(d) authorizes the commissioner to "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health." PHL Section 206(1)(e) permits the commissioner to "obtain, collect and preserve such information relating to marriage, birth, mortality disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state."

Legislative Objectives:

This regulation meets the legislative objective of protecting the public health by adding potential complications of vaccinia as part of the reportable disease requirements.

Needs and Benefits:

Vaccinia virus is the immunizing agent used to vaccinate against smallpox. It has the potential for contact spread of vaccinia to nonimmune contacts. Vaccination is contraindicated in persons with deficient immune systems, eczema or certain other dermatitis. Vaccinia immune globulin is given to individuals developing certain adverse reactions; like the vaccine, vaccinia immune globulin can only be obtained from the CDC.

Adding vaccinia disease to the reportable disease list will permit the Department of Health to monitor for complications of smallpox vaccination efforts to both the person vaccinated as well as to the contacts of the person vaccinated. By enabling enhanced disease monitoring, there will be systemic active monitoring for complications, the complications will be known to both state and federal officials, and any requests to CDC for vaccinia immune globulin, needed to treat some of the vaccine's adverse reactions, can be made on a timely basis.

Smallpox vaccination of core hospital medical care teams and public health response teams began in February 2003. Expansion of this program to include voluntary vaccination of health care and public safety workers is under review. Monitoring of vaccination complications is critical to appropriately evaluate and plan for continuation and future vaccination programs. Improved estimates of the number of potential complications and analysis of effective intervention strategies will assist in appropriately responding to such complications. Timely disease reporting will allow vaccinia immune globulin, used to treat some of the vaccine's adverse reactions, to be obtained from CDC.

COSTS:

Costs to Regulated Parties:

Smallpox vaccination of core hospital medical care teams and public health response teams began in February 2003. As of June 5, 2003, 704 individuals have been vaccinated. On two occasions, suspect generalized vaccinia has been investigated and clinical specimens were obtained for laboratory diagnosis. Generalized vaccinia was confirmed in one case. As previously mentioned, the expansion of the program is under review.

The costs of reporting this disease is expected to be modest as reporting processes already exist. Hospitals, practitioners and clinical laboratories are accustomed to reporting disease. The estimated cost of disease reporting by small hospitals is $150.00 annually. The cost for physicians is expected to be less.

Costs to Local and State Governments:

The additional cost of reporting vaccinia disease is expected to be minimal because the staff who will be involved in reporting the additional diseases at the local and state health departments are the same as those currently involved with reporting of other communicable diseases listed in 10 NYCRR Section 2.1. The additional cost to local or state governments associated with investigating vaccinia disease will largely depend on the extent of vaccinia in contacts of persons vaccinated. The number of cases of contact vaccinia is expected to be few. (See Costs to Regulated Parties).

Potential savings include reducing costs associated with morbidity, treatment and premature death.

Costs to the Department of Health:

The New York State Department of Health already collects communicable disease reports from local health departments, checks the reports for accuracy and transmits them to the Centers for Disease Control and Pre-

vention. The addition of vaccinia disease should not lead to additional costs for data entry, particularly as the Department adopts systems for electronic submission of case reports. The Department will assist counties in the investigation of vaccinia disease, as it does in the investigation of other communicable diseases.

Paperwork:

The existing general communicable disease reporting form (DOH-389) will be revised. This form is familiar to regulated parties.

Local Government Mandates:

Under Part 2 of the State Sanitary Code (10 NYCRR Part 2), the city, county or district health officer receiving reports from physicians in attendance on persons with or suspected of being affected with vaccinia disease, will be mandated to immediately forward such reports to the State Health Commissioner and to investigate the cases reported.

Duplication:

There is no duplication of this initiative in existing State or federal law.

Alternatives:

No other alternatives are available.

Reporting of diseases associated with vaccinia is of critical import to public health. There is an urgent need to conduct surveillance, identify human cases in a timely manner, and, in the case of contact vaccinia, reduce the potential for further exposure to contacts.

Federal Standards:

Currently there are no federal standards requiring the reporting of vaccinia disease.

Compliance Schedule:

Reporting of vaccinia disease will be mandated upon filing of a Notice of Emergency Adoption with the Secretary of State and made permanent by publication of a Notice of Adoption in the New York *State Register*.

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

It is expected that the proposed change will have modest impact on small business (hospitals, clinics, nursing homes, physicians, and clinical laboratories). There are approximately 6 hospitals, 15 nursing homes and 1,000 clinical laboratories that employ less than 100 people in New York State. There are 397 licensed clinics; information about how many operate as small businesses is not available. There are approximately 70,000 physicians in New York State but it is not known how many can be categorized as small businesses. This regulation will apply to all local health departments.

Compliance Requirements:

Hospitals, clinics, physicians, nursing homes, and clinical laboratories that are small businesses and local governments will utilize revised Department of Health reporting forms.

Professional Services:

No additional professional services will be required since providers should be able to utilize existing staff to report occurrences of vaccinia disease.

Compliance Costs:

No initial capital costs of compliance are anticipated. Annual compliance costs will depend upon the number of untoward events. As of June 5, 2003, 704 individuals have been vaccinated. On two occasions, suspect generalized vaccinia has been investigated and clinical specimens were obtained for laboratory diagnosis. Generalized vaccinia was confirmed in one case. The expansion of the program is currently under review.

The reporting of vaccinia disease should have a negligible effect on the estimated cost of disease reporting by small hospitals which is at most $150.00 per year. The cost would be less for physicians and other small businesses.

Minimizing Adverse Impact:

There are no alternatives to the reporting requirement. Adverse impacts have been minimized since revised forms and reporting staff will be utilized by regulated parties. Electronic reporting will save time and expense. The approaches suggested in the State Administrative Procedure Act Section 202-b(1) were rejected as unnecessary and inconsistent with the purpose of the regulation.

Feasibility Assessment:

Small businesses and local governments will likely find it easy to report conditions due to the availability to them of electronic reporting and tabulation.

Small Business and Local Government Participation:

Local governments have been consulted in the process through ongoing communication on this issue with the New York State Association of County Health Officers (NYSACHO).

Rural Area Flexibility Analysis

Effect on Rural Areas:

The proposed rule will apply statewide. It is expected to have minimal impact on local health units, physicians, hospitals and laboratories that are located in rural areas.

Compliance Requirements:

Local health units, hospitals, clinics, physicians and clinical laboratories in rural areas will continue to utilize Department of Health reporting forms that will be revised to include vaccinia disease.

Professional Services:

No additional professional services will be required. Rural providers are expected to use existing staff to comply with the requirements of this regulation.

Compliance Costs:

No initial capital costs of compliance are anticipated. See cost statement in Regulatory Impact Statement for additional information.

Minimizing Adverse Impact:

There are no alternatives to the reporting requirements. Adverse impacts have been minimized since familiar forms and reporting staff will be utilized by regulated parties. The approaches suggested in State Administrative Procedure Act Section 202-bb(2) were rejected as unnecessary and inconsistent with the purpose of the regulation.

Rural Area Input:

The New York State Association of County Health Officers, including representatives of small counties, have been informed about this change and the need for it.

Job Impact Statement

This regulation adds vaccinia disease to the list of diseases that health care providers must report to public health authorities using existing processes. The Department of Health has determined that this regulatory change will not have a substantial adverse impact on jobs and employment, based upon its nature and purpose.

EMERGENCY RULE MAKING

Physician Profiling

I.D. No. HLT-37-03-00006-E
Filing No. 1170
Filing date: Oct. 27, 2003
Effective date: Oct. 27, 2003

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

Action taken: Addition of Part 1000 to Title 10 NYCRR.

Statutory authority: Patient Health Information and Quality Improvement Act of 2000

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

Specific reasons underlying the finding of necessity: Immediate adoption of this rule is necessary for preservation of public health and general welfare and to prevent patient harm due to lack of information. The Patient Health Information and Quality Improvement Act requires the Department to collect information and create individual profiles on physicians that shall be available for dissemination to the public to improve the quality of health care in the State. The Department must also provide each physician with a copy of his/her profile prior to dissemination to the public. Information to be disseminated includes criminal conviction and medical malpractice information.

The development and passage of the Patient Health Information and Quality Improvement Act received significant support from patients who had experienced serious injury, and from families of patients and members of advocacy organizations, who had experienced death or serious injury of relatives or friends as a result of medical errors, including negligence. In these cases, the patients did not have ready access to meaningful information that would have been very important in guiding their decisions regarding choice of physician. For example, graduate medical education and board certification(s) are very important in choosing the most appropriate physician to perform complex surgical procedures on infants and children. Deaths can be avoided by providing patients with access to information that better informs them of physicians' education, training, credentials and experience and enables patients as consumers to actively participate in one of the most important health care decisions - the choice of physician.

Immediate adoption of this rule is necessary in order to provide access to information, as well as the timely reporting of updated or new informa-

tion, which is of the utmost importance to consumers making decisions concerning access to high quality health care services.

Subject: Physician profiling.

Purpose: To implement the Patient Health Information and Quality Improvement Act of 2000.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by section 2995(1)(b) of the Public Health Law, a new Chapter VIII consisting of Part 1000 is hereby added to Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York to be effective upon filing with the Department of State to read:

Chapter VIII
Physician Profiling
Part 1000
Physician Profiles

1000.1 Definitions.

For purposes of making individual physician profiles available for dissemination to the public, pursuant to the provisions of section 2995-a of the Public Health Law, the following definitions shall apply:

(a) "Board certification" means a specialty or subspecialty in which a physician is certified by the American Board of Medical Specialties (ABMS), American Osteopathic Association (AOA), Royal College of Physicians and Surgeons of Canada (RCPSC) or The College of Family Physicians of Canada (CFPC).

(b) "Concise statement" means a typewritten statement not exceeding 1,000 words which relates solely to information contained in the physician's profile. Statements which include the following prohibited language shall not be published with a physician's profile:

(1) potentially defamatory information that includes names of specific individuals or groups of individuals or any potentially defamatory information that could result in identification of an individual or individuals other than the physician who is making the concise statement;

(2) general statements relating to physician disciplinary or judicial processes; or

(3) statements that do not relate to the factual information contained in the physician's profile.

(c) "Graduate medical education" means a graduate medical education program accredited by the Accreditation Council for Graduate Medical Education (ACGME), American Osteopathic Association (AOA), Royal College of Physicians and Surgeons of Canada (RCPSC) or The College of Family Physicians of Canada (CFPC).

(d) "Loss or involuntary restriction of hospital privileges or failure to renew professional privileges at hospitals for reasons related to the quality of patient care delivered" means the loss or involuntary restriction of hospital privileges or failure to renew professional privileges at hospitals for reasons including, but not limited to:

(1) incompetence in providing direct patient care;

(2) sexual abuse or harassment of hospital staff or patients;

(3) disciplinary actions taken because of professional misconduct in any state related to the quality of patient care delivered;

(4) commission of crimes related to the quality of patient care delivered; and

(5) lack of maintaining accurate medical records.

(e) "Physician profile" means information collected on physicians currently licensed and registered in New York State that shall be available for dissemination to the public in accordance with section 2995-a of the Public Health Law.

(f) "Place" means, for purposes of reporting malpractice award, judgment, and settlement information, the geographic location where the injury occurred as a result of the malpractice or alleged malpractice, office practice location of the particular physician at the time of the malpractice or alleged malpractice, or county in which the malpractice award or judgment is filed. The department shall specify which of such places shall be included on reports required to be submitted by medical malpractice insurance companies or hospitals self-insured for professional medical malpractice in accordance with section 315 of the Insurance Law.

(g) "Within the most recent 10 years" means:

(1) for purposes of physician self-reporting, the period beginning 10 years prior to January 1, 2002 or the date the department initially collects information from a licensed registered physician, whichever is later; and

(2) for purposes of public dissemination of physician profiles, the period beginning 10 years prior to the day a physician profile is being made available for dissemination to the public.

1000.2 Criminal convictions.

(a) The department shall collect and make available to the public, and physicians shall submit, if applicable, information regarding criminal convictions within the most recent 10 years for any and all offenses under the laws of New York State or any other jurisdiction.

(1) "Offenses" shall include only felonies or misdemeanors, as defined under the laws of the jurisdiction within which such felonies or misdemeanors take place.

(2) "Conviction" means the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument, as defined in section 1.20 of the Criminal Procedure Law.

(b) Physicians shall submit to the department, if applicable, information regarding criminal convictions within the most recent 10 years that includes:

(1) name of the offense;

(2) state, province or country in which the conviction occurred; and

(3) date of conviction.

1000.3 Malpractice awards, judgments and settlements.

(a) Collection. The department shall collect and physicians shall submit, if applicable, the following information regarding all medical malpractice court judgments, arbitration awards and malpractice settlements within the most recent 10 years in which a payment has been awarded or made to a complaining party:

(1) date of each award, judgment or settlement, determined as follows:

(i) for arbitration awards, the date the arbitrator issued the award;

(ii) for judgments, the date of entry of the judgment; and

(iii) for settlements, the date of entry of the stipulation or, if no entry, the last date on which any person signed the settlement document;

(2) date payment was made or date claim was closed. The date a claim was closed is the date entered by an insurance company or third party reporter that the claim is resolved;

(3) amount of each award, judgment or settlement;

(4) place(s) of each award, judgment or settlement as specified by the department in accordance with subdivision (f) of section 1000.1 of this Part; and

(5) any other information deemed necessary by the department to implement the provisions of this subdivision.

(b) Public dissemination. (1) The department shall make available to the public information collected in accordance with subdivision (a) of this section regarding:

(i) all medical malpractice court judgments and arbitration awards within the most recent 10 years in which a payment has been awarded or made to a complaining party; and

(ii) malpractice settlements which exceed two in number within the most recent 10 years in which a payment has been awarded or made to a complaining party.

(2) In the case where the total number of malpractice settlements is two or fewer, the department shall make available to the public information collected in accordance with subdivision (a) of this section in those cases where it is alleged that a malpractice event resulted in death or permanent injury, and where the department has considered any information submitted in accordance with subparagraph (ii) of this paragraph.

(i) "Permanent injury" shall include, but is not limited to, the following:

(a) loss of finger or fingers;
(b) loss or permanent damage to organ or organs;
(c) deafness;
(d) loss of any limb or limbs;
(e) loss of eyes or eyesight;
(f) loss of kidney or kidneys;
(g) loss of lung or lungs;
(h) paraplegia;
(i) brain damage;
(j) quadriplegia;
(k) severe brain damage;
(l) lifelong care;
(m) fatal prognosis;
(n) any permanent loss or impairment (unable to function at same level prior to occurrence) of body part;
(o) any permanent loss or impairment of bodily function;
(p) any permanent physical or mental impairment that substantially limits one or more of the major life activities of an individual; or
(q) death.

For purposes of this subparagraph, the department may use information collected in accordance with section 315 of the Insurance Law, in-

cluding information relating to death or the seriousness of injury, or self-reported by physicians as required by subdivision (3) of section 2995-a of the Public Health Law.

(ii)(a) A physician may provide additional factual clinical information pertinent to the department's determination of whether settlement information is relevant to patient decisionmaking. Such information, if provided, will be reviewed by a panel appointed by the department to conduct such reviews. The panel is comprised of at least three persons, the majority of whom are physicians, at least one of whom is a physician of the same specialty as the physician whose settlement is under review. The panel shall submit its recommendation to the Commissioner of Health regarding whether, based upon the information provided by the physician whose settlement is under review, the settlement is relevant to patient decisionmaking. The recommendation of the panel that a settlement is not relevant for patient decisionmaking shall be predicated upon a preponderance of clinical information indicating that, despite the awarding of a payment to a complaining party, appropriate provision of patient care was provided.

(b) Additional clinical information provided by a physician must be received by the department postmarked within 30 days of the date of the letter transmitting the physician's medical malpractice review copy as specified in subdivision (c) of section 1000.4 of this Part. Requests for an extension of the 30-day period will be considered only if they:

(1) are in writing and received by the department or its agent within the 30-day period or received orally by the department or its agent within the 30-day period followed by a written request for the extension postmarked within five days of the department receiving the oral request or the expiration of the 30-day period, whichever is later;

(2) include the reason(s) why the extension is needed, which must be related to circumstances that are beyond the physician's control; and

(3) indicate the amount of additional time needed.

This clause does not obligate the department to grant extensions. Further, the department may deny any request received beyond the required time frames or missing information required by subclauses (1) - (3) of this clause. Public dissemination of medical malpractice settlement information will be suspended while the department is reviewing the request for an extension. The department will notify the physician in writing of its decision to either grant or deny an extension.

(iii) Consumers shall be advised by the department on a physician profile to contact the physician for more information regarding malpractice awards, judgments and settlements in order to facilitate patient decisionmaking concerning health care quality.

(3) Public dissemination of information regarding medical malpractice judgments, arbitration awards, and settlements under this section shall be made in graduated categories indicating whether the payment award is average, above average or below average, as set forth in subparagraph (i) of this paragraph, in comparison to other payment awards made to complaining parties within the same specialty. For purposes of this paragraph, "specialty" shall mean a specified area of medical practice including, but not limited to, anesthesiology, family practice, internal medicine, obstetrics and gynecology, pediatrics, physical medicine and rehabilitation, psychiatry, radiology and general surgery. For purposes of comparing payment awards, the department may calculate average, above average and below average amounts, and periodically update them, at least annually, based upon the most recent malpractice payment award information submitted to the department by medical malpractice insurance companies or hospitals self-insured for professional medical malpractice in accordance with section 315 of the Insurance Law, consistent with geographic areas of the State used by the Insurance Department to establish medical malpractice insurance premiums, as set forth in subparagraph (ii) of this paragraph. Average, above average, and below average amounts are based upon quartiles. Quartiles are developed by taking all claims for doctors within a certain specialty in a certain geographic region and dividing them, lowest to highest, into four groups (quartiles) of equal numbers.

(i)(a) An "average" payment award means a payment award amount falling in the middle two quartiles of payment award amounts for a certain specialty in a certain geographic region.

(b) A "below average" payment award means a payment award amount falling in the lowest quartile of payment award amounts for a certain specialty in a certain geographic region.

(c) An "above average" payment award means a payment award amount in the highest quartile of payment award amounts for a certain specialty in a certain geographic region.

(ii)(a) If there are at least eight claims in each of four regions, quartiles will be developed for each of four regions for a particular specialty as follows:

Region A = New York, Orange, Rockland, Sullivan, Westchester, Bronx, Kings, Queens, Richmond, Nassau and Suffolk Counties

Region B = Columbia, Dutchess, Greene, Putnam and Ulster Counties

Region C = Erie and Niagara Counties

Region D = All Other Counties

(b) If there are an insufficient number of claims to develop quartiles for each of four regions as specified in clause (a) of this subparagraph, then quartiles will be developed for each of two regions for a specialty if there are at least eight claims in each of two regions as follows:

Downstate = Region A

Upstate = Combined Regions B, C, and D

(c) If there is an insufficient number of claims to develop quartiles for downstate and upstate, quartiles will be developed on a statewide basis for a specialty.

1000.4 Collection of initial profile information.

(a) The department shall send an initial profile survey to every currently or newly State licensed and registered physician in New York State which reflects all the data elements required by Public Health Law section 2995-a(1), some elements of which shall be prepared by the department using data sources other than the physician. Such initial profile survey must be completed, signed and returned by each physician to the address designated by the department on the survey and postmarked within 30 days of the date of the letter transmitting such initial profile survey to the physician.

(b) Physicians shall be given the opportunity to correct factual inaccuracies that appear in the profile. Once the department receives a physician's completed and signed initial profile survey and enters the data into the physician profile database, the department will provide to the physician a copy of his or her profile in the form to be used for public dissemination, hereafter referred to as the review copy, prior to such public dissemination. The physician shall note any corrections on the review copy and return it to the department signed and postmarked within 10 days of the date of the letter transmitting the review copy to the physician; otherwise, the department will publicly disseminate the physician's profile information as received on the physician's initial profile survey.

(c) Subsequent to receiving the physician's review copy, if returned within the time frame required by subdivision (b) of this section, the department will provide to the physician a copy of any medical malpractice information in the form to be used for public dissemination, hereafter referred to as the medical malpractice review copy. Physicians shall correct any factual inaccuracies on the medical malpractice review copy and return it to the department postmarked within 10 days of the date of the letter transmitting the medical malpractice review copy to the physician, or, in the instance where the physician has two or fewer medical malpractice settlements over the most recent 10-year period and opts to access the panel review process, shall provide additional factual clinical information pursuant to subparagraph (ii) of paragraph (2) of subdivision (b) of section 1000.3 of this Part. If the physician does not respond in accordance with the timeframes set forth in this subdivision, the department will publicly disseminate the physician's medical malpractice information provided on the medical malpractice review copy.

1000.5 Updating self-reported information.

(a) Except for optional information provided on physician profiles, physicians shall notify the department of any change in profile information within 30 days of such change. Any change in optional information must be reported to the department within 365 days of such change.

(b) Physicians shall submit changes to physician profile information either electronically using the department's secure web site or on forms prescribed by the department. Physicians shall attest to the truthfulness, completeness and correctness of any changes submitted to the department.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-37-03-00006-P, Issue of September 17, 2003. The emergency rule will expire December 25, 2003.

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

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2995(1)(b) of the Public Health Law which directs the Department of Health to promulgate rules for the purpose of implementing provisions of Title 1 of Article 29-D of the Public Health Law, the Patient Health Information and Quality Improvement Act of 2000.

Legislative Objectives:

Article 29-D of the Public Health Law creates a statewide health information system, the purpose of which is to increase information available to patients about health care providers and health care plans, and improve the quality of health care in New York State. The statewide health information system will collect information on physicians, hospitals, and health care plans and disseminate such information to the public for purposes of improving health care decision-making.

Needs and Benefits:

These regulations will enable the Department to collect from physicians information which is required to be made available to the public, and publicly disseminate such information. Certain provisions of Section 2995-a of the Public Health Law require clarification in order for the Department to meet its mandate of collecting information from physicians to create individual profiles on licensees subject to the authority of the Office of Professional Medical Conduct. Without such clarification, physicians would not know what to report, to what period the reporting of information pertains, and how frequently to report changes in such information.

Additionally, these regulations clarify how the Department will publicly disseminate medical malpractice information that has been collected on individual physicians. Without such clarification, the Department would not be able to meet the legislative mandate of reporting medical malpractice information as an important component of physician profiles.

Costs:

Costs to Regulated Parties:

There are no costs to regulated parties resulting from these regulations since clarification of malpractice information relates to which malpractice information is collected and how it is publicly disseminated. The actual collection of malpractice information from physicians is mandated by statute. These regulations also clarify what specific data physicians must report on criminal convictions and require physicians to update profile information at regular intervals. There are no out-of-pocket costs anticipated to be incurred by physicians in obtaining the information necessary to meet the requirements of these regulations.

Costs to State and Local Governments:

There will be additional costs to the State to implement the statewide health information system required by Title 1 of Article 29-D of the Public Health Law and to conduct panel reviews of the medical malpractice settlements in the instance where a physician has two or fewer and has opted to provide additional factual information to the Department under the process set forth in these regulations. The current cost to establish and operate the physician profile database required by statute is approximately $1.8 million on an annual basis. The initial annual cost of conducting panel reviews under these regulations is estimated to be $100,000 with an annual cost of $10,000 thereafter. There will be no additional costs to local governments as a result of the reporting clarifications set forth in these regulations.

Cost to the Department of Health.

As discussed in the preceding section, to conduct panel reviews of the medical malpractice settlements in the instance where a physician has two or fewer and has opted to provide additional factual information to the Department under the process set forth in these regulations will result in additional costs. The Department estimates the initial annual cost of doing these reviews to be $100,000. The annual cost thereafter is estimated to be $10,000. Existing Department staff will implement other aspects of these regulations.

Local Government Mandates:

These regulations do not impose any substantial new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district, or other special district.

Paperwork:

These regulations clarify the reporting requirements mandated by Section 2995-a of the Public Health Law pertaining to the creation of physician profiles. The new reporting requirements imposed as a result of these regulations are voluntary in nature. If a physician with two or fewer medical malpractice settlements over the past ten years opts to access the panel review process set forth in section 1000.3(b)(2)(ii), the physician is required to provide additional factual clinical information pertinent to the Department's determination of whether such settlement information is relevant to patient decision-making within specified timeframes.

Duplication:

These regulations will not duplicate, overlap or conflict with federal or state statutes or regulations. Further, Section 2995-a(13)(a) of the Public Health Law requires that the department identify the types of physician data to which the public has access, including all information available from federal, state or local agencies which is useful for making determinations concerning health care quality determinations. The department shall study all physician data reporting requirements and develop recommendations to consolidate data collection and eliminate duplicate and unnecessary reporting requirements, or to supplement existing reporting requirements in order to meet the requirements of physician profiling.

Alternatives:

The alternative of taking no regulatory action was rejected because of the potential confusion concerning what information is to be reported by physicians and how frequently it is to be updated to the Department. Additionally the Department believes it necessary to clarify the definition of "Concise Statement" since several physicians submitted such statements that were neither concise nor did they pertain to "information contained in their profiles." Also, in the instance where a physician has two or fewer settlements and has opted to provide additional factual information to the Department, the Department feels it is very important to conduct the panel reviews of such medical malpractice settlements utilizing a panelist that is in the same specialty as the physician whose settlement is under review. The above were alternatives considered by the Department and incorporated into these regulations.

Federal Requirements:

These regulations do not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The regulations will go into effect upon filing a Notice of Adoption in the New York *State Register*.

Regulatory Flexibility Analysis

Types and Estimated Number of Small Businesses and Local Governments:

These regulations govern what individual physicians, not their professional corporations, must report to the New York State Department of Health to comply with the statutory provisions of Title 1 of Article 29-D of the Public Health Law. To the extent these regulations may impact certain physicians who are operating as professional corporations, the Department does not have the data to estimate the number of such professional corporations. These regulations do not apply to local government.

Compliance Requirements:

Physicians as individual licensees, including those practicing as professional corporations, are required to report certain information to the Department to be made available to the public on a physician profile pursuant to Section 2995-a of the Public Health Law. These regulations require physicians to report specific data on criminal convictions, medical malpractice court judgments, arbitration awards and malpractice settlements. These regulations also require physicians to update profile information at regular intervals.

It is anticipated that physicians will provide the required information themselves, therefore, no additional professional services are likely to be needed by physicians in order to comply with these regulations.

Compliance Costs:

The Department anticipates that there will be no initial capital costs, or annual ongoing costs, for physicians practicing as professional corporations to comply with these regulations. There are no out-of-pocket costs anticipated to be incurred by physicians in obtaining the information necessary to meet the requirements of these regulations. There is no variation in costs for different types and sizes of small businesses since the regulations apply uniformly to individual physicians.

Economic/Technological Feasibility:

The Department anticipates no economic or technological hardships for physicians practicing as professional corporations to comply with these regulations. The information physicians must provide pursuant to these regulations is readily available to them and does not require specific technology to submit to the Department. Physicians have the choice of submitting required information electronically or via the mail using a hard copy survey provided by the Department.

Minimize Adverse Impact:

These regulations are not expected to have any adverse impacts on physicians practicing as professional corporations.

Small Business and Local Government Participation:

The Department provided opportunity for small business and local government participation by convening three roundtable discussions in March, 2001. They were held around the state, in Albany, New York City, and Rochester. Physician representatives were invited as well as other professional organizations. A public notice regarding the meetings was published in the New York *State Register* on March 7, 2001. No participants raised any concerns regarding the economic impact of these proposed regulations on small businesses and local governments.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

These regulations apply uniformly throughout the State including all 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, those counties which include 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:

Physicians, including physicians in rural areas, are required to report certain information to the Department to be made available to the public on a physician profile pursuant to Section 2995-a of the Public Health Law. These regulations require physicians to report specific data on criminal convictions, medical malpractice court judgments, arbitration awards and malpractice settlements. These regulations also require physicians to update profile information at regular intervals.

No additional professional services are likely to be needed by physicians in rural areas in order to comply with these regulations.

Compliance Costs:

The Department anticipates that there will be no initial capital costs for physicians in rural areas to comply with these regulations. There are no out-of-pocket costs anticipated to be incurred by physicians in obtaining the information necessary to meet the requirements of these regulations. There is no variation in costs for different types of public and private entities in rural areas since the Department anticipates no out-of-pocket costs to physicians as a result of these regulations and they apply uniformly to individual physicians.

Minimizing Adverse Impact:

These regulations are not expected to have any adverse impact on physicians in rural areas.

Rural Area Participation:

The Department provided opportunity for physicians in rural areas to participate in the rule making process by convening three roundtable discussions in March, 2001. Two of these roundtable discussions were held in Albany and Rochester. Physician representatives were invited as well as other professional organizations. A public notice regarding the meetings was published in the New York *State Register* on March 7, 2001.

Job Impact Statement

In accordance with Section 201-a(2)(a) of the State Administrative Procedure Act, the Department has determined that these regulations will have no impact on jobs and employment opportunities. It is evident from the subject matter of the regulation that it has no impact on jobs and employment opportunities since they simply clarify what otherwise is required to be reported by physicians to the Department pursuant to the Patient Health Information and Quality Improvement Act.

EMERGENCY RULE MAKING

Part-Time Clinics

I.D. No. HLT-45-03-00001-E
Filing No. 1165
Filing date: Oct. 22, 2003
Effective date: Oct. 22, 2003

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

Action taken: Repeal of section 703.6; addition of new section 703.6; and amendment of section 710.1 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803(2)

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

Specific reasons underlying the finding of necessity: The agency finds the immediate adoption of this rule is necessary to preserve the public health, safety and general welfare and compliance with State Administrative Procedure Act Section 202(1) would be contrary to the public interest. These regulations repeal existing section 703.6 of 10 NYCRR and add a new section 703.6, amend sections 710.1(c)(1)(i) and 710.1(c)(4)(ii) and add section 710.1(c)(6)(v) to establish additional standards for the approval and operation of part-time clinics under Article 28 of the Public Health Law. The proposed rules would help ensure the provision of quality health care through needed preventive health screening programs and other public health initiatives to underserved populations and others in safe environments that protect both the patient and the general public.

A review of the part-time clinics approval system and operations raised serious questions and concerns as to whether care was being provided in appropriate sites, under adequate supervision, whether unnecessary care was being provided, whether the site environments were adequate and safe, and whether the type of services provided exceeded the original intent of the part-time clinic regulation. Examples of the problem areas include:

- The provision of radiology services in stationary sites and mobile vans where shielding may be inadequate.
- The provision of a full range of primary care services where minimum physical plant standards may not be met, as part-time clinics are exempt from most physical plant requirements. Inadequate space to provide the range of services safely compromised patient safety with narrow corridors which, if an emergency arises, would not provide for stretcher or wheelchair access or egress.
- The provision of a variety of complex services where more extensive supervision would be expected.
- The provision of services to all the residents in a given location, such as an Adult Home, raises questions about appropriate utilization.
- The provision of specialty services, such as pediatric cardiology utilizing sophisticated equipment, is considered inappropriate for a part-time clinic setting, since a comprehensive, integrated plan of care is needed to treat these patients effectively.
- The use of part-time clinics by some patients as their main source of health care compromises the continuity of their care, as the link to emergency and after-hours treatment becomes problematic.
- The improper application of infection control principles for sterilizing equipment.

The persistence of these problems warrants the issuance of these rules on an emergency basis.

The principal changes in the proposed rules are:

- A more detailed description of the types of services permitted in part-time clinics.
- Explicit exclusion of certain types of locations and premises as acceptable sites for part-time clinics.
- Addition of a requirement that part-time clinics be in sufficient proximity to the sponsoring hospital or diagnostic an treatment center to ensure adequate supervision.
- Enhanced operating standards, including requirements for quality assurance and improvement and for credentialing of staff.
- Addition of a requirement for prior limited review of all new part-time clinic sites and the continuation or proposed relocation of existing clinics.
- Recognition that part-time clinics which are operated by city and county health departments are governed by section 614 of the Public Health Law.

Compliance with the requirements of the State Administrative Procedure Act for filing of a regulation on a non-emergency basis, including the

requirements for a period of time for public comment, would be contrary to the public interest because to do so would place patients at continued risk that they would be served in sub-standard environments without adequate supervision and where continuity of care cannot be insured. In addition, the proposed rules guard against the unnecessary expenditure of Medicaid funds for unneeded or duplicative services thereby making funds available for needed care. This emergency regulation will go into effect immediately after the expiration of the prior emergency regulation. Its duration will extend until permanent regulations are promulgated or a subsequent regulation is adopted on an emergency basis.

Subject: Part-time clinics.

Purpose: To clarify and enhance requirements and require prior limited review.

Text of emergency rule: The current section 703.6 is repealed and a new section 703.6 is hereby adopted as follows:

Section 703.6 Part-time clinics

(a) Applicability. In lieu of Parts 702, 711, 712 and 715 of this Title, this section shall apply to part-time clinic sites, except for those operated by the State Department of Health (other than those part-time clinics which are operated as an extension of Article 28 hospitals operated by the State Department of Health) or by the health department of a city or county as such terms are defined in section 614 of the Public Health Law. Such cities and counties shall submit to the State Department of Health information which lists the location(s), hours of operation and services offered at each part-time clinic operated by or under the authority of the city or county health department. This information shall be submitted annually, by January 30 of each year, as an update to the Municipal Public Health Services Plan (MPHSP) submitted by the city or county pursuant to section 602 of the Public Health Law, and shall provide such information for each part-time clinic operated by or under the authority of the city or county health department in the previous calendar year. Consistent with the definition of part-time clinic site in section 700.2(a)(22) of this Title, a part-time clinic shall:

(1) provide services which shall be limited to low-risk (as determined by prevailing standards of care and services) procedures and examinations which do not normally require backup and support from the primary delivery site of the operator or other medical facility. Such services may include health screening (such as blood pressure screening), preventive health care and other public health initiatives, procedures and examinations (such as well child care, the provision of immunizations and screening for chronic or communicable conditions which are treatable or preventable by early detection or which are of public health significance);

(2) be located at a site that has adequate and appropriate space and resources to provide the intended services safely and effectively and is located in proximity to the primary delivery site to ensure that supervision and quality assurance are not compromised; and

(3) not be located at a private residence or apartment, an intermediate care facility, congregate living arrangements (not including an individualized residential alternative, a shelter for adults or other group shelter operated by governmental or other organizations to provide temporary housing accommodations in a safe environment to at-risk populations), an area within an adult home, a residence for adults or enriched housing program as defined in section 2 of the Social Services Law unless the part-time clinic is an outpatient mental health program approved by the Office of Mental Health, or the private office of a health care practitioner or group of practitioners licensed by the State Education Department, except if the private office space is leased for a defined period of time and on a regular basis for the provision of services consistent with paragraph (1) of this subdivision .

(b) Department approval and/or notification.

(1) An operator of part-time clinics may initiate patient care services at a specific site only upon written approval from the department in accordance with the department's prior limited review process set forth at section 710.1(c)(6)(v) of this Title. To request such approval, the operator shall submit to the department, for each such site, information and documentation in a format acceptable to the department and in sufficient detail to enable the Commissioner to make a decision, including the following:

(i) the location, type and nature of the building, days and hours of operation, expected duration of operation (specified limited period of time, for example, seasonally), staffing patterns and objectives of the part-time clinic;

(ii) the leasing or other arrangement for gaining access to the site's real property, (including a copy of the agreement which grants the applicant the right to use and occupy the space for the part-time clinic site);

(iii) the plans and strategies for meeting the operational standards set forth in this section and an explanation of how the operator will provide adequate supervision and ensure quality of care;

(iv) a listing of all part-time clinic sites already operated by the applicant;

(v) a description of the services to be provided and the populations to be served; and

(vi) procedures or strategies for advising patients on making arrangement for follow-up care.

(2) After initiating patient care services, an operator of part-time clinics may relocate a part-time clinic or change a category of service only upon written approval from the department in accordance with the department's prior limited review process as set forth in section 710.1(c)(6)(v) of this Title. The operator shall give written notification to the department at least 45 days prior to the relocation or change in services of a part-time clinic site. To request approval, the operator shall submit to the department, for the site of relocation or change in services, information concerning:

(i) the location, type and nature of the building, days and hours of operation, and expected duration of operation (specified limited period of time, for example, seasonally);

(ii) the leasing or other arrangement for gaining access to the site's real property (including a copy of the agreement which grants the applicant the right to use and occupy the space for the part-time clinic site); and

(iii) a description of the services to be provided and the populations to be served.

(3) After initiating patient care services, the operator shall give written notification, including a closure plan acceptable to the department, to the appropriate regional office of the department at least 15 days prior to the discontinuance of a part-time clinic site other than a scheduled discontinuance as indicated in accordance with subparagraph (i) of paragraph (1) of this subdivision. No part-time clinic site shall discontinue operation without first obtaining written approval from the department.

(4)(i) The operator of any part-time clinic that was in operation on the effective date of this paragraph, and in conformance with all pertinent statutes and regulations in effect prior to that date, and has submitted request(s) to the department for approval to continue providing services for each such site by November 13, 2000 in accordance with such requirements shall be permitted to operate until and unless the department issues a written denial of approval to continue operation. If a request to continue operation of a part-time clinic site is denied, the operator shall cease providing services at such site.

(ii) The operator of any part-time clinic site for which an application to continue providing services at such site was not submitted to the department by November 13, 2000, shall give the department the written notification and a closure plan required by subdivision (b)(3) of this section by November 28, 2000. Notwithstanding any other provision of this section, any part-time clinic for which an application to continue providing services at such site was not submitted to the department by November 13, 2000, shall cease operations by December 31, 2000.

(c) Policies and procedures. (1) The operator shall ensure the development and implementation of written policies and procedures specific to each part-time clinic site which shall include, but need not be limited to:

(i) security, confidentiality, maintenance, access to and storage of medical records for each patient, including documentation of any diagnoses or treatments;

(ii) handling and storage of drugs in accordance with state law and regulation;

(iii) provision and storage of sterile supplies including plans for sterilization or disposal of contaminated supplies and equipment;

(iv) disposal of solid wastes and sharps;

(v) handling of patient emergencies, including written transfer agreements with hospitals within the service area;

(vi) a fire plan consistent with local laws;

(vii) credentialing of staff by the governing authority of the operator and assurance that only appropriately licensed and/or certified staff perform functions that require such licensure or certification;

(viii) quality assurance/improvement initiatives coordinated with such activities at the operator's primary delivery site(s);

(ix) utilization review;

(x) community outreach efforts designed to ensure that community members are aware of the availability of and the range of clinic services and hours of operation; and

(xi) assurance that patients can access necessary services without regard to source of payment.

(2) The following services shall not be provided at a part-time clinic site:

(i) services that require specialized equipment such as radiographic equipment, computerized axial tomography, magnetic resonance imaging or that required for renal dialysis;

(ii) services that involve invasion or invasive treatment procedures or disruption of the integrity of the body that normally require a surgical operative environment; and

(iii) services other than those available at the primary delivery site(s) listed on the primary facility's operating certificate.

(d) Services and personnel. The operator shall ensure that all health care services and personnel provided at the part-time clinic site shall conform with generally accepted standards of care and practice and with the following:

(1) Part-time clinics operated by hospitals shall comply with pertinent standards established in Part 405 of this Title including, but not limited to, sections 405.7 (Patients' rights) and 405.20 (Outpatient services), which cross-references the outpatient care provisions of sections 752.1 and 753.1 of this Title.

(2) Part-time clinics operated by diagnostic and treatment centers shall comply with the pertinent provisions of Parts 750, 751, 752 and 753 of this Title including, but not limited to, section 751.9 (Patients' rights).

(e) Environmental health. The operator shall ensure that:

(1) exits and access to exits are clearly marked;

(2) lighting is provided for exit signs and access ways when located in dark areas and/or during night hours or power interruptions;

(3) passageways, corridors, doorways and other means of exit are kept unobstructed;

(4) the part-time clinic site is kept clean and free of safety hazards;

(5) all water used at the part-time clinic site is provided from a water supply which meets all applicable standards set forth in Part 5 of this Title;

(6) equipment to control a limited fire is available; and

(7) smoking is prohibited within patient care areas.

(f) Waivers. The Commissioner, upon a request from the operator, may waive one or more provisions of this section upon a finding that such waiver would:

(1) enable at risk or medically underserved patients to obtain needed care and services which are otherwise unavailable or difficult to access;

(2) contribute to attaining a generally recognized public health goal;

(3) not jeopardize the health or safety of patients or clinic staff; and

(4) not conflict with existing federal or state law or regulation.

Section 710.1(c)(1)(i) is hereby amended to read as follows:

(i) the *requirements relating to the* addition, modification or decertification of a licensed service other than the addition of a service or decertification of a facility's services as provided for in paragraph (6) of this subdivision or the addition or deletion of approval to operate part-time clinics, regardless of cost[;]. *The addition or deletion of approval to operate part-time clinics shall not be applicable to the State Department of Health (other than for the addition or deletion of approval to operate part-time clinics as an extension of an Article 28 hospital operated by the state Department of Health) or to the health department of a city or county as such terms are defined in section 614 of the Public Health Law;*

Section 710.1(c)(4)(ii) is hereby amended to read as follows:

(4) Proposals not requiring an application.

(ii) Any proposal to [add,] discontinue [or relocate] a part-time clinic site of a medical facility already authorized to operate part-time clinics pursuant to this Part shall not require the submission of an application pursuant to this Part, but compliance is required with the applicable notice provisions of Parts 405 and 703 of this Title.

Paragraph (6) of subdivision (c) of section 710.1 is hereby amended by the addition of a new subparagraph (v) to read as follows:

710.1(c)(6) Proposals requiring a prior review.

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(v) Any proposal to operate, change services offered or relocate a part-time clinic site shall be subject to a prior limited review under Article 28 of the Public Health Law.

(a) Requests for approval under the prior limited review process shall be consistent with the provisions of section 703.6(b) of this Title.

(b) Requests for approval to operate, change a category of service offered or relocate a part-time clinic site in accordance with section 703.6(b) of this Title shall be made directly to the Division of Health Facility Planning.

(c) If the proposal is acceptable to the department, the applicant shall be notified in writing within 45 days of acknowledgment of receipt of the request. If the proposal is not acceptable, the applicant shall be notified in writing within 45 days of such determination and the bases thereof, and the proposal shall be deemed an application subject to full review, including a recommendation by the State Hospital Review and Planning Council, pursuant to section 2802 of the Public Health Law.

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 19, 2004.

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

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2803(2) of the Public Health Law which authorizes the State Hospital Review and Planning Council (SHRPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of Article 28 of the Public Health Law, and to establish minimum standards governing the operation of health care facilities. This section also grants authority to establish requirements for projects subject to Certificate of Need Review and other Department approvals.

Legislative Objectives:

Article 28 of the PHL seeks to ensure that hospitals and related services are of the highest quality, efficiently provided and properly utilized at a reasonable cost. Consistent with this legislative intent, the proposed amendments would update standards under which part-time clinics are permitted to operate and establish new procedures for the process by which clinics are approved to provide services. These changes will promote improved quality and appropriateness of care at a reasonable cost to payors.

Needs and Benefits:

Part-time clinics provide low-risk procedures and examinations which do not normally require back-up and support from the hospitals and diagnostic and treatment centers that sponsor them. Typical of such services are well-child care, immunization and screening for chronic and communicable conditions treatable or preventable by early detection. Part-time clinics may not deliver services which require specialized equipment, such as magnetic resonance imaging or dialysis, nor may they provide invasive treatment procedures which normally require a surgical environment. Once approved, part-time clinics may operate on either a short-term or permanent basis but may not offer services for more than a total of 60 hours per month.

Part-time clinics were established as a separate category of service to encourage the provision of basic preventive health care in community-based settings easily accessible to the general public and to groups targeted for particular services (*e.g.,* senior citizens). Consequently, the approval process for these clinics is simpler than that for extension clinics of hospitals and diagnostic and treatment centers, whose services are more elaborate and hours of operation less restricted. The initial authority for a hospital or diagnostic and treatment center to operate part-time clinics requires administrative approval under the Certificate of Need (CON) process. However, the subsequent opening of individual clinic sites previously required only a letter of notification to the appropriate area office of the Department of Health, submitted a minimum 15 business days in advance of the proposed commencement of service. Environmental requirements for part-time clinics are minimal, calling only for compliance with prevailing standards for life safety, sanitation and infection control. Some 300 hospitals and diagnostic and treatment centers are authorized to operate part-time clinics.

The leniency of regulation which has encouraged the provision of needed services has also led to the delivery of services in locations and on a scale not intended for part-time clinics. Some providers, for example, have set up part-time clinics in sites such as an adult home and patients' private residences and in other settings not sanctioned under the current regulations. Other operators of part-time clinics have offered services far more elaborate than the low-risk screening and basic care procedures to which part-time clinics are restricted. Still others have engaged in questionable billing practices, submitting claims to the Medicaid program at rates ap-

proved only for the broader array of services offered at diagnostic and treatment centers and hospital-based clinics.

With large part-time clinic networks (one network has over 600 sites), there are the issues of service quality and patient safety in settings that lack appropriate medical supervision and staff support and which do not meet operational and environmental requirements. The delivery of services under these circumstances can pose a threat to patient safety and demands the issuance of the new rules on an emergency basis.

An emergency regulation addressing part-time clinics was adopted effective August 15, 2000. Additional emergency regulations were adopted effective on November 13, 2000, February 12, 2001, May 14, 2001, August 10, 2001, November 8, 2001, February 7, 2002, May 6, 2002, August 1, 2002, October 29, 2002, January 27, 2003, April 25, 2003 and July 24, 2003. The last emergency adoption is scheduled to expire on October 22, 2003. This new emergency regulation will repeal and/or amend the regulations which would have gone back into effect upon the expiration of the July 24, 2003 emergency regulation.

The proposed emergency regulations will repeal the existing 10 NYCRR section 703.6 and replace it with a new section 703.6 more explicit in the requirements and prohibitions that apply to part-time clinics. They further amend section 710.1 to require a formal approval process for individual clinic sites. The principal changes in the proposed rules are:

- A more detailed description of the types of services permitted in part-time clinics
- Explicit exclusion of certain types of locations and premises as acceptable sites for part-time clinics
- A requirement that part-time clinics be in sufficient proximity to the sponsoring hospital or diagnostic and treatment center to ensure adequate supervision
- Enhanced operational standards, including requirements for quality assurance and improvement and for credentialing of staff
- A requirement for prior limited review of new part-time clinic sites and proposed relocations of existing clinics. Requests for prior limited review must be submitted to the Department's central office at least 45 days in advance of the proposed commencement of service, instead of the 15 business days required for notification to the appropriate Department regional office.
- Recognition that part-time clinics which are operated by city and county health departments are governed by Section 614 of the Public Health Law.

The proposed rules apply to all existing part-time clinics as well as to all future sites. To ensure that the new regulations do not impede access to care by patients currently receiving services or penalize providers operating bona fide clinics, the proposed rules allow existing sites to continue in operation while their operators' applications for prior limited review of current services and sites are under review by the Department. The rules allowed operators 90 days from the effective date of the original emergency regulation, which was August 15, 2000, to submit such applications, which may include proposals to relocate noncompliant clinics to sites that are in compliance with the proposed regulations. For clinics that failed to submit such timely applications, the rules establish a deadline for submission of a closure plan.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

Both part-time clinics in existence at the time of the original emergency regulations and any new part-time clinics will be subject to the prior limited review process as set forth in the proposed amendments to section 710.1. The collection and submission of information for the prior limited review process will represent a new cost to the facility, but the Department has minimized that cost through issuance of a standardized form which can be filed electronically. Some facilities may incur additional costs in bringing substandard part-time clinics up to the standards established in the proposed regulations.

The cost impact of the proposed regulations will depend on the number of operators that seek to establish new part-time clinics, relocate existing clinics or change services in existing sites. For the individual provider, costs will vary with the condition of the existing or proposed site. For sites needing little or no renovation, costs will be minimal. For other locations, costs will depend on the degree of renovation needed, on whether the provider engages the services of architectural or construction firms to carry out the renovations, and on which firms the provider chooses to employ. Because the Department lacks data on the number of proposed sites that will need to pay for renovation, it is difficult to estimate these costs with any precision. However, it is expected that any expenditures will be insignificant in relation to the benefits of improved patient care and reductions in the costs to taxpayers of Medicaid claims for part-time clinic services rendered in inappropriate settings.

Cost to State and Local Government:

There will be no additional cost to State or local governments. If inappropriate or duplicative Medicaid billings are reduced, or if sites providing unsafe or inappropriate services discontinue operations, State and local governments will realize a share of the Medicaid savings. However, certain city and county health departments may incur minimal costs associated with submitting to the Department annually basic information regarding any part-time clinics they operate.

Cost to the Department of Health:

Additional costs related to the processing of prior limited review applications and stricter programmatic oversight of part-time clinics will be absorbed within existing resources.

Local Government Mandates:

This regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district. However, certain city and county health departments may incur minimal costs associated with submitting to the Department annually basic information regarding any part-time clinics they operate.

Paperwork:

The governing body will be responsible for filing requests for approval to operate specific sites under the limited prior review process. DOH will attempt to limit the paperwork burden by developing a standardized format for such submissions which may be filed electronically. DOH also considered requiring that each site maintain a patient log with numerous data elements. It was decided not to include this requirement in the operating standards because many of the data elements duplicated information in the medical record, and some could interpret the requirement as an unnecessary paperwork burden unrelated to patient care. However, certain city and county health departments may incur minimal costs associated with submitting to the Department annually basic information regarding any part-time clinics they operate.

Duplication:

The regulations will not duplicate, overlap or conflict with federal or state statutes or regulations.

Alternative Approaches:

The alternative of taking no regulatory action was rejected because of the ongoing potential for questionable quality of care provided at inappropriate sites and because of fiscal irregularities at part-time clinics under current regulations. DOH also considered subjecting all current and proposed part-time clinics to the administrative review process rather than to the prior limited review process. That option was rejected in order to promote a streamlined review process for clinics and DOH and to avoid imposing on facilities the $1,250 filing fee required for administrative reviews.

Federal Requirements:

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

Compliance Schedule:

The emergency regulations will go into effect immediately upon filing with the Department of State. Part-time clinics in operation at that time must have submitted requests to continue operating within 90 days of the effective date of the adoption of the first emergency regulation (issued August 15, 2000) but may continue to operate until and unless DOH issues a written denial of approval to operate. If the governing body of a primary delivery site wishes to open a new part-time clinic site after the effective date of the regulation, it must submit an application. If the proposal is acceptable, DOH will so notify the applicant within 45 days of acknowledgment of receipt of the request.

Regulatory Flexibility Analysis

Effect of rule:

New York State has 9 hospitals, 167 diagnostic and treatment centers and approximately 455 adult homes and 53 congregate living centers that could be considered small businesses affected by this rule. Physician offices, of which the Department has no statistics on how many there are, also could be considered small businesses and impacted by this regulation. The Office of Mental Health approved approximately 980 outpatient mental health programs, the majority of which are small businesses. The Office of Mental Retardation and Developmental Disabilities approves Intermediate Care Facilities (ICFs) many of which would be considered small businesses and which also could be impacted by the regulation. With respect to local governments, to the extent the New York City Department

of Health and 57 county health departments operate or propose to operate part-time clinics, they would be impacted by this regulation.

Compliance requirements:

In order to comply with these requirements, an operator/applicant will need to determine that the services to be provided at the part-time clinic(s) are limited to low-risk procedures and examinations which do not normally require backup and support from the primary delivery site of the operator or other medical facility as described in section 703.6(a)(1), be located at a site as described in 703.6(a)(2) and not be located at one of the sites as described in 703.6(a)(3). In addition, the operator/applicant must obtain written approval pursuant to the Department's prior limited review process set forth in section 710.1(c)(6)(v).

Professional services:

There should be no additional professional services required that a small business or local government is likely to need to comply with the proposed rule. Applicants for, and current operators of, part-time clinics must already be licensed pursuant to Public Health Law Article 28 to provide outpatient services. Therefore, adequate administrative mechanisms already should be in place to comply with any reporting and record-keeping requirements.

Compliance costs:

The collection and submission of information for the prior limited review process will represent a new cost to the facility, including facilities operated by a small business or local government. The Department has attempted to minimize that cost through the issuance of a standardized form, which may be obtained and submitted electronically. Some facilities may incur additional costs in bringing substandard part-time clinics up to the standards in the proposed regulations.

The cost impact of the proposed regulations will depend on the number of operators that seek to establish new part-time clinics, relocate existing clinics or change services in existing sites. For the individual provider, costs will vary with the condition of the existing or proposed site. For sites needing little or no renovation, costs will be minimal. For other locations, costs will depend on the degree of renovation needed, on whether the provider engages the services of architectural or construction firms to carry out the renovations, and on which firms the provider chooses to employ. Because the Department lacks data on the number of proposed sites that will need to pay for renovation, it is difficult to estimate these costs with any precision. However, it is expected that any expenditures will be insignificant in relation to the benefits of improved patient care and reductions in the costs to taxpayers of Medicaid claims for part-time clinic services rendered in inappropriate settings.

Economic and technological feasibility:

It should be economically and technologically feasible for small businesses and local governments to comply with the regulations. Providers should not need to hire additional professional or administrative staff to comply with the requirements of the regulations. Due to the nature of the services provided at part time clinics, such sites should not involve significant capital expenditures. Also, applicants under the prior limited review process for reviewing part time clinic proposals are not required to pay the $1,250 fee applicable to full review and administrative review applications. Therefore, overall costs of compliance should be minimal. The Department of Health also has developed a standardized electronic application form that applicants may use by accessing the Department's "web" page. This is technologically feasible using readily available, standard personal computers and internet access programs.

Minimizing adverse impact:

In developing the regulation, the Department considered the approaches set forth in section 202-b(1) of the State Administrative Procedure Act. The Department considered requiring all current and proposed part-time clinics to undergo the full administrative review process rather than the prior limited review process. That option was rejected in order to permit a streamlined review process for part-time clinics and to permit facilities to avoid the $1,250 filing fee required for full or administrative reviews. The Department also has developed a standardized electronic form to minimize the paperwork burden for requests for approval to operate specific sites under the prior limited review process. The Department also rejected a plan to require that each site maintain a patient log with numerous data elements. The maintenance of such a form was determined to be an unnecessary paperwork burden which duplicated information already in the medical record. This proposal also allows for a waiver from one or more provisions of the new regulations if the Department finds, upon a request from an applicant/operator, that a waiver would enable at-risk or medically underserved patients to obtain needed care and services which would be otherwise unavailable or difficult to access.

Language in this regulation in section 703.6(a)(2) specifies that part-time clinics shall be located at a site that "is located in proximity to the primary delivery site to ensure that supervision and quality assurance are not compromised." In order to allow providers flexibility in bringing needed services to patients, the Department has refrained from specifying a mileage limit for this requirement. In evaluating the distance of a part-time clinic from the sponsor's main site, the Department's principal consideration will be whether the sponsor can provide appropriate supervision and oversight of staff and services at the proposed site.

Part-time clinics may continue to operate while going through the prior approval process. Those in operation on the effective date of the first emergency adoption (August 15, 2000) had 90 days from such date to submit applications for the prior limited review process. If an operator wishes to open a new part-time clinic after the effective date of the regulation, it must submit an application. If the proposal is acceptable, the Department will so notify the applicant within 45 days of acknowledgment of receipt of the request.

Small business and local government participation:

Interested parties were given notice of this proposal by its inclusion in the agenda of the Codes and Regulations Committee of the State Hospital Review and Planning Council for its September 21, 2000 meeting and for its March 21, 2002 and November 21, 2002 meetings and for subsequent meetings. Comments were solicited and provided at the September 21, 2000 meeting. While comments were solicited at the March 21, 2002 and November 21, 2002 meetings and at subsequent meetings, none were provided.

Rural Area Flexibility Analysis

Effect on Rural Areas:

This rule applies uniformly throughout the State including all 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:

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:

This regulation should not adversely affect current rural part-time clinics that are providing quality services in appropriate settings. The new regulations will provide facilities with clarified operating standards that will enable them to operate in conformance with the law and meet generally accepted standards for quality care and safety of patients. Operators of part-time clinics in the State (including rural areas) must obtain written approval from the Department to continue operation, relocate, or open new part-time clinics in accordance with the Department's prior limited review process as outlined in section 710.1(c)(6)(v) of 10 NYCRR.

Professional Services:

Hospitals should not need to hire additional professional or other staff to comply with the requirements of the new regulation. Applicants for, and current operators of, part-time clinics must already be licensed pursuant to Public Health Law Article 28 to provide outpatient services. Therefore, additional staff should not need to be hired, as administrative mechanisms

should already be in place to comply with any reporting and recordkeeping requirements.

Compliance Costs:

Some facilities may incur additional costs in bringing substandard part-time clinics up to the standards established in the proposed regulations. It is impossible to quantify such costs because the Department lacks the data on the number of part-time clinics currently out of compliance with the proposed standards and on the cost of bringing such facilities into conformity with the proposed rules. In general, however, establishment of part-time clinics will not require significant capital expenditures because such clinics are intended to be limited to low risk procedures and examinations that normally do not require backup and support from the primary delivery site of the operator or other medical facilities.

Minimizing Adverse Impact:

In developing the regulation, the Department considered the approaches set forth in section 202-bb(2) of the State Administrative Procedure Act.

To minimize the paperwork and reporting requirements, the Department has developed a standardized application form which may be obtained and submitted electronically. Because the approval process is not a full, but a prior limited review, the $1,250 filing fee required for full or administrative reviews will not be imposed. The Department recognizes that part-time clinics can provide valuable sources of primary care in rural areas. These regulations will help to assure rural residents that such care meets appropriate quality and safety standards. This proposal also allows for a waiver from one or more provisions of the new regulations if the Department finds, upon a request from an applicant/operator, that a waiver would enable at risk or medically underserved patients to obtain needed care and services which are otherwise unavailable or difficult to access. While language in this regulation in section 703.6(a)(2) specifies that part-time clinics shall be located at a site that "is located in proximity to the primary delivery site to ensure that supervision and quality assurance are not compromised," The Department recognized that rural part-time clinics could serve a wide geographical area and did not specify a mileage limit for this requirement. In evaluating the distance of a part-time clinic from the sponsor's main site, the Department's principal consideration will be whether the sponsor can provide appropriate supervision and oversight of staff and services at the proposed site.

Part-time clinics may continue to operate while going through the prior approval process. Those in operation on the effective date of the first emergency adoption (August 15, 2000) had 90 days from such date to submit applications for the prior limited review process. If an operator wishes to open a new part-time clinic after the effective date of the regulation, it must submit an application. If the proposal is acceptable, the Department will so notify the applicant within 45 days of acknowledgment of receipt of the request. The Department also rejected a plan to require that each site maintain a patient log with numerous data elements. The maintenance of such a form was determined to be an unnecessary paperwork burden which duplicated information already in the medical record.

Opportunity for Rural Area Participation:

Rural areas were given notice of this proposal by its inclusion in the agenda of the Codes and Regulations Committee of the State Hospital Review and Planning Council for its September 21, 2000 meeting and for its March 21, 2002 and November 21, 2002 meetings and for subsequent meetings. Comments were solicited and provided at the September 21, 2000 meeting. While comments were solicited at the March 21, 2002 and November 21, 2002 meetings and at subsequent meetings, none were provided.

Job Impact Statement

A Job Impact Statement is not included in accordance with Section 201-a(2) of the State Administrative Procedure Act, because it is apparent from the nature and purpose of these proposed amendments that they will not have a substantial adverse impact on jobs and employment opportunities for those part-time clinics which provide appropriate services in appropriate locations. Those clinics which provide services in locations the Department deems unacceptable will be given an opportunity to relocate to an appropriate setting. The proposed amendments will help to ensure that qualified people provide clinical care and services. Appropriately operating part-time clinics will be allowed to continue providing care and services and newly-proposed sites will be permitted to open provided they can meet the standards established in the regulation. Thus, the jobs of people qualified to provide services, and currently doing so, will not be negatively impacted.

Division of Housing and Community Renewal

NOTICE OF ADOPTION

New York State Rent and Eviction Regulations

I.D. No. HCR-26-03-00011-A
Filing No. 1174
Filing date: Oct. 28, 2003
Effective date: Nov. 12, 2003

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

Action taken: Amendment of section 2102.4 of Title 9 NYCRR.

Statutory authority: Emergency Housing Rent Control Law, L. 1946, ch. 274, subd. 4(a)

Subject: Conversion of rent-regulated buildings from master to individual metering of electricity with rent reductions.

Purpose: To establish uniform standards for rent reductions and recoupment of costs related to electrical conversions.

Text of final rule: The State Rent and Eviction Regulations as promulgated and adopted by the Temporary State Housing Rent Commission, pursuant to the Emergency Housing Rent Control Law, Chap. 274 of the Laws of 1946, section 4, subdivision (4)(a), as amended by Chap. 250, Laws of 1950, as amended, and transferred to the Division of Housing and Community Renewal by Chap. 244, Laws of 1964, are amended to read as follows:

PART 2102 ADJUSTMENTS

Section 1

Section 2102.4 of this Part is amended to read as follows:

The administrator at any time, on his own initiative, or on application of the *owner or* tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

(h) There has been an approved conversion from master metering of electricity, with the cost of electricity included in the rent, to individual metering of electricity, with the tenant paying separately for electricity, and is in amounts set forth in a Schedule of Rent Reductions for different-sized rent controlled housing accommodations included in Operational Bulletin 2003-1 governing electrical conversions issued pursuant to this subdivision and section 2109.8 of this Title by DHCR, 92-31 Union Hall Street, Jamaica, Queens, New York, and available at DHCR's website at www.dhcr.state.ny.us, and determined as follows:

(1) Direct Metering: Where the conversion is to direct metering of electricity, with the tenant purchasing electricity directly from a utility, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "2002 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, and as further adjusted where appropriate to reflect differences in electric rates outside New York City. The charge for electricity is not part of the maximum rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge is not within the jurisdiction of the Commission. A conversion to direct metering is required to include rewiring the building unless the owner can establish that rewiring is unnecessary.

(2) Submetering. Where the conversion is to submetering of electricity, with the tenant purchasing electricity from the owner or a contractor retained by the owner, who purchases electricity from a utility at the bulk rate, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United State's Census Bureau's "2002 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, adjusted to reflect the bulk rate for electricity plus a reasonable service fee for the cost of meter reading and billing, based on the maximum estimated fee included in the "Residential Submetering Manual" revised October 2001, published by the New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, New York, and available on its website at www.nyserda.org, and further adjusted where appropriate to reflect differences in electric rates outside

New York City, and reflected in Operational Bulletin 2003-1. The owner or contractor retained by the owner is not permitted to charge the tenant more than the bulk rate for electricity plus a reasonable service charge for the cost of meter reading and billing. The charge for electricity as well as any related service surcharge is not part of the maximum rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge or surcharge is not within the jurisdiction of the Commission. A conversion to submetering does not require rewiring the building provided the owner submits an affidavit sworn to by a licensed electrician that the existing wiring is safe and of sufficient capacity for the building.

(3) Recipients of Senior Citizen Rent Increase Exemptions (SCRIE): For a tenant who on the date of the conversion is receiving a SCRIE authorized by local law, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this paragraph.

(a) After the conversion, upon the vacancy of the tenant, the owner, without making application to the Commission, is required to reduce the maximum rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(b) After the conversion, if a tenant ceases to receive a SCRIE, the owner, without making application to the Commission, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE, the owner, without making application to the Commission, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

(4) Every three years, upon the publication of a new Housing Vacancy Survey, and tabulation of the survey data by the New York City Rent Guidelines Board, DHCR shall issue a new Operational Bulletin governing electrical conversions setting forth rent reductions based on the new survey data, and shall move to amend the regulations to incorporate by reference the new Operational Bulletin, Housing Vacancy Survey, and Rent guidelines Board tabulation. At such time as NYSERDA issues a new Residential Electric Submetering Manual setting forth a new maximum estimated submetering service fee, DHCR shall move to amend the regulations to incorporate that document by reference.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 2102.4(h) and the Operational Bulletin published in the Miscellaneous Notices section of this issue.

Text of rule and any required statements and analyses may be obtained from: Maurice Jamison, Special Assistant to Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4941, e-mail: mjamison@dhcr.state.ny.us

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

Although there are non-substantive (non-substantial) revisions in the text of the rule as adopted and draft operational bulletin when compared with the text of the previously published version of the proposed rule and draft operational bulletin, which were published in the *State Register* on July 2, 2003, these changes do not necessitate any modification to the previously published regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and job impact statement.

Assessment of Public Comment

Issue: Even where it is clear that the tenants will benefit from the rewiring of their building, there is a potentially adverse impact on the tenants who become responsible for their own electric bills.

Commentary: The decision to undertake a building-wide rewiring rests with the owner. One of the purposes of the regulations is to provide an incentive for owners to upgrade their wiring in order to provide safer and improved electric service to the tenants. An important element of that incentive is the granting of permission to convert to direct or submetering, which, if removed, would significantly undermine the intended incentive. The regulations provide for a rent reduction to mitigate the burden of individual metering on the tenants, and the tenants will be able to further mitigate those effects through conservation.

Issue: Rent increase based on Major Capital Improvements ("MCI") after electrical conversion should not be granted.

Commentary: The proposed regulations merely codify the long-standing agency practice of requiring an owner to rewire a building in connection with an electrical conversion. The only additional MCI imposed by the regulations is for costs attributable to the conversion itself, which will result in a relatively small increase one that should not impose an undue burden on the tenants.

Issue: A prior procedure for determining rent reductions included, in addition to a schedule of standard dollar rent reductions, a rent reduction of 6.6% of the total rent in order to remove the cumulative effects of prior electrical inclusion guidelines increases. This additional rent reduction should be reinstated to avoid awarding the owner a windfall.

Commentary: The 6.6% adjustment was one component of a formula designed to strike a balance between providing an incentive to the owner to undergo electrical conversions in the interest of conservation of energy, and mitigating the burden upon tenants of assuming responsibility for their own electric bills. DHCR's experience with electrical conversion applications, and a report by the New York Energy and Research Agency ("NYSERDA"), indicated that the prior rent reduction formula, in particular the 6.6% rent reduction, was having the effect of discouraging owners from undergoing electrical conversions. The proposed regulations provide for a reasonable alternative method of determining rent reductions which avoids the necessity of the 6.6% reduction, while still accomplishing the agency's conservation objectives without imposing an undue burden upon the affected tenants. This method reduces the rents by an amount based on electric bills reported by New York City Tenants in the triennial Housing and Vacancy Survey ("HVS") performed by the United States Bureau of the Census. For housing accommodations outside New York City, the HVS data is adjusted based on differences in electric rates in each affected area. In a study commissioned by NYSERDA, this data was proven reliable by comparison to independent data derived from completely different sources, essentially electric rates reported by utility companies and applied to typical residential usage patterns. The post-conversion rent reductions, taken collectively, may exceed the owner's electric bill under master metering, since the rent reductions are based on the higher, residential rate, whereas the owners bill was based on the lower, bulk rate.

Issue: Removal of the 6.6% reduction is bared by *Maya Realty Assoc.* v. *Holland*, 235 AD2d 424, 652 NYS2d 302 (2nd Dept. 1997).

Commentary: DHCR has determined, based on changed circumstances, including its experience with electrical conversion applications over the years and a report from NYSERDA, that a different method is appropriate. The Maya Realty decision held that the agency had a rational basis for its prior method of determining rent reductions, and did not hold that such method was required by law to be continued unchanged. DHCR is of the opinion that the new method is also supported by a rational basis.

Issue: A prior procedure for determining rent reductions consisted of two stages, whereas this procedure calls for only one stage. The second stage should be included.

Commentary: The proposed regulations rely on the HVS data that reflects the actual electric bills reported by tenants under direct metering at the residential rate. Accordingly, it would be inappropriate to adjust this data for the residential rate or for anticipated reduced consumption under individual metering, or to eliminate the cost of electricity for the public areas of the building. These three factors, which were the reasons for the second stage, are no longer relevant in determining the rent reduction.

Issue: The rent regulatory laws require that a rent reduction be based on the actual cost of electricity to the tenants at a particular building. The new method is contrary to those laws in that it uses statistical data to determine the rent reduction.

Commentary: The use of statistical data is not contrary to the rent regulatory laws. Statistical data has historically been relied upon in determining rates under the rent regulatory laws, and their use has been repeatedly upheld by the courts.

Issue: Rather than base the rent reduction on the projected cost of electricity to the tenants at the residential rate, the reduction should be based on a proportionate share of the cost of electricity to the owner at the bulk rate.

Commentary: A rent reduction based on the bulk rate paid by the owner would not be sufficient to prevent an undue burden upon the tenants.

Issue: An MCI should not be awarded for the conversion, as it is not an improvement that benefits the tenants.

Commentary: The cost of conversion to individual metering may be included as an MCI because it inures to the benefit of the tenants. The resulting encouragement of conservation of energy is likely to contribute to lower electric rates and fewer power outages.

Issue: Grants and other incentives offered by NYSERDA are the appropriate sources of such incentives for conversion, rather than though the proposed method.

Commentary: DHCR encourages owners to take full advantage of available monetary incentives provided by NYSERDA to convert to individual metering. However, NYSERDA and DHCR are of the opinion that the proposed method of determining rent reductions is necessary in addition to the monetary incentives that NYSERDA provides. Moreover, prior methods of determining rent reductions in electrical conversions have always included, as a necessary component, providing owners with an incentive to convert.

Issue: The regulations will be insufficient to provide an incentive to owners to convert, and therefore more monetary incentives will have to be made available for this purpose.

Commentary: The proposed regulations will provide a sufficient incentive to owners to convert without imposing an undue burden upon the tenants.

Issue: The regulations should be modified to require that owners, as a prerequisite to filing for electrical conversion, must apply for all available energy conservation subsidies and incentives, such as those provided by NYSERDA, and that all amounts received are deducted from the MCI award.

Commentary: In reviewing applications for MCIs, DHCR will continue its present practice of deducting all grants received by the owner from the cost of the MCI.

Issue: DHCR should require installation of advanced metering in all buildings.

Commentary: DHCR acknowledges that advanced metering technologies have the capability to relieve demand during peak load periods and assist consumers in managing energy costs. DHCR will encourage applicants to investigate NYSERDA's Comprehensive Energy Management Program prior to conversion. Such technologies may not be appropriate in all circumstances and it would be counterproductive to energy conservation in general to require owners who are master metered to either accept such a system or remain master metered.

Issue: Conversions reduce the incentive for owners to undergo future conservation measures which would reduce the tenant's consumption of electricity. For example, owners may decide to replace tenants' appliances with less costly and less efficient models. In granting MCIs, DHCR should at least impose an "anti-backsliding" requirement, and even require greater efficiency in newly installed appliances.

Commentary: It is doubtful that less efficient appliances will be significantly less costly to purchase, given that the energy-efficient ones often come with NYSERDA rebates and other incentives. In any event, DHCR is seldom in a position to give prior approval to the installation of new appliances, as applications for MCIs do not often involve the buildingwide replacement of electrical appliances, and individual replacement of appliances occurs either on vacancy without the need to apply to DHCR or with the tenant in occupancy, who is in a position to insist upon an energy-efficient appliance in return for his or her consent to the rent increase.

Issue: The 2002 HVS is now available, so the rent reductions should be updated to reflect the new data.

Commentary: Comment accepted: The regulations and operational bulletin are updated to incorporate by reference the Rent Guidelines Board's tabulation of the 2002 HVS data.

Issue: The updating of rent reductions every three years based on new HVS is not embodied in the regulations, but is mentioned only in the draft operational bulletin. The three year update should be expressly included in the regulations, and reference to a particular operational bulletin or HVS should be deleted to avoid the need for future regulatory amendments.

Commentary: Comment accepted in part: The three-year updating requirement is added to the regulations. As to eliminating references to particular operational bulletins or surveys, the State Administrative Procedure Act prohibits incorporation by reference of the nature suggested by the comment.

Issue: Rent reductions should also be updated every year using cost indexes, rather than every three years as proposed.

Commentary: DHCR's proposed method calls for updating the rent adjustments every three years based on the results of the most recent HVS, which is updated every three years. Electrical inclusion rent reductions are intended to provide the basis for permanent rent reductions that take effect upon an electrical conversion, and remain unchanged thereafter. They remain fixed for a longer period of time in order to enable an owner who is considering undergoing the substantial expense of rewiring and conversion to predict the total cost of the project.

Issue: The regulations will place an undue burden on senior citizens. Protection of Senior Citizens Rent Increase Exemption ("SCRIE") recipients is not enough, as the income limit for SCRIE benefits is $20,000 per year and has not been raised for many years.

Commentary: SCRIE recipients are protected. The regulations are expected to result in rent reductions that will minimize the adverse effect upon all tenants, including senior citizens. Moreover, the SCRIE income limit has just been increased to $24,000.

Issue: Exception made for SCRIE recipients is cumbersome and inequitable. All tenants should be treated the same.

Commentary: Recipients of SCRIE benefits should be given the additional protection of being exempted from the conversion.

Issue: The proposed regulations do not make it clear whether they preempt the regulations of the Public Service Commission ("PSC").

Commentary: The proposed regulations do not pre-empt those of the PSC. The electrical conversion application forms will indicated the need for PSC approval.

Issue: The proposed regulations should be modified to address the situation in which the owner generates its own electricity rather than purchasing it from a utility.

Commentary: The regulations as written, when read in conjunction with existing provisions of the Code, can include owners who generate their own electricity. As to the rates to be charged to the tenants, this will have to be determined on a case-by-case basis in consultation with the PSC.

NOTICE OF ADOPTION

New York City Rent and Eviction Regulations

I.D. No. HCR-26-03-00012-A
Filing No. 1175
Filing date: Oct. 28, 2003
Effective date: Nov. 12, 2003

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

Action taken: Amendment of section 2202.16 of Title 9 NYCRR.

Statutory authority: Omnibus Housing Act, L. 1983, ch. 403, section 28; and Administrative Code of the City of New York, section 26-405(g)(1)

Subject: Conversion of rent-regulated buildings from master to individual metering of electricity with rent reductions.

Purpose: To establish uniform standards for rent reductions and recoupment of costs related to electrical conversions.

Text of final rule: The New York City Rent and Eviction Regulations as promulgated and adopted by the Division of Housing and Community Renewal pursuant to Omnibus Housing Act, Chap. 403, Laws of 1983, Section 28, are amended to read as follows:

PART 2202 ADJUSTMENTS; DETERMINATION OF RENT AND SERVICES

Section 1

Subdivision (e) of section 2202.16 of this Part is renumbered subdivision (f), and a new subdivision (e) is adopted to read as follows:

(e) the administrator may order a decrease of the maximum rent based on an approved conversion from master metering of electricity, with the cost of electricity included in the rent, to individual metering of electricity, with the tenant paying separately for electricity, and is in amounts set forth in a Schedule of Rent Reductions for different-sized rent controlled housing accommodations included in Operational Bulletin 2003-1 governing electrical conversions issued pursuant to this subdivision and section 2209.8 of this Title by DHCR, 92-31 Union Hall Street, Jamaica, Queens, New York, and available at DHCR's website at www.dhcr.state.ny.us, and determined as follows:

(1) Direct Metering. Where the conversion is to direct metering of electricity, with the tenant purchasing electricity directly from a utility, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "2002 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com. The charge for electricity is not part of the maximum rent and is not subject to this Subchapter. The resolution of any

dispute arising from the billing or collection of such charge is not within the jurisdiction of the city rent agency. A conversion to direct metering is required to include rewiring the building unless the owner can establish that rewiring is unnecessary.

(2) Submetering. Where the conversion is to submetering of electricity, with the tenant purchasing electricity from the owner or a contractor retained by the owner, who purchases electricity from a utility at the bulk rate, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "2002 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, adjusted to reflect the bulk rate for electricity plus a reasonable service fee for the cost of meter reading and billing, based on the maximum estimated fee included in the "Residential Electric Submetering Manual" revised October 2001, published by the New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, New York, and available on its website at www.nyserda.org, and reflected in Operational Bulletin 2003-1. The owner or contractor retained by the owner is not permitted to charge the tenant more than the bulk rate for electricity plus a reasonable service charge for the cost of meter reading and billing. The charge for electricity as well as any related service surcharge is not part of the maximum rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge or surcharge is not within the jurisdiction of the city rent agency. A conversion to submetering does not require rewiring the building provided the owner submits an affidavit sworn to by a licensed electrician that the existing wiring is safe and of sufficient capacity for the building.

(3) Recipients of Senior Citizen Rent Increase Exemptions (SCRIE): For a tenant who on the date of the conversion is receiving a SCRIE authorized by section 26-405(m) of the City Rent and Rehabilitation Law, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this subdivision.

(a) After the conversion, upon the vacancy of the tenant, the owner, without making application to the city rent agency, is required to reduce the maximum rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(b) After the conversion, if a tenant ceases to receive a SCRIE, the owner, without making application to the city rent agency, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE, the owner, without making application to the city rent agency, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

(4) Every three years, upon the publication of a new Housing Vacancy Survey, and tabulation of the survey data by the New York City Rent Guidelines Board, DHCR shall issue a new Operational Bulletin governing electrical conversions setting forth rent reductions based on the new survey data, and shall move to amend the regulations to incorporate by reference the new Operational Bulletin, Housing Vacancy Survey, and Rent guidelines Board tabulation. At such time as NYSERDA issues a new Residential Electric Submetering Manual setting forth a new maximum estimated submetering service fee, DHCR shall move to amend the regulations to incorporate that document by reference.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 2202.16(e); and the Operational Bulletin published in the Miscellaneous Notices section of this issue.

Text of rule and any required statements and analyses may be obtained from: Maurice Jamison, Special Assistant to Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4941, e-mail: mjamison@dhcr.state.ny.us

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

Although there are non-substantive (non-substantial) revisions in the text of the rule as adopted and draft operational bulletin when compared with the text of the previously published version of the proposed rule and draft operational bulletin, which were published in the *State Register* on July 2, 2003, these changes do not necessitate any modification to the previously published regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and job impact statement.

Assessment of Public Comment

Issue: For rent controlled tenants, the cost of electricity should be removed from the Maximum Base Rent ("MBR") calculation after conversion.

Commentary: Under the proposed regulations, the MBR and Maximum Collectible Rent ("MCR") will be reduced by the dollar reduction set forth in the Operational Bulletin. The dollar reductions are intended to mitigate the effects of the conversion from master metering, the cost of which was taken into account in the computation of the building's initial MBR, and subsequently increased biennially by standard percentages which apply to all rent controlled units, and do not include a separate factor for electrical inclusion.

Issue: Even where it is clear that the tenants will benefit from the rewiring of their building, there is a potentially adverse impact on the tenants who become responsible for their own electric bills.

Commentary: The decision to undertake a building-wide rewiring rests with the owner. One of the purposes of the regulations is to provide an incentive for owners to upgrade their wiring in order to provide safer and improved electric service to the tenants. An important element of that incentive is the granting of permission to convert to direct or submetering, which, if removed, would significantly undermine the intended incentive. The regulations provide for a rent reduction to mitigate the burden of individual metering on the tenants, and the tenants will be able to further mitigate those effects through conservation.

Issue: Rent increase based on Major Capital Improvements ("MCI") after electrical conversion should not be granted.

Commentary: The proposed regulations merely codify the long-standing agency practice of requiring an owner to rewire a building in connection with an electrical conversion. The only additional MCI imposed by the regulations is for costs attributable to the conversion itself, which will result in a relatively small increase—one that should not impose an undue burden on the tenants.

Issue: A prior procedure for determining rent reductions included, in addition to a schedule of standard dollar rent reductions, a rent reduction of 6.6% of the total rent in order to remove the cumulative effects of prior electrical inclusion guidelines increases. This additional rent reduction should be reinstated to avoid awarding the owner a windfall.

Commentary: The 6.6% adjustment was one component of a formula designed to strike a balance between providing an incentive to the owner to undergo electrical conversions in the interest of conservation of energy, and mitigating the burden upon tenants of assuming responsibility for their own electric bills. DHCR's experience with electrical conversion applications, and a report by the New York Energy and Research Agency ("NYSERDA"), indicated that the prior rent reduction formula, in particular the 6.6% rent reduction, was having the effect of discouraging owners from undergoing electrical conversions. The proposed regulations provide for a reasonable alternative method of determining rent reductions which avoids the necessity of the 6.6% reduction, while still accomplishing the agency's conservation objectives without imposing an undue burden upon the affected tenants. This method reduces the rents by an amount based on electric bills reported by New York City Tenants in the triennial Housing and Vacancy Survey ("HVS") performed by the United States Bureau of the Census. In a study commissioned by NYSERDA, this data was proven reliable by comparison to independent data derived from completely different sources, essentially electric rates reported by utility companies and applied to typical residential usage patterns. The post-conversion rent reductions, taken collectively, may exceed the owner's electric bill under master metering, since the rent reductions are based on the higher, residential rate, whereas the owners bill was based on the lower, bulk rate.

Issue: Removal of the 6.6% reduction is bared by *Maya Realty Assoc.* v. *Holland,* 235 AD2d 424, 652 NYS2d 302 (2nd Dept. 1997).

Commentary: DHCR has determined, based on changed circumstances, including its experience with electrical conversion applications over the years and a report from NYSERDA, that a different method is appropriate. The Maya Realty decision held that the agency had a rational basis for its prior method of determining rent reductions, and did not hold that such method was required by law to be continued unchanged. DHCR is of the opinion that the new method is also supported by a rational basis.

Issue: A prior procedure for determining rent reductions consisted of two stages, whereas this procedure calls for only one stage. The second stage should be included.

Commentary: The proposed regulations rely on the HVS data that reflects the actual electric bills reported by tenants under direct metering at the residential rate. Accordingly, it would be inappropriate to adjust this data for the residential rate or for anticipated reduced consumption under individual metering, or to eliminate the cost of electricity for the public areas of the building. These three factors, which were the reasons for the second stage, are no longer relevant in determining the rent reduction.

Issue: The rent regulatory laws require that a rent reduction be based on the actual cost of electricity to the tenants at a particular building. The new method is contrary to those laws in that it uses statistical data to determine the rent reduction.

Commentary: The use of statistical data is not contrary to the rent regulatory laws. Statistical data has historically been relied upon in determining rates under the rent regulatory laws, and their use has been repeatedly upheld by the courts.

Issue: Rather than base the rent reduction on the projected cost of electricity to the tenants at the residential rate, the reduction should be based on a proportionate share of the cost of electricity to the owner at the bulk rate.

Commentary: A rent reduction based on the bulk rate paid by the owner would not be sufficient to prevent an undue burden upon the tenants.

Issue: An MCI should not be awarded for the conversion, as it is not an improvement that benefits the tenants.

Commentary: The cost of conversion to individual metering may be included as an MCI because it inures to the benefit of the tenants. The resulting encouragement of conservation of energy is likely to contribute to lower electric rates and fewer power outages.

Issue: Grants and other incentives offered by NYSERDA are the appropriate sources of such incentives for conversion, rather than though the proposed method.

Commentary: DHCR encourages owners to take full advantage of available monetary incentives provided by NYSERDA to convert to individual metering. However, NYSERDA and DHCR are of the opinion that the proposed method of determining rent reductions is necessary in addition to the monetary incentives that NYSERDA provides. Moreover, prior methods of determining rent reductions in electrical conversions have always included, as a necessary component, providing owners with an incentive to convert.

Issue: The regulations will be insufficient to provide an incentive to owners to convert, and therefore more monetary incentives will have to be made available for this purpose.

Commentary: The proposed regulations will provide a sufficient incentive to owners to convert without imposing an undue burden upon the tenants.

Issue: The regulations should be modified to require that owners, as a prerequisite to filing for electrical conversion, must apply for all available energy conservation subsidies and incentives, such as those provided by NYSERDA, and that all amounts received are deducted from the MCI award.

Commentary: In reviewing applications for MCIs, DHCR will continue its present practice of deducting all grants received by the owner from the cost of the MCI.

Issue: DHCR should require installation of advanced metering in all buildings.

Commentary: DHCR acknowledges that advanced metering technologies have the capability to relieve demand during peak load periods and assist consumers in managing energy costs. DHCR will encourage applicants to investigate NYSERDA's Comprehensive Energy Management Program prior to conversion. Such technologies may not be appropriate in all circumstances and it would be counterproductive to energy conservation in general to require owners who are master metered to either accept such a system or remain master metered.

Issue: Conversions reduce the incentive for owners to undergo future conservation measures which would reduce the tenant's consumption of electricity. For example, owners may decide to replace tenants' appliances with less costly and less efficient models. In granting MCIs, DHCR should at least impose an "anti-backsliding" requirement, and even require greater efficiency in newly installed appliances.

Commentary: It is doubtful that less efficient appliances will be significantly less costly to purchase, given that the energy-efficient ones often come with NYSERDA rebates and other incentives. In any event, DHCR is seldom in a position to give prior approval to the installation of new appliances, as applications for MCIs do not often involve the buildingwide replacement of electrical appliances, and individual replacement of appliances occurs either on vacancy without the need to apply to DHCR or with the tenant in occupancy, who is in a position to insist upon an energy-efficient appliance in return for his or her consent to the rent increase.

Issue: The 2002 HVS is now available, so the rent reductions should be updated to reflect the new data.

Commentary: Comment accepted: The regulations and operational bulletin are updated to incorporate by reference the Rent Guidelines Board's tabulation of the 2002 HVS data.

Issue: The updating of rent reductions every three years based on new HVS is not embodied in the regulations, but is mentioned only in the draft operational bulletin. The three year update should be expressly included in the regulations, and reference to a particular operational bulletin or HVS should be deleted to avoid the need for future regulatory amendments.

Commentary: Comment accepted in part: The three-year updating requirement is added to the regulations. As to eliminating references to particular operational bulletins or surveys, the State Administrative Procedure Act prohibits incorporation by reference of the nature suggested by the comment.

Issue: Rent reductions should also be updated every year using cost indexes, rather than every three years as proposed.

Commentary: DHCR's proposed method calls for updating the rent adjustments every three years based on the results of the most recent HVS, which is updated every three years. Electrical inclusion rent reductions are intended to provide the basis for permanent rent reductions that take effect upon an electrical conversion, and remain unchanged thereafter. They remain fixed for a longer period of time in order to enable an owner who is considering undergoing the substantial expense of rewiring and conversion to predict the total cost of the project.

Issue: The regulations will place an undue burden on senior citizens. Protection of Senior Citizens Rent Increase Exemption ("SCRIE") recipients is not enough, as the income limit for SCRIE benefits is $20,000 per year and has not been raised for many years.

Commentary: SCRIE recipients are protected. The regulations are expected to result in rent reductions that will minimize the adverse effect upon all tenants, including senior citizens. Moreover, the SCRIE income limit has just been increased to $24,000.

Issue: Exception made for SCRIE recipients is cumbersome and inequitable. All tenants should be treated the same.

Commentary: Recipients of SCRIE benefits should be given the additional protection of being exempted from the conversion.

Issue: The proposed regulations do not make it clear whether they preempt the regulations of the Public Service Commission ("PSC").

Commentary: The proposed regulations do not pre-empt those of the PSC. The electrical conversion application forms will indicated the need for PSC approval.

Issue: The proposed regulations should be modified to address the situation in which the owner generates its own electricity rather than purchasing it from a utility.

Commentary: The regulations as written, when read in conjunction with existing provisions of the Code, can include owners who generate their own electricity. As to the rates to be charged to the tenants, this will have to be determined on a case-by-case basis in consultation with the PSC.

NOTICE OF ADOPTION

Emergency Tenant Protection Regulations

I.D. No. HCR-26-03-00013-A
Filing No. 1176
Filing date: Oct. 28, 2003
Effective date: Nov. 12, 2003

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

Action taken: Amendment of section 2502.4 of Title 9 NYCRR.

Statutory authority: Emergency Tenant Protection Act of 1974 (ETPA), L. 1974, ch. 576, section 10a

Subject: Conversion of rent-regulated buildings from master to individual metering of electricity with rent reductions.

Purpose: To establish uniform standards for rent reductions and recoupment of costs related to electrical conversions.

Text of final rule: The Emergency Tenant Protection Regulations as promulgated and adopted by the Division of Housing and Community

Renewal pursuant to the Emergency Tenant Protection Act of Nineteen Seventy-four, section 4 of Chap. 576, Laws of 1974, section 10(a), as amended, are amended to read as follows:

PART 2502 ADJUSTMENTS

Section 1

Subparagraph (ii) of paragraph (2) of subdivision (a) of section 2502.4 of this Part, item (22) under the Schedule of Major Capital Improvements, is amended to read as follows:

22. REWIRING:

- new copper risers and feeders extending from property box in basement to every housing accommodation; must be of sufficient capacity (220) volts to accommodate the installation of air conditioner circuits in living room and/or bedroom*; and work done to effectuate conversion from master to individual metering of electricity approved by the Division pursuant to paragraph (3) of subdivision (b) of this section.*

Section 2

Paragraph (3) of subdivision (b) of section 2502.4 of this Part is renumbered paragraph (4), and a new paragraph (3) is adopted to read as follows:

(3) such decrease, modification or substitution results from an approved conversion from master metering of electricity, with the cost of electricity included in the rent, to individual metering of electricity, with the tenant paying separately for electricity, and is in amounts set forth in a Schedule of Rent Reductions for different-sized rent stabilized housing accommodations included in Operational Bulletin 2003-1 governing electrical conversions issued pursuant to this paragraph and section 2507.11 of this Title by DHCR, 92-31 Union Hall Street, Jamaica, Queens, New York, and available at DHCR's website at www.dhcr.state.ny.us, and determined as follows:

(i) Direct Metering. Where the conversion is to direct metering of electricity, with the tenant purchasing electricity directly from a utility, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "2002 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, and as further adjusted where appropriate to reflect differences in electric rates outside New York City. The charge for electricity is not part of the legal regulated rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge is not within the jurisdiction of the Division. A conversion to direct metering is required to include rewiring the building unless the owner can establish that rewiring is unnecessary.

(ii) Submetering: Where the conversion is to submetering of electricity, with the tenant purchasing electricity from the owner or a contractor retained by the owner, who purchases electricity from a utility at the bulk rate, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "2002 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, adjusted to reflect the bulk rate for electricity plus a reasonable service fee for the cost of meter reading and billing, based on the maximum estimated fee included in the "Residential Electric Submetering Manual" revised October 2001, published by the New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, New York, and available on its website at www.nyserda.org, and further adjusted where appropriate to reflect differences in electric rates outside New York City, and reflected in Operational Bulletin 2003-1. The owner or contractor retained by the owner is not permitted to charge the tenant more than the bulk rate for electricity plus a reasonable service charge for the cost of meter reading and billing. The charge for electricity as well as any related service surcharge is not part of the legal regulated rent and is not subject to this Subchapter. The resolution of any dispute arising from the billing or collection of such charge or surcharge is not within the jurisdiction of the Division. A conversion to submetering does not require rewiring the building provided the owner submits an affidavit sworn to by a licensed electrician that the existing wiring is safe and of sufficient capacity for the building.

(iii) Recipients of Senior Citizen Rent Increase Exemptions (SCRIE): For a tenant who on the date of the conversion is receiving a SCRIE authorized by local law, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this paragraph.

(a) After the conversion, upon the vacancy of the tenant, the owner, without making application to the Division, is required to reduce the legal regulated rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(b) After the conversion, if a tenant ceases to receive a SCRIE, the owner, without making application to the Division, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE, the owner, without making application to the Division, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

(iv) Every three years, upon the publication of a new Housing Vacancy Survey, and tabulation of the survey data by the New York City Rent Guidelines Board, DHCR shall issue a new Operational Bulletin governing electrical conversions setting forth rent reductions based on the new survey data, and shall move to amend the regulations to incorporate by reference the new Operational Bulletin, Housing Vacancy Survey, and Rent Guidelines Board tabulation. At such time as NYSERDA issues a new Residential Electric Submetering Manual setting forth a new maximum estimated submetering service fee, DHCR shall move to amend the regulations to incorporate that document by reference.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 2502.4(b)(3) and the Operational Bulletin published in the Miscellaneous Notices section of this issue.

Text of rule and any required statements and analyses may be obtained from: Maurice Jamison, Special Assistant to Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4941, e-mail: mjamison@dhcr.state.ny.us

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

Although there are non-substantive (non-substantial) revisions in the text of the rule as adopted and draft operational bulletin when compared with the text of the previously published version of the proposed rule and draft operational bulletin, which were published in the *State Register* on July 2, 2003, these changes do not necessitate any modification to the previously published regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and job impact statement.

Assessment of Public Comment

Issue: Even where it is clear that the tenants will benefit from the rewiring of their building, there is a potentially adverse impact on the tenants who become responsible for their own electric bills.

Commentary: The decision to undertake a building-wide rewiring rests with the owner. One of the purposes of the regulations is to provide an incentive for owners to upgrade their wiring in order to provide safer and improved electric service to the tenants. An important element of that incentive is the granting of permission to convert to direct or submetering, which, if removed, would significantly undermine the intended incentive. The regulations provide for a rent reduction to mitigate the burden of individual metering on the tenants, and the tenants will be able to further mitigate those effects through conservation.

Issue: Rent increase based on Major Capital Improvements ("MCI") after electrical conversion should not be granted.

Commentary: The proposed regulations merely codify the long-standing agency practice of requiring an owner to rewire a building in connection with an electrical conversion. The only additional MCI imposed by the regulations is for costs attributable to the conversion itself, which will result in a relatively small increase—one that should not impose an undue burden on the tenants.

Issue: A prior procedure for determining rent reductions included, in addition to a schedule of standard dollar rent reductions, a rent reduction of 6.6% of the total rent in order to remove the cumulative effects of prior electrical inclusion guidelines increases. This additional rent reduction should be reinstated to avoid awarding the owner a windfall.

Commentary: The 6.6% adjustment was one component of a formula designed to strike a balance between providing an incentive to the owner to undergo electrical conversions in the interest of conservation of energy,

and mitigating the burden upon tenants of assuming responsibility for their own electric bills. DHCR's experience with electrical conversion applications, and a report by the New York Energy and Research Agency ("NYSERDA"), indicated that the prior rent reduction formula, in particular the 6.6% rent reduction, was having the effect of discouraging owners from undergoing electrical conversions. The proposed regulations provide for a reasonable alternative method of determining rent reductions which avoids the necessity of the 6.6% reduction, while still accomplishing the agency's conservation objectives without imposing an undue burden upon the affected tenants. This method reduces the rents by an amount based on electric bills reported by New York City Tenants in the triennial Housing and Vacancy Survey ("HVS") performed by the United States Bureau of the Census. In a study commissioned by NYSERDA, this data was proven reliable by comparison to independent data derived from completely different sources, essentially electric rates reported by utility companies and applied to typical residential usage patterns. For housing accommodations outside New York City, the HVS data is adjusted based on differences in electric rates in each affected area. The post-conversion rent reductions, taken collectively, may exceed the owner's electric bill under master metering, since the rent reductions are based on the higher, residential rate, whereas the owners bill was based on the lower, bulk rate.

Issue: Removal of the 6.6% reduction is bared by *Maya Realty Assoc.* v. *Holland*, 235 AD2d 424, 652 NYS2d 302 (2nd Dept. 1997).

Commentary: DHCR has determined, based on changed circumstances, including its experience with electrical conversion applications over the years and a report from NYSERDA, that a different method is appropriate. The Maya Realty decision held that the agency had a rational basis for its prior method of determining rent reductions, and did not hold that such method was required by law to be continued unchanged. DHCR is of the opinion that the new method is also supported by a rational basis.

Issue: A prior procedure for determining rent reductions consisted of two stages, whereas this procedure calls for only one stage. The second stage should be included.

Commentary: The proposed regulations rely on the HVS data that reflects the actual electric bills reported by tenants under direct metering at the residential rate. Accordingly, it would be inappropriate to adjust this data for the residential rate or for anticipated reduced consumption under individual metering, or to eliminate the cost of electricity for the public areas of the building. These three factors, which were the reasons for the second stage, are no longer relevant in determining the rent reduction.

Issue: The rent regulatory laws require that a rent reduction be based on the actual cost of electricity to the tenants at a particular building. The new method is contrary to those laws in that it uses statistical data to determine the rent reduction.

Commentary: The use of statistical data is not contrary to the rent regulatory laws. Statistical data has historically been relied upon in determining rates under the rent regulatory laws, and their use has been repeatedly upheld by the courts.

Issue: Rather than base the rent reduction on the projected cost of electricity to the tenants at the residential rate, the reduction should be based on a proportionate share of the cost of electricity to the owner at the bulk rate.

Commentary: A rent reduction based on the bulk rate paid by the owner would not be sufficient to prevent an undue burden upon the tenants.

Issue: An MCI should not be awarded for the conversion, as it is not an improvement that benefits the tenants.

Commentary: The cost of conversion to individual metering may be included as an MCI because it inures to the benefit of the tenants. The resulting encouragement of conservation of energy is likely to contribute to lower electric rates and fewer power outages.

Issue: Grants and other incentives offered by NYSERDA are the appropriate sources of such incentives for conversion, rather than though the proposed method.

Commentary: DHCR encourages owners to take full advantage of available monetary incentives provided by NYSERDA to convert to individual metering. However, NYSERDA and DHCR are of the opinion that the proposed method of determining rent reductions is necessary in addition to the monetary incentives that NYSERDA provides. Moreover, prior methods of determining rent reductions in electrical conversions have always included, as a necessary component, providing owners with an incentive to convert.

Issue: The regulations will be insufficient to provide an incentive to owners to convert, and therefore more monetary incentives will have to be made available for this purpose.

Commentary: The proposed regulations will provide a sufficient incentive to owners to convert without imposing an undue burden upon the tenants.

Issue: The regulations should be modified to require that owners, as a prerequisite to filing for electrical conversion, must apply for all available energy conservation subsidies and incentives, such as those provided by NYSERDA, and that all amounts received are deducted from the MCI award.

Commentary: In reviewing applications for MCIs, DHCR will continue its present practice of deducting all grants received by the owner from the cost of the MCI.

Issue: DHCR should require installation of advanced metering in all buildings.

Commentary: DHCR acknowledges that advanced metering technologies have the capability to relieve demand during peak load periods and assist consumers in managing energy costs. DHCR will encourage applicants to investigate NYSERDA's Comprehensive Energy Management Program prior to conversion. Such technologies may not be appropriate in all circumstances and it would be counterproductive to energy conservation in general to require owners who are master metered to either accept such a system or remain master metered.

Issue: Conversions reduce the incentive for owners to undergo future conservation measures which would reduce the tenant's consumption of electricity. For example, owners may decide to replace tenants' appliances with less costly and less efficient models. In granting MCIs, DHCR should at least impose an "anti-backsliding" requirement, and even require greater efficiency in newly installed appliances.

Commentary: It is doubtful that less efficient appliances will be significantly less costly to purchase, given that the energy-efficient ones often come with NYSERDA rebates and other incentives. In any event, DHCR is seldom in a position to give prior approval to the installation of new appliances, as applications for MCIs do not often involve the buildingwide replacement of electrical appliances, and individual replacement of appliances occurs either on vacancy without the need to apply to DHCR or with the tenant in occupancy, who is in a position to insist upon an energy-efficient appliance in return for his or her consent to the rent increase.

Issue: The 2002 HVS is now available, so the rent reductions should be updated to reflect the new data.

Commentary: Comment accepted: The regulations and operational bulletin are updated to incorporate by reference the Rent Guidelines Board's tabulation of the 2002 HVS data.

Issue: The updating of rent reductions every three years based on new HVS is not embodied in the regulations, but is mentioned only in the draft operational bulletin. The three year update should be expressly included in the regulations, and reference to a particular operational bulletin or HVS should be deleted to avoid the need for future regulatory amendments.

Commentary: Comment accepted in part: The three-year updating requirement is added to the regulations. As to eliminating references to particular operational bulletins or surveys, the State Administrative Procedure Act prohibits incorporation by reference of the nature suggested by the comment.

Issue: Rent reductions should also be updated every year using cost indexes, rather than every three years as proposed.

Commentary: DHCR's proposed method calls for updating the rent adjustments every three years based on the results of the most recent HVS, which is updated every three years. Electrical inclusion rent reductions are intended to provide the basis for permanent rent reductions that take effect upon an electrical conversion, and remain unchanged thereafter. They remain fixed for a longer period of time in order to enable an owner who is considering undergoing the substantial expense of rewiring and conversion to predict the total cost of the project.

Issue: The regulations will place an undue burden on senior citizens. Protection of Senior Citizens Rent Increase Exemption ("SCRIE") recipients is not enough, as the income limit for SCRIE benefits is $20,000 per year and has not been raised for many years.

Commentary: SCRIE recipients are protected. The regulations are expected to result in rent reductions that will minimize the adverse effect upon all tenants, including senior citizens. Moreover, the SCRIE income limit has just been increased to $24,000.

Issue: Exception made for SCRIE recipients is cumbersome and inequitable. All tenants should be treated the same.

Commentary: Recipients of SCRIE benefits should be given the additional protection of being exempted from the conversion.

Issue: The proposed regulations do not make it clear whether they preempt the regulations of the Public Service Commission ("PSC").

Commentary: The proposed regulations do not pre-empt those of the PSC. The electrical conversion application forms will indicated the need for PSC approval.

Issue: The proposed regulations should be modified to address the situation in which the owner generates its own electricity rather than purchasing it from a utility.

Commentary: The regulations as written, when read in conjunction with existing provisions of the Code, can include owners who generate their own electricity. As to the rates to be charged to the tenants, this will have to be determined on a case-by-case basis in consultation with the PSC.

NOTICE OF ADOPTION

Rent Stabilization Code

I.D. No. HCR-26-03-00014-A
Filing No. 1177
Filing date: Oct. 28, 2003
Effective date: Nov. 12, 2003

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

Action taken: Amendment of section 2522.4 of Title 9 NYCRR.

Statutory authority: Administrative Code of the City of New York, section 26-511(b)

Subject: Conversion of rent-regulated buildings from master to individual metering of electricity with rent reductions.

Purpose: To establish uniform standards for rent reductions and recoupment of costs related to electrical conversions.

Text of final rule: The Rent Stabilization Code as amended and adopted pursuant to the powers granted to the Division of Housing and Community Renewal by section 26-511(b) of the Administrative Code of the City of New York, as recodified by Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.0[b] as amended by Laws of 1985, Chap. 888, section 2), and section 26-518(a) of such Code, as recodified by Laws of 1985, Chap. 507, section 1 (formerly section YY51-6.1[a] as added by Laws of 1985, Chap. 888, section 8) is amended to read as follows:

PART 2522 RENT ADJUSTMENT

Section 1

Paragraph (3) of subdivision (a) of section 2522.4 of this Part, item 22 under the Schedule of Major Capital Improvements, is amended to read as follows:

22. REWIRING:

- new copper risers and feeders extending from property box in basement to every housing accommodation; must be of sufficient capacity (220 volts) to accommodate the installation of air conditioner circuits in living room and/or bedroom; *and work done to effectuate conversion from master to individual metering of electricity approved by DHCR pursuant to paragraph (3) of subdivision (d) of this section.*

Section 2

Paragraph (3) of subdivision (d) of section 2522.4 of this Part is renumbered paragraph (4), and a new paragraph (3) is adopted to read as follows:

(3) such decrease results from an approved conversion from master metering of electricity, with the cost of electricity included in the rent, to individual metering of electricity, with the tenant paying separately for electricity, and is in amounts set forth in a Schedule of Rent Reductions for different-sized rent stabilized housing accommodations included in Operational Bulletin 2003-1 governing electrical conversions issued pursuant to this paragraph and Section 2527.11 of this Code by DHCR, 92-31 Union Hall Street, Jamaica, Queens, New York, and available at DHCR's website at www.dhcr.state.ny.us, and determined as follows:

(i) Direct Metering: Where the conversion is to direct metering of electricity, with the tenant purchasing electricity directly from a utility, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "2002 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com. The charge for electricity is not part of the legal regulated rent and is not subject to this Code. The resolution of any dispute arising from the billing or collection of such charge is not within the jurisdiction of the DHCR. A conversion to direct metering is required to include rewiring the building unless the owner can establish that rewiring is unnecessary.

(ii) Submetering: Where the conversion is to submetering of electricity, with the tenant purchasing electricity from the owner or a contractor retained by the owner, who purchases electricity from a utility at the bulk rate, such Schedule of Rent Reductions is based on the median monthly cost of electricity to tenants derived from data from the United States Census Bureau's "2002 New York City Housing and Vacancy Survey," as tabulated by the New York City Rent Guidelines Board, 51 Chambers Street, Suite 202, New York, New York, and available on its website at www.housingnyc.com, adjusted to reflect the bulk rate for electricity plus a reasonable service fee for the cost of meter reading and billing, based on the maximum estimated fee included in the "Residential Electric Submetering Manual" revised October 2001, published by the New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, New York, and available on its website at www.nyserda.org, and reflected in Operational Bulletin 2003-1. The owner or contractor retained by the owner is not permitted to charge the tenant more than the bulk rate for electricity plus a reasonable service charge for the cost of meter reading and billing. The charge for electricity as well as any related service surcharge is not part of the legal regulated rent and is not subject to this Code. The resolution of any dispute arising from the billing or collection of such charge or surcharge is not within the jurisdiction of the DHCR. A conversion to submetering does not require rewiring the building provided the owner submits an affidavit sworn to by a licensed electrician that the existing wiring is safe and of sufficient capacity for the building.

(iii) Recipients of Senior Citizen Rent Increase Exemptions (SCRIE): For a tenant who on the date of the conversion is receiving a SCRIE authorized by section 26-509 of the Rent Stabilization Law of Nineteen Hundred Sixty-nine, the rent is not reduced and the cost of electricity remains included in the rent, although the owner is permitted to install any equipment in such tenant's housing accommodation as is required for effectuation of electrical conversion pursuant to this paragraph.

(a) After the conversion, upon the vacancy of the tenant, the owner, without making application to DHCR, is required to reduce the legal regulated rent for the housing accommodation in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion.

(b) After the conversion, if a tenant ceases to receive a SCRIE, the owner, without making application to DHCR, may reduce the rent in accordance with the Schedule of Rent Reductions set forth in Operational Bulletin 2003-1, and thereafter the tenant is responsible for the cost of his or her consumption of electricity, and for the legal rent as reduced, including any applicable major capital improvement rent increase based upon the cost of work done to effectuate the electrical conversion, for as long as the tenant is not receiving a SCRIE. Thereafter, in the event that the tenant resumes receiving a SCRIE, the owner, without making application to DHCR, is required to eliminate the rent reduction and resume responsibility for the tenant's electric bills.

(iv) Every three years, upon the publication of a new Housing Vacancy Survey, and tabulation of the survey data by the New York City Rent Guidelines Board, DHCR shall issue a new Operational Bulletin governing electrical conversions setting forth rent reductions based on the new survey data, and shall move to amend the regulations to incorporate by reference the new Operational Bulletin, Housing Vacancy Survey, and Rent guidelines Board tabulation. At such time as NYSERDA issues a new Residential Electric Submetering Manual setting forth a new maximum estimated submetering service fee, DHCR shall move to amend the regulations to incorporate that document by reference.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 2522.4(d)(3) and the Operational Bulletin published in the Miscellaneous Notices section of this issue.

Text of rule and any required statements and analyses may be obtained from: Maurice Jamison, Special Assistant to Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4941, e-mail: mjamison@dhcr.state.ny.us

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

Although there are non-substantive (non-substantial) revisions in the text of the rule as adopted and draft operational bulletin when compared with the text of the previously published version of the proposed rule and draft operational bulletin, which were published in the *State Register* on

July 2, 2003, these changes do not necessitate any modification to the previously published regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and job impact statement.

Assessment of Public Comment

Issue: Even where it is clear that the tenants will benefit from the rewiring of their building, there is a potentially adverse impact on the tenants who become responsible for their own electric bills.

Commentary: The decision to undertake a building-wide rewiring rests with the owner. One of the purposes of the regulations is to provide an incentive for owners to upgrade their wiring in order to provide safer and improved electric service to the tenants. An important element of that incentive is the granting of permission to convert to direct or submetering, which, if removed, would significantly undermine the intended incentive. The regulations provide for a rent reduction to mitigate the burden of individual metering on the tenants, and the tenants will be able to further mitigate those effects through conservation.

Issue: Rent increase based on Major Capital Improvements ("MCI") after electrical conversion should not be granted.

Commentary: The proposed regulations merely codify the long-standing agency practice of requiring an owner to rewire a building in connection with an electrical conversion. The only additional MCI imposed by the regulations is for costs attributable to the conversion itself, which will result in a relatively small increase—one that should not impose an undue burden on the tenants.

Issue: A prior procedure for determining rent reductions included, in addition to a schedule of standard dollar rent reductions, a rent reduction of 6.6% of the total rent in order to remove the cumulative effects of prior electrical inclusion guidelines increases. This additional rent reduction should be reinstated to avoid awarding the owner a windfall.

Commentary: The 6.6% adjustment was one component of a formula designed to strike a balance between providing an incentive to the owner to undergo electrical conversions in the interest of conservation of energy, and mitigating the burden upon tenants of assuming responsibility for their own electric bills. DHCR's experience with electrical conversion applications, and a report by the New York Energy and Research Agency ("NYSERDA"), indicated that the prior rent reduction formula, in particular the 6.6% rent reduction, was having the effect of discouraging owners from undergoing electrical conversions. The proposed regulations provide for a reasonable alternative method of determining rent reductions which avoids the necessity of the 6.6% reduction, while still accomplishing the agency's conservation objectives without imposing an undue burden upon the affected tenants. This method reduces the rents by an amount based on electric bills reported by New York City Tenants in the triennial Housing and Vacancy Survey ("HVS") performed by the United States Bureau of the Census. In a study commissioned by NYSERDA, this data was proven reliable by comparison to independent data derived from completely different sources, essentially electric rates reported by utility companies and applied to typical residential usage patterns. The post-conversion rent reductions, taken collectively, may exceed the owner's electric bill under master metering, since the rent reductions are based on the higher, residential rate, whereas the owners bill was based on the lower, bulk rate.

Issue: Removal of the 6.6% reduction is bared by *Maya Realty Assoc.* v. *Holland*, 235 AD2d 424, 652 NYS2d 302 (2nd Dept. 1997).

Commentary: DHCR has determined, based on changed circumstances, including its experience with electrical conversion applications over the years and a report from NYSERDA, that a different method is appropriate. The Maya Realty decision held that the agency had a rational basis for its prior method of determining rent reductions, and did not hold that such method was required by law to be continued unchanged. DHCR is of the opinion that the new method is also supported by a rational basis.

Issue: A prior procedure for determining rent reductions consisted of two stages, whereas this procedure calls for only one stage. The second stage should be included.

Commentary: The proposed regulations rely on the HVS data that reflects the actual electric bills reported by tenants under direct metering at the residential rate. Accordingly, it would be inappropriate to adjust this data for the residential rate or for anticipated reduced consumption under individual metering, or to eliminate the cost of electricity for the public areas of the building. These three factors, which were the reasons for the second stage, are no longer relevant in determining the rent reduction.

Issue: The rent regulatory laws require that a rent reduction be based on the actual cost of electricity to the tenants at a particular building. The new method is contrary to those laws in that it uses statistical data to determine the rent reduction.

Commentary: The use of statistical data is not contrary to the rent regulatory laws. Statistical data has historically been relied upon in determining rates under the rent regulatory laws, and their use has been repeatedly upheld by the courts.

Issue: Rather than base the rent reduction on the projected cost of electricity to the tenants at the residential rate, the reduction should be based on a proportionate share of the cost of electricity to the owner at the bulk rate.

Commentary: A rent reduction based on the bulk rate paid by the owner would not be sufficient to prevent an undue burden upon the tenants.

Issue: An MCI should not be awarded for the conversion, as it is not an improvement that benefits the tenants.

Commentary: The cost of conversion to individual metering may be included as an MCI because it inures to the benefit of the tenants. The resulting encouragement of conservation of energy is likely to contribute to lower electric rates and fewer power outages.

Issue: Grants and other incentives offered by NYSERDA are the appropriate sources of such incentives for conversion, rather than though the proposed method.

Commentary: DHCR encourages owners to take full advantage of available monetary incentives provided by NYSERDA to convert to individual metering. However, NYSERDA and DHCR are of the opinion that the proposed method of determining rent reductions is necessary in addition to the monetary incentives that NYSERDA provides. Moreover, prior methods of determining rent reductions in electrical conversions have always included, as a necessary component, providing owners with an incentive to convert.

Issue: The regulations will be insufficient to provide an incentive to owners to convert, and therefore more monetary incentives will have to be made available for this purpose.

Commentary: The proposed regulations will provide a sufficient incentive to owners to convert without imposing an undue burden upon the tenants.

Issue: The regulations should be modified to require that owners, as a prerequisite to filing for electrical conversion, must apply for all available energy conservation subsidies and incentives, such as those provided by NYSERDA, and that all amounts received are deducted from the MCI award.

Commentary: In reviewing applications for MCIs, DHCR will continue its present practice of deducting all grants received by the owner from the cost of the MCI.

Issue: DHCR should require installation of advanced metering in all buildings.

Commentary: DHCR acknowledges that advanced metering technologies have the capability to relieve demand during peak load periods and assist consumers in managing energy costs. DHCR will encourage applicants to investigate NYSERDA's Comprehensive Energy Management Program prior to conversion. Such technologies may not be appropriate in all circumstances and it would be counterproductive to energy conservation in general to require owners who are master metered to either accept such a system or remain master metered.

Issue: Conversions reduce the incentive for owners to undergo future conservation measures which would reduce the tenant's consumption of electricity. For example, owners may decide to replace tenants' appliances with less costly and less efficient models. In granting MCIs, DHCR should at least impose an "anti-backsliding" requirement, and even require greater efficiency in newly installed appliances.

Commentary: It is doubtful that less efficient appliances will be significantly less costly to purchase, given that the energy-efficient ones often come with NYSERDA rebates and other incentives. In any event, DHCR is seldom in a position to give prior approval to the installation of new appliances, as applications for MCIs do not often involve the buildingwide replacement of electrical appliances, and individual replacement of appliances occurs either on vacancy without the need to apply to DHCR or with the tenant in occupancy, who is in a position to insist upon an energy-efficient appliance in return for his or her consent to the rent increase.

Issue: The 2002 HVS is now available, so the rent reductions should be updated to reflect the new data.

Commentary: Comment accepted: The regulations and operational bulletin are updated to incorporate by reference the Rent Guidelines Board's tabulation of the 2002 HVS data.

Issue: The updating of rent reductions every three years based on new HVS is not embodied in the regulations, but is mentioned only in the draft operational bulletin. The three year update should be expressly included in

the regulations, and reference to a particular operational bulletin or HVS should be deleted to avoid the need for future regulatory amendments.

Commentary: Comment accepted in part: The three-year updating requirement is added to the regulations. As to eliminating references to particular operational bulletins or surveys, the State Administrative Procedure Act prohibits incorporation by reference of the nature suggested by the comment.

Issue: Rent reductions should also be updated every year using cost indexes, rather than every three years as proposed.

Commentary: DHCR's proposed method calls for updating the rent adjustments every three years based on the results of the most recent HVS, which is updated every three years. Electrical inclusion rent reductions are intended to provide the basis for permanent rent reductions that take effect upon an electrical conversion, and remain unchanged thereafter. They remain fixed for a longer period of time in order to enable an owner who is considering undergoing the substantial expense of rewiring and conversion to predict the total cost of the project.

Issue: The regulations will place an undue burden on senior citizens. Protection of Senior Citizens Rent Increase Exemption ("SCRIE") recipients is not enough, as the income limit for SCRIE benefits is $20,000 per year and has not been raised for many years.

Commentary: SCRIE recipients are protected. The regulations are expected to result in rent reductions that will minimize the adverse effect upon all tenants, including senior citizens. Moreover, the SCRIE income limit has just been increased to $24,000.

Issue: Exception made for SCRIE recipients is cumbersome and inequitable. All tenants should be treated the same.

Commentary: Recipients of SCRIE benefits should be given the additional protection of being exempted from the conversion.

Issue: The proposed regulations do not make it clear whether they preempt the regulations of the Public Service Commission ("PSC").

Commentary: The proposed regulations do not pre-empt those of the PSC. The electrical conversion application forms will indicated the need for PSC approval.

Issue: The proposed regulations should be modified to address the situation in which the owner generates its own electricity rather than purchasing it from a utility.

Commentary: The regulations as written, when read in conjunction with existing provisions of the Code, can include owners who generate their own electricity. As to the rates to be charged to the tenants, this will have to be determined on a case-by-case basis in consultation with the PSC.

New York State 911 Board

INFORMATION NOTICE
NOTICE OF PROPOSED STANDARDS

The New York State 911 Board is established pursuant to County Law § 326. The Board is charged with assisting local governments, service suppliers, wireless telephone service suppliers and appropriate state agencies by facilitating the most efficient and effective routing of wireless 911 emergency calls; developing minimum standards for public safety answering points; promoting the exchange of information, including emerging technologies; and encouraging the use of best practice standards among the public safety answering point community. The Board is exempt from the requirements of the New York State Administrative Procedure Act, but is required to publish its proposed and final standards pursuant to the provisions of County Law § 327. This Notice is published pursuant to those provisions.

Proposed Amendments to Minimum Standards Regarding Call-Taker/Dispatcher Training, Staffing of Public Safety Answering Points, and Equipment, Facilities and Security for Public Safety Answering Points. Summary. At its meeting of September 17, 2003, the Board adopted standards relating to minimum training requirements for call-takers/dispatchers who receive wireless 911 calls, the minimum staffing requirements for public safety answering points, and the minimum requirements for the equipment as well as the general building and security provisions at public safety answering point locations. These standards were published in the October 15, 2003 issue of the *Register*. At its meeting of October 28, 2003, the Board proposed amendments to those standards which appear in this Notice. A minimum 45-day comment period follows this Notice, during which all interested persons and organizations are invited to comment.

Further information, contacts: Written comments may be submitted to Harry J. Willis, Esq., at the New York State Department of State, Office of Counsel, 41 State Street, Suite 830, Albany, NY 12231, fax: 518-473-9211, phone: 518-474-6740.

The proposed amendments are as follows:

21 NYCRR Part 5201
Minimum Standards Regarding Call-Taker/Dispatcher Training
(Statutory Authority: County Law § 328)

A new Section 5201.6 is added to read as follows:

5201.6. Variances.

(a) The Board shall have authority to grant variances from the strict provisions of this Part, upon application therefor and upon a showing of:

(1) unnecessary hardship; and

(2) that an alternative measure or method to be adopted will meet the objectives of the standards.

(b) In granting such variance, the Board shall provide that such variance shall be for a stated period of time.

21 NYCRR Part 5202
Minimum Standards Regarding Staffing of Public Safety Answering Points
(Statutory Authority: County Law § 328)

A new Section 5202.3 is added to read as follows:

5202.3. Variances.

(a) The Board shall have authority to grant variances from the strict provisions of this Part, upon application therefor and upon a showing of:

(1) unnecessary hardship; and

(2) that an alternative measure or method to be adopted will meet the objectives of the standards.

(b) In granting such variance, the Board shall provide that such variance shall be for a stated period of time.

21 NYCRR Part 5203
Minimum Standards Regarding Staffing of Public Safety Answering Points
(Statutory Authority: County Law § 328)

A new Section 5203.6 is added to read as follows:

5203.6. Variances.

(a) The Board shall have authority to grant variances from the strict provisions of this Part, upon application therefor and upon a showing of:

(1) unnecessary hardship; and

(2) that an alternative measure or method to be adopted will meet the objectives of the standards.

(b) In granting such variance, the Board shall provide that such variance shall be for a stated period of time.

INFORMATION NOTICE
NOTICE OF PROPOSED STANDARDS

The New York State 911 Board is established pursuant to County Law § 326. The Board is charged with assisting local governments, service suppliers, wireless telephone service suppliers and appropriate state agencies by facilitating the most efficient and effective routing of wireless 911 emergency calls; developing minimum standards for public safety answering points; promoting the exchange of information, including emerging technologies; and encouraging the use of best practice standards among the public safety answering point community. The Board is exempt from the requirements of the New York State Administrative Procedure Act, but is required to publish its proposed and final standards pursuant to the provisions of County Law § 327. This Notice is published pursuant to those provisions.

Proposed Minimum Standards Relating to Expedited Deployment Funding. Summary. At its meeting of October 28, 2003, the Board proposed these minimum standards relating to expedited deployment funding. The standards provide for a ten percent local match for all grants of State funds, authorize the Board to establish a timeframe for the submission of expedited deployment funding plans, establish the criteria for approval of plans, set forth the minimum requirements for contents of plans, set forth the standards for eligible costs to be funded, and establish standards governing documentation of expenditure as well as repayment provisions. A minimum 45-day comment period follows this Notice, during which all interested persons and organizations are invited to comment.

Further information, contacts: Written comments may be submitted to Harry J. Willis, Esq., at the New York State Department of State, Office of Counsel, 41 State Street, Suite 830, Albany, NY 12231, fax: 518-473-9211, phone: 518-474-6740.

The proposed standards are as follows:

21 NYCRR Part 5204
Minimum Standards Regarding Expedited Deployment Funding
(Statutory Authority: County Law § 328)

Sec.
5204.1 Definitions
5204.2 State Assistance
5204.3 Time Frame for Submission of Plans
5204.4 Criteria for Approval of Plans
5204.5 Contents of Plans
5204.6 Standards Governing Reasonable Eligible Wireless 911 Service Costs
5204.7 Standards Governing Repayment Provisions

§ 5204.1. Definitions.

(a) "Board" means the New York State 911 Board.

(b) "PSAP" means public safety answering point, a site designated and operated by a local governmental entity for the purpose of receiving emergency calls from customers of a wireless telephone service supplier.

(c) "Expedited Deployment Funding" means the State assistance provided pursuant to this Part to local public safety answering points for eligible wireless 911 costs.

(d) "Plan" or "Plans" means a priority enhanced wireless 911 plan or plans.

§ 5204.2. State Assistance.

Subject to the appropriation of funds, the Department of State shall provide State assistance to local PSAPs for eligible wireless 911 costs. Such State assistance may be up to ninety (90) percent of the total amount of eligible costs to implement the enhanced wireless 911 plan approved pursuant to this Part. This funding is provided to encourage the rapid deployment of enhanced wireless 911. Expedited deployment funding will be provided to PSAPs for reasonable enhanced wireless 911 costs which conform to the FCC order. Funding will be provided to PSAPs based on need and readiness to receive and utilize enhanced wireless 911 information within 180 days of submission of the plan. Funding may be provided prospectively.

§ 5204.3. Time Frame for Submission of Plans.

The Board shall administratively establish and publicize a time frame for submission of plans, which shall be subsequent to its adoption of this Part.

§ 5204.4 Criteria for Approval of Plans.

(a) To be eligible for expedited deployment funding, a PSAP must:

(1) be operated by a local governmental entity other than the State Police; and

(2) be designated by resolution of a county governing board pursuant to County Law § 330(1)(b) to receive all wireless 911 calls within the county.

(b) Priority in approving plans will be given to those PSAPs which had not attained enhanced wireless 911 capability as of May 15, 2003.

§ 5204.5. Contents of Plans.

All plans submitted for expedited funding approval shall set forth the following:

(a) a timeframe for planned enhanced wireless 911 implementation;

(b) a list of all wireless service suppliers licensed to provide service in the county;

(c) a financial plan, including a summary of projected costs related to equipment purchase, installation and maintenance necessary to provide enhanced wireless 911 service;

(d) a list of specific projects eligible for expedited deployment funding contained in the financial plan;

(e) a description of technologies to be used to provide enhanced wireless 911 service;

(f) documentation supporting the PSAP's ability to receive and utilize enhanced wireless 911 information within one hundred eighty days of the submission of the plan;

(g) a resolution from the governmental entity supporting the local PSAP's request for expedited deployment funding;

(h) an inventory of the names and ages of all existing items of wireless equipment at the PSAP; and

(i) a statement setting forth the existing numerical volume of both hardwire and wireless 911 calls received during both the immediately preceding 12 months and the next preceding 12 months; and

(j) documentation sufficient to establish that at least ten (10) percent of eligible costs shall be funded and provided by the PSAP. Such local share may include in-kind costs.

§ 5204.6. Standards Governing Reasonable Eligible Wireless 911 Service Costs.

Items are eligible only insofar as they relate to the provision of enhanced wireless service.

(a) Eligible items:

(1) computer equipment;

(2) software;

(3) connection equipment (ANI & ALI);

(4) on-site equipment.

(b) Funding shall not be awarded for any items purchased prior to May 15, 2003.

(c) Funding shall not be awarded for:

(1) capital construction, other than costs incidental to the installation of eligible items;

(2) personal services; or

(3) training of personnel.

§ 5204.7. Standards Governing Repayment Provisions. Within six months following receipt of funding, the local governmental entity operating the PSAP shall submit to the Board all receipts documenting approved expenditures, in a single package. Immediately upon receipt of notice by the Board of any unauthorized expenditure or undocumented funds, the entity operating the PSAP shall cease making unauthorized expenditures. Within 30 days following the Board's final determination that any expenditure is unauthorized or is not sufficiently documented, the PSAP shall refund such amount.

Public Service Commission

NOTICE OF ADOPTION

Major Rate Increase by Orange and Rockland Utilities, Inc.

I.D. No. PSC-15-03-00014-A
Filing date: Oct. 23, 2003
Effective date: Oct. 23, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted in Case 02-G-1553, the amendments to Orange and Rockland Utilities, Inc.'s (Orange & Rockland) schedule for gas service—P.S.C. No. 4.

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

Subject: Major rate increase.

Purpose: To increase annual gas operating revenues.

Substance of final rule: The Commission authorized Orange and Rockland Utilities, Inc. to increase natural gas delivery rates over a three year period: by $9.25 million in November 2003; $9,275 million in November 2004; and by $5.0 million in November 2005, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(02-G-1553SA1)

NOTICE OF ADOPTION

Water Rates and Charges by Sea Cliff Water Company

I.D. No. PSC-16-03-00037-A
Filing date: Oct. 22, 2003
Effective date: Oct. 22, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted an order in Case 02-W-1564, approving revisions to Sea Cliff Water Company's (Sea Cliff) tariff schedule, P.S.C. No. 3—Water.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Tariff filing by Sea Cliff Water Company.

Purpose: To permit Sea Cliff to increase annual water revenues and change its name to Aquarion Water Company of Sea Cliff.

Substance of final rule: The Commission authorized Sea Cliff Water Company (Sea Cliff) to increase its revenues over a three year period and allowed Sea Cliff to revise its name to Aquarion Water Company of Sea Cliff, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-W-1564SA1)

NOTICE OF ADOPTION

Electric Service Reliability Performance Mechanism by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-21-03-00020-A
Filing date: Oct. 22, 2003
Effective date: Oct. 22, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted an order in Case 00-M-0095 directing Consolidated Edison Company of New York, Inc. (Con Edison) to defer $7.5 million in shareholders funds for the benefit of ratepayers.

Statutory authority: Public Service Law, sections 5(b), (c), 65 and 66.

Subject: Reliability performance mechanism.

Purpose: To compensate ratepayers from benefits accrued.

Substance of final rule: The Commission directed Consolidated Edison Company of New York, Inc. to defer on its books from shareholder funds a ratepayer credit of $7.5 million for neglecting to meet reliability goals under the terms of its Reliability Performance Mechanism, subject to the terms and conditions set forth in the Order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(00-M-0095SA4)

NOTICE OF ADOPTION

Rates by Orange and Rockland Utilities, Inc.

I.D. No. PSC-25-03-00009-A
Filing date: Oct. 23, 2003
Effective date: Oct. 23, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted an order in Case 03-E-0797, approving a joint proposal extending Orange and Rockland Utilities, Inc.'s (Orange & Rockland) electric rate plan.

Statutory authority: Public Service Law, sections 66(12) and 72

Subject: Joint proposal

Purpose: To extend electric rates for three years.

Substance of final rule: The Commission adopted the provisions of Orange and Rockland Utilities, Inc.'s electric operations Joint Proposal extending its Electric Rate Plan, subject to the terms and conditions of the Order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-E-0797SA1)

NOTICE OF ADOPTION

Gas Pricing Method by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-27-03-00007-A
Filing date: Oct. 24, 2003
Effective date: Oct. 24, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted in Case 03-G-0759, the amendments to Consolidated Edison Company of New York, Inc.'s (Con Edison) schedule for gas service—P.S.C. No. 9.

Statutory authority: Public Service Law, sections 5(b), (c), 65(1), 66(1), (2), (5), (7), (9), (10), (11), (12), 79(1) and 80

Subject: Revisions to tariff schedule.

Purpose: To modify the method of pricing gas used in steam and steam-electric generating facilities.

Substance of final rule: The Commission authorized Consolidated Edison Company of New York, Inc. to revise its method for purchasing and recording interdepartmental gas used for steam and steam-electric generating stations.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-G-0759SA2)

NOTICE OF ADOPTION

Uniform System of Accounts by Corning Natural Gas Corporation

I.D. No. PSC-27-03-00008-A
Filing date: Oct. 23, 2003
Effective date: Oct. 23, 2003

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

Action taken: The commission on Sept. 17, 2003, adopted an order in Case 02-G-0768 granting in part, a petition of Corning Natural Gas Corporation (Corning) for rehearing of the commission's order of April 28, 2003

Statutory authority: Public Service Law, sections 22 and 66(9)

Subject: Deferred accounting treatment

Purpose: To defer accounting treatment of short-term interest costs due to gas storage costs.

Substance of final rule: The Commission granted in part Corning Natural Gas Corporation's (Corning) request for rehearing authorizing Corning to use deferred accounting treatment for $37,759 of short-term interest expenses due to gas storage costs and denying deferred accounting treat-

ment for all other short-term interest expenses, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-G-0768SA2)

NOTICE OF ADOPTION

Gas Pricing Revisions by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-27-03-00010-A
Filing date: Oct. 24, 2003
Effective date: Oct. 24, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted in Case 03-S-0760, the amendments to Consolidated Edison Company of New York, Inc.'s (Con Edison) schedule for steam service—P.S.C. No. 3.

Statutory authority: Public Service Law, sections 5(b), (c), 65(1), 66(1), (2), (5), (7), (9), (10), (11), (12), 79(1) and 80

Subject: Revisions to tariff schedule.

Purpose: To modify the method of pricing gas used in steam and steam-electric generating facilities.

Substance of final rule: The Commission authorized Consolidated Edison company of New York, Inc. to revise its method for purchasing and recording interdepartmental gas used for steam and steam-electric generating stations.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-S-0760SA2)

NOTICE OF ADOPTION

Sale of Standby Service to Customers with On-Site Generation by Niagara Mohawk Power Corporation

I.D. No. PSC-31-03-00008-A
Filing date: Oct. 23, 2003
Effective date: Oct. 23, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted an order in Case 03-E-1011, approving amendments to Niagara Mohawk Power Corporation's (Niagara Mohawk) tariff schedule, P.S.C. No. 207.

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

Subject: Tariff filing.

Purpose: To revise the method used to bill electric service to customers served under SC-7.

Substance of final rule: The Commission authorized Niagara Mohawk Power Corporation to modify the method it uses to bill electric commodity to certain customers served under the SC-7 Sale of Standby Service Customers with On-Site Generation Facilities, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-E-1011SA1)

NOTICE OF ADOPTION

Uniform System of Accounts by United Water New Rochelle, Inc.

I.D. No. PSC-31-03-00011-A
Filing date: Oct. 27, 2003
Effective date: Oct. 27, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted an order in Case 03-W-0999, allowing United Water New Rochelle, Inc. to retain a portion of property tax overcollections and defer a portion for future ratepayer benefits.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Petition for reconciliation of revenue and property taxes.

Purpose: To allocate property tax overcollections.

Substance of final rule: The Commission authorized United Water New Rochelle, Inc. (United Water) to retain $34,495 of the $816,731 in property tax overcollections for the rate year ended June 30, 2002 and defer $782,236 plus interest for future ratepayer benefits.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-W-0999SA1)

NOTICE OF ADOPTION

Day Ahead Demand Reduction Program by Orange and Rockland Utilities, Inc.

I.D. No. PSC-33-03-00015-A
Filing date: Oct. 22, 2003
Effective date: Oct. 22, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted an order in Case 03-E-1054, approving the amendments to Orange and Rockland Utilities, Inc.'s electric tariff schedule, P.S.C. No. 2.

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

Subject: Tariff filing.

Purpose: To modify the Rider K—Day Ahead Reduction Program

Substance of final rule: The Commission authorized Orange and Rockland Utilities, Inc.'s to eliminate the 110% penalty from its Rider K Day-Ahead Demand Reduction Program.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-E-1054SA1)

NOTICE OF ADOPTION

Off-Peak Firm Rate by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-33-03-00016-A
Filing date: Oct. 22, 2003
Effective date: Oct. 22, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted in Case 03-G-1044, the amendments to Consolidated Edison Company of New York, Inc.'s (Con Edison) schedule for gas service—P.S.C. No. 9.

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

Subject: Revisions to tariff schedule.

Purpose: To modify timing for notifying S.C. No. 12 off-peak firm customers.

Substance of final rule: The Commission authorized the modification to consolidated Edison of New York, Inc.'s timing for notifying its S.C. No. 12 - Off-Peak firm customers of new monthly rate changes

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-G-1044SA1)

NOTICE OF ADOPTION

Transfer of Assets by Corning Natural Gas

I.D. No. PSC-34-03-00016-A
Filing date: Oct. 27, 2003
Effective date: Oct. 27, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted an order in Case 03-G-1049 authorizing corning Natural Gas Corporation (Corning Gas) to transfer utility assets to Corning Appliance Corporation.

Statutory authority: Public Service Law, sections 65, 66(12) and 70

Subject: Transfer of assets.

Purpose: To transfer assets to Corning Appliance Corporation.

Substance of final rule: The Commission approved Corning Natural Gas Corporation's (Corning Gas) request to transfer ten installation vans and one automobile, approximately $80,000 in assets, to Corning Appliance Corporation and directed Corning to set up a deferred credit for the value of the vehicles, subject to the terms and conditions set forth in the Order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-G-1049SA1)

NOTICE OF ADOPTION

Market Based Backout Credit by Rochester Gas and Electric Corporation

I.D. No. PSC-35-03-00017-A
Filing date: Oct. 27, 2003
Effective date: Oct. 27, 2003

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

Action taken: The commission, on Oct. 22, 2003, adopted an order in Case 03-E-1164, revising Rochester Gas and Electric Corporation's tariff schedule, P.S.C. No. 20—Electricity.

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

Subject: Tariff filing

Purpose: To comply with the commission's order extending full requirements option issued June 30, 2003.

Substance of final rule: The commission authorized Rochester Gas and Electric Corporation to eliminate the Full Requirements Option and to modify the Market Based Backout Credit Calculation mechanism to reflect service classification-specific load profiles and hourly market prices.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-E-1164SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Complaint by Global NAPs, Inc. against Verizon New York, Inc.

I.D. No. PSC-45-03-00006-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 a complaint filed by Global NAPs, Inc. against Verizon New York Inc. (Verizon) alleging that Verizon's failure to interconnect violated Federal law and a commission arbitration order (Case 02-C-0006).

Statutory authority: Public Service Law, section 94(2); 47 USC, sections 251 and 252

Subject: Complaint by Global NAPs, Inc. against Verizon New York Inc.

Purpose: To consider whether Verizon's actions are consistent with Federal law and a commission arbitration order.

Substance of proposed rule: The Commission is considering whether to grant or deny, in whole or in part, a complaint, filed August 20, 2003, by which Global NAPs, Inc. seeks an order directing Verizon New York Inc. to interconnect at points designated by Global NAPs Inc., irrespective of a Memorandum of Understanding governing the terms and conditions of end-point fiber meets (EPFMs) or mid-span fiber meets (Mid-Spans).

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-C-1176SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Temporary Suspension of Obligations by New York State Telecommunications Association, Inc.

I.D. No. PSC-45-03-00007-P

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

Proposed action: The Public Service Commission will consider a petition filed on behalf of certain incumbent local exchange company members of the New York State Telecommunications Association, Inc., requesting suspension of the companies individual obligation to provide number portability to requesting commercial mobile radio service providers.

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

Subject: Obligation of certain companies to provide wireline to wireless number portability.

Purpose: To consider the effects of requests for number portability by commercial mobile radio service providers on certain incumbent local exchange companies.

Substance of proposed rule: The Commission will investigate the petition filed by certain incumbent local exchange company members of the New York State Telecommunications Association, Inc. asking for a temporary suspension, under Section 251(f)(2) of the Telecommunications Act, of the obligations to provide number portability to requesting Commercial Mobile Radio Service providers.

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

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

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

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

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

(03-C-1508SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rules and Guidelines in the Environmental Disclosure Program

I.D. No. PSC-45-03-00008-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 to change the current settlement period from a quarterly to a six month cycle that would cover the first and second halves of the calendar year.

Statutory authority: Public Service Law, section 66

Subject: Rules and guidelines for the settlement period to be used in the Environmental Disclosure Program.

Purpose: To allow the load serving entities more flexibility when scheduling conversion transactions with seasonal sources of energy, such as wind or hydro.

Substance of proposed rule: The original Environmental Disclosure Opinion 98-19 discussed monthly settlements, but established a quarterly settlement period which allowed for a reduction in costs for the ISO, the Administrator and parties arranging Conversion Transactions. It also gave Load Serving Entities greater flexibility when arranging Conversion Transactions with seasonal sources of energy. The Commission is considering extending that period to a six month cycle, that would run from January through June and July through December, would provide greater cost savings in addition to giving Load Serving Entities even more flexibility than is currently available. Without this additional flexibility, there would continue to be a difficulty in matching sales with the inconsistent output of seasonal sources of energy, such as wind and hydro.

Making the change in the settlement period will not have an adverse impact on the Environmental Disclosure program that is currently in place. The Administrator will continue to produce the required labels, only less often. The Load Serving Entities will continue to present the labels to their customers once every six months, and in that regard, the proposed change in the settlement period would result in a direct match with the frequency of label distribution.

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

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

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

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

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

(94-E-0952SA33)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rate and Restructuring Plans by National Fuel Gas Distribution Corporation (NFGD)

I.D. No. PSC-45-03-00009-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 modify the terms of rate and restructuring plans for National Fuel Gas Distribution Corporation (NFGD) adopted by the commission in an order dated Sept. 18, 2003.

Statutory authority: Public Service Law, sections 5(2), 22, 51, 65(1) and 66(5)

Subject: Rate and restructuring plans.

Purpose: To consider whether NFGD should be required to purchase the accounts receivable of energy service companies.

Substance of proposed rule: The Commission will consider whether to modify the terms of rate and restructuring plans for National Fuel Gas Distribution Corporation, adopted by it in an order dated September 18, 2003. Specifically, the Commission will decide whether to require NFGD to purchase the accounts receivable of energy service companies, as suggested in petitions for rehearing filed by the Small Customer Marketer Coalition and the National Energy Marketers Association.

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

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

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

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

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

(00-G-1858SA5)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Environmental Expenses by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York and the KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island

I.D. No. PSC-45-03-00010-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 a joint request by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York and the KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery

Long Island to recover certain environmental expenses related to manufactured gas plant sites through a local distribution adjustment charge.

Statutory authority: Public Service Law, section 66

Subject: Petition to recover certain environmental costs.

Purpose: To obtain authorization to recover certain environmental costs.

Substance of proposed rule: The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York and the KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island jointly submitted a petition pursuant to Public Service Law Section 66 seeking authorization to recover certain environmental expenses related to Manufactured Gas Plant sites through a Local Distribution Adjustment Charge.

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

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

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

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

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

(03-G-1464SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Revolving Credit Agreement by Central Hudson Gas and Electric Corporation

I.D. No. PSC-45-03-00011-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 the petition of Central Hudson Gas and Electric Corporation (Central Hudson) for authority to enter into a new revolving credit agreement and issue and sell medium term notes.

Statutory authority: Public Service Law, section 69

Subject: Petition for the issuance of debt.

Purpose: To issue medium term notes and enter into a new revolving credit agreement.

Substance of proposed rule: The Commission is considering whether to approve or reject, in whole or in part, the petition of Central Hudson Gas and Electric Corporation to enter into a new revolving credit agreement on July 1, 2004 to provide committed funding to support unsecured short-term obligations and to issue and sell periodically unsecured Medium Term Notes from January 1, 2004 through December 31, 2006. The proceeds of the two financing vehicles will be used to provide service to the public.

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

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

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

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

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

(03-M-1510SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Rates and Charges by Rural Atlantic Water Company

I.D. No. PSC-45-03-00012-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed by Rural Atlantic Water Company, to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 2—Water, to become effective Dec. 1, 2003.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Water rates and charges.

Purpose: To increase annual revenues by about $7,268 or 75 percent, establish a $20,000 escrow account, and allow the company to recover $26,000 through the escrow account surcharge for recent repairs and future improvements.

Substance of proposed rule: On October 20, 2003, Rural Atlantic Water Company (Rural Atlantic or the company) filed to become effective December 1, 2003 Leaf No. 12, Revision 1 and Escrow Account Statement No. 1. Leaf No. 12, Revision 1 would increase Rural Atlantic's quarterly flat rate charge for water service by about 75% and increase the company's annual revenues by about $7,268. Escrow Account Statement No. 1 would establish a $20,000 replenishable escrow account to cover the costs of extraordinary repairs, emergency maintenance and major improvements. The company is also requesting that it be allowed to recover about $26,000 through the proposed escrow account surcharge for recent extraordinary repairs and for improvements it has to make in the immediate future. The company provides flat rate water service to 23 customers in the Hillside Acres subdivision in the Town of Warwick, Orange County. Under the company's proposal a customer's annual bill would increase from $420 to $736 (exclusive of any escrow payments). The escrow account and the repayment of the $26,000 would be funded by means of quarterly surcharge payments of $100 per customer beginning January 1, 2004. Rural Atlantic's tariff, along with its proposed changes (Leaf No. 12, Revision 1 and Escrow Account Statement No. 1), is available on the Commission's Home Page on the World Wide Web (www.dps.state.ny.us) - located under the file room - Tariffs). The Commission may approve, modify or reject, in whole or in part, Rural Atlantic's request.

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

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

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

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

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

(03-W-1499SA1)

Department of State

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Cease and Desist Zone for Real Estate Brokers and Salespersons

I.D. No. DOS-45-03-00002-P

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

Proposed action: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h(3)(a) and (c)

Subject: Cease and desist zone for real estate brokers and salespersons.

Purpose: To establish a cease and desist zone in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park.

Text of proposed rule: Paragraph (c)(2) of section 175.17 of Title 19 of the NYCRR is amended to add the following cease and desist zone:

Cease and Desist Zone
(Mill Basin/Brooklyn)

Zone	*Expiration Date*
County of Kings (Brooklyn)	*November 30, 2007*

Within the County of Kings as follows:

All that area of land in the County of Kings, City of New York, otherwise known as the communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park, bounded and described as follows: Beginning at a point at the intersection of Flatlands Avenue and the northern prolongation of Paerdegat Basin, thence southwesterly along Flatlands Avenue to Avenue N; thence westerly along Avenue N to Nostrand Avenue; thence southerly along Nostrand Avenue to Gerritsen Avenue; thence southeasterly along Gerritsen Avenue and the southern prolongation of Gerritsen Avenue to Shore Parkway; thence northeasterly, northerly, northeasterly, and northerly along Shore Parkway to Paerdegat Basin; thence northwesterly along Paerdegat Basin and the northern prolongation of Paerdegat Basin to Flatlands Avenue and the point of beginning.

Text of proposed rule and any required statements and analyses may be obtained from: Bruce Stuart, Department of State, Division of Licensing Services, 84 Holland Ave., Albany, NY 12208, (518) 473-2728

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

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

Regulatory Impact Statement

1. Statutory authority:

Section 442-h(3)(a) of the Real Property Law ("RPL") provides that the Secretary of State may adopt a rule establishing a cease-and-desist zone if the Secretary determines that some homeowners within a defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to list their homes for sale. Upon the establishment of such a zone, a homeowner may file with the Secretary a statement of desire not to be solicited. Thereafter, the Secretary will publish a list of the names and addresses of the persons who have filed the statement, and brokers and salespersons are then prohibited from soliciting persons on that list. That list is commonly referred to as a "cease-and-desist list".

Section 442-h(3)(c) of the RPL provides that no rule establishing a cease and desist zone shall be effective for more than five years; provided, however, that the Department of State may re-adopt the rule to continue a cease and desist zone for additional periods not to exceed five years.

Based testimony received at a public hearing on February 13, 2003, the Secretary of State has determined that some homeowners within the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park are subject to intense and repeated solicitations from real estate brokers and salespersons. As a result, the Secretary has express statutory authority to propose and adopt a cease-and-desist zone for that community.

2. Legislative objectives:

According to the Statement of Legislative Findings for section 442-h of the Real Property Law, the Legislature has found that, from time to time, homeowners in some neighborhoods have been subject to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale, with the implication that property values would be decreasing because persons of different ethnic, social or religious backgrounds were moving into the neighborhood in greater numbers. The Statement of Legislative Findings also concluded that this type of solicitation technique constitutes a churning of the market and generated panic selling in the neighborhood. By enacting § 442-h, the Legislature sought to provide a means by homeowners could effectively express their wish not to be solicited by real estate brokers or salespersons. The Secretary has found that some homeowners in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park are subject to intense and repeated solicitations to list their homes for sale. Therefore, this rule accords with the public policy objectives which the Legislature sought to advance by enacting § 442-h of the Real Property Law.

3. Needs and benefits:

A public hearing was held in P.S. 236 in Mill Basin on February 13, 2003. At the public hearing testimony was given by community leaders who spoke on behalf of their constituents. Speakers included a Congressman, two State Senators, a Member of the Assembly, the President of the Borough of Brooklyn, members of Community Board 18, representatives of civic associations for each of the communities and homeowners. Each of the speakers spoke in support of the proposed cease-and-desist zone citing the need to curb the aggressive solicitation practices of real estate agents in the affected communities. The speakers cited frequent telephone calls, unwanted mail and flyers, as well as door-to-door solicitations, as intrusive and unwanted solicitation practices by real estate brokers and salespersons. Accordingly, the Secretary of State has determined that homeowners in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park have no practical means of stopping the unwanted and intrusive solicitations and that the homeowners need immediate relief. This rule will provide those homeowners who do not wish to be solicited with an effective and practical means of so notifying real estate brokers and salespersons.

4. Costs:

a. Costs to regulated parties:

Regulated parties include licensed real estate brokers and salespersons who do residential sales in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park. There are approximately 1,200 real estate brokers and approximately 1,800 real estate salespersons with offices in Brooklyn.

The Department of State will have the cease-and-desist list available, at no cost, on its web site, www.dos.state.ny.us. The cease-and-desist list will also be sold to the public, including real estate brokers and salespersons, for $10 per copy, in accordance with existing 19 NYCRR Section 175.17(c)(5). Copies will also be made available for inspection and copying at Department of State offices.

We expect that most licensees who do business in the affected communities will access the list, at no cost, on the Department's web site. We expect that some licensees will purchase one or more copies. Some will share the expense by sharing a copy. Others will not access or purchase a copy because they do not solicit residential listings in the affected communities.

In addition, some real estate brokers may use commercial mailing lists to solicit. For those brokers, the cease-and-desist list may increase the cost of using a commercial mailing list. The list will have to be checked against the addresses in the cease-and-desist list, and the broker will have to delete the addresses that appear in the homeowner list. The Department of State is not able to estimate the cost to those brokers because the cost will depend on a number of factors, such as the number of names on the mailing list, the number of addresses in the cease-and-desist list, the technology to the licensee, and the licensee's cost for technology and labor. On the other hand, there may be some reductions in the total cost of the mailing when the "unproductive addresses" are eliminated from the list.

Also, if a licensee uses the telephone, delivery services and personal contact to solicit residential listings, the licensee may have to spend time checking the cease-and-desist list to avoid contact with any person at an address listed. There is, of course, an expense associated with that expenditure of time. On the other hand, there may be savings associated with elimination of unproductive calls or deliveries. Whether there is a net cost or savings will depend on the circumstances and practices of each licensee. Therefore, the Department of State is not able to estimate those costs.

b. Costs to the Department of State:

The estimated costs for preparing the cease-and-desist list are as follows:

Printing owners statements	$2,200	
Mailing owners statements	640	
Processing statements:		
Staff: SG-14 @ $29,110		
10 weeks	5,600	
Data entry:		
Staff: SG-6 (NYC) @ $23,385		
10 days	900	
Fringe benefits @ 36.5%	2,372	
Total:		$11,712

The costs for printing and mailing are unknown. The Department anticipates that most licensees will access the list, at no cost, on the Department's website. For those few who want to purchase a paper copy, the Department will likely print a copy, on an order-by-order basis, on existing equipment. The mailing costs will be dependent on the number of copies that are ordered. However, the Department expects that the costs for printing and mailing will be incidental to the costs of preparing the list.

The Department of State expects that revenues from the sale of the list will be incidental to the costs of preparing, printing and mailing.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

Homeowners who do not want to be solicited will have to file an "owner's statement" with the Department of State. The owner's statement will indicate the owner's desire not to be solicited and will set forth the owner's name and the address of the property within the cease-and-desist

zone. The Department of State will provide homeowners with a standard form although use of the form is not mandatory. Owner's statements will be provided to community leaders for distribution to their constituents. In addition, owner's statements will be available from the Department of State on request, as well as available on the Department's web site. The Department of State will prepare a cease-and-desist list containing the names and addresses of all of the homeowners who filed an owner's statement. The list will be available, at no cost, on the Department's website. The publication will also be sold to the public, including real estate brokers and salespersons. The price will be $10 per copy. Except for orders submitted by mail, real estate brokers and salespersons will not have to complete any paperwork or file any paperwork as a result of this rule.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

The Department of State did not consider any other alternatives.

9. Federal standards:

There are no federal standards regulating the frequency or intensity of solicitations by real estate brokers or salespersons. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

Real estate brokers and salespersons can comply with the cease-and-desist order immediately upon publication of the list.

Regulatory Flexibility Analysis

1. Effect of rule:

This cease-and-desist rule applies to an areas generally known as Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park in the Borough of Brooklyn. There are approximately 1,170 real estate brokers and approximately 1,852 real estate salespersons in the Brooklyn. Most of those licensees are small businesses, or they work for a small business. This rule will apply to most of the licensees. The exceptions will be those who do not deal in residential properties, and those who do not deal in properties located within the cease-and-desist zone.

The cease-and-desist rule will also apply to licensed real estate brokers and salespersons who are located outside of the Brooklyn but who solicit residential properties within the designated area. The Department of State does not have a practical way of estimating how many brokers and salespersons fall within this category.

The rule does not apply to local governments.

2. Compliance requirements:

The rule does not impose any reporting or recordkeeping requirements on the licensees. The rule does prohibit each licensee from soliciting the sale, rental or listing from any homeowner whose name appears of a cease-and-desist list published by the Department of State.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

A licensee will not need professional services in order to comply with the rule. The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The cost of compliance and the variations in the costs of compliance are detailed in section 4(c) of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the names and addresses of the homeowners who do not want to be solicited will be published by the Department of State and since the cost of the publication is $10 per copy or free if accessed on the Department's website, it will be economically and technologically feasible for real estate brokers and salespersons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

To provide homeowners in the designated area with relief from intense and repeated solicitations from real estate brokers and salespersons, the rule must apply equally to all licensees regardless of the size of their business or the size of their employer's business. Consequently, the rule does not make special accommodations for different classes of licensees.

7. Small business participation:

The Department of State conducted an open public hearing on February 13, 2003, at P.S. 326, in the Brooklyn community of Mill Basin. The time, date and place of the public hearing was well advertised within the affected communities. Testifying at the hearing on behalf of their constituents were a Congressman, two State Senators, a Member of the Assembly, the President of the Borough of Brooklyn, members of Community Board 18, representatives of civic associations for the affected communities, and homeowners.

There were no real estate brokers or real estate salespersons who identified themselves at the public hearing, and no real estate broker or salesperson spoke at the hearing. In addition, no real estate broker or salesperson submitted any written testimony regarding the proposed re-adoption of the cease-and-desist zone.

Rural Area Flexibility Analysis

A rural flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

This rule establishes a cease-and-desist zone in the Brooklyn communities of Mill Basin, Mill Island, Bergen Beach, Futurama and Marine Park, and this rule only affects those real estate brokers and salespersons who do business in those communities.

Brooklyn is not a rural area and, therefore, a rural flexibility analysis is not required for this rule.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for real estate brokers or real estate salespersons.

The rule provides a means by which homeowners in the designated community can notify real estate brokers and real estate salespersons that the homeowners do not want to be solicited for the purchase, sale or rental of their homes.

Since the homeowners who file a homeowner's statement with the Department of State are not interested in receiving solicitations from real estate brokers or real estate salespersons, publication of names and addresses of those homeowners and the resulting notification to real estate brokers and salespersons will not have any substantial impact on jobs or employment opportunities for real estate brokers or salespersons.

Department of Taxation and Finance

NOTICE OF ADOPTION

Fuel Use Tax

I.D. No. TAF-36-03-00006-A
Filing No. 1173
Filing date: Oct. 28, 2003
Effective date: Oct. 28, 2003

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

Action taken: Amendment of section 492.1(b) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); and 528-(a)

Subject: Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

Purpose: To set forth the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning Oct. 1, 2003, and ending Dec. 31, 2003, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-36-03-00006-P, Issue of September 10, 2003.

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

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

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.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Taxation of Foreign Corporations Participating in a Trade Show

I.D. No. TAF-45-03-00003-P

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

Proposed action: Amendment of sections 1-3.2, 1-3.3 and 1-3.4 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; and 1096(a)

Subject: Taxation of foreign corporations participating in a trade show.

Purpose: To provide in the regulations that limited participation in a trade show or shows is an activity that is deemed insufficient to subject a foreign corporation to tax under art. 9-A of the Tax Law, and reflect various statutory and non-substantive technical changes.

Text of proposed rule: Section 1. The index of Subpart 1-3 is amended to read as follows:

Sec.

1-3.1 Domestic corporations subject to tax

1-3.2 Foreign corporations subject to tax

1-3.3 Activities deemed insufficient to subject foreign [corporation] *corporations* to tax

1-3.4 Corporations not subject to tax

1-3.5 Change of classification

Section 2. Subdivision (e) of section 1-3.2 is amended to read as follows:

(e) "Foreign corporation—maintaining an office." A foreign corporation which maintains an office in New York State is engaged in an activity which makes it subject to tax. An office is any area, enclosure or facility which is used in the regular course of the corporate business. A [salesman's] *salesperson's* home, a hotel room, or a trailer used on a construction job site may constitute an office.

Section 3. Paragraph (7) of subdivision (f) of section 1-3.2 is amended to read as follows:

(7) A foreign corporation which operates several retail stores outside New York State leases an office in New York City for the convenience of its buyers when they come to New York State. [Salesmen] *Salespeople* call at the office to solicit orders. The merchandise is shipped by the sellers directly to the offices of the corporation outside New York State. The corporation is subject to tax.

Section 4. Paragraph (9) of subdivision (f) of section 1-3.2 is amended to read as follows:

(9) A foreign corporation sends [salesmen] *salespeople* into New York State to solicit orders. The orders must be accepted at the home office of the corporation located in another state. The corporation displays goods in New York City at a space leased occasionally and for short terms. The corporation is subject to tax.

Section 5. Section 1-3.3 is amended to read as follows:

Section 1-3.3 Activities deemed insufficient to subject foreign [corporation] *corporations* to tax. (Tax Law, Sections 209(2) *and 209(2-a))*

(a) A foreign corporation will not be deemed to be doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office in New York State because of:

[(a)] *(1)* the maintenance of cash balances with banks or trust companies in New York State;

[(b)] *(2)* the ownership of shares of stock or securities kept in New York State in a safe deposit box, safe, vault or other receptacle rented for this purpose, or if pledged as collateral security, or if deposited in safekeeping or custody accounts with one or more banks or trust companies, or brokers who are members of a recognized security exchange;

[(c)] *(3)* the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such corporation;

[(d)] *(4)* the maintenance of an office in this State by one or more officers or directors of the corporation who are not employees of the corporation if the corporation is not otherwise doing business or employing capital in New York State and does not own or lease property in New York State;

[(e)] *(5)* the keeping of books or records of a corporation in New York State, if such books or records are not kept by employees of such corporation and such corporation does not otherwise do business, employ capital, own or lease property, or maintain an office in New York State;[or]

(6) the use of fulfillment services of a person, other than an affiliated person, located in New York State and the ownership of property stored on the premises of such person in conjunction with such services. For purposes of this paragraph, the terms "fulfillment services", "person" and "affiliated person" are defined in sections 208(19), 1101(a) and 209(2) of the Tax Law respectively;

(7) the participation in a trade show or shows, regardless of whether the corporation has employees or other staff present at such trade shows, provided the corporation's activity at the trade show is limited to displaying goods or promoting services, no sales are made, any orders received are sent outside New York State for acceptance or rejection and are filled from outside the state, and provided that such participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes; or

[f] *(8)* any combination of the foregoing activities.

(b) An alien corporation, as defined in section 209(2-a) of the Tax Law, will not be deemed to be doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office in New York State if its activities in New York State are limited solely to investing or trading for its own account in (a) stocks and securities within the meaning of section 864(b)(2)(A)(ii) of the Internal Revenue Code, or (b) commodities within the meaning of section 864(b)(2)(B)(ii) of the Internal Revenue Code or (c) any combination of stocks, securities and commodities described in paragraphs (a) and (b) above.

Section 6. The heading of section 1-3.4 is amended to read as follows:

Section 1-3.4 Corporations not subject to tax. (Tax Law, Sections 3, [5] *8, 13*, 208(9)(i), 209(4), (9), *(10)*)

Section 7. Paragraph (3) of subdivision (a) of section 1-3.4 of such regulations is amended to read as follows:

(3) [waterworks companies, gas companies, electric or steam heating, lighting and power companies] *continuing section 186 taxpayers* subject to tax under *former* section 186 of the Tax Law *as it was in effect on December 31, 1999 (section 44 of Part Y of Chapter 63 of the Laws of 2000);*

Section 8. Subparagraph (i) of paragraph (5) of subdivision (b) of section 1-3.4 is amended to read as follows:

(i) The domestic corporation must operate the vessels regardless of whether it owns them or has leased them from another person or corporation. "Operation of the vessels" means the direction and supervision of the crew and of the actual movements or routes of the vessels. The Commissioner [of Taxation and Finance] generally deems the furnishing of the crew as the operation of the vessel.

Section 9. Clause (h) of subparagraph (iv) of paragraph (9) of subdivision (b) of section 1-3.4 is amended and a new clause (i) is added to read as follows:

"(h)" use of space at the salesperson's home solely for the salesperson's convenience. (However, see subparagraph [vi] of this paragraph as to loss of immunity for maintaining an office.) *;*

"(i)" participating in a trade show or shows, provided that participation is for not more than 14 days, or part thereof, in the aggregate during the corporation's taxable year for Federal income tax purposes. (However, see subparagraph [vi] of this paragraph as to loss of immunity for maintaining an office.)

Section 10. Paragraph (13) of subdivision (b) of section 1-3.4 of such regulations is amended and new paragraphs (14), (15) and (16) are added to read as follows:

(13) for any taxable year beginning on or after January 1, 1987, an organization described in paragraph (2) or (25) of subdivision (c) of section 501 of the Internal Revenue Code[.]*;*

(14) redevelopment companies organized pursuant to article 5 of the Private Housing Finance Law;

(15) a qualified subchapter S subsidiary (QSSS) corporation, as defined in section 208(1-B) of the Tax Law, provided it meets the requirements for exemption pursuant to section 208(9)(k) of such article;

(16) a qualified settlement fund under section 468B of the Internal Revenue Code or an entity that is treated as such for federal purposes or a grantor trust, either of which is used for Nazi reparations.

Section 11. These amendments shall take effect on the date the Notice of Adoption regarding such amendments is published in the State Register except the amendments relating to participation in a trade show or shows made by Section 5 which added paragraph (7) to subdivision (a) of section 1-3.3 of the Regulations and by Section 9 which added clause "(i)" to subparagraph (iv) of paragraph (9) of subdivision (b) of section 1-3.4 of the Regulations shall apply to taxable years beginning on or after January 1, 2002.

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

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, subdivision First; and 1096(a) authorize the Commissioner of Taxation and Finance to make reasonable rules and regulations, which are consistent with law, that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law. This authority also provides for the adoption of rules and regulations that are appropriate to carry out and administer the New York State Franchise Tax on Business Corporations imposed by and pursuant to the authority of Article 9-A of the Tax Law.

2. Legislative objectives: The rule is being proposed pursuant to such authority and in accordance with the legislative objectives that the Commissioner equitably administer the provisions of the Tax Law and take judicious regulatory actions when such actions are warranted. Regulatory action is necessary to provide guidance on the taxation of foreign corporations participating in trade shows in New York State and to update various provisions of the Business Corporation Franchise Tax Regulations.

3. Needs and benefits: The primary purpose of this rule is to set forth Department policy to allow that the limited participation of 14 days or less per taxable year in a trade show(s) to display goods or promote services is an activity that will not subject a foreign corporation to tax under Article 9-A of the Tax Law. The rule addresses participation in trade shows both in the general context of nexus and in the context of foreign corporations otherwise eligible for the protection of Public Law 86-272. The rule provides a bright-line test for foreign corporations participating in trade shows in New York State. This rule is also beneficial to the State and local economies including businesses involved in or affected by the trade show industry.

The Department worked on this rule with the New York City Department of Finance to promote consistency in the trade show nexus rules for ease of compliance by foreign corporations. The New York City Department of Finance adopted its amendments on January 9, 2003.

Updates to the regulations were made to reflect the following statutory amendments: the fulfillment services legislation enacted by Chapter 681 of the Laws of 1997 and its subsequent amendment by Chapter 75 of the Laws of 1998; the exemption for offshore funds enacted by Chapter 340 of the Law of 1998; the repeal of section 186 of Article 9, including the provisions for continued application of former section 186 as provided in section 44 of Chapter 63 of the Laws of 2000; and the exemptions from Article 9-A for redevelopment companies organized pursuant to article 5 of the Private Housing Finance Law enacted by Chapter 659 of the Laws of 1993, qualified subchapter S subsidiary corporations as enacted by Chapter 389 of the Laws of 1997, and qualified settlement funds and grantor trusts established for the benefit of victims or targets of Nazi persecution by or in the Swiss Confederation pursuant to section 13 of the Tax Law enacted by Chapter 407 of the Laws of 1999. Lastly, technical and editorial corrections of some provisions are included in the amendments.

4. Costs:

(i) Costs to regulated parties: It is estimated that there would be minimal costs to regulated parties associated with the implementation of, and continued compliance with, this rule. A foreign corporation which currently participates in trade shows for 11 to 14 days annually, and whose activities are confined to the solicitation of orders or solicitation of services to be filled or performed out of state, would be affected. Such a corporation would no longer be subject to corporate franchise tax in New York State.

(ii) Costs to the State and its local governments including this agency: It is estimated that the implementation and continued administration of the trade show regulation will have a minimal fiscal impact on the Department of Taxation and Finance and to New York State. The amendments regarding trade show activities increase the current maximum amount of time a foreign corporation can participate in trade shows in New York annually. Although not published in the regulations, the Department's current policy allows a foreign corporation to participate for up to ten days. The time period is being increased to a total of 14 days. A foreign corporation, which currently participates in trade shows in New York for 11 to 14 days annually and whose activities regarding trade shows are confined to the solicitation of orders or solicitation of services to be filled or performed out of state, would be affected. Such a corporation would no longer be subject to tax.

There are no costs to New York State local governments for the implementation and continued administration of this rule. The additional amendments that update the Department regulations to reflect various statutory and technical changes represent current policy and will not have any impact.

(iii) Information and methodology: These conclusions are based on discussions and information received from the Office of Tax Policy and Analysis, Client Support Services Bureau and Fiscal Services Bureau.

5. Local government mandates: This rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: The rule imposes no reporting requirements, forms, or other paperwork upon regulated parties.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives: There were no significant alternatives to the rule considered by the Department. The Department could refrain from this proposal and continue the limited policy of exempting from tax only those foreign corporations participating in a trade show or shows in New York State whose activities at such show(s) are limited to the solicitation of orders of tangible personal property -an activity exempt by virtue of Public Law 86-272. However, this policy is limited because it does not apply to the solicitation of sales of services.

Additionally, New York City adopted similar regulations to encourage participation in trade shows in the City. The continuation of the current policy at the State level would not only affect the State's economic development, but the City's as well. Foreign corporations exempt from the New York City tax would be subject to franchise tax at the State level and therefore may be reluctant to participate in trade shows in the City. New York State and New York City strive to administer their tax laws consistently where possible. Therefore, no significant alternatives to the rule were considered by this Department.

The Tax Section of the New York State Bar Association was asked to comment on this rule prior to its proposal. In its comments, the Association requested that the Department make parallel amendments to its Sales and Use Tax regulations with this proposal. After careful consideration of the comments, the Department has decided to address the sales and use tax issue apart from this proposal because it requires further study. The Department has concluded that corporate New York State trade show participants will be better served by the timely promulgation of this corporation franchise tax rule. Additionally, as noted in the Needs and benefits section, the New York City Department of Finance promulgated its rule on January 9, 2003.

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

10. Compliance schedule: No measurable time is needed in order for regulated parties to comply with this rule. The amendments relating to participation in a trade show or shows made in the rule, shall apply to taxable years beginning on or after January 1, 2002, which corresponds to

the effective date of the rule adopted by the New York City Department of Finance. The other amendments in the rule will take effect on the date the Notice of Adoption regarding such amendments is published in the *State Register*.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because this rule will not impose any adverse economic impact or reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The rule does not distinguish between different types and sizes of regulated parties. The rule does not distinguish between regulated parties located in different geographical areas. The rule will include limited participation in a trade show or shows as an activity that is deemed insufficient to subject a foreign corporation to tax under Article 9-A of the Tax Law. This rule also amends the regulations to reflect various statutory and non-substantive technical changes.

The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the Small Business Council of the New York State Business Council, the Division of Small Business of Empire State Development, the National Federation of Independent Businesses, the Retail Council of New York State, the New York State Association of Counties, the Association of Towns of New York State, the New York Conference of Mayors, the Office of Local Government and Community Services of the New York State Department of State, Director of Tax Policy (Technical Services) of New York State Society of CPA's, the Business Council of New York State, Chair of State and Local Taxation of Association of the Bar of the City of New York, and Chair of Tax Section of New York State Bar Association.

Comments were received from the Tax Section of the New York State Bar Association. The comments did not address any specific issues or concerns of small businesses or local governments. A brief discussion of the comments is included in the "Alternatives" section of the Regulatory Impact Statement.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas or any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The rule does not distinguish between regulated parties located in different geographical areas. The rule will include limited participation in a trade show or shows in New York State as an activity that is deemed insufficient to subject a foreign corporation to tax under Article 9-A of the Tax Law. This rule also amends the regulations to reflect various statutory and non-substantive technical changes.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it will have no adverse impact on jobs and employment opportunities. The rule will include limited participation in a trade show or shows in New York State as an activity that is deemed insufficient to subject a foreign corporation to tax under Article 9-A of the Tax Law. This rule also amends the regulations to reflect various statutory and non-substantive technical changes.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Registration of Wholesale Dealers of Cigarettes

I.D. No. TAF-45-03-00004-P

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

Proposed action: Amendment of sections 70.2, 72.1, 73.2, 74.4, 78.4, 82.1-82.3 and 85.1 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 475 (not subdivided), 482-a and 488

Subject: Registration of wholesale dealers of cigarettes that also sell cigarettes at retail.

Purpose: To require wholesale dealers of cigarettes that sell cigarettes at retail, to also register as retail dealers of cigarettes and update regulations to reflect statutory changes.

Substance of proposed rule: This rule amends the Cigarette Tax regulations and the Cigarette Marketing Standards regulations, as published in Title 20 NYCRR. The primary purpose of the proposed amendments is to amend the Cigarette Tax regulations to require a licensed wholesale dealer of cigarettes (wholesale dealer) that also sells cigarettes at retail, to be registered as a retail dealer of cigarettes (retail dealer.)

Currently, the Tax Law provides that a retail dealer is required to display a certificate of registration as a retail dealer at each retail location. However, the existing regulations allow a wholesale dealer to display its license as a wholesale dealer at any of its retail locations, rather than obtaining a separate certificate of registration as a retail dealer for each such retail location. Therefore, a wholesale dealer that violates any provision of Tax Law Articles 20 or 20-A at any of its retail locations is subject to suspension or revocation of its wholesale dealer's license. (Tax Law § 480.1(j) and 480.3)

This proposal will provide separate authorities for each activity: sales of cigarettes for resale are a wholesale activity and require a wholesale dealer's license; sales of cigarettes to consumers are a retail activity and require a retail dealer's certificate of registration for each separate retail location.

In addition, several sections of the Cigarette Tax and Cigarette Marketing Standards regulations have been updated to reflect statutory changes.

Section 1 amends section 70.2 to modify the definition of wholesale dealer to provide that a wholesale dealer that also sells cigarettes at retail is also required to register as a retail dealer. This section further changes the definition of retail dealer to include a wholesale dealer that is engaged in the activity of selling cigarettes at retail.

Sections 2 and 3 amend section 72.1 to remove the reference of a wholesale dealer displaying its wholesale license at retail places of business. A wholesale dealer making retail sales will be required to also register as a retail dealer and display a certificate of registration as a retail dealer at all retail locations.

Sections 4 and 6 amend sections 73.2 and 78.4 to reflect the statutory increase in the amount of civil fines and penalties for various violations.

Section 5 amends section 74.4 to reflect statutory changes that forbid an agent or wholesale dealer from making sales to a retail dealer that is not registered or whose registration has been suspended or revoked.

Section 7 amends section 82.1 to reflect statutory changes that require retail dealer registration.

Sections 8 and 9 amend sections 82.2 and 82.3 respectively, to require a retail dealer to provide a copy of its certificate of registration as a retail dealer rather than a properly completed sales tax resale certificate when making purchases of cigarettes, based on statutory changes regarding retail dealer registration.

Section 10 amends section 85.1 to reflect statutory changes that require retail dealer registration.

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

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, section 171, subdivision First; section 475 (not subdivided); section 482-a; and section 488. This statutory authority provides for the Commissioner of Taxation and Finance to make reasonable rules and regulations, which are consistent with law, that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law. This authority also provides for the adoption of rules and regulations that are appropriate to carry out and jointly administer the New York State Tax on Cigarettes and Tobacco Products and the Cigarette Marketing Standards imposed by and pursuant to the authority of Articles 20 and 20-A of the Tax Law.

2. Legislative objectives: The rule is being proposed pursuant to such authority and in accordance with the legislative objectives that the Commissioner equitably administer the provisions of the Tax Law and take judicious regulatory actions when such actions are warranted. Specifically, this rule is an exercise of the Commissioner's statutory authority to reexamine the existing policy of the Department of Taxation and Finance and to provide a rule that will prescribe consistent treatment with respect to the retail registration requirement for both wholesale dealers and retail dealers that sell cigarettes at retail.

3. Needs and benefits: The primary purpose of the amendments is to require a licensed wholesale dealer of cigarettes that also sells cigarettes at retail, to register as a retail dealer of cigarettes. This proposal will provide

separate authorities for each activity: sales of cigarettes for resale are a wholesale activity and require a wholesale dealer's license; sales of cigarettes to consumers are a retail activity and require a retail dealer's certificate of registration for each separate retail location. As a result, a wholesale dealer that also sells cigarettes at retail will become subject to the appropriate penalties applicable to its retail activity. The Tax Law will be applied consistently to both wholesale dealers that also sell cigarettes at retail and retail dealers of cigarettes.

In addition, this change will support certain provisions of Article 13-F of the Public Health Law. Article 13-F provides that retail dealers of cigarettes and tobacco products that sell such products to minors may have their retail dealer's certificate of registration suspended or revoked. Under our current regulations, wholesale dealers that also sell cigarettes at retail are effectively immune from any suspension or revocation penalty in conjunction with their retail locations' sales of cigarettes to minors. By requiring wholesale dealers that also sell cigarettes at retail locations to register as retail dealers, they will now be subject to the suspension and revocation of their retail dealers' certificate of registration for sales to minors.

4. Costs: It is estimated that the implementation of, and continued compliance with, the rule will impose minimal fiscal costs upon regulated parties and no measurable non-fiscal impact on regulated parties in part, because this is a standard industry practice that most wholesale dealers are already complying with. Any wholesale dealer that sells cigarettes at retail that is not currently complying with this practice will need to register each location, at a cost of $100 per establishment per year. The application for registration and the annual renewal form require basic address information, the number of retail locations, and the name and address of each retail location.

It is estimated that there is minimal fiscal impact to this Department for the implementation and continued administration of the rule. The Department will incur minimal costs affiliated with processing of the additional application requests and the issuance of the retail certificates. However, these costs will be offset by the revenue collected from the small number of wholesalers who are not currently registered for their retail activities. It is also estimated that the rule will have no fiscal impact on local governments throughout the state.

This analysis is based upon the information and methodologies set forth above and upon discussions among personnel from the Department's Office of Counsel, Office of Tax Policy Analysis, Client Services Division, Transaction and Transfer Tax Bureau, Office of Tax Enforcement, Bureau of Fiscal Management and Technical Services Division.

5. Local government mandates: The rule imposes no mandates upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork: The rule imposes minimal paperwork requirements upon regulated parties. It requires every wholesale dealer that is selling cigarettes in New York State at retail to complete an application for registration. In addition, the dealers must complete renewal application forms for each subsequent year. The dealers must list each of their retail locations on the registration and renewal applications.

7. Duplication: These amendments do not duplicate any existing Federal or State requirements.

8. Alternatives: The alternative to the proposed regulation would be to continue to allow a wholesale dealer to display its license as a wholesale dealer at each of its retail locations. This approach, however, as described in Section 3, Needs and Benefits, places the wholesale dealer's license at risk if a violation occurs at a retail location. It would also provide unintended immunity from penalty for sales of cigarettes or tobacco products to minors.

9. Federal standards: The rule does not exceed any minimum standards of the Federal government for the same or similar subject areas.

10. Compliance schedule: Sections 1, 2, and 3, of this rule require every wholesale dealer engaged in the activity of selling cigarettes in New York State at retail to display a certificate of registration as a retail dealer at each retail location. To obtain a certificate of registration for each retail location, the wholesale dealer must obtain, complete and mail the application for registration along with payment of the proper application fee. The Department, by statute, is allowed ten days after receipt of the application to issue the certificate of registration for each retail location to the wholesale dealer. The wholesale dealer is responsible for providing each of its retail locations with the applicable certificate of registration. It is estimated that 45 days will be a sufficient amount of time to enable the regulated parties to achieve compliance with these requirements. Therefore, the effective date for sections 1, 2, and 3 of the amendments has been modified to allow additional time to accommodate the new registration requirement. No measurable time is needed in order for regulated parties to comply with the remaining provisions of this rule.

Regulatory Flexibility Analysis

1. Effect of the rule: This rule will not impose any adverse economic impact or any additional reporting, recordkeeping, or other compliance requirements on most small businesses. This is a standard industry practice that most wholesale dealers also engaged in the business of selling cigarettes in New York State at retail are already complying with. The rule does not distinguish between different types and sizes of regulated parties. It merely provides that all wholesaler dealers of cigarettes that also sell cigarettes in New York State at retail must register each such retail location regardless of the type or size of the location.

2. Compliance requirements: There are minimal reporting, recordkeeping, or other compliance requirements imposed by the rule. It requires every wholesale dealer that is selling cigarettes in New York State at retail to complete an application for registration. In addition, the dealers must complete renewal application forms for each subsequent year. The dealers must list each of their retail locations on the registration and renewal applications.

3. Professional services: No professional services are necessary in order to comply with the rule.

4. Compliance costs: See paragraph 4 of the "Regulatory Impact Statement" for this rule. There would be no variation in costs for small businesses.

5. Economic and technological feasibility: The rule does not impose any economic or technological compliance burdens.

6. Minimizing adverse impact: The rule does not distinguish between affected small businesses and other types of businesses. The rule places no additional burdens on small businesses or local governments.

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

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas. In addition, the rule will not impose any additional reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The rule does not distinguish between rural areas and non-rural areas in the state. This rule merely makes necessary regulatory changes to require a licensed wholesale dealer of cigarettes that also sells cigarettes at retail, to register as a retail dealer of cigarettes. This change will provide separate authorities for each activity: sales of cigarettes for resale are a wholesale activity and require a wholesale dealer's license; sales of cigarettes to consumers are a retail activity and require a retail dealer's certificate of registration for each separate retail location. In addition, several sections of the Cigarette Tax and the Cigarette Marketing Standards regulations have been updated to reflect statutory changes.

The following organizations have been given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Deputy Secretary of State for Local Government and Community Services; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York State Association of Tobacco and Candy Distributors.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it will have no impact on jobs and employment opportunities. The primary purpose of the amendments is to require a licensed wholesale dealer of cigarettes that also sells cigarettes at retail, to register as a retail dealer of cigarettes. This change will provide separate authorities for each activity: sales of cigarettes for resale are a wholesale activity and require a wholesale dealer's license; sales of cigarettes to consumers are a retail activity and require a retail

dealer's certificate of registration for each separate retail location. In addition, several sections of the Cigarette Tax and the Cigarette Marketing Standards regulations have been updated to reflect statutory changes.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Fuel Use Tax

I.D. No. TAF-45-03-00005-P

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

Proposed action: Amendment of section 492.1(b) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); and 528(a)

Subject: Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

Purpose: To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning Jan. 1, 2004, and ending March 31, 2004, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

Text of proposed rule: Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (xxxii) to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(xxxii) October - December 2003					
9.5	17.5	31.5	9.9	17.9	30.15
(xxxiii) January - March 2004					
10.5	*18.5*	*33.1*	*10.3*	*18.3*	*31.15*

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

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

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

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

Statements and analyses are 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.

Office of Temporary and Disability Assistance

NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED

Eligibility for Food Stamps

I.D. No. TDA-20-30-00002-C

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

The notice of proposed rule making, I.D. No. TDA-20-03-00002-P was published in the *State Register* on May 21, 2003.

Subject: Eligibility for food stamps.

Purpose: To implement Federal requirements concerning the value of a motor vehicle that is considered when determining eligibility for food stamps.

Substance of rule: The proposed amendments implement provisions of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for 2001 (P.L. 106-387) and 7 CFR 273.8 concerning the value of a motor vehicle that is considered when determining eligibility of a household for food stamps. P.L. 106-387 provides that if the vehicle allowance standards that a state agency uses to determine eligibility for assistance under the Temporary Assistance for Needy Families (TANF) program would result in a lower attribution of resources to certain households then under the rules used in the food stamp program, then the state may apply the TANF vehicle allowance standards to all households that would incur a lower attribution of resources under the state vehicle allowance standards.

7 CFR 273.8 provides that the value of certain vehicles is not to be considered available to a household when determining eligibility of the household for food stamps. The regulation excludes the value of a vehicle that a household is unable to sell for any significant return (more than $1500) because the household's interest is relatively slight or the cost of selling the household's interest would be relatively great. The regulation also exempt the value of one vehicle for each adult household member and one licensed vehicle for each household member under 18 years of age who drives to commute to, and from work, or to and from training or education that is preparatory to employment or to seek work.

Changes to rule: No substantive changes.

Expiration date: May 20, 2004.

Text of proposed rule and changes, if any, may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

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