

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 Agriculture and Markets

EMERGENCY RULE MAKING

Pine Shoot Beetle Quarantine

I.D. No. AAM-33-04-00005-E
Filing No. 868
Filing date: July 30, 2004
Effective date: July 30, 2004

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

Action taken: Amendment of section 131.1 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 164 and 167

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

Specific reasons underlying the finding of necessity: This rule amends the pine shoot beetle quarantine in section 131.1 of 1 NYCRR by extending that quarantine to the Counties of Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates. This rule also incorpo-

rates by reference, the most recent revisions to federal regulations at 7 CFR sections 301.50 through 301.50-10, revised as of January 1, 20043, which set forth requirements and restrictions for the movement of host materials. Finally, this rule deletes spruce, larch and fir from the list of regulated host materials subject to regulation under the quarantine, since the United States Department of Agriculture (USDA) has tested and determined that these materials are not a host to the pine shoot beetle.

The pine shoot beetle, *Tomicus piniperda*, an insect non-indigenous to the United States, is a destructive wood-boring insect native to Europe. The beetle attacks pine trees by nesting under the bark and feeding on new shoots. The resulting damage by the beetle causes shoot and branch mortality which affects the growth and appearance of the tree and may eventually lead to the death of the tree. Although it is a slow-moving pest, the pine shoot beetle is easily spread through the movement of Christmas trees, nursery stock and pine logs and lumber. The pine shoot beetle was first detected in a Christmas tree farm near Cleveland, Ohio in July of 1992 and subsequently spread to other parts of Ohio as well as to sections of Michigan, Indiana, Illinois, Pennsylvania and New York. On November 19, 1992, the USDA adopted regulations establishing a pine shoot beetle quarantine to help prevent the spread of this pest. On November 25, 1992, the Department, as an emergency measure, adopted section 131.1 of 1 NYCRR, which incorporated by reference that federal quarantine. This emergency measure was ultimately adopted as a permanent rule on March 17, 1993.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that the failure to immediately incorporate by reference the federal regulations which set forth requirements for the movement of host materials and to extend the quarantine could result in the spread of this pest. The beetle has already been detected in the Counties of Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates. Failure to immediately extend the quarantine to these counties could result in the spread of the pest beyond those areas. Although the beetle has not as yet been detected in Columbia County, extension of the quarantine into Columbia County would establish a buffer between infested and uninfested counties, thereby helping to control the further spread of this pest. Columbia County is not the only county adjacent to counties in which the beetle has been detected, since the Counties of Ulster and Orange are also adjacent to the quarantined area. However, since Columbia County contains saw mills which process pine logs shipped from counties where the beetle has been detected, there is a greater likelihood that infested materials will be transported to Columbia County. Failure to establish such a buffer by immediately extending the quarantine into Columbia County could result in the spread of the pest through transportation of susceptible materials into Vermont and Massachusetts as well as those uninfested counties in New York which lie south of the Counties of Sullivan, Delaware, Greene and Columbia. The failure to immediately extend the quarantine will promote the spread of the beetle which can be easily transported on nursery stock, pine logs and lumber with bark attached from infested areas to uninfested areas. incorporate by reference the federal regulations which set forth requirements for the movement of host materials and to extend the quaran-

tine to counties where the beetle has been detected. This would not only result in damage to the natural resources of the State, but could also result in a federal quarantine or quarantines by other states which would cause economic hardship to the Christmas tree, nursery and forest products industries throughout New York State. The consequent loss of business would harm industries which are important to New York State's economy and as such, would harm the general welfare. Given the potential for the spread of the pine shoot beetle beyond the areas currently infested and the detrimental consequences that would have, it appears that this rule should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

Subject: Pine Christmas trees, nursery stock, logs and lumber, with bark attached.

Purpose: To modify the pine shoot beetle quarantine.

Text of emergency rule: Section 131.1 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

Pine Christmas trees, pine nursery stock and pine [, spruce, larch and fir] logs and lumber, with bark attached, shall not be shipped, transported or otherwise moved from any point within Albany, Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Erie, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Monroe, Montgomery, Niagara, Oneida, Onondaga, Oswego, Ontario, Orleans, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne, [and] Wyoming and Yates Counties to any point outside of said counties, except in accordance with 7 CFR sections 301.50 through 301.50-10 [(pages 27 - 34) (revised as of January 1, 1995)] (pages 33 - 41) (revised as of January 1, 2004) which is incorporated by reference herein. Copies of the Code of Federal Regulations may be obtained from the U.S. Government Printing Office, Washington, DC 20402 and the material incorporated by reference herein is available for public inspection and copying at the offices of the Department of Agriculture and Markets, Division of Plant Industry, [Capital Plaza, One Winners Circle] 10B Airline Drive, Albany, NY 12235.

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 October 27, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Robert Mungari, Director, Division of Plant Industry, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-2087

Regulatory Impact Statement

1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Said Section also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

2. Legislative objectives:

The modification of the quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the pine shoot beetle.

3. Needs and benefits:

The pine shoot beetle, *Tomicus piniperda*, an insect non-indigenous to the United States, is a destructive wood-boring insect native to Europe. The beetle attacks pine trees by nesting under the bark and feeding on new shoots. The resulting damage by the beetle causes shoot and branch mor-

tality which affects the growth and appearance of the tree and may eventually lead to the death of the tree. Although it is a slow-moving pest, the pine shoot beetle is easily spread through the movement of Christmas trees, nursery stock and pine logs and lumber.

The pine shoot beetle was first detected in a Christmas tree farm near Cleveland, Ohio in July of 1992 and subsequently spread to other parts of Ohio as well as to sections of Michigan, Indiana, Illinois, Pennsylvania and New York. On November 19, 1992, the United States Department of Agriculture (USDA) adopted regulations (7 CFR sections 301.50 through 301.50-10), establishing a pine shoot beetle quarantine as well as requirements and restrictions governing the movement of regulated materials from counties where this pest has been detected. On November 25, 1992, the Department, as an emergency measure, adopted section 131.1 of 1 NYCRR, which required that pine Christmas trees, pine nursery stock and pine, spruce, larch and fir logs and lumber, with bark attached, shall not be shipped, transported or otherwise moved from any point within Allegany, Cattaraugus, Erie, Genesee, Livingston, Monroe, Niagara, Oswego, Ontario and Wyoming Counties to any point outside said counties, except in accordance with federal regulations at 7 CFR sections 301.50 through 301.50-10. This emergency measure was ultimately adopted as a permanent rule on March 17, 1993.

However, subsequent observations of the pine shoot beetle in the Counties of Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates, have resulted in the need to add these counties to the list of quarantined areas in section 131.1. The amendments contain the needed additions. Although the beetle has not as yet been detected in Columbia County, extension of the quarantine into that county will establish a buffer between infested and uninfested counties, thereby helping to control the further spread of this pest. Columbia County is not the only county adjacent to counties in which the beetle has been detected, since the Counties of Ulster and Orange are also adjacent to the quarantined area. However, since Columbia County contains saw mills which process pine logs shipped from counties where the beetle has been detected, there is a greater likelihood that infested materials will be transported to Columbia County. The need to establish such a buffer has resulted in the need to add Columbia County to the list of quarantined areas in section 131.1. The amendments contain the needed addition. The amendments also incorporate by reference, the most recent revision of the federal regulations at 7 CFR sections 301.50 through 301.50-10, revised as of January 1, 2004, which set forth requirements and restrictions governing the movement of regulated materials from counties where the pine shoot beetle has been detected. Finally, the amendments delete spruce, larch and fir from the list of regulated host materials subject to regulation under the quarantine, since the USDA has tested and determined that these materials are not a host to the pine shoot beetle.

The effective control of the pine shoot beetle within the areas of the State where the insect has been found is important to protect New York's Christmas tree, nursery and forest products industries. It is estimated that there are 3,970 nursery dealers, 2,205 nursery growers, 673 forest products companies, 119 arborists and 116 Christmas tree farms in the State which engage in these industries. They employ an estimated 42,000 people and generate 1.51 billion dollars in revenue per year. The failure of states to control insect pests within their borders can lead to federal quarantines as well as quarantines by other states which would affect all areas of those states, rather than just the infested portions. Such widespread quarantines would adversely affect the Christmas tree, nursery and forest products industries throughout New York State.

4. Costs:

(a) Costs to the State government:

None.

(b) Costs to local government:

None.

(c) Costs to private regulated parties:

Under the amendments, regulated parties exporting host material from the quarantined area, other than pursuant to compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1000.

Most shipments will be made pursuant to compliance agreements for which there is no charge.

(d) Costs to the regulatory agency:

(i) The initial expenses the agency will incur in order to implement and administer the regulation: None

(ii) It is anticipated that the Department will be able to administer the quarantine with existing staff.

5. Local government mandate:

None.

6. Paperwork:

Under the amendments, regulated articles inspected and certified to be free of the pine shoot beetle moving from quarantined areas will have to be accompanied by a state or federal phytosanitary certificate of a limited permit or be undertaken pursuant to a compliance agreement.

7. Duplication:

None.

8. Alternatives:

None. The failure of the State to modify the quarantine to reflect the areas in which the pine shoot beetle has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. In addition, the failure to regulate the movement of host material from the buffer area may be viewed by these partners as facilitating the spread of this pest. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of pine shoot beetle that could result from the unrestricted movement of regulated articles from the areas covered by the modified quarantine. In light of these factors there does not appear to be any viable alternative to the modification of quarantine in this rulemaking.

9. Federal standards:

The amendments do not exceed any minimum standards for the same or similar subject areas.

10. Compliance schedule:

Immediate.

Regulatory Flexibility Analysis

1. Effect on small business:

The amendments to the pine shoot beetle quarantine in section 131.1 of 1 NYCRR will extend that quarantine to the Counties of Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates. The amendments also incorporate by reference, the most recent revisions to federal regulations at 7 CFR sections 301.50 through 301.50-10, revised as of January 1, 2004, which set forth requirements and restrictions for the movement of host materials. Finally, the amendments delete spruce, larch and fir from the list of regulated host materials subject to regulation under the quarantine, since the United States Department of Agriculture (USDA) has tested and determined that these materials are not a host to the pine shoot beetle.

It is estimated that there are 1,899 nursery dealers, 1,408 nursery growers, 673 forest products companies, 119 arborists and 67 Christmas tree farms in the 37 counties which will be added to the pine shoot beetle quarantine under the amendments. Most of these entities are small businesses.

Although it is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantined areas, in the event that they do, they would be subject to the same requirements and restrictions governing such movement set forth in 7 CFR sections 301.50 through 301.50-10 as are other regulated parties.

2. Compliance requirements:

Under the amendments, all regulated parties in the modified quarantined areas would be required to obtain state or federal phytosanitary certificates and limited permits in order to ship regulated articles from quarantined areas. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

3. Professional services:

In order to comply with the amendments, businesses and local governments shipping regulated articles from the modified quarantined areas will require professional inspection services, which would be provided by the Department and the USDA.

4. Compliance costs:

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule: None

(b) Annual cost for continuing compliance with the proposed rule:

Under the amendments, regulated parties exporting host material from the modified quarantined area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most of these inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year, with a total cost of less than \$1,000. Most shipments will be made pursuant to compliance agreements for which there is no charge.

Local governments shipping regulated articles from the modified quarantined areas will incur similar costs.

5. Minimizing adverse impact:

The Department has designed the amendments to minimize adverse economic impact on small businesses and local governments. The amendments limit the modified quarantined areas to only those areas where the pine shoot beetle has been detected and to those areas that will serve as a buffer to prevent the spread of the pest through transportation of infested materials to uninfested areas. The amendments also limit the regulated articles to only those susceptible to infestation by the pine shoot beetle. Finally, the amendments limit the inspection and permit requirements to only those necessary to detect the presence of the pine shoot beetle and prevent its movement in host materials from the quarantined areas. As set forth in the regulatory impact statement, the amendments provide for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the proposed amendments were designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the amendments minimize adverse economic impact as much as is currently possible.

6. Small business and local government participation:

The Department has contacted representatives of the Empire State Forest Products Association, New York State Nursery / Landscape Association and the Christmas Tree Farmers Association of New York to discuss the expansion of the pine shoot beetle quarantine. The representatives of these three trade organizations representing regulated parties, expressed support for the amendments.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments:

The economic and technological feasibility of compliance with the amendments by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping host materials from the quarantined areas, other than pursuant to a compliance agreement, will require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, will be made pursuant to compliance agreements for which there is no charge.

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The amendments to the pine shoot beetle quarantine in section 131.1 of 1 NYCRR will extend that quarantine to the Counties of Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates. The amendments also incorporate by reference, the most recent revisions to federal regulations at 7 CFR sections 301.50 through 301.50-10, revised as of January 1, 2004, which set forth requirements and restrictions for the movement of host materials. Finally, the amendments delete spruce, larch and fir from the list of regulated host materials subject to regulation under the quarantine, since the United States Department of Agriculture (USDA) has tested and determined that these materials are not a host to the pine shoot beetle.

It is estimated that there are 1,899 nursery dealers, 1,408 nursery growers, 673 forest products companies, 119 arborists and 67 Christmas tree farms in the 37 counties which will be added to the pine shoot beetle quarantine under the amendments. Many of these entities are located in rural areas of the State.

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

Under the amendments, all regulated parties in the modified quarantined areas will be required to obtain state or federal phytosanitary certifi-

cates and limited permits in order to ship regulated articles from quarantined areas. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

In order to comply with the amendments, entities that ship regulated articles from the modified quarantined areas will require professional inspection services, which will be provided by the Department and the USDA.

3. Costs:

Under the amendments, regulated parties exporting host material from the modified quarantined area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most of these inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year, with a total cost of less than \$1,000. Most shipments will be made pursuant to compliance agreements for which there is no charge.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act Section 202-bb(2), the amendments were drafted to minimize reporting and testing requirements for all regulated parties, including those in rural areas. The amendments limit the modified quarantined areas to only those areas where the pine shoot beetle has been detected and those areas that will serve as a buffer to prevent the spread of the pest through transportation of infested materials to uninfested areas. The amendments also limit the regulated articles to only those susceptible to infestation by the pine shoot beetle. Finally, the amendments limit the inspection and permit requirements to only those necessary to detect the presence of the pine shoot beetle and prevent its movement in host materials from the quarantined areas. As set forth in the regulatory impact statement, the amendments provide for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the proposed amendments were designed to minimize adverse impact. Given all of the facts and circumstances, it is submitted that the amendments minimize adverse economic impact as much as is currently possible.

5. Rural area participation:

The Department has contacted representatives of the Empire State Forest Products Association, New York State Nursery/Landscape Association and the Christmas Tree Farmers Association of New York to discuss the expansion of the pine shoot beetle quarantine. The representatives of these three trade organizations representing regulated parties, expressed support for the amendments.

Job Impact Statement

The amendments will not have a substantial adverse impact on jobs and employment opportunities. The modification of the quarantine area is designed to prevent the spread of the pine shoot beetle to other parts of the State. It is estimated that there are 3,970 nursery dealers, 2,205 nursery growers, 673 forest products companies, 119 arborists and 116 Christmas tree farms in the State which engage in these industries. They employ an estimated 42,000 people and generate 1.51-billion dollars in revenue per year. A spread of the infestation would have very adverse economic consequences to these industries in New York State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government and by other states. By helping to prevent the spread of the pine shoot beetle, the amendments would help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's Christmas tree, nursery and forest products industries.

Office of Children and Family Services

NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

Statewide Automated Child Welfare Information Systems (SACWIS)

I.D. No. CFS-09-04-00015-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. CFS-09-04-00015-P was published in the *State Register* on March 3, 2004.

Subject: Establishing standards relating to the implementation of CONNECTIONS, New York's Statewide Automated Child Welfare Information System (SACWIS).

Purpose: To implement the State's SACWIS system in a manner that allows child welfare workers time to effectively communicate with one another, enter information directly, eliminate duplicate entry of information, allow for direct determination of claims, improve the convenience to consumers of service, reduce the administrative burden of child welfare workers in social services districts and the agencies with which they contract to provide direct services, protect the confidentiality of individuals about whom information is recorded, meet the requirements of section 479 of the Federal Social Security Act (SSA) and 45 CFR parts 1355 and 1356 which mandate the collection of specified adoption and foster care information, and protect Federal financial participation.

Substance of rule: The regulations set forth standards for submission to SACWIS of data elements relating to child welfare services, including foster care, adoption assistance, preventive services, child protective services and other family preservation and support services.

Changes to rule: No changes.

Expiration date: March 3, 2005.

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

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

Department of Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-17-04-00009-A

Filing No. 875

Filing date: Aug. 3, 2004

Effective date: Aug. 18, 2004

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class in the Department of Mental Hygiene.

Text was published in the notice of proposed rule making, I.D. No. CVS-17-04-00009-P, Issue of April 28, 2004.

Final rule compared with proposed rule: No changes.

Text of rule 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.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-17-04-00010-A
Filing No. 872
Filing date: Aug. 3, 2004
Effective date: Aug. 18, 2004

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Lake George Park Commission.

Text was published in the notice of proposed rule making, I.D. No. CVS-17-04-00010-P, Issue of April 28, 2004.

Final rule compared with proposed rule: No changes.

Text of rule 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.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-17-04-00011-A
Filing No. 873
Filing date: Aug. 3, 2004
Effective date: Aug. 18, 2004

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete a title from the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-17-04-00011-P, Issue of April 28, 2004.

Final rule compared with proposed rule: No changes.

Text of rule 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.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-17-04-00012-A
Filing No. 871
Filing date: Aug. 3, 2004
Effective date: Aug. 18, 2004

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete a position from and classify a position in the non-competitive class in the Department of Environmental Conservation.

Text was published in the notice of proposed rule making, I.D. No. CVS-17-04-00012-P, Issue of April 28, 2004.

Final rule compared with proposed rule: No changes.

Text of rule 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.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-17-04-00013-A
Filing No. 874
Filing date: Aug. 3, 2004
Effective date: Aug. 18, 2004

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional classification.

Purpose: To delete a position from and classify a position in the non-competitive class in the Department of Labor.

Text was published in the notice of proposed rule making, I.D. No. CVS-17-04-00013-P, Issue of April 28, 2004.

Final rule compared with proposed rule: No changes.

Text of rule 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.

Education Department

**NOTICE OF CONTINUATION
 NO HEARING(S) SCHEDULED**

Requirements for Conferral of a College Degree and Home Instruction

I.D. No. EDU-09-04-00007-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. EDU-09-04-00007-P was published in the *State Register* on March 3, 2004.

Subject: Requirements for the conferral of a college degree and the home instruction of students of compulsory attendance age and college study.

Purpose: To establish alternatives to the requirement that a candidate for a college degree hold a high school diploma, repeal the requirement that a student must have completed at least a four-year high school course or its equivalent before beginning degree study, require students who seek to meet compulsory educational requirements through full-time college study to obtain the approval of the school district, and establish requirements relating to the home instruction of students of compulsory attendance age and college study.

Substance of rule: The following is a description of the substance of the proposed rule:

Subdivisions (a) and (b) of section 3.47 of the Rules of the Board of Regents are repealed and new subdivisions (a) and (b) are added, effective September 30, 2004.

Subdivision (a) of section 3.47 establishes general requirements for the conferral of earned degrees. The requirement that the candidate must demonstrate a preliminary education of at least a four-year high school course or its equivalent before beginning the course of study for a degree is deleted.

Paragraph (1) of subdivision (a) provides that no earned degree may be conferred on a person unless the person completed a program of study requisite to such degree at an institution authorized to confer that degree. It also provides that no earned degree may be conferred unless the applicant has completed a program registered by the State Education Department.

Paragraph (2) of subdivision (a) provides that no earned degree shall be conferred unless the candidate has met the requirements in subparagraphs (i) or (ii) of this paragraph.

Subparagraph (i) of paragraph (2) establishes requirements for candidates for an earned college degree that are of compulsory school age. It requires them to either hold a high school diploma or have completed the

substantial equivalent of a four-year high school course, as certified by the superintendent of schools or comparable chief school administrator.

Subparagraph (ii) of paragraph (2) establishes requirements for candidates for an earned degree who are beyond compulsory school age. It permits such candidates to demonstrate a preliminary education needed to obtain a college degree through six alternatives: (a) holding a high school diploma; or (b) having completed the substantial equivalent of a four-year high school course, as certified by the superintendent of schools or comparable chief school administrator; or (c) holding a high school equivalency diploma; or (d) having successfully completed 24 semester hours or the equivalent as a recognized candidate for a college-level degree or certificate distributed in specified subjects; (e) or having previously earned and been granted a college degree; (f) or having passed and successfully completed all requirements for five specified Regents examinations or the approved alternative assessments for these examinations.

Subdivision (b) of section 3.47 establishes the preliminary requirement that, prior to enrolling, a student who seeks to meet compulsory educational requirements through full-time study at a degree-granting institution must submit to the college a valid and in effect Individualized Home Instruction Plan (IHIP) that authorizes such full-time college study.

Subdivision (d) of section 100.10 of the Regulations of the Commissioner of Education is amended, effective September 30, 2004, to require a home schooled student's Individualized Home Instruction Plan to include a statement that the child will be meeting the compulsory educational requirements through full-time study at a degree-granting institution, if that is the case. In this situation, the IHIP must identify the degree-granting institution and the subjects to be covered by that study.

Changes to rule: Since publication of the Notice of Proposed Rule Making in the *State Register* on March 3, 2004, the proposed rule was both substantially and non-substantially revised. These changes were included in a Notice of Revised Rule Making that was published in the July 14, 2004 edition of the *State Register*, I.D. No. EDU-09-04-00007-RP. The following describes the changes to the rule:

Section 3.47(a)(2)(i)(b) and (ii)(b) of the Rules of the Board of Regents is non-substantially revised to add the word "substantial" before the word equivalent to clarify the regulation and more accurately reflect the statutory requirement that instruction given to a minor elsewhere than at a public school shall be substantially equivalent to instruction given in the public school.

Section 3.47(a)(2)(ii)(d) concerns the 24 semester hours alternative which students beyond compulsory school age may use to demonstrate preliminary education before obtaining a college degree. This requirement is changed to reflect core liberal arts and science requirements in college degree programs. The change would decrease the number of semester hours in mathematics from six to three, and replace the requirement for three semester hours in career and technical education and/or foreign languages with six semester hours in courses within the registered degree or certificate program. This clause was also changed to require the student to complete the course work as a recognized candidate for a college-level degree or certificate at a degree-granting institution defined in the regulation to ensure course work quality.

Section 3.47(a)(2)(ii)(e) is non-substantially revised to add the word "or" at the end of the clause to accommodate the added alternative in clause (f).

Section 3.47(a)(2)(ii)(f) is added to provide another alternative which students beyond compulsory school age may use to demonstrate preliminary education before obtaining a college degree: passing and meeting requirements for five specified Regents examinations or their approved alternatives. The Regents determined that this alternative was needed to provide flexibility, enabling students beyond compulsory school age to demonstrate preliminary education through another means.

Section 3.47(b) of the Rules of the Board of Regents is substantially revised. This subdivision concerns a preliminary requirement that must be met by students who are subject to compulsory educational requirements before they may enroll in college study. The requirement has been significantly narrowed to include only students who seek to meet compulsory educational requirements through full-time college study. The previous version required all students subject to compulsory educational requirements to obtain approval of the superintendent of schools or other school administrator before enrolling in a college credit course during the regular school day and year. This change responds to public comment that indicated that the previous requirement would be unduly onerous to administer.

Paragraph (5) of subdivision (d) of section 100.10 of Commissioner's Regulations is substantially revised in order to align with revised section

3.47(b) of the Regents Rules, as described above. The revised regulation requires the Individualized Home Instruction Plan (IHIP) of home schooled students to include a statement that the child will be meeting the compulsory educational requirements through full-time study at a degree-granting institution, if that is the case, and to identify the degree-granting institution and the subjects to be covered by that study.

Expiration date: March 3, 2005.

Text of proposed rule and changes, if any, may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Residency Option Pathway for Dental Licensure

I.D. No. EDU-33-04-00008-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 61.18(b)(1) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6506(1), 6507(2)(a) and 6604(3) and (4)

Subject: Residency option pathway for dental licensure.

Purpose: To adjust the requirements for the residency option pathway for dental licensure by deleting the provision that requires the dental residency to be completed within a time frame of two years prior to application for licensure.

Text of proposed rule: Paragraph (1) of subdivision (b) of section 61.18 of the Regulations of the Commissioner of Education is amended, effective November 25, 2004, as follows:

(1) The residency program shall be a postdoctoral clinical dental residency program in either general dentistry, or a specialty of dentistry as defined in paragraph (2) of this subdivision, of at least one year's duration in a hospital or dental facility accredited for teaching purposes by the CDA, which is completed successfully by the applicant [within two years] prior to the submission to the department of the application for licensure [to the department].

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Subdivision (1) of section 6506 of the Education Law authorizes the Board of Regents to supervise the admission to the practice of the professions and to promulgate rules to carry out such supervision.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and the practice of the professions.

Subdivision (3) of section 6604 of the Education Law defines the experience requirement for dental licensure and provides that such experience may include a dental residency with a formal outcome assessment evaluation of the resident's competence to practice dentistry acceptable to the State Education Department.

Subdivision (4) of section 6604 of the Education Law defines the examination requirement for dental licensure and provides that the clinical dentistry licensing examination requirement may be met by completion of a prescribed dental residency that includes an outcome assessment evaluation acceptable to the State Education Department.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes in that it will, as authorized by subdivisions (3) and (4) of section 6604 of the Education Law, establish requirements for the residency option pathway for licensure in dentistry.

3. NEEDS AND BENEFITS:

The residency option pathway permits the applicant for licensure in dentistry to complete a dental residency program in lieu of the licensure examination in clinical dentistry (Part III of the licensing examination). The purpose of the proposed amendment is to adjust the requirements for the residency option pathway for dental licensure by deleting the provision that requires the dental residency program to be completed within a time frame of two years prior to application for licensure. After consultation with the field, the Department has determined that this requirement is unnecessary. The regulation contains other requirements that adequately verify that the applicant has completed the residency program. Among other requirements, the regulation requires the program to have a formal written outcome assessment that includes a notarized written statement by the residency program director that the applicant has completed the residency program and is in the director's judgment competent to practice dentistry. In addition, other licensed professions do not have similar time frames for completing residency programs.

4. COSTS:

(a) Costs to State government: The amendment will not impose any additional cost on State government.

(b) Costs to local government: The amendment will not impose any additional cost on local government.

(c) Costs to private regulated parties: The proposed amendment will not impose any additional costs on applicants for licensure in dentistry or dental residency programs.

(d) Cost to the regulatory agency: As stated above in "Costs to State Government," the proposed amendment does not impose costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment concerns dental residency programs and does not impose any program, service, duty or responsibility upon local governments.

6. PAPERWORK:

The adjustment in the requirements for the residency option pathway for dental residency will not impose any additional paperwork requirements on the applicant for licensure or the residency program.

7. DUPLICATION:

The proposed amendment does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

There are no Federal standards for dental licensure.

10. COMPLIANCE SCHEDULE:

The proposed amendment is effective on its stated effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

The proposed amendment adjusts the requirements for a residency option pathway for dental licensure by deleting the provision that requires the residency program to be completed within a time frame of two years prior to application for licensure. The amendment affects applicants for licensure in dentistry who wish to pursue the residency option pathway instead of taking the licensing examination in clinical dentistry (Part III of the dental licensing examination). As the amendment only affects applicants for licensure in dentistry, the amendment will not affect small businesses or local governments in New York State. The measure will not impose any adverse economic, reporting, recordkeeping, or any other compliance requirements on small businesses or local governments. Because it is evident from the nature of the rule that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The rule will apply to applicants who wish to use the residency option pathway for dental licensure and residency programs approved by the Commission on Dental Accreditation of the American Dental Association (CDA) that meet the requirements of the proposed amendment, including those that are located in the 44 rural counties with less than 200,000

inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. At the present time, there are about 125 CDA accredited residency programs in New York State that may potentially meet the requirements of the proposed amendment. Of these, one is located in a rural county of the State, a program at St. Clare's Hospital, Schenectady County.

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

The proposed amendment would adjust the requirements for the residency option pathway for dental licensure by deleting the provision that requires the dental residency program to be completed within a time frame of two years prior to application for licensure. The amendment does not impose any additional reporting or recordkeeping requirements on applicants for licensure in dentistry or residency programs, including those located in rural areas. In addition, the amendment does not require regulated parties to hire professional services in order to comply.

3. COSTS:

The proposed amendment does not impose additional costs on applicants for licensure in dentistry or dental residency programs.

4. MINIMIZING ADVERSE IMPACT:

The amendment deletes the requirement that the applicant must complete the residency program for the residency option pathway for dental licensure within a time frame of two years of applying for licensure. The State Education Department has determined that this requirement is unnecessary. The regulation contains other requirements that adequately verify that the applicant has completed the residency program. Other licensed professions do not have similar time frames for completing residency programs. Due to the nature of the proposed amendment, establishing a different standard for dental residency programs located in rural areas of the State is unwarranted.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from statewide organizations representing all parties having an interest in the practice of dentistry. Included in the group were the American Dental Association, the State Board for Dentistry, and the New York State Dental Association, which represent among others individuals who live or work in rural areas. In addition, comments were solicited from all residency programs approved by the Commission on Dental Accreditation of the American Dental Association and all dental schools in the United States.

Job Impact Statement

The amendment concerns requirements for the residency option pathway to dental licensure. It deletes the requirement that the residency program must be completed within a time frame of two years prior to application for licensure. The amendment may facilitate the process for some applicants to become licensed through the residency option pathway. The amendment concerns a requirement for licensure in dentistry and will have no impact on labor market demand for dentists. It will not affect the number of jobs or employment opportunities in the field of dentistry. Because it is evident from the nature of the proposed amendment, that the proposed amendment will have no impact on the number of jobs or employment opportunities in the field of dentistry or any other field, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Executive Director of the Office of Teaching Initiatives

I.D. No. EDU-33-04-00009-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 80-3.6, 80-4.1, 80-4.3, 83.1, 83.3, 83.5, 87.5 and 87.6 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 305(1), (2) and (7); 3001(2); 3004(1); 3004-c; 3006(1)(b); 3009(1); 3010 (not subdivided); and 3035(3)

Subject: Title of the Executive Director of the Office of Teaching Initiatives and the extension in gifted education of a teaching certificate.

Purpose: To update the title of the head of the State Education Department's Office of Teaching Initiatives in various provisions of the Regulations of the Commissioner of Education and delay the effective date of the requirement for a gifted education extension of a teaching certificate.

Substance of proposed rule (Full text is not posted on a State website): The State Education Department proposes to amend sections 80-3.6, 80-

4.1, 80-4.3, 83.1, 83.3, 83.5, 87.5, and 87.6 of the Regulations of the Commissioner of Education. The following is a summary of the proposed rule making.

The following sections are amended to update the title of the head of the State Education Department's Office of Teaching Initiatives, to Executive Director of the Office of Teaching Initiatives: 80-3.6(c)(2), 80-3.6(g)(2), 80-3.6(h)(2)(ii), 80-3.6(h)(2)(iv), 80-3.6(h)(3)(ii), 80-3.6(h)(3)(vi), 80-3.6(h)(4), 80-3.6(h)(5)(i), 83.1(c), 83.3, 83.5(a), 83.5(b)(2), 87.5(a)(4)(vii), 87.5(a)(4)(viii), 87.5(a)(5), 87.5(b), and 87.6(b).

Section 80-4.1(a) of the Commissioner's Regulations is amended to delay until September 1, 2005 the requirement for the extension in gifted education of a teaching certificate that would authorize a candidate to provide education for gifted pupils, as such term is defined in section 4452 of the Education Law, within a gifted and talented program which is funded pursuant to Education Law and in accordance with Part 142 of this Title.

Section 80-4.3(d) of the Commissioner's Regulations is also amended to delay, until September 1, 2005, the above-described requirement for an extension in gifted education. In addition, it changes the time period in which a candidate may use employment in a gifted and talented program which is funded pursuant to the Education Law and in accordance with Part 142 of Commissioner's Regulations to satisfy the requirement for a statement of continued eligibility, in lieu of the extension in gifted education, that would permit a candidate to teach in such program. The requirement was changed from employment for three of the five years immediately preceding February 2, 2004 to employment for three years in the period between September 1, 1998 and August 31, 2005. In addition, the requirement for the statement of continued eligibility is changed to require the candidate to hold either a professional certificate or a permanent certificate. The previous requirement stated the candidate must hold a permanent certificate.

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

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

Public comment will be received until: 60 days after publication of this notice.

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Regents.

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

Subdivision (7) of section 305 of the Education Law authorizes the Commissioner of Education to annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher.

Subdivision (2) of section 3001 of the Education Law establishes certification by the State Education Department as a qualification to teach in the public schools of New York State.

Subdivision (1) of section 3004 of the Education Law authorizes the Commissioner of Education to prescribe, subject to the approval of the Regents, regulations governing the examination and certification of teachers employed in all public schools in the State.

Section 3004-c of the Education Law provides that an applicant for a teaching certificate who is denied certification, based on a criminal history check, shall be afforded notice and the right to be heard in accordance with the Regulations of the Commissioner of Education.

Paragraph (b) of subdivision (1) of section 3006 of the Education Law provides that the Commissioner of Education may issue such teacher certificates as the Regents Rules prescribe.

Subdivision (1) of section 3009 of the Education Law provides that no part of the school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher, nor shall his salary or any

part thereof, be collected by a district tax except as provided in the Education Law.

Section 3010 of the Education Law provides that any trustee or member of a board of education who applies, or directs, or consents to the application of any district money to the payment of an unqualified teacher's salary, thereby commits a misdemeanor.

Subdivision (3) of section 3035 of the Education Law requires the Commissioner of Education to provide prospective school employees denied clearance for employment based upon a criminal history check with notice and a right to be heard, in accordance with the Regulations of the Commissioner of Education.

2. LEGISLATIVE OBJECTIVES:

The proposed rule carries out the legislative objectives of the aforementioned statutes by delaying the effective date of an extension of a teaching certificate, and updating the title Executive Director of the Office of Teaching Initiatives in provisions of the Regulations of the Commissioner of Education dealing with professional development for holders of the professional certificate, teacher moral character proceedings, and proceedings for the denial of clearance for employment or certification based upon a criminal history check.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to update the title of head of the Office of Teaching Initiatives in various provisions of the Regulations of the Commissioner of Education and delay the effective date of the requirement for a gifted education extension of a teaching certificate.

The proposed amendment is needed to conform the Regulations of the Commissioner of Education to changes made in the organization of the Office of Higher Education. Specifically, the former title of Executive Coordinator of the Office of Teaching Initiatives has been changed to Executive Director of the Office of Teaching Initiatives. The amendment updates references to this title in provisions of the Regulations of the Commissioner of Education relating to professional development for teachers holding a professional certificate, teacher moral character proceedings, and proceedings for the denial of clearance for employment or certification based upon a criminal history check.

The amendment is also needed to delay until September 1, 2005 the requirement that a teacher must hold a gifted education extension of a teaching certificate, or have obtained from the Department a statement of continued eligibility based upon employment in this field, in order to provide education for gifted pupils within a gifted and talented program which is funded pursuant to Education Law and in accordance with Part 142 of the Commissioner's Regulations. At the present time, there are insufficient options available for candidates to take the course work they need to have completed for this extension. Only eight colleges offer registered programs leading to the extension in gifted education. Currently, the Office of Higher Education is encouraging additional colleges across the State to offer the course work for the extension. The delay in the effective date is needed to permit colleges time to develop and offer the course work and candidates additional opportunities to complete it.

4. COSTS:

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

(b) Costs to local government: The amendment will not impose any additional costs on local government, including school districts.

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

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to state government," the amendment will not impose any additional costs on State government, including the State Education Department.

5. PAPERWORK:

The proposed amendment does not impose any reporting or other paperwork requirements.

6. LOCAL GOVERNMENT MANDATES:

The amendment will affect school districts that have gifted and talented programs funded pursuant to Education Law and in accordance with Part 142 of the Commissioner's Regulations. The amendment delays, until September 1, 2005, the requirement that teachers in such funded gifted and talented programs must hold a gifted education extension of their teaching certificate, or obtain from the Department a statement of continued eligibility based upon employment in this field. The amendment does not impose any other program, service, duty or responsibility on local governments.

7. DUPLICATION:

The proposed amendment does not duplicate other existing State or Federal requirements. There are no relevant State or Federal requirements that deal with the subject of the proposed amendment.

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment, and none were considered because of the nature of the amendment, which updates the title of head of the Office of Teaching Initiatives and delays the effective date for the requirement for an extension in gifted education of a teaching certificate.

9. FEDERAL STANDARDS:

There are no Federal standards regarding the subject matter of the proposed amendment.

10. COMPLIANCE SCHEDULE:

The amendment would be effective on its stated effective date. However, it prescribes in its terms a delay, until September 1, 2005, in the requirement that a teacher in a State funded gifted education program must hold an extension in gifted education, or obtain from the Department a statement of continued eligibility based upon employment in this field.

Regulatory Flexibility Analysis

(a) Small Businesses:

The proposed amendment updates the title of head of the State Education Department's Office of Teaching Initiatives in various provisions of the Regulations of the Commissioner and delays the effective date of the requirement for an extension in gifted education of a teaching certificate. The amendment does not impose any reporting, recordkeeping, or compliance requirements and will not have an economic impact on small businesses. Because it is evident from the nature of the rule that it does not affect small businesses, no further steps were needed to ascertain that fact and none were taken.

(b) Local Governments:

1. Effect of the rule:

The proposed amendment affects all school districts in the State that wish to employ a teacher to provide education for gifted pupils within a gifted and talented program which is funded pursuant to Education Law and in accordance with Part 142 of the Commissioner's Regulations.

2. Compliance requirements:

The amendment delays until September 1, 2005 the requirement that a teacher must hold a gifted education extension of a teaching certificate, or obtain from the Department a statement of continued eligibility based upon employment in this field, in order to provide education for gifted pupils within a gifted and talented program which is funded pursuant to Education Law and in accordance with Part 142 of the Commissioner's Regulations.

3. Professional services:

The proposed amendment does not mandate school districts to contract for additional professional services to comply.

4. Compliance costs:

There is no cost for school districts to comply with the proposed amendment, which delays a requirement, until September 1, 2005, that teachers employed in a State funded gifted and talented program must hold an extension in gifted education of their teaching certificate, or obtain from the State Education Department a Statement of Continued Eligibility based on employment in this field.

5. Economic and technological feasibility:

Meeting the requirements of the proposed amendment is economically and technologically feasible. As stated above in compliance costs, the amendment imposes no costs on school districts.

6. Minimizing adverse impact:

The amendment establishes requirements for teacher certification. It only applies to those school districts that wish to employ teachers in State funded gifted and talented programs. It will not impose costs on local governments. The State Education Department has determined that uniform requirements for the extension in gifted education are necessary to ensure the quality of the State's teaching workforce.

7. Local government participation:

The proposed rule was discussed with the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES. The same discussion occurred with the State's District Superintendents, representing BOCES and school districts across the State, and with the City School District of the City of New York.

Rural Area Flexibility Analysis

1. Types and estimated of number of rural areas:

The proposed amendment will affect school districts in all parts of the State that offer State funded gifted and talented programs, and teachers in those programs, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 per square mile or less.

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

The purpose of the proposed amendment is to update the title of head of the State Education Department's Office of Teaching Initiatives in various provisions of the Regulations of the Commissioner of Education and delay the effective date of the requirement for a gifted education extension of a teaching certificate.

The proposed amendment will conform the Regulations of the Commissioner of Education to changes made in the organization of the Office of Higher Education. Specifically, the former title of the Executive Coordinator of the Office of Teaching has been changed to Executive Director of the Office of Teaching Initiatives. The amendment updates references to the title in provisions of the Regulations of the Commissioner of Education relating to professional development for teachers holding a professional certificate, teacher moral character proceedings, and proceedings for the denial of clearance for employment or certification based upon a criminal history check.

The amendment also delays until September 1, 2005 the requirement that a teacher must hold an extension in gifted education of a teaching certificate, or a statement of continued eligibility based upon employment in this field, in order to provide education for gifted pupils within a gifted and talented program which is funded pursuant to Education Law and in accordance with Part 142 of the Commissioner's Regulations.

The proposed amendment will not establish additional reporting or recordkeeping requirements. The proposed amendment will not require regulated parties, including those located in rural areas, to hire professional services in order to comply.

3. Costs:

The amendment will not impose additional costs on regulated parties, including those located in rural areas of New York State.

4. Minimizing adverse impact:

The amendment delays the effective date for the requirement that a teacher must hold an extension in gifted education of a teaching certificate, or obtain from the Department a statement of continued eligibility based upon employment in this field, in order to provide education for gifted pupils in State funded gifted and talented programs. This delays the requirement to permit candidates the opportunity to complete necessary course work for the extension. Because of the nature of the proposed amendment, the State Education Department does not believe that establishing a different requirement for teachers of the gifted who live or work in rural areas is warranted.

5. Rural area participation:

The proposed rule was discussed with the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives who live and/or work in rural areas, including individuals who are employed as educators in rural school districts and BOCES. The same discussion occurred with the State's District Superintendents, representing BOCES and school districts across the State, and with postsecondary institutions in the State that offer teacher education programs, including institutions located in rural areas of the State.

Job Impact Statement

The proposed amendment would update the title of the head of the State Education Department's Office of Teaching Initiatives in various provisions of the Regulations of the Commissioner of Education. It would also delay until September 1, 2005 the requirement that a teacher must hold an extension in gifted education of a teaching certificate, or a statement of continued eligibility based upon employment in this field, in order to provide education for gifted pupils in State funded gifted and talented programs in New York State public schools. The delay is proposed in order to give teachers additional time to complete the college course work needed for the extension. The amendment will have no effect on the number of jobs or the number of employment opportunities for teachers of the gifted and talented in public schools of New York State.

Because it is evident from the nature of the rule that it will have no impact on the number of jobs and number of employment opportunities in teaching or any other field, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

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

Local High School Equivalency Diploma

I.D. No. EDU-33-04-00010-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 100.8 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305(1) and (2), 309 (not subdivided) and 3204(3)

Subject: Local high school equivalency diploma.

Purpose: To extend for three years the provision that allows boards of education specified by the commissioner to award a local high school equivalency diploma based upon experimental programs approved by the commissioner.

Text of proposed rule: Section 100.8 of the Regulations of the Commissioner of Education is amended, effective November 25, 2004, as follows:
100.8 Local high school equivalency diploma.

Boards of education specified by the commissioner may award a local high school equivalency diploma based upon experimental programs approved by the commissioner until January 31, [2005] 2008, after which date such boards may no longer award a local high school equivalency diploma.

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Data, views or arguments may be submitted to: James A. Kadamus, Deputy Commissioner, Education Department, Rm. 875, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915, e-mail: jkadamus@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

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

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3204(3) provides for required courses of study in the public schools and authorizes the State Education Department to alter the subjects of required instruction.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement Regents policy to extend for three years the provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental

programs approved by the Commissioner. The existing provision will otherwise sunset on January 31, 2005.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Regents policy to extend the time period that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

The extension will allow the continuance of the External Diploma Program (EDP), which is a complete assessment program that allows adults to demonstrate and document the lasting outcomes and transferable skills for which a high school diploma is awarded. EDP is a competency-based, applied performance assessment system that expects adults to demonstrate their ability in a series of simulations that parallel job and life situations. Participants are evaluated against a criterion of excellence instead of by comparison with others. They take responsibility for acquiring instruction through existing community resources to achieve mastery of all the competencies required, plus an occupational or specialized skill.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment will not impose any costs on the State, local governments, private regulated parties or the State Education Department. It merely extends for three years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district. It merely extends an existing provision related to the issuance of a local high school equivalency diploma.

6. PAPERWORK:

The proposed amendment merely extends an existing provision related to the issuance of a local high school equivalency diploma, and does not impose any additional paperwork requirements.

7. DUPLICATION:

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

8. ALTERNATIVES:

The proposed amendment is necessary to enact Regents policy to extend the time period that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner. There are no significant alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

There are no related federal standards in this area.

10. COMPLIANCE SCHEDULE:

Because of the nature of the proposed amendment, which merely extends for three years the existing provision in section 100.8 of the Commissioner's Regulations, it is anticipated that school districts and boards of cooperative educational services will be able to achieve compliance with this rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment merely extends for three years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and boards of cooperative educational services (BOCES) specified by the Commissioner to award a local high school equivalency diploma for adults over age 21, based upon experimental programs approved by the Commissioner, and will not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment applies to boards of education and boards of cooperative educational services (BOCES) that are specified by the Commissioner to award a local high school equivalency diploma based upon

experimental programs approved by the Commissioner. At present, there are 8 school districts and 11 BOCES offering such programs.

COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any new compliance requirements but merely extends for three years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment will not impose any costs on local governments. It merely extends for three years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any costs or new technological requirements on local governments.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents. The proposed amendment does not impose any new compliance requirements or costs on local governments, but merely extends the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) that are specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. At present 2 school districts and 11 BOCES serve rural areas.

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

The proposed amendment does not impose any new compliance requirements on rural areas but merely extends for three years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The proposed amendment does not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment will not impose any costs on rural areas. It merely extends for three years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents. The proposed amendment does not impose any new compliance requirements on rural areas, but merely extends the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

RURAL AREA PARTICIPATION:

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

Job Impact Statement

The proposed amendment merely extends for three years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education specified by the Commissioner to award a local high

school equivalency diploma based upon experimental programs approved by the Commissioner, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Adult Literacy Education Aid

I.D. No. EDU-33-04-00011-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 164.2 of Title 8 NYCRR.

Statutory authority: Education Law, section 207 (not subdivided); and L. 2003, ch. 53, section 1

Subject: Adult literacy education aid.

Purpose: To amend certain requirements for not-for-profit organizations applying for adult literacy education grants and delete references to obsolete provisions.

Text of proposed rule: Subdivision (d) of section 164.2 of the Regulations of the Commissioner of Education is amended, effective November 25, 2004, as follows:

(d) Approval of application. Each not-for-profit organization applying for a grant under this section will be notified by the department, within a reasonable period of time after the receipt of its application, of the commissioner's approval or disapproval of its application in accordance with this subdivision.

(1) Program approval. No program application shall be approved unless such application meets the requirements of subdivision (c) of this section and the proposed program meets the criteria set forth in section 168.3(b) of this Title, [provided that the minimum class size shall be 10 pupils] *except that the criteria set forth in section 168.3(b)(5) and (6) shall not apply to such program.*

(2) Priority in award of grants. In awarding grants to not-for-profit organizations priority shall be given to those organizations [which either meet the criteria for approval to operate a basic skills program set forth in section 167.3(b) of this Title or qualify for an exemption from such criteria pursuant to section 167.4 of this Title, and] which propose to serve persons who are receiving public assistance, who are unemployed, or who are economically or educationally disadvantaged.

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Data, views or arguments may be submitted to: James A. Kadamus, Deputy Commissioner, Education Department, Rm. 875, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915, e-mail: jkadamus@mail.nysed.gov

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

Section 1 of Chapter 53 of the Laws of 2003, the Education, Labor and Family Assistance Budget Bill for the 2003-2004 State fiscal year (page 36, lines 8-19), contains an apportionment of \$3,324,700 in State aid for competitive grants for adult literacy/education aid to public and private not-for-profit agencies, including but not limited to, 2 and 4 year colleges, community based organizations, libraries, and volunteer literacy organizations and institutions which meet quality standards promulgated by the commissioner to provide programs of basic literacy, high school equivalency, and English as a second language to persons 16 years of age or older. A similar apportionment is included in the proposed Education, Labor and Family Assistance budget bills for State fiscal year 2004-2005 (S.6053 and A.9553).

LEGISLATIVE OBJECTIVES:

Adult literacy education aid provides financial assistance to not-for-profit organizations for the operation of adult literacy education programs, including adult basic education, English for speakers of other languages, and high school equivalency programs. The proposed amendment will eliminate the requirement for minimum class size for each not-for-profit organization that works with students at the lowest level of literacy and that applies for an adult literacy education grant.

NEEDS AND BENEFITS:

The proposed amendment to section 164.2(d)(1) of the Regulations of the Commissioner of Education will provide not-for-profit organizations with increased flexibility in offering adult literacy education (ALE) programs, which are designated by the commissioner to serve persons who are receiving public assistance, who are unemployed, or who are economically or educationally disadvantaged, by deleting the 10-pupil minimum class size requirement and the requirement that ALE programs meet certain frequency and duration criteria set forth in section 168.3(b)(5) and (6), relating to Employment Preparation Education programs. This will extend eligibility for State aid to not-for-profit ALE providers serving small populations, such as in situations involving one-on-one tutoring or small groups of no more than 4 students, in which students receive between 1 to 3 hours of instruction per week.

The proposed amendment also deletes obsolete references to section 167.3(b) and 167.4, which applied to programs funded under the federal Job Training Partnership Training Act, which Act was repealed by the Workforce Investment Act of 1998 (Pub.L. 105-220).

COSTS:

- (a) Costs to State government: None.
- (b) Costs to local government: None.
- (c) Costs to private regulated parties: None.
- (d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment does not impose any compliance costs. The proposed amendment deletes a 10-pupil minimum class size requirement and the requirement that adult literacy education (ALE) programs meet certain frequency and duration criteria set forth in section 168.3(b)(5) and (6), relating to Employment Preparation Education programs, and thus will provide increased flexibility to not-for-profit organizations that offer adult literacy programs designated by the commissioner to serve persons who are receiving public assistance, who are unemployed, or who are economically or educationally disadvantaged, and extend eligibility for State aid to those not-for-profit ALE providers serving small populations, such as in situations involving one-on-one tutoring or small groups of no more than 4 students, in which students receive between 1 to 3 hours of instruction per week.

LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district. The proposed amendment deletes a 10-pupil minimum class size requirement and the requirement that adult literacy education (ALE) programs meet certain frequency and duration criteria set forth in section 168.3(b)(5) and (6), relating to Employment Preparation Education programs, and thus will provide increased flexibility to not-for-profit organizations that offer adult literacy programs designated by the commissioner to serve persons who are receiving public assistance, who are unemployed, or who are economically or educationally disadvantaged, and extend eligibility for State aid to those not-for-profit ALE providers serving small populations, such as in situations involving one-on-one tutoring or small groups of no more than 4 students, in which students receive between 1 to 3 hours of instruction per week.

PAPERWORK:

The proposed amendment does not impose any additional paperwork requirements.

DUPLICATION:

The proposed amendment does not duplicate existing State or federal regulations.

ALTERNATIVES:

There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

It is anticipated that not-for-profit organizations will be able to achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

The proposed amendment relates to an apportionment of State funds for not-for-profit organizations which operate adult literacy education

(ALE) programs, including adult basic education, English for speakers of other languages, and high school equivalency programs, and is inapplicable to organizations which are businesses operating on a for-profit basis. Not-for-profit organizations may, but are not required to, apply for such State aid, and those that do apply receive an economic benefit. The proposed amendment will provide not-for-profit organizations with increased flexibility in offering ALE programs, by deleting the 10-pupil minimum class size requirement and the requirement that such programs meet certain frequency and duration criteria set forth in section 168.3(b)(5) and (6), relating to Employment Preparation Education programs. This will extend eligibility for State aid to not-for-profit ALE providers serving small populations, such as in situations involving one-on-one tutoring or small groups of no more than 4 students, in which students receive between 1 to 3 hours of instruction per week. The proposed amendment also deletes obsolete references to section 167.3(b) and 167.4, which applied to programs funded under the federal Job Training Partnership Training Act, which Act was repealed by the Workforce Investment Act of 1998 (Pub.L. 105-220).

Consequently, the proposed amendment does not impose any reporting, recordkeeping or other compliance requirements on small businesses or local governments nor will it have any adverse economic impact on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it does not impose compliance requirements on or have adverse economic impact on small businesses or local governments, no affirmative steps were needed to ascertain such facts and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not needed and one has not been prepared.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to not-for-profit organizations, including two-year colleges, four-year colleges or universities, community-based organizations, libraries or volunteer literacy organizations, that offer adult literacy education programs, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment does not impose any compliance requirements. The proposed amendment deletes a 10-pupil minimum class size requirement and the requirement that adult literacy education (ALE) programs meet certain frequency and duration criteria set forth in section 168.3(b)(5) and (6), relating to Employment Preparation Education programs, and thus will provide increased flexibility to not-for-profit organizations that offer adult literacy programs designated by the commissioner to serve persons who are receiving public assistance, who are unemployed, or who are economically or educationally disadvantaged, and extend eligibility for State aid to those not-for-profit ALE providers serving small populations, such as in situations involving one-on-one tutoring or small groups of no more than 4 students, in which students receive between 1 to 3 hours of instruction per week.

The proposed amendment also deletes obsolete references to section 167.3(b) and 167.4, which applied to programs funded under the federal Job Training Partnership Training Act, which Act was repealed by the Workforce Investment Act of 1998 (Pub.L. 105-220).

The proposed amendment does not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment does not impose any compliance costs. The proposed amendment deletes a 10-pupil minimum class size requirement and the requirement that adult literacy education (ALE) programs meet certain frequency and duration criteria set forth in section 168.3(b)(5) and (6), relating to Employment Preparation Education programs, and thus will provide increased flexibility to not-for-profit organizations that offer adult literacy programs designated by the commissioner to serve persons who are receiving public assistance, who are unemployed, or who are economically or educationally disadvantaged, and extend eligibility for State aid to those not-for-profit ALE providers serving small populations, such as in situations involving one-on-one tutoring or small groups of no more than 4 students, in which students receive between 1 to 3 hours of instruction per week.

The proposed amendment also deletes obsolete references to section 167.3(b) and 167.4, which applied to programs funded under the federal Job Training Partnership Training Act, which Act was repealed by the Workforce Investment Act of 1998 (Pub.L. 105-220).

MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any compliance requirements or costs. The proposed amendment deletes a 10-pupil minimum class size requirement and the requirement that adult literacy education (ALE) programs meet certain frequency and duration criteria set forth in section 168.3(b)(5) and (6), relating to Employment Preparation Education programs, and thus will provide increased flexibility to not-for-profit organizations that offer adult literacy programs designated by the commissioner to serve persons who are receiving public assistance, who are unemployed, or who are economically or educationally disadvantaged, and extend eligibility for State aid to those not-for-profit ALE providers serving small populations, such as in situations involving one-on-one tutoring or small groups of no more than 4 students, in which students receive between 1 to 3 hours of instruction per week.

RURAL AREA PARTICIPATION:

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

Job Impact Statement

The proposed amendment relates to an apportionment of State funds for not-for-profit organizations which operate adult literacy education (ALE) programs, including adult basic education, English for speakers of other languages, and high school equivalency programs, and is inapplicable to organizations which are businesses operating on a for-profit basis. Not-for-profit organizations may, but are not required to, apply for such State aid, and those that do apply receive an economic benefit. The proposed amendment will provide not-for-profit organizations with increased flexibility in offering adult literacy education (ALE) programs, which are designated by the commissioner to serve persons who are receiving public assistance, who are unemployed, or who are economically or educationally disadvantaged, by deleting the 10-pupil minimum class size requirement and the requirement that ALE programs meet certain frequency and duration criteria set forth in section 168.3(b)(5) and (6), relating to Employment Preparation Education programs. This will extend eligibility for State aid to not-for-profit ALE providers serving small populations, such as in situations involving one-on-one tutoring or small groups of no more than 4 students, in which students receive between 1 to 3 hours of instruction per week. The proposed amendment also deletes obsolete references to section 167.3(b) and 167.4, which applied to programs funded under the federal Job Training Partnership Training Act, which Act was repealed by the Workforce Investment Act of 1998 (Pub.L. 105-220).

The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

**NOTICE OF EMERGENCY
ADOPTION
AND REVISED RULE MAKING
NO HEARING(S) SCHEDULED**

Recreational Harvest and Possession of Marine Fish Species**I.D. No.** ENV-19-04-00003-ERP**Filing No.** 867**Filing date:** July 30, 2004**Effective date:** July 30, 2004

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

Emergency action taken: Amendment of section 40.1(f) of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0340-b, 13-0340-e and 13-0340-f

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

Specific reasons underlying the finding of necessity: Pursuant to § 13-0371 of the ECL, New York State participates in the Atlantic States Marine Fisheries Compact administered through the Atlantic States Marine Fisheries Commission (ASMFC) to promote cooperative utilization of marine fish species. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fisheries Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers. Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have timely implemented provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0340-b, 13-0340-e and 13-040-f, which authorize the adoption of regulations for the management of summer flounder, scup, and black sea bass, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission. ASMFC recently amended the FMPs for summer flounder, scup, and black sea bass by adopting annual quota changes and recreational harvest projections. In order to maintain compliance with the FMPs and ACFCMA, states are required to immediately implement these changes by amending their recreational fishing regulations for each of these species.

Under the FMP for summer flounder and scup, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest, assuming its regulations are unchanged and that harvest patterns and rates remain the same as the previous year. If the projected harvest for a state exceeds that state's assigned quota, the state is required to amend its harvest regulations so that they are sufficiently restrictive to prevent the state from exceeding its assigned quota. ASMFC reviews each state's regulations and must determine that they are compliant with the FMP. Accordingly, failure to timely adopt revised 2004 regulations may result in a non-compliance determination by ASMFC and the Secretary of Commerce, and the imposition of a total closure of fishing for summer flounder, scup and/or black sea bass in New York State, with significant adverse impacts to that state's economy. New York's projected harvests for summer flounder and scup in 2004 exceed the state's assigned quotas by 48.5% and 58%, respectively. The regulatory changes in this emergency rule are calculated to bring New York into compliance.

On April 23, 2004 the Department adopted emergency regulations intended to comply with the ASMFC 2004 requirements for summer flounder, scup and black sea bass. The ASMFC approved the regulations for scup. This emergency rule includes those approved regulations that achieve a 58% reduction for scup for 2004.

However, on June 17, 2004, the ASMFC determined that New York's emergency regulations for summer flounder were not in compliance with the requirements to achieve a 48.5% reduction. On July 19, 2004 the U.S. Secretary of Commerce determined that the summer flounder regulations did not comply with the ASMFC requirements. Accordingly the Secretary of Commerce sent a letter to Governor George Pataki notifying him of that decision and establishing a date certain when a moratorium would be placed on commercial and recreational summer flounder fishing in New York. In order to achieve compliance and to prevent a federal closure of the commercial and recreational summer fishery in New York, the Department is adopting emergency regulations which establish an open season for fluke from May 15 to September 6, a daily limit of three (3) summer flounder, and an increase in the minimum length for summer flounder from 17 inches to 18 inches. Simultaneously, the Department is revising its proposed rule, which appeared in the May 12, 2004 issue of the State Register, to include these same provisions.

The FMP for black sea bass calls for annual adjustments to common coastwide regulations that are calculated to hold coastwide harvest within the allowed annual quota. Under the FMP for the black sea bass, a single coastwide regime of size limits, possession limits and seasons is annually established by ASMFC. For 2004, a revised season closure for a two-week period in September and for the month of December was established. On April 23, 2004, the Department adopted emergency regulations to close an

equivalent period in September/October. However, the ASMFC determined that New York must revise its closure period to specifically conform to the September 7 to September 22 and December 1 to 31 period in order to comply with the FMP, and that unless New York has come into compliance by August 1, a non-compliance determination will be forwarded to the Secretary of Commerce pursuant to ACFCMA. Therefore, in order to achieve compliance and prevent a federal closure of the black sea bass fishery in New York, the Department is adopting emergency regulations which establish the specific black sea bass season closure periods necessary to comply with the FMP. Simultaneously, the Department is revising its proposed rule, which appeared in the May 12, 2004 issue of the *State Register*, to include these same provisions.

The promulgation of this regulation on an emergency basis is necessary in order for the Department to maintain compliance with the FMPs for summer flounder, scup, and black sea bass and to avoid closure of these fisheries and the economic hardship that would be associated with such closure.

Subject: Regulation of the recreational harvest and possession of marine fish species (summer flounder, scup, and black sea bass) in New York's marine district.

Purpose: To control the recreational harvest and possession of marine fish species (summer flounder, scup, and black sea bass) consistent with conservation requirements identified in regional FMPs.

Text of emergency/revised rule: Section 40.1 (f) is amended as follows: 40.1 (f) Table A - Recreational Fishing.

Species	Open Season	Minimum Length	Possession Limit
Striped Bass (except the Hudson River north of the George Washington Bridge)	Apr 15 - Dec 15	28" TL (Total Length) *	1
Red Drum	All year	No minimum size limit	No limit for fish less than 27" TL Fish greater than 27" TL shall not be possessed
Tautog	Oct 1 - May 31	14" TL	10
American Eel	All year	6" TL	50
Pollock	All year	19" TL	No limit
Haddock	All year	21" TL	No limit
Atlantic cod	All year	23" TL	No limit
Summer flounder	[All year] May 15 - Sept. 6	[17" 18" TL	[7] 3
Yellowtail Flounder	All year	13" TL	No limit
Atlantic Sturgeon	No possession allowed		
Spanish Mackerel	All year	14" TL	15
King Mackerel	All year	23" TL	3
Cobia	All year	37" TL	2
Monkfish (Goosefish)	All year	21" TL 14" Tail	No limit
Weakfish	All year	16" TL	6
		10" Fillet length+ 12" Dressed length**	
Bluefish	All year	No minimum size limit	10
Winter Flounder	Third Saturday in March to June 30 and Sept. 15 to Nov 30	11" TL	15
Scup (porgy)	[All year] June 16 - Oct. 17 and Nov. 1 - Nov. 30	[10" 11" TL	[50] 20
Black Sea Bass	Jan 1 - Sept. [1] 7 and Sept. [16] 22 - Nov 30	12"	25
American Shad	All year	No minimum size limit	5
Hickory Shad	All year	No minimum size limit	5
Large & Small Coastal Sharks ###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###
### Pelagic Sharks ++,###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###
Prohibited Sharks***, ###	No possession allowed		

* Total length is the longest straight line measurement from the tip of the snout, with the mouth closed, to the longest lobe of the caudal fin (tail), with the lobes squeezed together, laid flat on the measuring device.

- # The tail length is the longest straight line measurement from the tip of the caudal fin (tail) to the fourth cephalic dorsal spine (all dorsal spines must be intact), laid flat on the measuring device.
- + The fillet length is the longest straight line measurement from end to end of any fleshy side portion of the fish cut lengthwise away from the backbone, which must have the skin intact, laid flat on the measuring device.
- ** Dressed length is the longest straight line measurement from the most anterior portion of the fish, with the head removed, to the longest lobe of the caudal fin (tail), with the caudal fin intact and with the lobes squeezed together, laid flat on the measuring device.
- ## Large and Small Coastal Sharks include those shark species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations.
- ++ Pelagic sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations.
- *** Prohibited sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations.
- ### Applicable provisions of the following are incorporated herein by reference: 50 CFR Part 635-Atlantic Highly Migratory Species, final rule as adopted by U.S. Department of Commerce as published in the Federal Register, Volume 64, Number 103, pages 29135-29160, May 28, 1999. A copy of the federal rule incorporated by reference herein may be viewed at: New York State Department of Environmental Conservation, Bureau of Marine Resources, 205-S North Bellemeade Road, East Setauket, New York, 11733.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on May 12, 2004, I.D. No. ENV-19-04-00003-EP. The emergency rule will expire September 27, 2004.

Emergency rule compared with proposed rule: Substantial revisions were made in section 40.1(f).

Text of rule and any required statements and analyses may be obtained from: Alice Weber, Department of Environmental Conservation, 205-S North Bellemead Rd., East Setauket, NY 11733, (631) 444-0435, e-mail amweber@gw.dec.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) Section 13-0340-b, 13-0340-e and 13-0340-f authorize the Department of Environmental Conservation (DEC or Department) to establish by regulation, open season, size, catch limits, possession and sale restrictions and manner of taking for summer flounder, scup and black sea bass.

2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manage marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies and interstate Fishery Management Plans (FMPs).

3. Needs and benefits:

Pursuant to § 13-0371 of the ECL, New York State participates in the Atlantic States Marine Fisheries Compact administered through the Atlantic States Marine Fisheries Commission (ASMFC) to promote cooperative utilization of marine fish species. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fisheries Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers. Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have timely implemented provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0340-b, 13-0340-e and 13-040-f, which authorize the adoption of regulations for the management of summer flounder, scup, and black sea bass, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission. ASMFC recently amended the FMPs for summer flounder, scup, and black sea bass by adopting annual quota changes and recreational harvest projections. In order to maintain compliance with the FMPs and ACFCMA, states are required to immediately implement these changes by amending their recreational fishing regulations for each of these species.

Under the FMP for summer flounder and scup, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest, assuming its regulations are unchanged and that harvest patterns and rates remain the same as the previous year. If the projected harvest for a state exceeds that state's assigned quota, the state is required to amend its harvest regulations so that they are sufficiently restrictive to prevent the state from exceeding its assigned quota. ASMFC reviews each state's regulations and must determine that they are compliant with the FMP. Accordingly, failure to timely adopt revised 2004 regulations may result in a non-compliance determination by ASMFC and the Secretary of Commerce, and the imposition of a total closure of fishing for summer flounder, scup and/or black sea bass in New York State, with significant adverse impacts to the state's economy. New York's projected harvests for summer flounder and scup in 2004 exceed the state's assigned quotas by 48.5% and 58%, respectively. The regulatory changes in this emergency rule are calculated to bring New York into compliance.

On April 23, 2004 the Department adopted emergency regulations intended to comply with the ASMFC 2004 requirements for summer flounder, scup and black sea bass. The ASMFC approved the regulations for scup. This emergency rule includes those approved regulations that achieve a 58% reduction for scup for 2004.

However, on June 17, 2004, the ASMFC determined that New York's emergency regulations for summer flounder were not in compliance with the requirements to achieve a 48.5% reduction. On July 19, 2004 the U.S. Secretary of Commerce determined that the summer flounder regulations did not comply with the ASMFC requirements. Accordingly the Secretary of Commerce sent a letter to Governor George Pataki notifying him of that decision and establishing a date certain when a moratorium would be placed on commercial and recreational summer flounder fishing in New York. In order to achieve compliance and to prevent a federal closure of the commercial and recreational summer fishery in New York, the Department is adopting emergency regulations which establish an open season for fluke from May 15 to September 6, a daily limit of three (3) summer flounder, and an increase in the minimum length for summer flounder from 17 inches to 18 inches. Simultaneously, the Department is revising its proposed rule, which appeared in the May 12, 2004 issue of the *State Register*, to include these same provisions.

The FMP for black sea bass calls for annual adjustments to common coastwide regulations that are calculated to hold coastwide harvest within the allowed annual quota. Under the FMP for the black sea bass, a single coastwide regime of size limits, possession limits and seasons is annually established by ASMFC. For 2004, a revised season closure for a two-week period in September and for the month of December was established. On April 23, 2004, the Department adopted emergency regulations to close an equivalent period in September/October. However, the ASMFC determined that New York must revise its closure period to specifically conform to the September 7 to September 22 and December 1 to 31 period in order to comply with the FMP, and that unless New York has come into compliance by August 1, a non-compliance determination will be forwarded to the Secretary of Commerce pursuant to ACFCMA. Therefore, in order to achieve compliance and prevent a federal closure of the black sea bass fishery in New York, the Department is adopting emergency regulations which establish the specific black sea bass season closure periods necessary to comply with the FMP. Simultaneously, the Department is revising its proposed rule, which appeared in the May 12, 2004 issue of the *State Register*, to include these same provisions.

The promulgation of this regulation on an emergency basis is necessary in order for the Department to maintain compliance with the FMPs for summer flounder, scup, and black sea bass and to avoid closure of these fisheries and the economic hardship that would be associated with such closure.

The text of the revised rulemaking and the emergency regulations adopted herein include the following items:

Summer Flounder

Implement an open season of May 15 to September 6 for the summer flounder recreational fishery. The current fishing season for summer flounder is open year-round. Lower the recreational possession limit from 7 fish per person per trip to 3 fish per person per trip. Increase the recreational minimum size limit from 17 to 18 inches total length.

Scup

Implement an open season from June 16 through October 17 and November 1 through November 30 for the scup recreational fishery. The current fishing season for scup in New York is open year round. Lower the recreational possession limit from 50 fish per person per trip to 20 fish per

person per trip. Increase the recreational minimum size limit from the current 10 inches to 11 inches total length.

Black sea bass

Implement an open season for black sea bass from January 1 through September 7 and from September 23 through November 30 for the recreational black sea bass fishery. The current open fishing season for black sea bass is from January 1 through September 1 and from September 16 through November 30.

4. Costs:

(a) Cost to State government:

There are no new costs to state government resulting from this action.

(b) Cost to Local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this action.

Certain regulated parties (Party/charter vessels, Bait and tackle shops) may experience some adverse economic effects through lost economic opportunities.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

The Department of Environmental Conservation will incur limited costs associated with both the implementation and administration of these rules. The implementation costs will be associated with the public notification and final adoption of these regulations, and costs relating to the expense of updating informational materials and notifying recreational harvesters, party and charter boat operators and other recreational support industries of the new rules.

There will also be additional costs associated with enforcement of these new regulations.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

None.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

The following alternatives have been considered by the Department and rejected for the reasons set forth below:

(1) Do not amend Part 40.

Failing to make required changes to summer flounder, black sea bass and scup recreational regulations would place New York in a position of non-compliance with an ASMFC/Regional Council FMPs, and thus subject all New York fishermen, including commercial fishermen, to a federal moratorium on fishing for that species. This would cause more serious negative economic impacts on the regional economy. New York is currently in that position with summer flounder pursuant to the Secretary of Commerce's determination that New York is out of compliance with the summer flounder FMP. A letter stating that fact has been sent to Governor Pataki. This letter provides a date certain when a moratorium will be placed on the commercial and recreational summer flounder fishery.

9. Federal standards:

These amendments to Part 40 are in compliance with the ASMFC and Regional Fishery Management Council FMPs for summer flounder, scup and black sea bass.

10. Compliance schedule:

The regulations will take effect upon filing with the Department of State. Regulated parties will be notified by mail, through appropriate news releases and via the Department's website of the changes to the regulations.

Regulatory Flexibility Analysis

1. Effect of the regulations:

There were 496 licensed party/charter vessels operating in New York during 2003 and an unknown number of retail and wholesale marine bait and tackle shop businesses operating in New York in 2003. Many currently licensed party and charter boat owners and operators, as well as bait and tackle businesses, will be affected by these regulations. The regulations will likely result in a short term reduction in allowable catch or availability of marine fisheries resources for the affected parties. This may result in a lower number of fishing trips and/or lower bait and tackle sales during the upcoming fishing season. However, over the long term, these short term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources.

There are no local governments involved in the recreational fish harvesting business, nor do any participate in the sale of marine bait fish or

tackle. Therefore, no local governments are affected under these proposed regulations.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

The annual cost of continuing compliance may take the form of lost income if the sales of marine bait fish or tackle declines or if fewer fishermen take trips aboard marine party and charter vessels. Some of the proposed regulations will likely result in a short term reduction in allowable catch or availability of marine fisheries resources for the affected parties. It is not known if fishermen will take fewer trips or if they will purchase less bait and tackle as a result of the shorter seasons, higher size limits or lower possession limits, or if they will instead re-direct their fishing effort towards other species.

The maintenance of long term sustainable fisheries will have a positive affect on employment for the fisheries in question including party and charter vessels, as well as wholesale and retail bait and tackle outlets and other support industries for recreational fisheries. These regulations are designed to protect stocks from continued over harvest and to rebuild them for future utilization. Failing to take these appropriate actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries.

5. Minimizing adverse impact:

The purpose to these regulations is to constrain the recreational harvest of these species by reducing the length of the fishing season, increasing minimum size limits and lowering possession limits for recreational fishermen. Since these regulatory amendments are required under federal and interstate fishery management plans, the Department has little discretion regarding adverse impacts. New York must comply with the provisions of the FMPs or face federal sanctions and the imposition of a total closure of the fishery for summer flounder, scup and/or black sea bass in New York State, with significant adverse impacts to the state's economy.

Pursuant to § 13-0371 of the ECL, New York State participates in the Atlantic States Marine Fisheries Compact administered through the Atlantic States Marine Fisheries Commission (ASMFC) to promote cooperative utilization of marine fish species. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fisheries Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers. Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have timely implemented provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ASMFC recently amended the FMPs for summer flounder, scup, and black sea bass by adopting annual quota changes and recreational harvest projections. In order to maintain compliance with the FMPs and ACFCMA, states are required to immediately implement these changes by amending their recreational fishing regulations for each of these species.

Therefore, in order to prevent imposition of a federal closure for the recreational and commercial fisheries for these species and the economic hardship that would be associated with such closures, this emergency rule adopts the specific measures necessary to comply with the FMPs.

The impact of these regulations has been minimized to the extent possible, by adjusting and coordinating fishing seasons to maintain recreational fishing opportunities for some species when others are closed, and by implementing season closure and size and possession limit options throughout the marine district that will not unduly affect some fishing modes and geographic areas more than others.

Ultimately, the maintenance of long term sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat fisheries as well as wholesale and retail outlets and other support industries for recreational fisheries. The purpose of the rule is to constrain harvest of these species to allow the stocks to rebuild to higher sustainable levels. There is no means to eliminate the potential for

short term economic losses while attempting to rebuild over harvested stocks of fish. Failing to take these appropriate actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. Regulations are proposed which provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

6. Small business and local government participation:

The development of this proposal has drawn upon input from recreational fishermen, recreational fishing industry representatives and the Marine Resources Advisory Council, which is comprised of representatives from recreational and commercial fishing interests. The proposed regulations are also based upon consultation with and recommendations received from other interested and affected parties, including recreational fishing organizations, party and charter boat owners and operators, retail and wholesale bait and tackle shop owners and state law enforcement personnel. There was no special effort to contact local governments because the rule does not affect them.

7. Economic and technological feasibility:

The changes required by this action have been determined to be economically feasible for the majority of the affected parties. For those proposals which are required under federal and interstate fishery management plans, the Department does not have any discretion regarding this economic impact. New York must comply with the provisions of the FMPs or face Federal sanctions.

There is no additional technology required for small businesses, and this action does not apply to local governments, so there are no economic or technological impacts for any such bodies.

Rural Area Flexibility Analysis

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The summer flounder, scup and black sea bass fisheries directly affected by the emergency rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the state. Further, the emergency rule does not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the emergency amendments of Part 40, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

The Department of Environmental Conservation (Department) has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities. Therefore, a job impact statement is not required.

There were 496 licensed party/charter vessels operating in New York during 2003 and an unknown number of retail and wholesale marine bait and tackle shop businesses operating in New York in 2003. Many currently licensed party and charter boat owners and operators, as well as bait and tackle businesses, will be affected by these regulations. The regulations will likely result in a short term reduction in allowable catch or availability of marine fisheries resources for the affected parties. This may result in a lower number of fishing trips and/or lower bait and tackle sales during the upcoming fishing season.

The purpose of these regulations is to constrain the harvest of certain marine fish species to reduce fishing mortality and rebuild stock biomass. The potential short term impact of these regulations may be that some recreational party and charter boat owners experience short term reductions in customers, and bait and tackle businesses could lose sales revenue from a decline in bait and tackle sales during the fishing season. It is possible that some jobs and employment opportunities associated with party and charter boat operations or bait and tackle businesses could be lost as a result of the restrictions imposed by the proposed regulations. However, based on outreach with members of the recreational fluke, scup and black sea bass fisheries, the Department does not anticipate that there will be any substantial loss of jobs as a result of the proposed changes. Moreover, in the long term, the effect of this proposed rule on jobs and employment opportunities will be positive. Protection of the fluke, scup and black sea bass fisheries is essential to the survival of the party and charter boat operations and bait and tackle businesses that support in these fisheries.

The maintenance of long term sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat owners and operators, wholesale and retail bait and tackle outlets and other support industries for recreational fisheries. Over the long term, these short term losses in participation and sales will be offset by the

restoration of fishery stocks and an increase in yield from well-managed resources. These regulations are designed to protect stocks from continued over-harvest and to rebuild them for future utilization. Failing to take these appropriate actions to protect our natural resources could cause the collapse of a stock which would have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries.

Based on the above and Department staff's knowledge and past experience with the adoption of finfish rules similar to those contained in this proposal, the Department has concluded that there will not be any substantial adverse impact on jobs or employment opportunities as a consequence of these amendments.

Summary of Assessment of Public Comment

A proposal to amend Part 40 of 6 NYCRR, New York's marine recreational finfish regulations, was published in the *New York State Register* on May 12, 2004. During the public comment period, 35 written comments were received. All comments are addressed in the summary below.

Summer flounder Recreational Fishing

Summary of Comments: The Department received twenty five written comments. Eight comments were from owners of party or charter boats or their representatives; two written comments were received from recreational fishing organizations; and fifteen comments were sent by individual anglers. All but one letter opposed the proposed changes.

One letter supported the proposed changes. Specifically, the author preferred the lower possession limit and shortened season over raising the minimum size limit because past increases in minimum size limit have had an unfair and disproportionately negative impact upon vessels fishing in western Long Island areas, and because the proposed regulations would more equitably balance the impacts of regulatory changes that have been implemented in recent years.

Twelve of the comments specifically objected to the proposed three fish possession limit, and indicated that the daily limit was too low. Three persons objected to the shortened fishing season; one comment sent by a recreational fishing organization objected to any change to the regulations prior to May 15, allowing the season to remain open in May. Several of the letters stated that the recreational harvest data used to develop the proposed summer flounder regulations was inaccurate or not credible, and therefore the proposed changes were based on flawed information. Nine of the comments reported that the proposed regulations would have significant economic effects on the author's business, or on other marine related industries, including: loss of income associated with fewer customers for party and charter boat fisheries; loss of sales revenue for wholesale and retail bait and tackle businesses; loss of marina and ramp boat fees, tourist dollars, and loss of associated general tax revenues. In particular, several party and charter boat owners voiced concern about the potential loss of customers to other nearby states who had more liberal fishing regulations.

Comment was received from a recreational fishing organization that did not support the proposed changes to the summer flounder regulations because they were not in compliance with the Atlantic States Marine Fisheries Commission's (ASMFC) Fishery Management Plan (FMP), and because the Department's regulatory process that led to the development of the proposed changes favored industry members and failed to provide adequate representation for most anglers and citizens. The organization stated that it believed that the failure to implement more conservative measures would result in a finding of non-compliance. The organization is concerned that New York's failure to comply with the ASMFC requirements would threaten the integrity of the cooperative interstate management process and undermine the effectiveness of other FMP's. Additional comments included in the letter indicated that because of the large available biomass of coastal summer flounder stocks, the current 17 inch minimum size limit would not be sufficient to constrain the catch within the required quota allocation, and therefore, an 18 inch minimum size limit would be more effective while still allowing for a quality fishery. Based on a survey of its membership, this organization favors the adoption of an 18 inch minimum size limit and a three fish limit, a proposal which they believe would comply with ASMFC requirements, constrain the catch within New York's allocation and maximize fishing participation.

Department Response: The predominance of comments to the Department strongly objected to increasing the size limit, and to any significant decrease in the daily possession limit or the open season. The Department thoroughly considered the comments that opposed such more restrictive regulations, and determined that it was not possible to make the regulations less restrictive as suggested by the comments while complying with the requirements of ASMFC's FMP. As described in Environmental Conser-

vation Law Section 13-0340-b, the Department is required to adopt regulations which are consistent with the compliance requirements of the FMP for summer flounder. The Department believes the original proposed rulemaking, which appeared in the May 12, 2004 issue of the *State Register* and imposed a 20 per cent reduction of the projected fluke harvest, is compliant, and further believes that more liberal regulations would not comply with the FMP. The specific combination of regulations selected to meet a 20% reduction target attempts to mitigate the economic impact and loss of fishing opportunity that result from imposing more restrictive regulations, consistent with the majority of public comment. The specific option chosen is also consistent with advice received from a number of party/charter boat associations and bait and tackle shops as to which array of options to select if the Department implements a 20% reduction option.

However, on May 29, 2004, ASMFC determined that New York's regulations are not compliant with the FMP in that a 48.5%, not a 20% reduction, was required, and referred the state's non-compliance to the Secretary of Commerce for review under ACFMA. On July 19, 2004, the Department of Commerce determined that New York's regulations do not comply with the FMP, and that a 48.5% reduction is required for conservation of summer flounder and in order to comply with the FMP. Accordingly, the Department of Commerce has initiated rulemaking to impose a federal closure of the summer flounder fishery in New York, effective September 3, 2004, unless ASMFC determines that New York has revised its regulations to comply with the FMP.

In order to avoid federal closure of the summer flounder fishery, the Department has revised its proposed fluke regulations to raise the size limit to 18 inches. This revision is also being adopted by emergency rulemaking and is expected to result in a determination of compliance by ASMFC. The rule is consistent with the Environmental Conservation Law, and with the single comment received which supported raising the size limit to comply with a 48.5% reduction.

As noted, several comments disputed the 2003 recreational landings data a basis of the regulations. The landings data upon which these reductions are based are provided by the National Marine Fisheries Service (NMFS), an agency of the U.S. Department of Commerce. Since 1980, NMFS has conducted an annual survey of marine recreational catch, effort and landings in each coastal state, a survey known as the Marine Recreational Fisheries Statistics Survey (MRFSS). While the 2003 MRFSS catch and effort estimates for New York have been the subject of considerable controversy, the MRFSS scientists and staff at NMFS that have reviewed the survey data have indicated that the estimates are correctly calculated. Therefore, these estimates, although they remain controversial, continue to be the basis for estimating New York's harvest of summer flounder in 2003, and for ASMFC's and the Department of Commerce's determination that a 48.5% reduction is required for 2004.

Black Sea Bass Recreational Fishing

Summary of Comments: Two comments were received on the proposal to implement a change to the open fishing season for black sea bass. One comment was from a party and charter boat owner and the other comment was written on behalf of a party and charter boat fishing organization. Both letters objected to the current proposal and recommended that the Department adopt an alternative open fishing season for black sea bass of September 7 through September 21, concurrent with the closure that will be in place in federal waters.

Department Response: Consistent with the public comment received and based on the determination of the ASMFC's Black Sea Bass Board that New York's proposed black sea bass fishing season does not comply with FMP requirements, and that the current FMP does not provide for adoption of an alternative equivalent season, the Department is revising its proposal with regard to black sea bass. The revised closed recreational fishing season for black sea bass will include the periods from September 8 through September 21 and from December 1 through December 31.

Scup Recreational Fishing

Summary of Comments:

The Department received twenty three written comments. Fourteen comments were from owners of recreational party or charter boats or their representatives; one written comment was received from a recreational fishing organization; and seven comments were sent by individual recreational anglers. All but three comments opposed the three changes.

For the three letters supporting proposed changes, two specifically endorsed the reduced possession limit. One additional letter in support of the proposed scup regulations, submitted by a recreational fishing organization, stated strong support for the minimum size limits, possession limit, and season closure measures included in the proposed regulations.

Seven of the comments written in opposition to the proposed regulations objected to the twenty fish possession limit as too low. Nine persons objected to the proposed fishing season; seven of these comments specifically opposed the two week mid-season closure in October. One letter writer objected to closing the season in May and June, indicating that the closure of the early part of the fishing season would disproportionately affect western Long Island Sound scup fisheries. Two of the comments objected to the increased minimum size limit and one letter writer was concerned about the impact of the increased minimum size limit on shore based fishermen.

Three of the letters stated that the recreational harvest data used to develop the proposed scup regulations was inaccurate or not credible, and therefore the proposed changes were based on flawed information. Sixteen of those offering comment reported that the proposed regulations would have significant economic effects on their own business, or on other marine related industries, including: a loss of income and jobs associated with fewer customers for party and charter boat fisheries; loss of sales revenue for wholesale and retail bait and tackle businesses; loss of marina and ramp boat fees, tourist dollars, and loss of associated tax revenues. In particular, several party and charter boat owners voiced concern about the potential loss of customers to other nearby states who had more liberal fishing regulations. One letter written by a representative of an organization of bait and tackle businesses described the potential and current impacts associated with the proposed scup regulations that concerned its members. These include reports of a reduction in early spring orders and sales of recreational fishing tackle used to fish for scup; forecasts of projected sales of scup-related fishing tackle are depressed; and businesses that operate in areas in which fishermen primarily target scup have reported losses.

Department Response: The Atlantic States Marine Fisheries Commission (ASMFC) Fisheries Management Plan (FMP) for Scup provides minimum management measures required for states to remain in compliance with the stock conservation objectives of the FMP. To remain in compliance with the current FMP, New York is required to set recreational fishing regulations that are calculated to reduce our scup landings by 58 per cent from the level that was reported harvested in 2003.

Concerning the credibility of the recreational harvest data, please refer to the above response to the comments on fluke.

During the development of these proposed regulations, there was extensive public comment and debate over the most acceptable combination of management measures. The Department thoroughly considered the comments that opposed the proposed regulations, and determined that it was not possible to make the changes suggested by the comments while complying with the requirements of ASMFC's FMP. Guided by the concerns conveyed to the Department by the recreational fishing industry, the Department selected a proposed minimum size limit, possession limit and season closure option that balance and accommodate the competing seasonal, geographic, mode specific (party/charter, private/rental, shore-based), and socioeconomic needs of an economically important, wide-ranging and diverse fishery. Raising the minimum size limit and lowering the possession limit provided the longest possible open fishing season, which would mitigate the adverse economic impacts associated with the very large required harvest reduction, while maximizing fishing opportunities for the fishing public.

NOTICE OF ADOPTION

Sanitary Condition of Shellfish Lands

I.D. No. ENV-18-04-00003-A

Filing No. 876

Filing date: Aug. 3, 2004

Effective date: Aug. 18, 2004

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

Action taken: Amendment of section 41.3(b) of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0307 and 13-0319

Subject: Sanitary condition of shellfish lands.

Purpose: To reclassify underwater lands for shellfishing purposes in order to protect public health.

Text of final rule: Subparagraph 41.3(b)(4)(xi) is repealed.

Subparagraphs 41.3(b)(4)(xii) through 41.3(b)(4)(xvii) are renumbered as subparagraphs 41.3(b)(4)(xi) through 41.3(b)(4)(xvi), respectively.

Paragraph 41.3(b)(5) remains unchanged.

Subparagraph 41.3(b)(6)(i) is amended to read as follows:

(i) Shelter Island Sound and Dering Harbor. All that area of Shelter Island Sound and Dering Harbor south and east of a line extending southwesterly from the westernmost point of land at Dering Point, Shelter Island to the southernmost point of land at Fanning Point, Southold and continuing southeasterly to the westernmost corner of the ferry dock at Shelter Island; and all that area of Shelter Island Sound extending seaward 1000 feet from mean high water from the ferry dock to a line extending westerly from the yellow house at 34 Prospect Avenue, Shelter Island to the foot of Island View Lane, Southold (local names, local landmarks).

Clause 41.3(b)(6)(i)('a') is repealed.

Subparagraph 41.3(b)(6)(ii) is repealed.

Subparagraphs 41.3(b)(6)(iii) and 41.3(b)(6)(iv) are renumbered 41.3(b)(6)(ii) and 41.3(b)(6)(iii), respectively.

Subparagraph 41.3(b)(7)(i) through subparagraph 41.3(b)(7)(iv) remains unchanged.

Clause 41.3(b)(7)(v)('a') is repealed.

New clause 41.3(b)(7)(v)('a') is adopted to read as follows:

(a) All that area of Shelter Island Sound and Dering Harbor south and east of a line extending southwesterly from the westernmost point of land at Dering Point, Shelter Island to the southernmost point of land at Fanning Point, Southold and continuing southeasterly to the westernmost corner of the ferry dock at Shelter Island; and all that area of Shelter Island Sound extending seaward 1000 feet from mean high water from the ferry dock to a line extending westerly from the yellow house at 34 Prospect Avenue, Shelter Island to the foot of Island View Lane, Southold (local names, local landmarks).

Clause 41.3(b)(7)(v)('b') through subparagraph 41.3(b)(7)(xv) remains unchanged.

New subparagraph 41.3(b)(7)(xvi) is adopted to read as follows:

(xvi) Pipes Cove. All that area of the unnamed creek northwest of Fanning Point and east of Silvermere Road, Southold, and all that area of Pipes Cove within 100 feet of the southernmost point of the eastern bulkhead within the mouth of the unnamed creek.

Subparagraphs 41.3(b)(8)(i) and 41.3(b)(8)(ii) remain unchanged.

Clause 41.3(b)(8)(iii)('a') is repealed.

New clause 41.3(b)(8)(iii)('a') is adopted to read as follows:

(a) East Creek. All that area of the East Creek boat basin and its tributaries.

Clause 41.3(b)(8)(iii)('b') is repealed.

Subparagraph 41.3(b)(8)(iv) remains unchanged.

Subparagraph 41.3(b)(8)(v) is amended to read as follows:

(v) Wading River Creek. All that area of Wading River Creek and its tributaries.

Subparagraph 41.3(b)(9)(i) is amended to read as follows:

(i) Port Jefferson Harbor and Conscience Bay.

Clause 41.3(b)(9)(i)('a') remains unchanged.

Clause 41.3(b)(9)(i)('b') is repealed.

New clause 41.3(b)(9)(i)('b') is adopted to read as follows:

(b) During the period January 1st through December 31st, both dates inclusive, all that area of Conscience Bay, including tributaries, lying south of a line extending northeasterly from utility pole "NYT 183" (with transformer), located across Old Field Road from the residence located at #92 Old Field Road (local landmark), to the top of the white chimney of the residence located at 22 Conscience Circle, Strong's Neck (local landmark, said residence is a gray, two story house).

New clause 41.3(b)(9)(i)('c') is adopted to read as follows:

(c) During the period May 1st through November 30th, both dates inclusive, all that area of Port Jefferson Harbor, including tributaries, lying southerly and easterly of a line extending southwesterly from the light, Fl 4 sec, 35 feet 6M "3" (located on the eastern jetty at the entrance to Port Jefferson Harbor) to the light, Fl R 4 sec, 26 feet 5M "2A" (located on the western jetty at the entrance to Port Jefferson Harbor); and thence continuing southeasterly to the southeasternmost point of land on the western side of the entrance to Port Jefferson Harbor; and thence continuing southwesterly to the southern end of the rock jetty (located on the western shoreline of Port Jefferson Harbor approximately 250 yards easterly of the eastern side of the entrance to Setauket Harbor).

New clause 41.3(b)(9)(i)('d') is adopted to read as follows:

(d) During the period May 1st through October 31st, both dates inclusive, all that area of Port Jefferson Harbor, the Narrows and Conscience Bay, including tributaries, lying westerly of a line extending due north from the northeasternmost corner of the gray slate chimney located on the residence at #11 Indian Field Rd, Strong's Neck (said

residence is a red brick and gray slate structure located on property that is protected by a stone seawall) to a point on the harbor side of the Old Field Beach peninsula (local names, local landmarks).

Subparagraph 41.3(b)(9)(ii) remains unchanged.

Subparagraph 41.3(b)(9)(iii) is repealed.

New subparagraph 41.3(b)(9)(iii) is adopted to read as follows:

(iii) *Flax Pond. During the period January 1st through December 31st, both dates inclusive, all that area east of a line extending southerly from the southeasternmost point of the easternmost rock jetty protecting the entrance to Flax Pond to the northwesternmost point of the red brick chimney located on the residence at #9 Shore Drive, Village of Old Field (said house is a multi-story structure painted gray with white trim) (local landmarks).*

Clause 41.3(b)(9)(iv)(‘a’) is repealed.

New clause 41.3(b)(9)(iv)(‘a’) is adopted to read as follows:

(‘a’) *During the period May 15th through October 31st, both dates inclusive, all that area of Mount Sinai Harbor, including tributaries, bounded by a line extending southerly from utility pole LIL 82 (located between the shoreline and Harbor Beach Road near the southeastern side of the entrance to the harbor, local landmark) to the westernmost Town of Brookhaven red nun channel marker in a line of red nun channel markers; and thence continuing easterly along the line of red nun channel markers to the easternmost Town of Brookhaven red nun channel marker; and thence continuing northerly to the wooden pole located at the southeastern end of the Town of Brookhaven boat launching ramp (local landmarks).*

Clauses 41.3(b)(9)(iv)(‘b’) and 41.3 (b)(9)(iv)(‘c’) remain unchanged.

New clause 41.3(b)(9)(iv)(‘d’) is adopted to read as follows:

(‘d’) *During the period May 1st through October 31st, both dates inclusive, all that area of Mount Sinai Harbor, including tributaries, lying both westerly of a line extending northerly from the Town of Brookhaven access point known locally as Satterly Landing (located on the northern side of Shore Road and immediately westerly of the residence at #182 Shore Road, local landmarks) to utility pole LIL 82 (located between the shoreline and Harbor Beach Road near the southeastern side of the entrance to the harbor (local landmark); and southerly of a line extending westerly from utility pole 27 BBL located near the shoreline at the intersection of Pipe Stave Hollow Road and Enchanted Woods Court, Miller Place, to the foot of Crystal Brook Hollow Road at the Village of Port Jefferson cul-de-sac parking area, Port Jefferson (local landmark).*

Subparagraph 41.3(9)(v) remains unchanged.

Subparagraph 41.3(9)(vi) is amended to read as follows:

(vi) *Wading River Creek. All that area of Wading River Creek and its tributaries.*

Subparagraph 41.3(9)(vii) through the end of Section 41.3 remains unchanged.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 41.3(b)(9)(iv)(d).

Text of rule and any required statements and analyses may be obtained from: Juliette Ventaloro, Department of Environmental Conservation, 205 N. Bellemeade Rd., Suite 1, East Setauket, NY 11733, (631) 444-0492, e-mail: jlvental@gw.dec.state.ny.us

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

Changes have been made to the terms of the rule, as compared to the text of the last published version of the rule, in order to correct a typographical error. These changes are nonsubstantive in nature and do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis, and Job Impact Statement.

Assessment of Public Comment

A proposal to amend 6 NYCRR Section 41.3, “Shellfish Lands in Suffolk County,” was published in the New York State Register on May 5, 2004. The proposed regulations designate 82 acres of underwater shellfish lands in Mount Sinai Harbor (Town of Brookhaven) and 171 acres in Port Jefferson Harbor (Town of Brookhaven) as seasonally uncertified.

A total of two (2) letters were received by the Department during the 45-day comment period. Both letters contained comments pertaining to that portion of the proposal that would reclassify underwater lands in Mount Sinai and Port Jefferson Harbors. The Department received no comments regarding the proposed regulations that reclassify eight acres of certified underwater lands in Flax Pond (Town of Brookhaven) as uncertified year-round. Similarly, the Department received no public comments regarding the proposed regulations that reclassify portions of underwater

shellfish lands in and adjacent to the Towns of Shelter Island, Southold, and Riverhead.

Comment: The comments voiced opposition to the specific water quality testing procedures and bacteriological standards used by the Department in evaluating water quality of shellfish growing areas in Mount Sinai and Port Jefferson Harbors. The comments challenge the Department’s utilization of a water quality testing procedure that measures levels of fecal coliform bacteria rather than total coliform bacteria.

Department response: The Department’s regulations, specifically 6 NYCRR Part 47 “Certification of Shellfish Lands,” authorize the Department to use one of two possible testing measures to assess water quality and determine if shellfish lands are safe for taking shellfish therefrom for human consumption. One test measures total coliform levels, and the other test measures fecal coliform levels. Both tests are recognized by the Interstate Shellfish Sanitation Conference and the U.S. Food and Drug Administration as appropriate testing methods to ensure public health protection for those who consume raw or cooked shellfish. The Department used the fecal coliform standards for classifying shellfish lands addressed in this rulemaking.

Comment: It is further asserted that the Department should have performed an analysis pursuant to the New York State Environmental Quality Review Act (SEQR) concerning the impact that the Department’s use of the fecal coliform bacteriological standard, as opposed to the total coliform standard, would have on the number of acres open to shellfishing.

Department response: The Department’s authority to utilize the fecal coliform standard in evaluating water quality of shellfish growing areas was established by the amendment of 6 NYCRR Part 47 in 1981. In testing for fecal coliform, the Department was operating in accordance with Part 47. Once testing is performed and the test results become available, classification of the tested shellfish areas by the Department is mandatory pursuant to Section 13-0307 of the Environmental Conservation Law (ECL). Therefore, the current proposed rulemaking, which classifies areas that have been tested, is a non-discretionary act. Official acts involving no exercise of discretion are exempt from SEQR review pursuant to 6 NYCRR Section 617.5.

Comment: It is also asserted in the letters of public comment that the Department should “quantitatively demonstrate” that the proposed reclassification of portions of Mount Sinai and Port Jefferson Harbors is the result of the presence of new pollution sources and a real change in water quality, rather than the application of alternate bacteriological standards.

Department response: The Department does not claim that the proposed reclassification is the result of new pollution sources causing a degradation in water quality in the aforementioned water bodies; therefore, no attempt will be made to quantify a change in water quality. The Department acknowledges that the proposed reclassification could be a result of the application of the fecal coliform standards. The Department has exercised its authority to use an alternate laboratory water quality testing procedure and apply the fecal coliform standards as set forth in 6 NYCRR Part 47 “Certification of Shellfish Lands.” It is the position of the Department, the Interstate Shellfish Sanitation Conference and the U.S. Food and Drug Administration that the alternate water quality testing procedure and fecal coliform standards provide public health protection equivalent to the total coliform standards for those who consume raw or cooked shellfish.

Independent of which approved water quality test is used, the Department is required, pursuant to ECL Section 13-0307, to conduct sanitary surveys and designate as uncertified (closed) those shellfish lands where the coliform levels fail to meet the criteria specified in 6 NYCRR, Part 47 “Certification of Shellfish Lands.” Evaluation of bacteriological data collected during routine sanitary surveys determined that water quality in portions of Mount Sinai Harbor and Port Jefferson Harbor no longer meets criteria for certified shellfishing areas during the months of May through October, and those areas must be designated as uncertified during those months. The proposed reclassifications are necessary to protect public health.

Comment: The comments included a request that the Department revert to testing for and evaluating water quality based on the total coliform standard.

Department response: The total coliform standard remains as an approved standard for water quality testing pursuant to 6 NYCRR Part 47 “Certification of Shellfish Lands.” The Department will continue to have the option, where feasible and appropriate, to test for total coliform bacteria and classify areas based on the total coliform standards.

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Well Construction

I.D. No. HLT-33-04-00004-P

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

Proposed action: Amendment of Subparts 5-1 and 5-2, repeal of Appendix 5-B and addition of new Appendix 5-B to Title 10 NYCRR.

Statutory authority: Public Health Law, sections 201, 206(8), 225 and 1120

Subject: Water well construction.

Purpose: To establish standards for water well construction.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): The regulation contains the following provisions:

1. Appendix 5-B applies to water supply wells used for drinking, culinary, and/or food processing purposes. Additional requirements may need to be met for certain water supply wells that serve a public water system as defined in Chapter 1, Subpart 5-1 of the State Sanitary Code.

2. Appendix 5-B establishes the minimum standards for construction, renovation, development and abandonment of such water supply wells.

3. Defines acceptable water supply well drilling methods which include cable-tool drilling, percussion drilling, rotary drilling, jet drilling, sonic drilling, driving water supply well casing, and boring with earth augers to obtain ground water.

4. Requires proper well location and protection and provides required minimum separation distances to protect water supply wells from contamination.

5. Establishes specific requirements for casing and grouting of water supply wells.

6. Requires a well yield test to provide evidence that a particular well will produce a sustained flow for a specified period of time.

7. Requires proper selection of pumps and appurtenances and proper installation, repair and maintenance of water supply well pumps.

8. Establishes standards for proper decommissioning (abandonment) of any water supply well.

Text of proposed 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: regsqa@health.state.ny.us

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

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

Regulatory Impact Statement

Statutory Authority and Legislative Objectives:

Public Health Law Section 206 Subdivision 18, as added by chapter 395 of the Laws of 1999, authorizes and directs the Commissioner of Health to promulgate rules and regulations to establish standards for water wells, including but not limited to drilling, construction, abandonment, repair, maintenance, water flow, including testing thereof, and pump standards for wells. The legislative objective is to protect the public's health and safety by requiring licensed well drillers to comply with standards for water well construction. Sections 201, 225, and 1120 of the Public Health Law also authorize DOH to regulate public health aspects of potable water supplies. Additional considerations are the protection of the state's water resources and consumer protection.

Needs and Benefits:

Approximately 7,500,000 New Yorkers depend on well water for their water supply. This number includes persons served by individual, public and other well water supplies. In 1998, the Empire State Water Well Drillers Association (ESWWDA) and others urged lawmakers to provide a law and applicable regulations to ensure professionalism and consistency in the water well drilling industry, and to protect groundwater resources and public health. As a result of these concerns, Chapter 395 of the Laws of 1999, also known as the Water Well Driller Registration Law, was enacted. The Law requires that anyone conducting business in water well

activities register annually with the Department of Environmental Conservation (DEC) before doing business anywhere within the State of New York. Approximately 400 well drillers are currently registered with the DEC, with a potential of 150 to 200 additional drillers expected to register in the future.

Chapter 395 of the Laws of 1999 further requires that the Department of Health (DOH) promulgate rules and regulations to establish standards for water wells, including but not limited to drilling, constructing, abandonment, repair, maintenance, water flow, including testing thereof, and pump standards for such wells. In response to this directive, DOH proposes to replace the existing Appendix 5-B (known as "Rural Water Supply") of its rules and regulations, 10 NYCRR, with a new Appendix 5-B, "Standards for Water Wells." The proposed new Appendix 5-B provides the minimum requirements for all water wells used for drinking, culinary and/or food processing purposes. Concurrent amendments will be made to other DOH regulations that reference Appendix 5-B and/or Rural Water Supply to update these references.

Costs to State Government:

There will be no additional costs to the State other than costs associated with printing and distribution of the new code. Inquiries about the new code will be responded to by existing agency staff who currently address inquiries about water wells. Information about the new code will be provided to regional agency staff during normal staff training modules and semi-annual meetings.

Costs to Local Government:

There will be no additional costs to local governments.

Costs to Regulated Parties:

The rule will have some cost impacts to most of the 400 registered drillers who drill water wells in the state. These costs will be related to well construction and/or to well yield testing. In each case, the magnitude of the impact will depend upon the extent a driller's current practice reflects the guidance and specifications provided by DOH in Rural Water Supply. The following discussion includes cost estimates based upon information provided by ESWWDA and recent well installation data from DEC.

Potential New Costs to Drillers for Well Construction:

The proposed rule will formally codify well casing and grouting specifications for well construction. Well casing is used to provide structure to a well in the soil above bedrock and to prevent contamination from entering the well. The space around the casing must also be properly sealed with a cement-like mixture known as grout to prevent contaminants from flowing down the side of the casing and into the well. Failure to properly seal this space between the drillhole and the casing is a primary cause of contamination in drilled wells. Recognizing the public health benefits of proper well construction, DOH published recommendations for well casing and grouting in a document titled Rural Water Supply in 1966. DOH subsequently (in 1978) incorporated Rural Water Supply into its rules and regulations (10 NYCRR) as Appendix 5-B.

For well drillers who are not currently using the well casing and grouting recommendations in Rural Water Supply, additional costs will be incurred by complying with the proposed rule. Proper casing could add between about \$200 to \$300 to the cost of each well depending upon a driller's current procedure for installation of casing. Proper grouting could add an additional \$100 to \$300 to the cost of each well depending upon depth to the rock surface. Additionally, some types of drilling may require larger size drill cutting tools than presently used. These tools cost about \$400 and, as with cutting tools presently used, must be replaced every one to ten jobs depending upon the rock formations being drilled in. Discussions with ESWWDA indicate that the number of drillers who have implemented proper casing and grouting procedures has increased in recent years. However, a considerable number have yet to do so and will likely incur some of these additional costs.

For well drillers who presently use the specifications in Rural Water Supply, the proposed rule will result in minimal additional cost because changes between the two are relatively minor. Additionally, changes that could result in additional costs are offset by changes that will result in decreased costs. For example, in some instances well casing will be required to extend into rock a few feet deeper than under the earlier guidance; however, in other instances a new requirement of one foot less of initial casing length beneath the ground will mean less casing and significantly less labor. In some instances well drillers may need to apply grout at greater depths. However, because of advances in grout material and placement procedures, the required width of drill holes is less than in the earlier guidance (allowing smaller drill bits and less time drilling) and the requirement for "down-time" while the grout sets is no longer necessary.

Potential New Costs to Drillers for Well Yield Testing:

An important part of well installation is the yield test. This test is used to determine the amount of water production that a well can sustain over time. An adequate quantity of water must be available for human consumption, food preparation, dishwashing, cleaning, laundering, bathing, and use in sanitary facilities such as toilets. Recognizing these needs, DOH published specifications for household water supply wells that included a yield test of at least four-hour duration in Rural Water Supply. This duration is used because it provides an indication of the long-term adequacy of a well to meet the maximum projected water demand of a typical household based on the extreme drought of record. Four-hour yield tests are required by the states of Connecticut and New Jersey and by some counties in New York State, and are recommended by the National Ground Water Association and the US EPA.

Discussions with the ESWWDA and other organizations indicate that conducting a yield test of four-hour duration will add an additional cost for most drillers. Current yield tests on household wells are usually (about 70% of the time) less than four hours and in many cases (about 50%) as brief as one hour or less. Additionally, the proposed test requires a determination of well stabilization during pumping followed by observation of well recovery after pumping. The cost difference to a driller between a one and four-hour test is approximately \$200 and the cost of recovery observation could be an additional \$40 to \$100. The increase in testing time and observation may also present scheduling difficulties for some drilling companies. Additionally, the requirement for determining well stabilization will require many well drillers to gain proficiency in the task (potential training costs) or to subcontract the task to another party.

After discussion with representatives from the ESWWDA and upon further consideration, these new regulations were proposed in a manner that minimizes the additional cost of yield testing. Specifically, in instances where a yield test for a residential well demonstrates a yield of 10 or more gallons per minute (gpm) for two hours (i.e., twice the typical target yield of 5 gpm), the test may be curtailed after two hours (rather than four hours). Thus, well drilling equipment and personnel need not stay on site as long, which will provide a cost saving for the driller. About 50% of the water wells drilled in New York State have yields of 10 gpm or more. With regard to proficiency in determining well stabilization, ESWWDA has stated that it plans to provide training to well drillers. A growing number of local governments already require stabilized water flow determinations for new water wells.

Potential New Costs to Drillers, Summary:

As noted above, the proposed rule will have some cost impacts to most water well drillers in the state. Cumulative cost impacts for well construction and yield testing will range from none for those drillers currently following the specifications in Rural Water Supply to between about \$400 to \$900, depending largely upon site-specific conditions, for those drillers not following Rural Water Supply. These costs will likely be passed on to the customer. Well installation costs for most residential water wells presently range from \$3500 to \$5500, depending largely upon site-specific conditions.

Paperwork:

No new reporting requirements are created by the proposed rule. Although not required, tabulation of data during the yield test will be very useful and will probably be done by most drillers or their yield testers. This information may be maintained on file with the driller, may be provided to the customer, and/or may be provided to the local agency having jurisdiction, some of which have requirements for reporting this data. Additionally, this information can be used to provide a more accurate summary of water well yield for the written well log report that must be filed by well drillers with the DEC.

Local Government Mandates:

The new Appendix 5-B will provide standards for water wells and will not impose a new program duty or responsibility on any county, city, town, village, school district, fire district or special district.

Duplication:

This regulation does not duplicate any existing state or local regulation. The proposed Appendix 5-B codifies specifications contained in the document Rural Water Supply and other state policy pertaining to water wells. With respect to requirements for public water systems, the proposed rule will supplement the current 10 NYCRR Part 5 regulatory requirements. Finally, with respect to the Water Well Driller Registration Law, the proposed regulation will complement requirements for well drillers administered by the DEC.

Alternatives Considered:

One alternative is to adopt Rural Water Supply verbatim with some necessary supplements. This alternative was rejected based on comments

received during outreach and initial meetings with the ESWWDA, New York State Conference of Environmental Health Directors and DEC. These comments indicated that the guidance provided in Rural Water Supply was too prescriptive in some respects, outdated in some cases, and beyond the scope of the Water Well Drillers Law on occasion. Additionally, some of the information presented in Rural Water Supply was either too technical or too academic for use as a regulation.

Federal Standards:

No federal standards presently exist. States use standards developed by other recognized authorities (such as the American Water Works Association for public water supply wells). The proposed Appendix 5-B will provide standards for water well drilling activities; additional requirements may need to be met for certain water wells that serve a public water system as defined in Subpart 5-1 of the State Sanitary Code.

Compliance Schedule:

These regulations will be effective upon publication of a notice of adoption in the *State Register*.

Regulatory Flexibility Analysis

Effects on small business and local government:

Approximately 400 well drillers are currently registered in New York State, with a potential of 150 to 200 additional drillers expected to register in the future. All of these well drillers would be classified as "small businesses," having less than 100 employees. Typical drilling companies range between one and 40 employees. Presently all of these well drillers follow, either in total or in part, guidance and recommendations provided in the New York State Department of Health (NYSDOH) publication Rural Water Supply (1966), which was incorporated into NYSDOH's rules and regulations (10 NYCRR) as Appendix 5-B in 1978. The proposed rule will replace this existing Appendix 5-B with a new Appendix 5-B, "Standards for Water Wells", promulgated pursuant to Chapter 395 of the 1999 Laws of New York State and in accordance with the State Administrative Procedures Act Rule Making process. Concurrent amendments will be made to other DOH regulations that reference Appendix 5-B and/or Rural Water Supply to update these references. The extent of impact this proposed rule will have on well drillers depends upon the extent a driller's current practice reflects the specifications provided by DOH in Rural Water Supply as these are very similar to the requirements of the new Appendix 5-B.

No adverse impacts will be created for local government under the proposed rule.

Reporting and Recordkeeping:

No new reporting or recordkeeping requirements are created by the proposed rule. Although not required, tabulation of data during the yield test will be very useful and will probably be done by most drillers or their yield testers. This information may be maintained on file with the driller, may be provided to the customer, and/or may be provided to the local agency having jurisdiction, some of which have requirements for reporting this data. Additionally, this information can be used to provide a more accurate summary of water well yield for the written well log report that must be filed by well drillers with the New York State Department of Environmental Conservation (DEC).

Professional Services:

No additional requirement for professional licensing, certification, or registration is required under Appendix 5-B. The requirement for stabilized water yield testing will involve developing proficiency in this task, either through training and/or practice. The Empire State Water Well Drillers Association (ESWWDA) has stated that it plans to provide such training to well drillers. Alternatively, drillers may opt to use the services of persons skilled in well yield testing. A growing number of counties already require stabilized water flow determinations for new water wells.

Other Compliance Requirements:

The proposed rule will require compliance with standards for water well drilling and for well construction, abandonment, repair, maintenance, water flow, and pumps. The standards specify appropriate construction materials, casing/grouting procedures, and methods for testing well yield. The standards also specify methods for siting new wells in a manner that results in a water supply that is protected from contamination.

Costs:

The rule will have some cost impacts to most of the 400 registered drillers who drill water wells in the state. These costs will be related to well construction and/or to well yield testing. In each case, the magnitude of the impact will depend upon the extent a driller's current practice reflects the guidance and specifications provided by DOH in Rural Water Supply. The following discussion includes cost estimates based upon information pro-

vided by representatives from the ESWWDA and recent well installation data from DEC.

Potential New Costs to Drillers for Well Construction:

The proposed rule will formally codify well casing and grouting specifications for well construction. Well casing is used to provide structure to a well in the soil above bedrock and to prevent contamination from entering the well. The space around the casing must also be properly sealed with a cement-like mixture known as grout to prevent contaminants from flowing down the side of the casing and into the well. Failure to properly seal this space between the drillhole and the casing is a primary cause of contamination in drilled wells. Recognizing the public health benefits of proper well construction, DOH published recommendations for well casing and grouting in a document titled *Rural Water Supply* in 1966. DOH subsequently (in 1978) incorporated *Rural Water Supply* into its rules and regulations (10 NYCRR) as Appendix 5-B.

For well drillers who are not currently using the well casing and grouting recommendations in *Rural Water Supply*, additional costs will be incurred by complying with the proposed rule. Proper casing could add between about \$200 to \$300 to the cost of each well depending upon a driller's current procedure for installation of casing. Proper grouting could add an additional \$100 to \$300 to the cost of each well depending upon depth to the rock surface. Additionally, some types of drilling may require larger size drill cutting tools than presently used. These tools cost about \$400 and, as with cutting tools presently used, must be replaced every one to ten jobs depending upon the rock formations being drilled in. Discussions with representatives of the ESWWDA indicate that the number of drillers who have implemented proper casing and grouting procedures has increased in recent years. However, a considerable number have yet to do so and will likely incur some of these additional costs.

For well drillers who presently use the specifications in *Rural Water Supply*, the proposed rule will result in minimal additional cost because changes between the two are relatively minor. Additionally, changes that could result in additional costs are offset by changes that will result in decreased costs. For example, in some instances well casing will be required to extend into rock a few feet deeper than under the earlier guidance; however, in other instances a new requirement of one foot less of initial casing length beneath the ground will mean less casing and significantly less labor. In some instances well drillers may need to apply grout at greater depths. However, because of advances in grout material and placement procedures, the required width of drill holes is less than in the earlier guidance (allowing smaller drill bits and less time drilling) and the requirement for "down-time" while the grout sets is no longer necessary.

Potential New Costs to Drillers for Well Yield Testing:

An important part of well installation is the yield test. This test is used to determine the amount of water production that a well can sustain over time. An adequate quantity of water must be available for human consumption, food preparation, dishwashing, cleaning, laundering, bathing, and use in sanitary facilities such as toilets. Recognizing these needs, DOH published specifications for household water supply wells that included a yield test of at least four-hour duration in *Rural Water Supply*. This duration is used because it provides an indication of the long-term adequacy of a well to meet the maximum projected water demand of a typical household based on the extreme drought of record. Four-hour yield tests are required by the states of Connecticut and New Jersey and by some counties in New York State, and are recommended by the National Ground Water Association and the US EPA.

Discussions with the ESWWDA and other organizations indicate that conducting a yield test of four-hour duration will add an additional cost for most drillers. Current yield tests on household wells are usually (about 70% of the time) less than four hours and in many cases (about 50%) as brief as one hour or less. Additionally, the proposed test requires a determination of well stabilization during pumping followed by observation of well recovery after pumping. The cost difference to a driller between a one and four-hour test is approximately \$200 and the cost of recovery observation could be an additional \$40 to \$100. The increase in testing time and observation may also present scheduling difficulties for some drilling companies. Additionally, the requirement for determining well stabilization will require many well drillers to gain proficiency in the task (potential training costs) or to subcontract the task to another party.

After discussion with representatives from the ESWWDA and upon further consideration, these new regulations were proposed in a manner that minimizes the additional cost of yield testing. Specifically, in instances where a yield test for a residential well demonstrates a yield of 10 or more gallons per minute (gpm) for two hours (i.e., twice the typical target yield of 5 gpm), the test may be curtailed after two hours (rather than

four hours). Thus, well drilling equipment and personnel need not stay on site as long, which will provide a cost saving for the driller. About 50% of the water wells drilled in New York State have yields of 10 gpm or more. With regard to proficiency in determining well stabilization, ESWWDA has stated that it plans to provide training to well drillers. It should also be noted that a growing number of local governments already require stabilized water flow determinations for new water wells.

Potential New Costs to Drillers, Summary:

As noted above, the proposed rule will have some cost impacts to most water well drillers in the state. Cumulative cost impacts for well construction and yield testing will range from none for those drillers currently following the specifications in *Rural Water Supply* to between about \$400 to \$900, depending largely upon site-specific conditions, for those drillers not following *Rural Water Supply*. These costs will likely be passed on to the customer. Well installation costs for most residential water wells presently range from \$3500 to \$5500, depending largely upon site-specific conditions.

Economic and Technological Feasibility:

The proposal is technologically feasible because it requires the use of existing, standard well drilling technology, methods, and appurtenances.

Minimizing Adverse Economic Impact:

The rule establishes standards for the well drilling industry to minimize risk to public health and protect ground water. If these standards have a substantial adverse impact on a particular property, a waiver of one or more requirements is permitted pursuant to 10 NYCRR, Part 75 so long as alternative arrangements or conditions protect public health and safety. System performance with respect to the key objectives of supplying an adequate quantity of potable water in a cost-effective and environmentally-sound manner are the primary considerations in these situations. Appropriate waivers may be issued by municipalities that choose to adopt these standards into local sanitary code or law.

As noted above in the discussion of Potential New Costs to Drillers, the yield test requirements were developed in a manner that allow flexibility where possible, thereby minimizing potential cost impacts.

Small Business and Local Government Participation:

In February of 2000 NYSDOH convened a meeting with representatives from the DEC, ESWWDA (an organization that represents water well drillers), county health departments, and organizations of professionals potentially impacted by the proposed rule. Two advisory committees were then formed and on April 5 and 13, 2000 meetings were held with the Regulatory Advisory Committee and the Technical Advisory Committee, respectively. Members of these committees included organizational representatives from the ESWWDA, DEC, New York State Conference of Environmental Health Directors, Northeast Rural Community Assistance Program, New York Rural Water Association, Cornell Cooperative Extension, several county health departments (Cortland, Dutchess, Westchester, Albany, Putnam, Monroe, Rockland), American Water Works Association, New York State Council of Professional Geologists, United States Geological Survey and the New York State Society of Professional Engineers. As the regulations were developed, follow-up meetings with many of the above representatives were held. These follow-up meetings consisted primarily of working group sessions. Additionally, DOH met with representatives of its district offices to solicit input of a technical and regulatory nature on the draft regulation. All committee members and DOH district office representatives were provided the opportunity to review and submit written comments on an early draft of the regulation. Where appropriate, the draft regulation was edited to incorporate those comments. In this manner, proposed specifications that would impact certain entities (e.g., yield test requirements and well drillers) were developed with input from the potentially affected parties. All of the organizational members of these committees recognize the need to formally promulgate uniform standards for water wells and have been generally supportive of the draft rule.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

Rural areas affected by the new Appendix 5-B exist in most counties in New York State. In general, wells are installed outside of urban areas and within rural areas and some suburban areas. Well drilling records submitted to the New York State Department of Environmental Conservation (DEC) for the three years from 2000 through 2002 indicate that recently installed wells are generally distributed statewide outside of New York City with relatively sparse distribution in the Adirondack region.

Reporting and Record Keeping:

No new reporting or recordkeeping requirements are created by the proposed rule. Although not required, tabulation of data during the yield

test will be very useful and will probably be done by most drillers or their yield testers. This information may be maintained on file with the driller, may be provided to the customer, and/or may be provided to the local agency having jurisdiction, some of which have requirements for reporting this data. Additionally, this information can be used to provide a more accurate summary of water well yield for the written well log report that must be filed by well drillers with the New York State Department of Environmental Conservation (DEC).

Professional Services:

No additional requirement for professional licensing, certification, or registration is required under Appendix 5-B. The requirement for stabilized water yield testing will involve developing proficiency in this task, either through training and/or practice. The Empire State Water Well Drillers Association (ESWWDA) has stated that it plans to provide such training to well drillers. Alternatively, drillers may opt to use the services of persons skilled in well yield testing. It should also be noted that a growing number of counties already require stabilized water flow determinations for new water wells.

Other Compliance Requirements:

The proposed rule will require compliance with standards for water well drilling and for well construction, abandonment, repair, maintenance, water flow and pumps. The standards specify appropriate construction materials, casing/grouting procedures, and methods for testing well yield. The standards also specify methods for siting new wells in a manner that results in a water supply that is protected from contamination. Most of these standards had previously been incorporated (in 1966) by DOH in a publication titled Rural Water Supply and have become, in large part, standard industry practice. Inasmuch as many drillers have been using these technical specifications during the past twenty to thirty years, the changes necessary for compliance will be minimal.

Projected Costs of Compliance:

The rule will have some cost impacts to most of the 400 registered drillers who drill water wells in the state. These costs will be related to well construction and/or to well yield testing. In each case, the magnitude of the impact will depend upon the extent a driller's current practice reflects the guidance and specifications provided by DOH in Rural Water Supply. The following discussion includes cost estimates based upon information provided by representatives from the ESWWDA and recent well installation data from DEC.

Potential New Costs to Drillers for Well Construction:

The proposed rule will formally codify well casing and grouting specifications for well construction. Well casing is used to provide structure to a well in the soil above bedrock and to prevent contamination from entering the well. The space around the casing must also be properly sealed with a cement-like mixture known as grout to prevent contaminants from flowing down the side of the casing and into the well. Failure to properly seal this space between the drillhole and the casing is a primary cause of contamination in drilled wells. Recognizing the public health benefits of proper well construction, DOH published recommendations for well casing and grouting in a document titled Rural Water Supply in 1966. DOH subsequently (in 1978) incorporated Rural Water Supply into its rules and regulations (10 NYCRR) as Appendix 5-B.

For well drillers who are not currently using the well casing and grouting recommendations in Rural Water Supply, additional costs will be incurred by complying with the proposed rule. Proper casing could add between about \$200 to \$300 to the cost of each well depending upon a driller's current procedure for installation of casing. Proper grouting could add an additional \$100 to \$300 to the cost of each well depending upon depth to the rock surface. Additionally, some types of drilling may require larger size drill cutting tools than presently used. These tools cost about \$400 and, as with cutting tools presently used, must be replaced every one to ten jobs depending upon the rock formations being drilled in. Discussions with representatives of the ESWWDA indicate that the number of drillers who have implemented proper casing and grouting procedures has increased in recent years. However, a considerable number have yet to do so and will likely incur some of these additional costs.

For well drillers who presently use the specifications in Rural Water Supply, the proposed rule will result in minimal additional cost because changes between the two are relatively minor. Additionally, changes that could result in additional costs are offset by changes that will result in decreased costs. For example, in some instances well casing will be required to extend into rock a few feet deeper than under the earlier guidance; however, in other instances a new requirement of one foot less of initial casing length beneath the ground will mean less casing and significantly less labor. In some instances well drillers may need to apply grout at

greater depths. However, because of advances in grout material and placement procedures, the required width of drill holes is less than in the earlier guidance (allowing smaller drill bits and less time drilling) and the requirement for "down-time" while the grout sets is no longer necessary.

Potential New Costs to Drillers for Well Yield Testing:

An important part of well installation is the yield test. This test is used to determine the amount of water production that a well can sustain over time. An adequate quantity of water must be available for human consumption, food preparation, dishwashing, cleaning, laundering, bathing, and use in sanitary facilities such as toilets. Recognizing these needs, DOH published specifications for household water supply wells that included a yield test of at least four-hour duration in Rural Water Supply. This duration is used because it provides an indication of the long-term adequacy of a well to meet the maximum projected water demand of a typical household based on the extreme drought of record. Four-hour yield tests are required by the states of Connecticut and New Jersey and by some counties in New York State, and are recommended by the National Ground Water Association and the US EPA.

Discussions with the ESWWDA and other organizations indicate that conducting a yield test of four-hour duration will add an additional cost for most drillers. Current yield tests on household wells are usually (about 70% of the time) less than four hours and in many cases (about 50%) as brief as one hour or less. Additionally, the proposed test requires a determination of well stabilization during pumping followed by observation of well recovery after pumping. The cost difference to a driller between a one and four-hour test is approximately \$200 and the cost of recovery observation could be an additional \$40 to \$100. The increase in testing time and observation may also present scheduling difficulties for some drilling companies. Additionally, the requirement for determining well stabilization will require many well drillers to gain proficiency in the task (potential training costs) or to subcontract the task to another party.

After discussion with representatives from the ESWWDA and upon further consideration, these new regulations were proposed in a manner that minimizes the additional cost of yield testing. Specifically, in instances where a yield test for a residential well demonstrates a yield of 10 or more gallons per minute (gpm) for two hours (i.e., twice the typical target yield of 5 gpm), the test may be curtailed after two hours (rather than four hours). Thus, well drilling equipment and personnel need not stay on site as long, which will provide a cost saving for the driller. About 50% of the water wells drilled in New York State have yields of 10 gpm or more. With regard to proficiency in determining well stabilization, ESWWDA has stated that it plans to provide training to well drillers. It should also be noted that a growing number of local governments already require stabilized water flow determinations for new water wells.

Potential New Costs to Drillers, Summary:

As noted above, the proposed rule will have some cost impacts to most water well drillers in the state. Cumulative cost impacts for well construction and yield testing will range from none for those drillers currently following the specifications in Rural Water Supply to between about \$400 to \$900, depending largely upon site-specific conditions, for those drillers not following Rural Water Supply. These costs will likely be passed on to the customer. Well installation costs for most residential water wells presently range from \$3500 to \$5500, depending largely upon site-specific conditions.

Minimizing Adverse Economic Impact on Rural Areas:

The rule establishes standards for the well drilling industry to minimize risk to public health and protect ground water. If these standards have a substantial adverse impact on a particular property, a waiver of one or more requirements is permitted pursuant to 10 NYCRR, Part 75 so long as alternative arrangements or conditions protect public health and safety. System performance with respect to the key objectives of supplying an adequate quantity of potable water in a cost-effective and environmentally-sound manner are the primary considerations in these situations. Appropriate waivers may be issued by municipalities that choose to adopt these standards into local sanitary code or law.

As noted above in the discussion of Potential New Costs to Drillers, the yield test requirements were developed in a manner that allow flexibility where possible, thereby minimizing potential cost impacts.

Rural Area Participation:

In February of 2000 NYSDOH convened a meeting with representatives from the DEC, ESWWDA, county health departments, and organizations of professionals potentially impacted by the proposed rule. Two advisory committees were then formed and on April 5 and 13, 2000 meetings were held with the Regulatory Advisory Committee and the Technical Advisory Committee, respectively. Members of these commit-

tees included organizational representatives from the ESWWDA, DEC, New York State Conference of Environmental Health Directors, Northeast Rural Community Assistance Program, New York Rural Water Association, Cornell Cooperative Extension, several county health departments (Cortland, Dutchess, Westchester, Albany, Putnam, Monroe, Rockland), American Water Works Association, New York State Council of Professional Geologists, United States Geological Survey and the New York State Society of Professional Engineers. The ESWWDA represents private well drillers located in rural areas and several local health departments are also located in rural areas. Many of the professional associations and other government offices also represent rural constituencies. As the regulations were developed, follow-up meetings with many of the above representatives were held. These follow-up meetings consisted primarily of working group sessions. Additionally, DOH met with representatives of its district offices to solicit input of a technical and regulatory nature on the draft regulation. (The district office jurisdictions include one or more counties primarily of a rural nature.) All committee members and DOH district office representatives were provided the opportunity to review and submit written comments on an early draft of the regulation. Where appropriate, the draft regulation was edited to incorporate those comments. In this manner, proposed specifications that would impact certain entities (e.g., yield test requirements and well drillers) were developed with input from the potentially affected parties. All of the organizational members of these committees recognize the need to formally promulgate uniform standards for water wells and have been generally supportive of the draft rule.

Job Impact Statement

The Department of Health has determined that the rule will not have substantial adverse impact on jobs or employment opportunities. The rule formally codifies long-standing guidance and recommendations that have become, to a great extent, standard industry practice. The technology and equipment for complete compliance are readily available and accessible. Depending upon how drillers choose to implement the yield test requirements of the proposed rule, there is a potential for new employment opportunities for individuals skilled in water flow testing procedures.

Insurance Department

EMERGENCY RULE MAKING

Claim Submission Guidelines

I.D. No. INS-33-04-00002-E

Filing No. 865

Filing date: July 28, 2004

Effective date: July 28, 2004

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

Action taken: Addition of Part 217 (Regulation 178) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 2403, 3224 and 3224-a

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

Specific reasons underlying the finding of necessity: Prior to the enactment of Chapters 637 and 666 of the Laws of 1997 (the "Prompt Pay Law"), establishing prompt payment requirements for health care claims, existing law did not require insurers under contracts issued by insurers pursuant to Articles 32, 42 or 43, HMOs and PHSPs to pay claims or bills for healthcare services within any specific timeframe. Neither did existing law require interest on unpaid claims or bills for health care services. The lack of specific statutory time frames for payment encouraged delayed payment of claims.

Chapters 637 and 666 of the Laws of 1997, which took effect on January 22, 1998, amended the Insurance Law relating to settlement of claims for health care services. The law was intended to set timeframes within which insurers under contracts issued pursuant to Articles 32, 42, or 43, HMOs and PHSPs must pay undisputed claims for health care services submitted by subscribers and health care providers.

Since the effective date of the prompt payment statute, the Insurance Department has received over 88,000 complaints against insurers, HMO and PHSPs concerning late payment of claims. The Department also levied periodic monetary penalties against insurers, HMOs and PHSPs for untimely payment and untimely denial of health care claims.

While insurers, HMOs and PHSPs have altered their procedures to comply with the timeframes of the Prompt Pay Law, there remained disagreement among the various associations that represent health care providers, insurers, HMOs and PHSPs regarding when a claim should be considered clean and therefore ready for payment.

The Insurance Department convened the Healthcare Roundtable to encourage dialogue among the various associations representing health care providers, insurers, HMOs and PHSPs in order to reach agreement as to when a claim should be considered to be clean or undisputed. Regulation 178 is the result of several meetings, discussions and agreement, and represents a consensus of the Healthcare Roundtable. The Department believes that the clean claim provision in this regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient.

The Insurance Department and the Healthcare Roundtable continue to meet to discuss additional changes that might be necessary to further the prompt pay requirements. This regulation must be promulgated as an emergency measure so that, as discussions continue, the clean claim parameters can be put in place and assessed to determine what other claim payment guidelines are needed. Insurers, HMOs and PHSPs are ready to accept the guidelines, as they will improve insurers', HMOs', and PHSPs' relationships with the provider community, which is essential for the viability of health insurance in New York State.

Consequently, it is critical for this regulation to be adopted as promptly as possible. For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the public health and general welfare.

Subject: Claim submission guidelines for medical service and hospital claims submitted in paper form.

Purpose: To create claim payment guidelines on what is needed in order to determine when a health care insurance claim is considered complete and ready for payment.

Text of emergency rule: A new Part 217 of Chapter IX of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation 178), entitled " Prompt Payment Of Health Insurance Claims", is adopted to read as follows:

Section 217.1 Definitions and applicability.

(a) For the purposes of this Part:

(1) "Payer" shall mean an insurer authorized to write accident and health insurance or that is licensed pursuant to Article 43 of the New York Insurance Law, or an entity certified pursuant to Article 44 of the Public Health Law.

(2) "Submitted on paper" shall include claims submitted on paper or by facsimile.

(b) This Part shall apply to all health care claims submitted under contracts or agreements issued or entered into pursuant to Articles 32, 42 or 43 of the Insurance Law or Article 44 of the Public Health Law.

Section 217.2 Health Insurance claim submission guidelines.

(a) A claim for payment of medical or hospital services submitted on paper shall be deemed complete if it contains the minimum data elements set forth in this Part. If the minimum data elements set forth are not present or accurate, the payer may, but need not, adjudicate the claim if the payer can determine, based on the information submitted, whether such claim should be paid or denied. Even if the claim is deemed complete, a payer may, pursuant to the provision of Section 3224-a(b) of the New York Insurance Law, request specific additional information, distinct from information on the claim form, necessary to make a determination as to its obligation to pay such claim.

(b)(1) In the case of a medical claim submitted on the national standard form known as a CMS 1500 (previously known as HCFA 1500 (New York State)), attached as an appendix (Appendix 26), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:

- 1a. Insured's I.D. Number*
- 2. Patient's Name*
- 3. Patient's Date of Birth and Gender*
- 4. Insured's Name (Last Name, First Name)*
- 5. Patient's Address*
- 9. Other Insured's Name (if appropriate)*
- 9a. Other Insured's Policy or Group Number (if appropriate)*

- 9b. Other Insured's Date of Birth and Gender (if appropriate)
 - 9c. Employer's Name or School Name (if appropriate)
 - 9d. Insurance Plan Name or Program Name (if appropriate)
 - 10a. Is Patient's Condition Related to Employment?
 - 10b. Is Patient's Condition Related to Auto Accident?
 - 10c. Is Patient's Condition Related to Other Accident?
 - 11. Insured's Policy, Group or FECA Number (if provided on ID Card)
 - 11d. Is There Another Health Benefit Plan?
 - 12. Patient's or Authorized Person's Signature (Can be completed by writing "signature on file" where appropriate)
 - 13. Insured's or Authorized Person's Signature (if appropriate)
 - 17. Name of Referring Physician or Other Source (if appropriate)
 - 17a. I.D. Number of Referring Physician (if appropriate)
 - 18. Hospitalization Dates Related to Current Services (if appropriate)
 - 21. Diagnosis or Nature of Illness or Injury
 - 24A. Dates of Service
 - 24B. Place of Service
 - 24D. Procedures, Services, or Supplies
 - 24E. Diagnosis Code (refer to item 21)
 - 24F. \$ Charges
 - 24G. Days or Units (for Durable Medical Equipment) (if appropriate)
 - 25. Federal Tax I.D. Number
 - 28. Total Charge
 - 29. Amount Paid (if appropriate)
 - 30. Balance Due
 - 31. Signature of Physician or Supplier Including Degrees or Credentials (if not already on file, except as required by applicable Federal and State laws)
 - 33. Personal Identifying Number of the particular practitioner rendering the care plus, if practicing in a group, the Identifying Number of the group as well
- (2) For items listed in paragraph (1) of this subdivision with the notation "(if appropriate)", the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.
- (c)(1) In the case of a hospital claim submitted on the national standard form HCFA 1450 (also known as UB-92), attached as an appendix (Appendix 27), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:
- 1. Provider Name and Address
 - 3. Patient Control Number
 - 4. Type of Bill
 - 5. Federal Tax Number
 - 6. Statement Covers Period
 - 7. Covered Days (if appropriate) (interim bill, etc)
 - 8. Non-Covered Days (if appropriate)
 - 9. Coinsurance Days (if appropriate)
 - 10. Lifetime Reserve Days (if appropriate)
 - 11. Newborn Birthweight (if appropriate)
 - 12. Patient Name
 - 13. Patient Address
 - 14. Patient Birthdate
 - 15. Patient Sex
 - 17. Admission Date
 - 18. Admission Hour
 - 19. Type of Admission
 - 22. Discharge Status Code
 - 42. Revenue Codes
 - 43. Revenue Description
 - 44. HCPCS/CPT4 Codes
 - 45. Service Date
 - 46. Service Units
 - 47. Total Charges (by revenue code)
 - 48. Non-Covered Charges
 - 50. Payer Name
 - 51. Provider ID
 - 54. Other Insurance Payment (if appropriate)
 - 55. Estimated Amount Due (if appropriate)
 - 58. Insured's Name
 - 59. Patient Relationship

- 60. Patient's Cert. SSN - HIC - ID No.
 - 62. Insurance Group Number (if on card) (where appropriate)
 - 67. Principal Diagnosis Code
 - 68. Code
 - 69. Code
 - 70. Code
 - 71. Code
 - 72. Code
 - 73. Code
 - 74. Code
 - 75. Code
 - 76. Admitting Diagnosis Code
 - 77. E-Code
 - 78. DRG #
 - 79. P.C.
 - 80. Principal Procedure Code and Date
 - 81. Other Procedures Code and Date
 - 82. Attending Physician's ID Number
- (2) For items listed in paragraph (1) of this subdivision with the notation "(if appropriate)", the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.
- (d) Nothing in this Part shall prohibit a payer from electing to accept some or all claims with less information than that specified in the lists set forth in subdivisions (b) and (c) of this section.

A new Appendix 26 of Title 11 is adopted to read as follows:
 See Appendix in the back of this issue.
 A new Appendix 27 of Title 11 is adopted to read as follows:
 See Appendix in the back of this issue.

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 October 25, 2004.

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

Regulatory Impact Statement

1. Statutory Authority: The Superintendent's authority for the adoption of Part 217 of Title 11 (Regulation 178) is derived from Sections 201, 301, 1109, 2403, 3224, 3224-a of the Insurance Law. Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations. Section 1109 authorizes the Superintendent to promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law. Section 2403 prohibits any person from engaging in any trade practice constituting a "defined violation", which pursuant to the provisions of Section 2402(b) includes a violation of Section 3224-a. Section 3224-a sets forth the timeframes for timely payment of undisputed claims for health care services under contracts issued by insurers pursuant to Articles 32, 42 and 43 of the Insurance Law and by health maintenance organizations (HMOs) or Prepaid Health Service Plans (PHSPs) pursuant to Article 44 of the Public Health Law. Section 3224 gives the Superintendent the authority to establish a standard claim form for physicians or other health care providers to be used for accident and health insurance claims and by Article 43 corporations.

2. Legislative Objectives: Prior to the enactment of Chapters 637 and 666 of the Laws of 1997, establishing prompt payment requirements for health care claims, existing law did not require insurers under contracts issued by insurers pursuant to Articles 32, 42 or 43, HMOs or PHSPs to pay claims or bills for health care services within any specific timeframe. Neither did existing law require interest on unpaid claims or bills for health care services. The statement in support of the prompt payment legislation stated that HMOs and insurers did not pay claims and bills in a timely fashion, to the detriment of providers and patients alike. The lack of specific statutory provisions encouraged payers to delay payments to take advantage of interest, which can be earned on the moneys being withheld from payment. The intent of the prompt payment law was to provide protection to both patients and health care providers relative to the timely

payment of health service claims by insurers under contracts issued pursuant to Articles 32, 42 or 43, HMOs and PHSPs.

Prior to the legislation, there were generally no repercussions for the late payment of claims. Healthcare providers complained that there were no incentives for paying claims promptly or penalties for late payments. Consequently, hospitals were accumulating large receivables because of these late payments.

Chapters 637 and 666 of the Laws of 1997, which took effect on January 22, 1998, amended the Insurance Law relating to the settlement of claims for health care and payment for health care services. The law was intended to set timeframes within which insurers under contracts issued pursuant to Articles 32, 42 or 43, HMOs and PHSPs must pay undisputed claims for health care services submitted by subscribers and health care providers. New Section 3224-a prescribed penalties in the form of interest payable on claims paid later than 45 days. The law also amended Section 2402, to include a violation of Section 3224-a as a defined violation, and amended Section 2406 to specifically provide for the Superintendent to levy daily monetary penalties against such insurers, HMOs and PHSPs for their failure to pay undisputed health claims within 45 days of receipt, untimely denials of claims, or requesting additional information needed to process the claim beyond 30 days of receipt of the claim. The Insurance Department established mechanisms for accepting complaints from health care providers and created procedures for levying monetary penalties against insurers, HMOs and PHSPs for violation of the prompt payment statute.

Since January 1998, the Department has received over 88,000 complaints from health care providers against insurers, HMOs and PHSPs regarding the timely payment of health care claims. The Department has collected monetary penalties of approximately 5 million dollars from insurers, HMOs and PHSPs for violations of Section 3224-a.

The powers granted to the Superintendent of Insurance to investigate and enforce compliance with the prompt payment requirements established by the law as well as the new interest and penalty sanctions, help ensure that payments are made in a timely manner. The purpose of this regulation is to facilitate the legislative intent of the Prompt Pay Law by establishing minimum requirements when claims are submitted on paper as to what constitutes a clean or undisputed claim, thereby resulting in more timely payment of claims by insurers, HMOs and PHSPs.

3. Needs and Benefits: While insurers, HMOs, and PHSPs have altered their procedures to comply with the timeframes of the Prompt Pay Law, there remained disagreement among the various associations that represent health care providers, insurers, HMOs, and PHSPs regarding when a claim should be considered to be clean and therefore ready for payment.

The Superintendent of Insurance convened the Healthcare Roundtable to encourage dialogue among the various associations representing health care providers, insurers, HMOs, and PHSPs in order to reach agreement as to when a claim should be considered to be clean or undisputed. The group agreed that the guidelines established by the State of Connecticut in the form of a regulation, which sets forth elements of a clean claim, would be a good starting point in determining what information must be included on a claim form in order for the claim to be considered complete.

Regulation 178 is the result of several meetings, discussions and agreements, and represents a consensus of the Healthcare Roundtable. Members of the Roundtable include the Medical Society of the State of New York, The Healthcare Association of New York, The Greater New York Hospital Association, The Conference of Blue Cross Blue Shield Plans, the Health Plan Association, the American College of Obstetricians and Gynecologists, and various provider representatives.

This regulation is similar to Connecticut's regulation in that the parameters are clear and consistent with the health care claims process for provider claims submitted on paper. The regulation provides clear standards with which insurers, HMOs, and PHSPs need to comply in processing health care claims submitted on paper. In this way, providers will know what information will be needed when submitting such claims to ensure prompt payment of the claims.

4. Cost: Any cost associated with implementing the claims payment guidelines was established by statute and has already been incurred by insurers, HMOs, and PHSPs who readied their claims processing functions in early 1998, when Section 3224-a became effective, in order to process claims within the requisite timeframes. The regulation does not require insurers, HMOs, or PHSPs to provide additional or new claim forms but simply establishes which elements on existing claim forms need to be completed. In fact, insurers, HMOs and PHSPs have already established procedures to handle the increased number of complaints filed by health care providers. Insurers, HMOs and PHSPs believe that the clean claim

provisions in this proposed regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient. The prevention of such a practice could also serve to reduce costs to regulated parties and the Department.

5. Local Government Mandates: The proposed regulation does not impose any new mandates on any county, city, town, village, school district or fire district.

6. Paperwork: The proposed regulation does not impose any reporting requirements on insurers, HMOs, PHSPs, or health care providers. No additional paperwork will be required from insurers, HMOs, PHSPs or health care providers, other than what is already required by statute.

7. Duplication: The proposed regulation does not overlap or duplicate any other state regulations, or federal mandates.

8. Alternatives: Interest groups representing providers and payers met on numerous occasions to develop the parameters for determining what constitutes a substantially complete claim. Various alternatives were considered but all affected parties agreed that the regulation represents the best solution to resolve the question about what constitutes a clean claim.

9. Federal Standards: There are no federal laws that require timely payment of undisputed health care claims. There is a new claims payment regulation issued by the United States Department of Labor, which relates to the processing of claims under employer group contracts, but the federal regulation does not address timely payment of health care claims.

10. Compliance Schedule: Since interested parties representing providers, HMOs, PHSPs and insurers developed the regulation, these parties are aware of the regulatory provisions and will be able to bring practices into compliance with the requirements. Insurers, HMOs, and PHSPs are ready to accept the guidelines, as they will improve insurers', HMOs', and PHSPs' relationships with the provider community, which is essential for the viability of health insurance in New York State. The regulation has already been promulgated on an emergency basis and has been in effect for many months.

Regulatory Flexibility Analysis

1. Effect of the rule: The regulation will affect insurers paying claims under contracts written pursuant to Articles 32, 42, and 43 of the Insurance Law and health maintenance organizations (HMOs) and Prepaid Health Service Plans (PHSPs) pursuant to Article 44 of the Public Health Law. The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of insurers authorized to do business in New York and has concluded that insurers and HMOs do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedures Act, because there are none which are both independently owned and have under 100 employees.

There are under 20 PHSPs in New York, some of which are small businesses. PHSPs are entities certified pursuant to Article 44 of the Public Health Law that provide Medicaid services in a managed care environment. However, they will not be negatively impacted by this regulation. The regulation establishes minimum requirements for the submission of claims on forms that the plans currently use. The establishment of these minimum requirements will assist the plans by reducing the administrative burden of requesting additional information on incomplete claims.

The regulation will also affect health care providers, many of which are small businesses, submitting claims on paper for payment for health care services submitted on the CMS 1500 claim form and the CMS 1450 form. It sets forth guidelines for determining when a claim that is submitted on paper is considered complete and ready for processing. This regulation is the result of meetings with representatives of health care providers, insurers, HMOs and PHSPs, and represents a consensus between the Department and the various interested parties as to what information is necessary for a claim to be considered substantially complete. The regulation does not apply to or affect local governments.

2. Compliance requirements: Prompt payment reporting, record keeping and other compliance requirements are imposed by statute. Insurers, HMOs, and PHSPs are already paying claims for healthcare services to providers. There are no compliance requirements for local governments. There are no compliance requirements for small businesses including health care providers other than clarifying what constitutes a substantially complete claim so as to facilitate payment of claims to them.

3. Professional Services: Insurers, HMOs, and PHSPs are not required and should not need to obtain professional services to comply with this regulation. Health care providers do not need to obtain additional professional services as a result of this regulation.

4. Compliance costs: The relevant statutes, as amended by Chapters 637 and 666 of the Laws of 1997, require that insurers, HMOs, and PHSPs pay undisputed claims within 45 days of receipt, or deny the claim, or

request additional information within 30 days of receipt. Insurers, HMO, and PSHPs are already responding to the mandates of the prompt payment statute. This regulation had been requested by interested parties in order to establish the framework for what is considered a substantially complete claim that is ready for processing. The regulation does not impose any additional cost to insurers, HMOs, and PSHPs. As a result of this regulation, insurers, HMOs, and PSHPs should not need to request additional information as frequently, thereby reducing their costs of processing claims.

5. Economic and technological feasibility: Compliance with the regulation should be economically and technologically feasible for small businesses since no new procedures or requirements are added and the regulation merely establishes the minimum items needed to have a clean claim when using the standard form and adherence on the part of the health care provider will speed the processing of health care claims and curtail the various requests from insurers and HMOs for additional information.

6. Minimizing adverse impact: The regulation is intended to help health care providers, many of which are small businesses. If claims are substantially complete when submitted, insurers, HMOs and PHSPs will not need to request additional information. Consequently, payment to providers will be faster, resulting in lower receivables on the books of health care providers. Differing compliance timetables or an exemption from coverage by the regulation are not feasible given existing statutory requirements for prompt payment of claims.

7. Small businesses and local government participation: Notification of the Department's intent to propose the regulation was included in the Department's regulatory agenda, accessible to small businesses and local governments. Interested parties representing HMOs, insurers, and PHSPs and providers developed the regulation with Department representatives during numerous meetings convened by the Department, and therefore interested parties had an opportunity to participate in the rule making process.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Health maintenance organizations (HMOs), Prepaid Health Service Plans (PHSPs) and insurers to which this regulation is applicable do business in every county of the state including rural areas as defined under Section 102(13) of the State Administrative Procedure Act. Health care providers in New York State are comprised of mostly physicians, but include other health care providers in individual practices or small groups throughout the state.

2. Reporting, recordkeeping and other compliance requirements and professional services: This regulation requires no additional recordkeeping or reporting by insurers, HMOs, or PHSPs other than that which they are required to perform by statute. Although health care providers are being asked to include certain elements on the claim form when a claim is submitted on paper to make it substantially complete, these elements have always been required by insurers and HMOs for claims that are submitted on paper by health care providers. The regulation will not add any new reporting requirements for health care providers, and professional services will not be needed to comply with the proposed regulation.

3. Costs: Any cost associated with implementing the claims payment guidelines was established by statute and has already been incurred by insurers, HMOs and PHSPs who readied their claims processing functions in early 1998, when Section 3224-a became effective, in order to process claims within the requisite timeframes. The regulation does not require insurers, HMOs, or PHSPs to provide additional or new claim forms but simply establishes which elements on existing claim forms need to be completed. In fact, insurers, HMOs and PHSPs have already established procedures to handle the increased number of complaints filed by health care providers. Insurers, HMOs and PHSPs believe that the clean claim provisions in this proposed regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient. The prevention of such a practice could also serve to reduce costs to regulated parties and the Department.

4. Minimizing adverse impact: Because the same requirements apply to both rural and non-rural entities, the regulation will impact all affected entities in the same manner. In fact, the regulation has the potential to decrease insurers', HMOs' and PSHPs' expenses, possibly reducing rate increase requests. It will also accelerate payment to providers for the delivery of health care services. This acceleration of payment to health care providers will help keep local doctors in family practice in their respective communities, and will foster consumers' continued access to providers.

5. Rural area participation: Notification of the Department's intent to propose the regulation was included in the Department's regulatory

agenda. In addition, interested parties representing insurers, HMOs, PHSPs, and providers, potentially located in rural areas, discussed the regulation during numerous meetings convened by the Department and therefore had an opportunity to participate in the rule making process.

Job Impact Statement

This regulation will not adversely affect jobs or employment opportunities in New York State. The regulation is intended to improve the relationship between payers and providers, ultimately getting payment to providers more quickly, and helping to keep providers in their communities. As a result of the regulation, insurers will spend less time requesting information from health care providers. The regulation will also lessen confusion as to whether insurers have exercised bad faith in requesting additional information.

There is no anticipated adverse impact on job opportunities in this state.

EMERGENCY RULE MAKING

Physicians and Surgeons Professional Insurance Merit Rating Plans

I.D. No. INS-33-04-00003-E

Filing No. 866

Filing date: July 28, 2004

Effective date: July 28, 2004

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

Action taken: Amendment of Part 152 (Regulation 124) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 2342(d) and (e); L. 2002, ch. 1, part A, section 42, as amd. by L. 2002, ch. 82, part J, section 16

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

Specific reasons underlying the finding of necessity: Section 42 of Part A of Chapter 1 of the Laws of 2002, requires that any physician, surgeon or dentist who wants to participate in the excess medical malpractice insurance program established by the Legislature in 1986 must participate in a proactive risk management course. Section 42 authorized the Superintendent to promulgate regulations that provide for the establishment and administration of such plans. Section 42, as originally enacted on January 25, 2002, established an effective date of July 1, 2003 for participation in these courses. However, on May 29, 2002, Section 16 of Part J of Chapter 82 of the Laws of 2002 was enacted and the effective date was amended to July 1, 2002.

It is essential that this amendment be promulgated on an emergency basis so that insurers are made aware of the requirements for proactive risk management courses and have the courses in place as soon as possible. Insureds must be able to avail themselves of these courses as soon as possible so that they may participate in the excess medical malpractice insurance program. This is especially important for those insureds who are presently insured in the excess medical malpractice insurance program. It is vital that their insurance be maintained on a continuous basis not only for their financial protection but also to preserve the rights of claimants who suffer injury as a result of medical malpractice.

For the reasons cited above, this amendment is being promulgated on an emergency basis for the preservation of the general welfare.

Subject: Physicians and surgeons professional insurance merit rating plans.

Purpose: To establish guidelines and requirements for medical malpractice merit rating plans and risk management plans.

Substance of emergency rule: Section 152.1 is amended by adding paragraph (e) which details the statutory authority for proactive risk management programs.

Section 152.2 is amended by adding definitions for the terms physician, excess medical malpractice program and insurer.

Section 152.6 contains the standards for risk management programs in which insureds participate in order to receive premium credits. This section is amended to provide that these courses may be offered in an internet-based format.

Section 152.7 is amended by specifying how risk management programs, provided in an internet-based format, may be implemented.

Section 152.8 is renumbered to be Section 152.11 and a new Section 152.8 is added to provide the standards for proactive risk management

programs which are provided for insureds who wish to qualify for the excess medical malpractice insurance programs established by the Legislature.

A new Section 152.9 is added to provide coordination of the excess medical malpractice risk management courses with risk management courses that are offered for the purpose of providing premium credits.

A new Section 152.10 is added to provide guidelines for insurers in implementing risk management programs administered for insureds who wish to qualify for participation in the excess medical malpractice insurance program established by the Legislature.

Section 152.11 is amended to provide requirements for insurers conducting audits of insureds or for insureds to conduct self-review surveys. A new provision is added requiring insurers to report, by territory and medical specialty, the number of insureds participating in risk management programs who qualify for the excess medical malpractice insurance program.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire October 25, 2004.

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

Regulatory Impact Statement

1. Statutory authority: Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law, and to effectuate any power granted under the Insurance Law and to prescribe forms or otherwise make regulations. Section 2343(d) provides that the Superintendent shall, by regulation, establish a merit rating plan for physicians professional liability insurance. Section 2343(e) provides that the Superintendent may approve malpractice insurance premium reductions for insured physicians who successfully complete an approved risk management course, subject to standards prescribed by the Superintendent by regulation. Section 42 of Part A of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002, requires that all physicians, surgeons and dentists participating in the excess medical malpractice insurance program established by the Legislature in 1986 participate in a proactive risk management program. Section 42 authorizes the Superintendent to promulgate regulations which provide for the establishment and administration of these risk management courses.

2. Legislative objectives: The objective of Section 2343(d) was the establishment, by the Superintendent, by regulation, of a merit rating plan for physicians professional liability insurance that was reasonable and not unfairly discriminatory, inequitable, violative of public policy or contrary to the best interests of the people of New York. The regulation was to include reasonable standards to be applied to merit rating plans submitted by insurers for approval by the Superintendent. Those standards are to be used to arrive at premium rates, surcharges and discounts based on an evaluation of the insured, geographical areas, specialties of practice, past and prospective loss and expense experience for medical malpractice insurance and any other factors deemed relevant in a system of merit rating.

The objective of Section 2343(e) was to permit insurers to provide premium credits for successful completion of risk management programs approved by the Superintendent.

The objective of Section 42 of Part A of the Laws of 2002 was to require that all physicians, surgeons and dentists participating in the excess medical malpractice insurance program established by the Legislature participate in a proactive risk management program.

An effective risk management program would provide insureds with an overview of the causes of malpractice claims, emphasize communication skills and improved patient rapport skills, and focus on improving procedures. This should reduce the frequency and severity of medical malpractice claims. The intent of this amendment is to effectuate that objective.

3. Needs and benefits: The first amendment to Part 152 established standards under which risk management programs may be approved by the Superintendent. Successful completion of approved risk management programs permitted credits to be applied to physicians professional liability programs.

At the time that amendment was promulgated, all risk management courses were conducted in a classroom setting in a lecture format. Since that time, advances in technology have made Internet-based home study courses available in an array of disciplines. Insurers have requested that they be permitted to take advantage of this technology and offer Internet-based risk management courses to their medical malpractice insureds. Offering Internet-based risk management courses will allow insureds increased flexibility in participating in these courses. This may result in more

insureds completing the courses, which should ultimately translate into better patient care and reductions in the incidence and cost of medical malpractice claims.

The recently enacted Section 42 of Part A of Chapter 1 of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002 requires that, as of July 1, 2002, physicians, surgeons and dentists participate in a proactive risk management program in order to be eligible to participate in the excess medical malpractice insurance program established by the Legislature.

4. Costs: This rule imposes no compliance costs upon state or local governments.

There are no additional costs imposed upon regulated parties by the provisions of this amendment since, for the purposes of obtaining a premium credit, insurers are not required to offer risk management courses to their insureds, and those that offer risk management courses will not be required to include an Internet-based version. However, if they do offer these courses, these provisions offer regulated parties another option in offering risk management courses to their insureds. It is likely that it is more cost effective to offer Internet-based risk management courses to insureds in addition to, or in place of risk management courses in the lecture format. Courses conducted in a lecture format entail costs of hiring instructors, printing course materials and renting physical settings that can accommodate, and are convenient to, as many insureds that are eligible to attend.

In addition, insured physicians taking the Internet-based courses would not incur any transportation expenses that are associated with attending lecture format risk management courses. Furthermore, physicians would not have to schedule time away from their practice since these courses could be taken on line at virtually any time.

While insurers will incur additional costs when offering proactive risk management programs for the purpose of insurer eligibility in the excess medical malpractice insurance program, the statute provides that these costs will be reimbursed from funds available pursuant to Section 51 of Part A of Chapter 1 of the Laws of 2002. Reimbursement will be made according to procedures to be established by the Superintendent.

Although insurers have offered risk management programs, for the purpose of obtaining premium credits, for almost ten years, there are additional requirements specified in Section 42 of Chapter 1 of the Laws of 2002 for proactive risk management courses.

The follow-up course component of the proactive risk management course must be offered annually rather than every other year.

In order to satisfy the statutory requirement that these courses be proactive, insurers will also be required to conduct risk management audits annually, either by the insurer or by a self-review survey completed by the insured. There will be costs associated with developing the audit procedure, training people to conduct the audits, visiting insureds' practice settings to do the audit and implementing any necessary follow-up procedures after the results of the audit are analyzed.

These new requirements must be incorporated into the course and the course must be submitted to the superintendent for approval.

In addition, Section 42 requires that, in order for a dentist to participate in the excess medical malpractice program, he or she must participate in a proactive risk management program. Dental malpractice insurance carriers will incur costs necessary to set up proactive risk management courses, since up to this point the requirements of this Part with respect to risk management courses set up for purposes of premium credits did not apply to them.

Although the statute does not permit insurers to assess any fees against insureds for participating in these courses, insureds may have to schedule time away from their practice to participate in these risk management courses. However, it should be noted that participation in a proactive risk management course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

In addition, it is anticipated that completion of the excess medical malpractice risk management program will allow an insured physician to receive credit for Category 1 continuing medical education.

5. Local government mandates: This rule does not impose any mandates on local government.

6. Paperwork: There are paperwork requirements imposed by the provisions of the amendment on insurers with respect to offering an internet based risk management course. An insurer that decides to offer an Internet-

based risk management course will have to follow existing procedures for obtaining the Superintendent's approval of that course and submit required data on the number of insureds receiving the risk management credit.

Although they are not regulated parties, an insured physician might be subject to minimal paperwork requirements. If an insured physician takes an Internet-based risk management course, he or she must affirm that they were the person who actually took the course and that they are aware that any premium credit granted by the insurer is based on this affirmation. Any additional costs associated with the completion of this affirmation will be offset by the fact that the insured does not have to travel to and from a location where any risk management course is offered in the lecture format. It should also be noted that it is a voluntary decision by the insured to participate in any risk management course.

With respect to the proactive risk management course, insurers will have to provide the follow-up course on an annual basis rather than every other year which will entail making more frequent arrangements concerning location, notification and presentation of the course if it is offered in a lecture format. They will also have to develop new procedures for the purposes of conducting audits and/or self-audits by insureds.

Insurers will also be required to submit to the Department, on an annual basis, the number of insureds participating in proactive risk management courses. However, this paperwork burden should be minimal since insurers are already required to submit similar statistics regarding other risk management courses.

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

8. Alternatives: The alternative of not permitting Internet-based risk management courses to be offered by insurers is not a viable alternative. The Department is of the opinion that technological advances in this area should be made available to insurers and insureds. By permitting the availability of these types of courses, it is expected that more insured physicians will be able to take these courses and the benefits of risk management will improve the quality of care provided to their patients.

Consideration was given to permitting insurers to provide non-Internet-based home study courses to their insureds. However, the Department is of the opinion that such home study courses do not afford insurers the ability to properly monitor the effectiveness of the course and to verify that the insured physician is actually taking the course as do other formats. Currently, when offering a risk management course in the lecture format, attendance must be taken of participants both before and after the lecture and admittance to the course is closed at a certain time after the start of the course. With Internet-based risk management courses, the insured physician will be required to affirm that they have read the content of the course, taken any quizzes and completed the required project. In addition, insureds will be given an individual password to use and the length of time spent on the Internet taking the course can be tracked by the insurer.

Since the proactive risk management course is required by statute, the Department could not consider the alternative of not implementing it. Although an internet based format is not directly addressed in the mandatory statute, the rule provides for this option in order to provide flexibility to both insurers and physicians, surgeons and dentists who must take such courses to qualify for the excess medical malpractice insurance coverage and to maintain consistency between the risk management credit course which is voluntary, and the course that must be taken by all insureds wishing to qualify for the excess medical malpractice insurance program.

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

10. Compliance schedule: The provisions of this amendment will apply immediately. As required by statute, insurers must have a proactive risk management course available for their insureds in order for insureds to participate in the excess medical malpractice insurance program. It is expected that insurers will be able to comply with the new provisions in a relatively short period of time since most medical malpractice insurers already have had other risk management programs approved by the superintendent. In order to facilitate compliance with this statute, extensive discussions have been held by the Department with the major medical malpractice insurers in this state and the Medical Society of the State of New York so that the content of the course relative to excess management will be consistent from course to course and also qualify for continuing medical education credit.

Since the offering of risk management courses for the purpose of premium credits is optional for insurers, there is no compliance schedule with respect to the offering of these courses in an internet-based format. An insurer may offer an internet-based risk management course to its insureds

as soon as the Department determines that the course is in compliance with the provisions of this Part.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. The basis for this finding is that this rule is directed to property/casualty insurance companies licensed to do business in New York State and self-insurers, none of which fall within the definition of "small business".

The Insurance Department has reviewed filed Reports on Examination an Annual Statements of authorized property/casualty insureds and determined that none of them would fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees. Self-insurers typically have to be large enough to have the financial ability to self insure losses and the Department has never been provided information to indicate that any of the self-insurers are small businesses.

This rule will also have no adverse economic impact on local governments and does not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurance companies, none of which are local governments.

Although they are not regulated parties, this part affects physicians, surgeons and dentists, some of whom may be considered small businesses as they are required to attend proactive risk management courses if they wish to be eligible to participate in the excess medical malpractice insurance program. This may entail scheduling time away from their medical practice in order to participate in these courses. However, it should be noted that participation in this course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

In addition, by providing insurers with the option of offering risk management programs in an internet-based format, physicians should be able to save time and money by taking these courses in their home or office at a time convenient to them as opposed to attending these courses when conducted in a lecture format.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Insurers and self-insurers covered by this regulation do business in every county in this state, including rural areas as defined under Section 102 (1) of the State Administrative Procedure Act. Other affected parties, such as physicians, surgeons and dentists, conduct their practices throughout the state.

2. Reporting, recordkeeping and other compliance requirements: There are paperwork requirements imposed by the provisions of this amendment on insurers with respect to offering an internet-based risk management course. An insurer that decides to offer an internet-based risk management course will have to follow existing procedures for obtaining the Superintendent's approval of that course and submit required data on the number of insureds receiving the risk management credit.

Although they are not regulated parties, an insured physician might be subject to minimal paperwork requirements. If an insured physician takes an internet-based risk management course, he or she must affirm that they were the person who actually took the course and that they are aware that any premium credit granted by the insurer is based on this affirmation. Any additional costs associated with the completion of this affirmation will be offset by the fact that the insured does not have to travel to and from a setting where any risk management course is offered in the lecture format. It should also be noted that it is a voluntary decision by the insured to participate in any risk management course.

With respect to the proactive risk management course, insurers will have to provide the follow-up course on an annual basis rather than every other year which will entail making more frequent arrangements concerning location, notification and presentation of the course if it is offered in a lecture format. They will also have to develop new procedures for the purpose of conducting audits and/or self-audits by insureds.

Insurers will also be required to submit to the Department, on an annual basis, the number of insureds participating in proactive risk management courses. However, this paperwork should have a minimal impact since insurers are already required to submit similar statistics regarding other risk management courses.

3. Costs: This rule imposes no compliance costs upon state or local governments.

It is not expected that insurers would incur undue expenses in offering internet-based risk management courses to their insureds for the purpose of obtaining premium credits. In fact, it is likely that it is more cost effective to offer internet-based risk management courses to insureds in addition to, or in place of, risk management courses in the lecture format.

Insureds would not be unduly affected by participating in internet-based risk management courses and would probably incur time and financial savings since they would be able to take these courses in their home or office at a time convenient to them.

Insurers will incur additional costs when offering proactive risk management programs to insureds for the purpose of eligibility in the excess medical malpractice insurance program. However, the statute provides that their costs will be reimbursed from statutory funds according to procedures to be established by the Superintendent. Insurers must offer these courses on an annual basis and will be conducting risk management audits or have insureds conduct self-audits. These new requirements are statutorily mandated, but should not impose any undue hardships for insurers.

However, it should be noted that participation in this course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

It should also be noted that portions of the excess medical malpractice risk management programs will be reviewed by the Medical Society of the State of New York for qualification as Category 1 of continuing medical education credit. Therefore, an insured who successfully completes this course will qualify both for continuing medical education and for participation in the excess medical malpractice insurance program.

4. Minimizing adverse impact: The regulation applies to regulated parties that do business throughout New York State and does not impose any adverse impact on rural areas. Permitting insurers to offer risk management courses in an internet-based format should benefit insureds in rural areas through savings of time and money. Instead of traveling to central locations throughout the state to attend these courses in a lecture format, they can take the courses on computers in their home or office at a time convenient to them.

5. Rural area participation: The Department met extensively with the major medical malpractice insurers in New York State to solicit their opinions on the subject of proactive risk management programs. The Department also solicited input from the Medical Society of the State of New York in order that these courses would qualify for continuing medical education credit. Their comments were taken into account in developing the provisions of this Part.

Job Impact Statement

This rule should not have any adverse impact on jobs and employment opportunities in this State since it merely sets forth guidelines that medical malpractice insurers must follow when developing statutorily prescribed proactive risk management programs that must be submitted to the Superintendent for approval. It also permits insurers to offer risk management courses in an internet-based format.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Charges for Professional Health Services

I.D. No. INS-12-04-00016-RC

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

Revised action: Amendment of Part 68 (Regulation 83) of Title 11 NYCRR.

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

Subject: Charges for professional health services.

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

Expiration date: March 24, 2005.

Text of revised rule: Section 68.1(b) of Part 68 is hereby amended to read as follows:

(b)(1) The charges for services specified in paragraph one of subsection (a) of section 5102 of the Insurance Law and any further health service charges which are incurred as a result of the injury and which are in excess of basic economic loss, shall not exceed the charges permissible under the schedules prepared and established by the chair of the Workers' Compensation Board for industrial accidents. However, references to workers' compensation reporting and procedural requirements in such schedules do not apply, e.g., requirements that provide for authorization to perform surgical procedures, is not applicable to no-fault. The general instructions and ground rules in the workers' compensation fee schedules apply, but those rules which refer to workers' compensation claim forms, pre-authorization approval and dispute resolution guidelines do not apply, unless specified in this Part.

(2) If a fee schedule has been adopted for a licensed health provider, the fee for services provided shall be the fee adopted or established for that licensed health provider. (For example, the fee for chiropractic services performed by a chiropractor employed by a physician would be the fee applicable for chiropractic services as contained in the Chiropractic Fee Schedule). However, if the Workers' Compensation Fee Schedule contains a specific ground rule to permit reimbursement at the physician rate then that rule will apply. (For example, the fee for services performed by a physical or occupational therapist employed by a physician would be the fee applicable at the physician rate in accordance with Ground Rule Nine contained in the Workers' Compensation Physical Medicine Fee Schedule).

(3) A "licensed health provider" means a licensed healthcare professional acting within the scope of his or her licensure or an entity properly formed in accordance with applicable law and acting within the scope of its license.

Part E of Appendix 17-C is amended to read as follows:
Part E. [Drugs, medical equipment and supplies] *Prescription drugs.*

(a)(1) [The maximum permissible charge for drugs, [medical equipment and supplies] which are provided by a licensed pharmacist [is: (i) for drugs requiring] and require a [doctor's] prescription, is the actual cost of the drug to the druggist (not to exceed the cost shown in the American Druggist Blue Book or Drug Topic Red Book) plus a dispensing fee of [\$4.85] \$5.00, except that for a compounded prescription a [\$1.95] \$2.00 compounding fee shall be added to the dispensing fee[.].

Note: In order to minimize the administrative cost, insurers need not verify the maximum permissible charge for the first \$50 of prescription drug bills received per person, per accident.

(ii) for medicines not requiring a doctor's prescription, the prevailing charge;

(iii) for medical equipment and supplies, 150 percent of the actual cost of the equipment or supplies to the pharmacist.

(2) The maximum permissible monthly rental charge for medical equipment and supplies provided by a licensed pharmacist on a rental basis is one sixth of the actual cost of the equipment or supplies to the pharmacist, provided further that the maximum total charge is 12 times the maximum permissible monthly rental charge.

(b)(1) For medical equipment and supplies (e.g., TENS units, soft cervical collars) provided by physician or medical equipment supplier, the maximum permissible charge is 150 percent of the documented cost of the equipment to the provider.

(2) The maximum permissible monthly rental charge for medical equipment and supplies provided on a rental basis is one ninth of the maximum permissible charge for purchase of the equipment or supplies, provided further that the maximum total charge is 12 times the maximum permissible monthly rental charge.]

Part F of Appendix 17-C is amended to read as follows:

Part F. [Prosthetic and orthotic appliance supplies and services] *Durable medical equipment, medical/surgical supplies, orthopedic footwear, and orthotic and prosthetic appliances* fee schedule.

(a) The maximum permissible charge for [prosthetic and orthotic appliance supplies and services is the product of the Statewide Maximum Fee and the conversion factor set forth herein] *the purchase of durable medical equipment, medical/surgical supplies, orthopedic footwear and orthotic and prosthetic appliances is the fee payable for such equipment and supplies under the New York State Medicaid program at the time such equipment and supplies are provided. If the New York State Medicaid program has not established a fee payable for the specific item, then the fee payable, in accordance with Medicaid rules, shall be the lesser of:*

(1) *the acquisition cost (i.e. the line item cost from a manufacturer or wholesaler net of any rebates, discounts or other valuable considerations, mailing, shipping, handling, insurance costs or any sales tax) to the provider plus 50%; or*

(2) *the usual and customary price charged to the general public.*

(b) [The conversion factor applicable to prosthetic and orthotic appliance supplies and services is 1.55.

(c) The Statewide Maximum Fee is as set forth in the New York State Orthotics, Prosthetics and Stock Orthoses Fee Schedules published and amended by the Bureau of Medicaid, State of New York Department of Health.

(d) The maximum permissible monthly rental charge for [prosthetic and orthotic appliance] *such equipment*, [and] supplies and services provided on a rental basis [is one ninth of the maximum permissible charge for purchase of the appliance or supplies, provided further that the maximum total charge is 12 times the maximum permissible monthly rental charge] *shall not exceed the lower of the monthly rental charge to the general public or the price determined by the New York State Department of Health area office. The total accumulated monthly rental charges shall not exceed the fee amount allowed under the Medicaid fee schedule.*

Revised rule compared with proposed rule: Substantial revisions were made in section 68.1(b)(2)-(4) and Appendix 17.

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

Data, views or arguments may be submitted to: Buffy Cheung, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5587, e-mail: bcheung@ins.state.ny.us

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

Regulatory Impact Statement

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

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

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

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

The adoption by the Superintendent of an established fee schedule that is updated as necessary to reflect increased costs and to include newer products as they are developed will provide for more timely payment of

health care provider charges and result in a significant reduction in litigation costs that are being incurred due to the variable nature of the current fee schedule rule used to establish these costs. Utilization of the established New York State Medicaid fee schedules for durable medical equipment, medical/surgical supplies, orthopedic footwear and orthotic and prosthetic appliances should significantly reduce the number of disputes between insurers and health care providers, resulting in more uniform, efficient and cost effective processing and payment of no-fault claims.

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

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

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

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

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

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

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

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

provide a framework to curtail abusive practices while assuring quality care.

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

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

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

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

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

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

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

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

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

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

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

10. Compliance schedule: The implementation date of this amendment provides enough lead time for insurers, self-insurers and health care prov-

iders to obtain copies of the New York State Medicaid fee schedule for medical equipment and familiarize themselves with the fees contained therein.

Regulatory Flexibility Analysis

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

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

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

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

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

Rural Area Flexibility Analysis

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

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

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

Insurers, self-insurers and health care providers who provide services under the no-fault system must acquire a New York State Medicaid fee schedule from the New York State Department of Health. However, all entities affected by this part should incur lower costs in processing claims since the use of the fee schedule should eliminate disputes as to the value of claims reducing litigation costs and resulting in more timely payment of health care provider charges.

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

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

Job Impact Statement

The proposed amendment should have minimal adverse impact on jobs or economic opportunities in New York State since it simply establishes the use of the New York State Medicaid fee schedule for durable medical equipment, medical/surgical supplies, orthopedic footwear and orthotic and prosthetic devices in the payment of no-fault claims and establishes

reasonable rules for compensation for the treatment of motor vehicle accident victims. However, those who have engaged in fraudulent or abusive practices resulting from the treatment of motor vehicle accident victims might lose their jobs as the ability to profit from the operation of "medical mills" or dishonest medical supply firms is diminished. The savings that will result from these changes will generate premium savings for New York policyholders.

Assessment of Public Comment

The Department received comments from a physician organization, organizations representing chiropractors, an organization representing acupuncturists, insurer health organizations, an organization representing New York insurance agents, a fee schedule publisher, members of the Assembly, insurers, law firms, medical doctors, acupuncturists, a chiropractor, and interested members of the public.

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

(1) Section 68.1(b)(2) required that if a fee schedule was established or adopted for a licensed health provider that the fee for services provided shall be the fee for the licensed health provider performing the services. The purpose of the proposed rule was to establish parity between the independent provider and the multi-specialty practice and to reduce the financial incentive for multi-specialty practices to employ various health care providers in order to charge higher fees for services rendered. This change was not intended to minimize the physician's impact on the quality of the care provided.

Some of the comments received addressing the rule were as follows:

- The proposed rule was unfair because it would reduce the physician fee for patient care provided by a licensed employee non-physician.
- Various comments were received that indicated agreement with the proposed rule.

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

(2) One comment noted that the term "treating provider" as used in section 68.1(b)(2) and (4) of the proposed amendment should be defined to assure consistency in the regulation and recommends the following definition: "a licensed healthcare professional acting within the scope of his or her licensure or a properly licensed and formed entity acting within the scope of its license billing for the services provided by the service provider."

Therefore, after reviewing the text of the proposed amendment and in response to this comment, a new rule as contained in section 68.1(b)(3) is added in which the phrase "licensed health provider" is now defined and is used in place of the term "treating provider." The new definition includes a properly organized and licensed business entity. This definition was added to clarify that the rule is to apply not only to a licensed individual health care provider but also to properly licensed business entities as well.

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

Some of the significant comments addressing this proposed rule included the following:

- Various comments were received that indicated that the treatments received from multiple specialties often have an exponential effect on the overall care of the patient, and that limiting care to one specialty will result in slowing the recovery of the patient and requiring more treatments.

- Other comments received indicated a belief that the proposed change may result in insurers paying for duplicative treatments and requested that the Department craft better language to help reduce duplicative treatments.
- Various comments were received that indicated that the language in the proposed change is vague and will produce more questions than answers resulting in an increase in arbitrations and lawsuits.
- Others commented that the concurrent care rule works in the Workers Compensation system because this system has additional rules that do not exist under the No-fault system, - *i.e.* decertification of health providers, pre-authorization of treatment and testing, treatment protocols, mandatory arbitration; and, therefore the rule would not be effective under No-fault.
- Various comments were received that indicated a belief that the proposed change will reduce the billing of duplicative treatments rendered by health providers.

In light of the comments, and upon further review, the Department was concerned that the rule might be inappropriately applied to deny necessary patient care in instances where two or more licensed health providers provide treatment during the same period of time. Therefore, the "concurrent care" provision as proposed in section 68.1(b)(3)(i) & (ii) has been removed from the revised amendment. Insurers may challenge the medical necessity of health services provided concurrently by multiple providers pursuant to Insurance Department Regulation 68.

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

Some of the comments received addressing this rule were as follows:

- A party recommended various changes to the language of the proposed rule with regard to business entities providing medical services.
- Another comment recommended that the Department amend the language to limit the potential for inappropriate and excessive requests for massive unnecessary documentation.

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

(5) The rule, as originally contained in Part E of Appendix 17-C, appeared to permit only a licensed doctor to prescribe drugs although other licensed providers also have this privilege under law. A comment was received noting that nurse practitioners are permitted under their license to prescribe drugs and inquired if the rule's intent was to only permit a doctor this privilege under No-fault.

This rule was not intended to prevent other licensed health providers, whose license permits, from prescribing drugs, so the word "doctor" was removed.

(6) As a result of comments received, Part F of Appendix 17-C was revised by the Department to clarify that the reimbursement for the purchase of durable medical equipment, medical/surgical supplies, orthopedic footwear and orthotic and prosthetic appliances is the fee payable for such equipment as contained in the New York State Medicaid program at the time the items are provided.

Some of the comments made addressing the rule were as follows:

- One comment noted that the Department should adopt the Medicaid language as contained in 18 NYCRR 505.5(d)(4).
- Another comment expressed concerns about the use of the Medicaid fee schedule because New York State law precludes chiropractors from participating in the Medicaid program. There was concern that there might be the unintended consequence of DME claims being denied on the basis that a chiropractor ordered the equipment.

While the wording of the Department's proposed rule is not identical to the language of the Medicaid rule as noted above, it accomplishes the same purpose in substance.

In addition, chiropractors are permitted to prescribe or provide DME equipment under the No-fault system and the adoption of the Medicaid fee schedule cannot be used by an insurer as a basis to deny payment to a chiropractor for providing the DME as included in that schedule.

Public Service Commission

NOTICE OF ADOPTION

Lightened Regulation by Astoria Energy LLC

I.D. No. PSC-06-04-00008-A

Filing date: Aug. 2, 2004

Effective date: Aug. 2, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-E-0058 approving lightened regulation for Astoria Energy LLC (Astoria), as owner and operator of a 1,000 megawatt generating facility.

Statutory authority: Public Service Law, sections 2(12), (13), 18-a, (21), (22), 64, 65, 66, 67, 68, 69, 70, 71, 72, 72-a, 75, 78, 79, 80, 81, 82, 82-a, 83, 84, 85, 88, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 116, 117, 118, 119-b and 119-c

Subject: Lightened regulation.

Purpose: To provide lightened regulation for Astoria's electric generating facility.

Substance of final rule: The Commission granted lightened regulation for Astoria Energy LLC's proposed 1,000 MW combined cycle natural gas fired merchant electric generating facility in Queens, New York, 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.

(04-E-0058SA1)

NOTICE OF ADOPTION

Petitions for Rehearing and Clarification by Niagara Mohawk Power Corporation

I.D. No. PSC-10-04-00020-A

Filing date: Aug. 2, 2004

Effective date: Aug. 2, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 03-M-0117 directing all utilities that files unauthorized reconnection fees to modify their tariff leaves to eliminate these fees.

Statutory authority: Public Service Law, sections 22, 30-53, 65 and 66

Subject: Petitions for rehearing and clarification of the commission's December 5, 2003 order.

Purpose: To remove unauthorized connection charges from tariff leaves and refund customers for any such fees collected.

Substance of final rule: The Commission approved the petitions for Clarification of the Commission December 5, 2003, Order providing Niagara Mohawk Power Corporation, KeySpan Energy Delivery New York and Long Island, Consolidated Edison Company of New York, Inc., National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Orange and Rockland Utilities, Inc., St. Lawrence Gas Company, Inc., Central Hudson Gas and Electric and Corning Natural Gas Corporation modify their tariff leaves to eliminate reconnection fees not authorized by Chapter 686 of the Laws of 2002 or prior Commission Order. Furthermore, the Commission directed utilities to refund applicable ESCO's and customers any such fees collected as soon as possible but no later than within 60 days of the date of this 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-M-0117SA4)

NOTICE OF ADOPTION

Replacement of Expired Storage Contracts and Capacity Cost Imputation by Rochester Gas & Electric Corporation

I.D. No. PSC-15-04-00028-A

Filing date: July 28, 2004

Effective date: July 28, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-G-0386 authorizing revisions to Rochester Gas and Electric Corporation's (RG&E) schedule for gas service—P.S.C. No. 16.

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

Subject: Tariff amendments.

Purpose: To replace the expired storage Union Gas limited storage contracts and eliminate the capacity cost imputation.

Substance of final rule: The Commission approved a request by Rochester Gas and Electric Corporation to replace the expired Union Storage Contract with BP Canada Energy Company Delivery and Storage Redelivery Service and to eliminate its Capacity Cost Imputation, 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.

(04-G-0386SA1)

NOTICE OF ADOPTION

Lightened Regulation of Utility Operations by Eastman Kodak Company

I.D. No. PSC-15-04-00029-A

Filing date: Aug. 2, 2004

Effective date: Aug. 2, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-M-0388 granting Eastman Kodak Company's (Kodak) lightened regulation of electric, gas, steam and water service within its Kodak Park facility.

Statutory authority: Public Service Law, sections 2(10), (11), (12), (13), (21), (22), (26), (27), 5(b), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 75, 78, 79, 80, 81, 82, 82-a, 83, 84, 85, 88, 89-a, 89-b, 89-c, 89-d, 89-e, 89-f, 89-g, 89-h, 89-i, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

Subject: Lightened regulation.

Purpose: To provide lightened regulation for Kodak's electric, gas, steam and water utility operations within its Kodak Park facility.

Substance of final rule: The Commission approved a request by Eastman Kodak Company for lightened and incidental regulation of electric, gas, steam and water operations within the confines of Kodak Park located in the City of Rochester and the Town of Greece, 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. (04-M-0388SA1)

NOTICE OF ADOPTION

Initial Tariff Schedule by Emerald Green Lake Louise Marie Water Company, Inc.

I.D. No. PSC-16-04-00016-A

Filing date: July 29, 2004

Effective date: July 29, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-W-0349 approving Emerald Green Lake Louise Marie Water Company, Inc.'s (EGLLM) initial tariff schedule, P.S.C. No. 1—Water.

Statutory authority: Public Service Law, section 89-e(2)

Subject: Electronic tariff filing.

Purpose: To set forth the initial rates, charges, rules and regulations under which EGLLM will operate.

Substance of final rule: The Commission authorized Emerald Green Lake Louise Marie Company, Inc.'s new tariff schedule, P.S.C. No. 1 (Original Leaves 1 through 11) to take effect on August 1, 2004 with the exception of the Capital Reserve Fee Statement No. 1, which is suspended to and including November 28, 2004 to allow for further investigation, 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. (04-W-0349SA1)

NOTICE OF ADOPTION

Transfer of Certain Cable System Facilities by Time Warner NY Cable, Inc.

I.D. No. PSC-18-04-00007-A

Filing date: July 29, 2004

Effective date: July 29, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-V-0367 authorizing the transfer of certain cable system facilities by Time Warner NY Cable, Inc. (Time Warner) to Heart of the Catskills Communications, Inc. d/b/a MTC Cable.

Statutory authority: Public Service Law, section 222

Subject: Transfer of cable system facilities.

Purpose: To allow Heart of the Catskills Communications, Inc. d/b/a MTC Cable to acquire cable system facilities from Time Warner.

Substance of final rule: The Commission approved the transfer of certain cable television system assets owned by Time Warner NY Cable, Inc. to Heart of the Catskills Communications Inc. d/b/a MTC Cable, 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. (04-V-0367SA1)

NOTICE OF ADOPTION

2003 Reliability Report by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-19-04-00008-A

Filing date: Aug. 2, 2004

Effective date: Aug. 2, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 00-M-0095 directing Consolidated Edison Company of New York, Inc. (Con Edison) to defer on its books from shareholder funds a ratepayer credit of \$1.5 million.

Statutory authority: Public Service Law, sections 65 and 66

Subject: 2003 reliability performance mechanism.

Purpose: To defer \$1.5 million in shareholder funds for the benefit of ratepayers.

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 \$1.5 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-0095SA5)

NOTICE OF ADOPTION

Net Metering Special Provisions by Central Hudson Gas & Electric Corporation

I.D. No. PSC-20-04-00012-A

Filing date: July 29, 2004

Effective date: July 29, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-E-0546 approving revisions to Central Hudson Gas and Electric Corporation's (Central Hudson) tariff schedule, P.S.C. No. 15—Electricity.

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

Subject: Tariff filing by Central Hudson.

Purpose: To modify net metering special provisions.

Substance of final rule: The Commission approved revisions, with modifications, to sections of Central Gas & Electric Corporation's (Central Hudson) Net Metering Special Provisions within S.C. No. 1 - Residential Service and S.C. No. 6 - Residential Time-of-Use Rates and directed Central Hudson to file a supplement suspending Fifth Revised Leaf No. 212 and Second Revised Leaf No. 213.1 through November 29, 2004, 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.
(04-E-0546SA1)

NOTICE OF ADOPTION

Financing of Ongoing Operations at 50 MW Coal-Fired Generation Facility by Black River Generation LLC

I.D. No. PSC-21-04-00014-A

Filing date: July 29, 2004

Effective date: July 29, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-E-0594 approving a request by Black River Generation LLC (Black River) for the financing of ongoing operations at its 50 MW coal-fired generation facility.

Statutory authority: Public Service Law, section 69

Subject: Financing of ongoing operations at 50 MW coal-fired generation facility.

Purpose: To approve a working capital facility.

Substance of final rule: The Commission authorized Black River Generation LLC to incur up to \$4 million in debt for the financing of ongoing operations at its 50 MW coal-fired power plant, 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.
(04-E-0594SA1)

NOTICE OF ADOPTION

Tariff Filing by Misty Hills Water Corporation

I.D. No. PSC-21-04-00018-A

Filing date: July 28, 2004

Effective date: July 28, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-W-0549 approving revisions to Misty Hills Water Corporation's (Misty Hills) tariff schedule, P.S.C. No. 2—Water.

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

Subject: Electronic filing system.

Purpose: To allow Hilltop Meadows to replace its current water tariff schedule with an electronic tariff.

Substance of final rule: The Commission authorized Misty Hills Water Corporation to replace its current tariff schedule, P.S.C. No. 1—Water with a new tariff schedule, P.S.C. No. 2—Water. The proposed electronic tariff will become effective on August 1, 2004.

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.
(04-W-0549SA1)

NOTICE OF ADOPTION

Tariff Filing by Hilltop Meadows Water-Works Corp.

I.D. No. PSC-21-04-00019-A

Filing date: July 28, 2004

Effective date: July 28, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-W-0550 approving revisions to Hilltop Meadows Water-Works Corp.'s (Hilltop Meadows) tariff schedule, P.S.C. No. 3—Water.

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

Subject: Electronic tariff filing.

Purpose: To allow Hilltop Meadows to convert its current water tariff schedule to an electronic filing system.

Substance of final rule: The Commission authorized Hilltop Meadows Water-Works Corp. to replace its current tariff schedule, P.S.C. No. 2 - Water with a new tariff schedule, P.S.C. No. 3 - Water. The proposed electronic tariff will become effective on August 1, 2004.

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.
(04-W-0550SA1)

NOTICE OF ADOPTION

Water Service by Saratoga Water Services, Inc. (Saratoga)

I.D. No. PSC-21-04-00020-A

Filing date: Aug. 2, 2004

Effective date: Aug. 2, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-W-0560 approving an agreement between Saratoga Water Services, Inc. (SWS) and Charter Concord Const. Inc. (Charter) for the provision of water service and granting a waiver of certain tariff provisions concerning water main extensions.

Statutory authority: Public Service Law, section 89-b

Subject: Water service.

Purpose: To extend water service to Charter's real estate subdivision and grant a waiver for certain tariff provisions.

Substance of final rule: The Commission approved an agreement between Saratoga Water Services, Inc. (SWS) and Charter Concord Const. Inc. for the provision of water service and granted SWS a waiver of tariff provisions that relate to water main extensions, referencing 16 NYCRR, Parts 501 and 502.

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.
(04-W-0560SA1)

NOTICE OF ADOPTION

Water Services by Saratoga Water Services, Inc. (Saratoga)**I.D. No.** PSC-21-04-00021-A**Filing date:** Aug. 2, 2004**Effective date:** Aug. 2, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-W-0561 approving an agreement between Saratoga Water Services, Inc. (SWS) and Parade Ground Village Partnership (Parade Ground) for the provision of water service and granting a waiver of certain tariff provisions concerning water main extensions.

Statutory authority: Public Service Law, section 89-b

Subject: Water service.

Purpose: To extend water service to Parade Ground's real estate subdivision and waive certain tariff provisions.

Substance of final rule: The Commission approved an agreement between Saratoga Water Services, Inc. (SWS) and Parade Ground Village Partnership for the provision of water service and granted SWS a waiver of tariff provisions relating to water main extensions, referencing 16 NYCRR, Parts 501 and 502.

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.

(04-W-0561SA1)

NOTICE OF ADOPTION

Lightened Regulation by Black River Power LLC and Black River Generation LLC**I.D. No.** PSC-22-04-00012-A**Filing date:** July 29, 2004**Effective date:** July 29, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 04-E-0632 approving a request by Black River Power LLC and Black River Generation LLC (Black River) for lightened regulation of their 50 MW coal-fired generation facility.

Statutory authority: Public Service Law, sections 2(13), 5(b), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 75, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

Subject: Lightened regulation.

Purpose: To provide lightened regulation for Black River's coal-fired power plant.

Substance of final rule: The Commission granted lightened regulation for Black River Power LLC and Black River Generation LLC's 50 MW coal-fired power plant, 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.

(04-E-0632SA1)

NOTICE OF ADOPTION

Major Rate Increase by Heritage Hills Water Works Corporation**I.D. No.** PSC-22-04-00015-A**Filing date:** July 28, 2004**Effective date:** July 28, 2004

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

Action taken: The commission, on July 28, 2004, adopted an order in Case 03-W-1182 approving revisions to Heritage Hills Water Works Corporation's (Heritage Hills) tariff schedules, P.S.C. Nos. 67, 68 and 69—Water.

Statutory authority: Public Service Law, section 89-c(8)

Subject: Major rate increase.

Purpose: To increase annual water revenues.

Substance of final rule: The Commission denied Heritage Hills Waterworks Corporation's (Heritage Hills) request to increase annual revenues by \$439,100 or 40.28% and authorized a \$212,090 or 18.5% revenue increase for Heritage Hills, 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-W-1182SA1)

PROPOSED RULE MAKING
HEARING(S) SCHEDULED**Water Rates and Charges by Long Island Water Corporation****I.D. No.** PSC-33-04-00026-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 Long Island Water Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 5—Water.

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

Subject: Water rates and charges.

Purpose: To increase Long Island Water Corporation's annual revenues by \$10,196,834 or 29.5 percent.

Public hearing(s) will be held at: 11:00 a.m., Oct. 27, 2004 at Department of Public Service, One Penn Plaza, Hearing Rm. A, New York, NY.

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

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

Substance of proposed rule: On April 30, 2004, Long Island Water Corporation (the company) filed a request for approval to increase the company's annual revenues by about \$10,196,834 or 29.5%. The company states that the principal reasons for the rate request are due to infrastructure improvements, property tax increases and other increases in operating expenses. On May 19, 2004, the Commission initially suspended the effective date of the filing to September 30, 2004. The company provides water service to approximately 73,000 customers in southwestern Nassau County. The Commission may approve or reject, in whole or in part, or modify the company's request.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-3204

Data, views or argument 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: five days after the last scheduled public hearing.

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-W-0577SA1)

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

Interconnection Agreement between Verizon New York Inc. and Atlantic Telecom, Inc.

I.D. No. PSC-33-04-00012-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, a proposal filed by Verizon New York Inc. and Atlantic Telecom, Inc. for approval of an interconnection agreement executed on June 16, 2004.

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

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Verizon New York Inc. and Atlantic Telecom, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and Atlantic Telecom, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until June 15, 2006, or as extended.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-C-0919SA1)

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

Interconnection Agreement between Verizon New York Inc. and New Horizons Communications Corp.

I.D. No. PSC-33-04-00013-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and New Horizons Communications Corp. for approval of an interconnection agreement executed on May 12, 2004.

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

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Verizon New York Inc. and New Horizons Communications Corp. have reached a negotiated agreement whereby

Verizon New York Inc. and New Horizons Communications Corp. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-C-0920SA1)

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

Purchase of the Retail Suppliers Accounts Receivable by Central Hudson Gas & Electric Corporation

I.D. No. PSC-33-04-00014-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Central Hudson Gas & Electric Corporation (the company) to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 15, to implement the retail access policies outlined in the commission's order of June 14, 2004 in Case 00-E-1273.

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

Subject: Purchase of the retail supplier's accounts receivable.

Purpose: To establish new accounts receivable purchase procedures.

Substance of proposed rule: Central Hudson Gas & Electric Corporation proposes to change its current practice of purchasing the Retail Supplier's accounts receivable "with recourse" to a program whereby, if Central Hudson is providing consolidated billing service to a Retail Supplier, Central Hudson will purchase the Retail Supplier's accounts receivable at a discount, without recourse and take other steps to implement the retail access policies outlined in the Public Service Commission's Order of June 14, 2004 in Case 00-E-1273.

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-E-1273SA7)

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

Two-Meter and Time-Differentiated Metering Options by Central Hudson Gas & Electric Corporation

I.D. No. PSC-33-04-00015-P

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

Proposed action: As detailed more fully in the order approving in part and suspending in part net metering tariff provisions, instituting further

proceedings, and soliciting comments issued July 29, 2004 in Case 04-E-0546, the commission is considering the two-meter and time-differentiated metering options that should be available to the residential photovoltaic and farm waste net metering customers of Central Hudson Gas & Electric Corporation, and whether to adopt the metering options proposed by Central Hudson Gas & Electric Corporation. The commission may adopt, modify or reject, in whole or in part, the relief proposed.

Statutory authority: Public Service Law, sections 65(1), (2), (3), 66(1), (2), (3), (5), (8), (10), (12) and 66-j

Subject: Two-meter and time-differentiated metering options.

Purpose: To approve the options that should be available to the residential photovoltaic and farm waste net metering customers.

Substance of proposed rule: As detailed more fully in the Order Approving In Part And Suspending In Part Net Metering Tariff Provisions, Instituting Further Proceedings, And Soliciting Comments issued July 29, 2004 in Case 04-E-0546, the Commission is considering the two-meter and time-differentiated metering options that should be available to the residential photovoltaic and farm waste net metering customers of Central Hudson Gas & Electric Corporation, and whether to adopt the metering options proposed by Central Hudson Gas & Electric Corporation. The Commission may adopt, modify or reject, in whole or in part, the relief proposed.

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. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-E-0546SA2)

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

New Types of Electricity Meters, Transformers and Auxiliary Devices by Consolidated Edison Company of New York

I.D. No. PSC-33-04-00016-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a request filed by Consolidated Edison Company of New York, Inc. for approval of the Kuhlman voltage transformer type POF 350-2.

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

Subject: Types of electricity meters, transformers, and auxiliary devices.

Purpose: To permit electric utilities in New York State to use the Kuhlman voltage transformer type POF-350-2.

Substance of proposed rule: The Commission will consider a request from Consolidated Edison Company of New York, Inc. for the approval and use of the Kuhlman Electric Company Voltage Transformer Type POF-350-2. Consolidated Edison of New York, Inc. requests the approval of the Kuhlman Voltage Transformer Type POF-350-2 for use in revenue metering applications. The transformer is an outdoor device intended for use in service applications rated at 65kV. The Kuhlman POF-350-2 is capable of providing ANSI revenue metering class accuracy, and has been designed to exceed national standards for accuracy. The cost of these transformers will range from \$2600- \$3000.

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. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-E-0883SA1)

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

Two-Meter and Time-Differentiated Metering Options

I.D. No. PSC-33-04-00017-P

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

Proposed action: As detailed more fully in the order approving in part and suspending in part net metering tariff provisions, instituting further proceedings, and soliciting comments issued July 29, 2004 in Case 04-E-0917, the commission is considering the two-meter and time-differentiated metering options that should be available to the residential photovoltaic and farm waste net metering customers, and whether to extend the same metering options to all electric utilities offering net metering. The commission may adopt, modify or reject, in whole or in part, the relief proposed.

Statutory authority: Public Service Law, sections 65(1), (2), (3), 66(1), (2), (3), (5), (8), (10), (12) and 66-j

Subject: Two-meter and time-differentiated metering options.

Purpose: To approve the options.

Substance of proposed rule: As detailed more fully in the Order Approving In Part And Suspending In Part Net Metering Tariff Provisions, Instituting Further Proceedings, And Soliciting Comments issued July 29, 2004 in Case 04-E-0917, the Commission is considering the two-meter and time-differentiated metering options that should be available to residential photovoltaic and farm waste net metering customers, and whether to extend the same metering options to all electric utilities offering net metering. The Commission may adopt, modify or reject, in whole or in part, the relief proposed.

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. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-E-0917SA1)

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

Rider M—Voluntary Real-Time Pricing by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-33-04-00018-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 9 to become effective Oct. 22, 2004.

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

Subject: Rider M—voluntary real-time pricing.

Purpose: To increase the population of customers eligible to participate in the program.

Substance of proposed rule: Consolidated Edison Company of New York, Inc. made a tariff filing for approval to revise its Rider M — Voluntary Real-Time Pricing to increase the population of customers eligible to participate in the program to become effective on October 22, 2004. The company proposes to eliminate the minimum 100 kW threshold

for Rider M participation, and to permit Rider W customers to participate. It further proposes housekeeping changes to indicate that Riders I and L customers may participate in Rider M, but customers enrolled in any of the economic development programs specified under the tariff's General Rule III-11(W) may not.

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

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

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

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

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

(04-E-0922SA1)

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

Retail Access Program by Central Hudson Gas & Electric Corporation

I.D. No. PSC-33-04-00019-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Central Hudson Gas & Electric Corporation (the company) to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 12, to implement the retail access policies outlined in the commission's order of June 14, 2004 in Case 00-G-1274.

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

Subject: Retail Access Program.

Purpose: To improve the program.

Substance of proposed rule: Central Hudson Gas and Electric Corporation (the Company) proposes changes in its retail access program based on collaborative discussions pursuant to the Public Service Commission's Order of June 14, 2004 in Cases 00-E-1273 and 00-G-1274. The Order called for a retail access collaborative process to discuss potential tariff revisions in the following areas: encouraging marketers to acquire their own capacity; requiring marketers to commit to 12 month terms for the use of such pipeline capacity as the Company may continue to hold for marketer-served loads; developing a mechanism allowing the Company to access pipeline capacity provided by marketers in the event the marketer either defaults or decides to exit the market; reconsidering gas balancing and cashout procedures for marketers; eliminating the practice of showing the pipeline release, storage, and peaking service charges on gas customer bills; considering further consolidated bill and accounts receivable procedures for ESCOs and marketers; design of a program whereby Central Hudson's call center representatives are trained to refer customers to a rotating list of ESCOs and marketers, and the participating ESCOs and marketers agree to guarantee referral customers a set level of earnings for some initial period.

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-1274SA3)

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

Interruptible and Off-Peak Customers by Consolidated Edison Company of New York

I.D. No. PSC-33-04-00020-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 9.

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

Subject: Interruptible and off-peak customers taking service under S.C. Nos. 9 and 12.

Purpose: To address the problem that some of the company's interruptible and off-peak firm customers continue to utilize gas during interruption periods.

Substance of proposed rule: Consolidated Edison Company of New York, Inc. proposes to increase the economic penalties applicable to S.C. Nos. 9 and 12 interruptible and off-peak firm customers who fail to comply with company-directed interruptions and to introduce stricter rules regarding maintenance of such customer's alternate fuel or energy equipment. The proposed tariff changes are intended to address the problem that some of the company's interruptible and off-peak firm customers continue to utilize gas during interruption periods.

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

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

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

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

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

(04-G-0948SA1)

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

Electric Safety Requirements by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-33-04-00021-P

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

Proposed action: The commission is considering whether to adopt new safety requirements for the electric utilities subject to its jurisdiction, such as annual testing and inspection requirements, requiring Consolidated Edison Company of New York, Inc. to eliminate the back log of repairs it must make to its facilities that provide electric service to street lights and traffic signals in New York City, and related matters.

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

Subject: Adoption of electric safety requirements for New York electric utilities, as well as of the nature and scope of the requirements; use of revenue adjustments for utilities that do not achieve target levels for testing and inspection; elimination of the back log of repairs to electric services to street lights and traffic signals in New York City; and other related matters.

Purpose: To consider adoption of electric safety requirements for New York electric utilities and matter related thereto.

Substance of proposed rule: The Public Service Commission is considering whether to adopt electric safety requirements for the electric utilities, both investor-owned and municipal, subject to its jurisdiction. The requirements may include annual testing and inspections of electric facilities (e.g., manholes, service boxes, pad-mounted transformers, poles) and street light poles to which the utilities provide electric service. The Commission is also considering the application of revenue adjustments to provide incen-

tives to utilities to comply with the testing and inspection requirements and ensure that the utilities achieve specified performance targets each year. Other aspects of the proposal before the Commission include various quality assurance, certification, reporting and recordkeeping requirements, adoption of the National Electric Safety Code as the minimum level of safety standards with which the electric utilities must comply, and that Consolidated Edison Company of New York, Inc. eliminate its back log of repairs to street lights and traffic signals owned by the City of New York and take steps to ensure that future repairs are timely made. The Commission will also consider other, related matters raised by interested parties.

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. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(04-M-0159SA1)

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

Application Form for Steam Service by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-33-04-00022-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for steam service—P.S.C. No. 3 to become effective Oct. 22, 2004.

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

Subject: Application form for steam service.

Purpose: To replace the existing application form with an updated version.

Substance of proposed rule: Consolidated Edison Company of New York, Inc. made a tariff filing for approval to replace its existing application form for steam service with an updated version. The new form eliminates certain information required on the old form, such as bank references, and requests certain new information, such as the applicant's contact information and more detailed information about the use of the premises to aid in selection of the appropriate rate.

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. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(04-S-0905SA1)

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

Transfer of Certain Cable System Facilities by Staten Island Cable, LLC

I.D. No. PSC-33-04-00023-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 petition by Staten Island Cable, LLC for approval to transfer certain cable system facilities in New York City to Time Warner Entertainment-Advance/Newhouse Partnership.

Statutory authority: Public Service Law, section 222

Subject: Transfer of certain cable system facilities in the City of New York.

Purpose: To allow Time Warner Entertainment-Advance/Newhouse Partnership to acquire certain cable system facilities from Staten Island Cable, LLC.

Substance of proposed rule: The Public Service Commission is considering a petition submitted by Staten Island Cable, LLC for approval to transfer certain cable system facilities in New York City to Time Warner Entertainment-Advance/Newhouse Partnership.

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. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(04-V-0858SA1)

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

Transfer of Certain Cable System Facilities by Queens Inner Unity Cable System

I.D. No. PSC-33-04-00024-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 petition by Queens Inner Unity Cable System for approval to transfer certain cable system facilities in New York City to Time Warner Entertainment-Advance/Newhouse Partnership.

Statutory authority: Public Service Law, section 222

Subject: Transfer of certain cable system facilities in the City of New York.

Purpose: To allow Time Warner Entertainment-Advance/Newhouse Partnership to acquire certain cable system facilities from Queens Inner Unity Cable System.

Substance of proposed rule: The Public Service Commission is considering a petition submitted by Queens Inner Unity Cable System for approval to transfer certain cable system facilities in New York City to Time Warner Entertainment-Advance/Newhouse Partnership.

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. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(04-V-0859SA1)

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

Transfer of Certain Cable System Facilities by CAT Holdings, LLC

I.D. No. PSC-33-04-00025-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 petition by CAT Holdings, LLC for approval to transfer certain cable system facilities in New York City to Time Warner Entertainment-Advance/Newhouse Partnership.

Statutory authority: Public Service Law, section 222

Subject: Transfer of certain cable system facilities in the City of New York.

Purpose: To allow Time Warner Entertainment-Advance/Newhouse Partnership to acquire certain cable system facilities from CAT Holdings, LLC.

Substance of proposed rule: The Public Service Commission is considering a petition submitted by CAT Holdings, LLC for approval to transfer certain cable system facilities in New York City to Time Warner Entertainment-Advance/Newhouse Partnership.

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. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(04-V-0860SA1)

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

Lightened Regulation by Northrup Grumman Corporation and Northrop Grumman Systems Corporation

I.D. No. PSC-33-04-00027-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 lightly regulate Northrup Grumman Corporation and Northrop Grumman Systems Corporation as the owner and operator of a water distribution system located in Long Island, NY.

Statutory authority: Public Service Law, sections 2(26) and (27), 89-a, 89-b, 89-c, 89-d, 89-e, 89-f, 89-g, 89-h, 89-1, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 116, 117, 118, 119-b and 119-c

Subject: Lightened regulation.

Purpose: To establish the extent of the lightened regulation.

Substance of proposed rule: The Public Service Commission is considering whether to lightly regulate Northrup Grumman Corporation and Northrop Grumman Systems Corporation as the owner and operator of a water distribution system in the Long Island, NY. The Commission may grant, deny or modify, in whole or in part, the relief requested.

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. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(04-W-0886SA1)

Racing and Wagering Board

EMERGENCY RULE MAKING

Drug Testing in Horses

I.D. No. RWB-33-04-00007-E

Filing No. 870

Filing date: Aug. 2, 2004

Effective date: Aug. 2, 2004

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

Action taken: Amendment of sections 4043.6, 4043.7, 4038.18, 4120.10, 4120.11, 4109.7 and 4113.3 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 301 and 902

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

Specific reasons underlying the finding of necessity: These rule amendments will provide an effective mechanism to deter the use in the racing horse of the potent tranquilizers reserpine and fluphenazine. Both drugs are being abused in an effort to gain an improper advantage in pari-mutuel racing; however the existing time-based structure of the equine drug rule does not provide effectively for the sanction of abusers and deterrence. These rule amendments will provide an effective mechanism to deter the use of erythropoietin and darbepoietin in the racing horse. These substances are being abused in an effort to gain an improper advantage in pari-mutuel racing; however the existing equine drug rule does not provide an effective means for the sanction of abusers and deterrence. The continued abuse of these drugs and substances, which have no legitimate use in pari-mutuel racing, undermines public confidence in the integrity of racing with resultant loss of willing participants and bettors. This would result in the loss of significant revenues to the State, municipalities, breeders and the industry. In addition, the continued undeterred use of these drugs and substances poses a threat to the safety of both the equine and human racing participants. An emergency rulemaking is necessary because the Board has determined that emergency adoption is necessary for the preservation of the general welfare and public safety and that standard rulemaking procedures would be contrary to the public interest.

Subject: The testing of horses for the drugs reserpine and fluphenazine and for the antibodies of erythropoietin and darbepoietin, as well as the consequences of positive tests.

Purpose: To provide for effective testing for the drugs reserpine and fluphenazine and for the antibodies of erythropoietin and darbepoietin and the consequences of positive tests, in order to deter their use in horses that compete in pari-mutuel racing. These rules will provide for the exclusion from racing of those horses that are the subject of a positive test until there is a subsequent negative test. Claimants of horses will have the option of voiding any claim based upon the report of a positive test.

Text of emergency rule: AMEND Part 4043 (Drugs Prohibited and Other Prohibitions) to add a new Rule 4043.6:

4043.6 Erythropoietin and Darbepoietin

(a) A finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from a horse shall establish that the horse is unfit to race in any subsequent race, subject to the provisions of paragraph b.

(b) Any horse that has been the subject of a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse shall not be entered or allowed to race in any subsequent race until the horse has tested negative for the antibodies of erythropoietin or darbepoietin in a test conducted by the laboratory.

(c) Notwithstanding any inconsistent provision of this Part, a horse shall not be subject to disqualification from the race and from any share of the purse in the race, and the trainer of the horse shall not be subject to application of trainer's responsibility based upon the finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse.

AMEND Rule 4038.18 (Certain Voidable Claims) to add new paragraphs b and c and reletter existing paragraphs b and c to be d and e respectively:

(a) Post-race positive. Should the analysis of a post-race blood or urine sample taken from a claimed horse result in a post-race positive test, the claimant's trainer shall be promptly notified in writing by the stewards and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the stewards by the claimant or his trainer.

(b) *Erythropoietin and darbepoietin*. Should the analysis of a post-race blood or urine sample taken from a claimed horse result in a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse, the claimant's trainer shall be promptly notified in writing by the stewards and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the stewards by the claimant or his trainer.

(c) *Reserpine and fluphenazine*. Notwithstanding any inconsistent provision of Part 4043, should the analysis of a post-race blood or urine sample taken from a claimed horse result in a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from that horse, the claimant's trainer shall be promptly notified in writing by the stewards and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the stewards by the claimant or his trainer.

[(b)] (d) Upper neurectomy or unreported lower neurectomy. Where an upper neurectomy as defined in subdivision (a) of section 4025.31 of this Subchapter or a lower neurectomy which has not been reported as required in subdivision (b) of section 4025.31 has been performed on a horse prior to the race in which it is claimed, the claimant shall have the option to void said claim upon written notice to the stewards from the claimant or his trainer given within 10 days following the date of the claim.

[(c)] (e) Undeclared pregnant mare. Where a pregnant mare has been claimed which pregnancy has not been disclosed as required in section 4038.17 of this Part, the claimant shall have the option to void the claim upon written notice to the stewards from the claimant or his trainer within 10 days following the date of the claim.

HARNESS

AMEND Part 4120 (Drugs Prohibited and Other Prohibitions) by adding a new Rule 4120.10:

4120.10 Erythropoietin and Darbepoietin

(a) A finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from a horse shall establish that the horse is unfit to race in any subsequent race, subject to the provisions of paragraph b. Such horse shall be placed on the stewards' list.

(b) Any horse that has been the subject of a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse shall not be entered or allowed to race in any subsequent race until the horse has tested negative for the antibodies of erythropoietin or darbepoietin in a test conducted by the laboratory.

(c) Notwithstanding any inconsistent provision of this Part, a horse shall not be subject to disqualification from the race and from any share of the purse in the race and the trainer of the horse shall not be subject to application of trainer's responsibility based upon the finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse.

AMEND Rule 4109.7 (Certain Voidable Claims) to add new paragraphs b and c and reletter paragraphs b and c to be d and e respectively:

(a) Post-race positive. Should the analysis of a post-race blood or urine sample taken from a claimed horse result in a post-race positive test, the claimant's trainer shall be promptly notified in writing by the judges and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the judges by the claimant or his trainer.

(b) *Erythropoietin and darbepoietin*. Should the analysis of a post-race blood or urine sample taken from a claimed horse result in a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse, the claimant's trainer shall be promptly notified in writing by the judges and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the judges by the claimant or his trainer.

(c) *Reserpine and fluphenazine*. Notwithstanding any inconsistent provision of Part 4120, should the analysis of a post-race blood or urine sample taken from a claimed horse result in a finding by the laboratory

that the drug reserpine or the drug fluphenazine was present in the sample taken from that horse, the claimant's trainer shall be promptly notified in writing by the judges and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the judges by the claimant or his trainer.

[(b)] (d) Upper neurectomy or unreported lower neurectomy. Where an upper neurectomy as defined in subdivision (a) of section 4025.31 of this Subchapter or a lower neurectomy which has not been reported as required in subdivision (b) of section 4025.31 has been performed on a horse prior to the race in which it is claimed, the claimant shall have the option to void said claim upon written notice to the judges from the claimant or his trainer given within 10 days following the date of the claim.

[(c)] (e) Undeclared pregnant mare. Where a pregnant mare has been claimed which pregnancy has not been disclosed as required in section 4038.17 of this Part, the claimant shall have the option to void the claim upon written notice to the judges from the claimant or his trainer within 10 days following the date of the claim.

AMEND Rule 4113.3 to add a new paragraph i:

4113.3. Reasons for placing a horse on the steward's list.

A horse shall be placed on the steward's list at each track for the following reasons:

(a) it has a tube in its throat;

(b) it is dangerous or unmanageable. Such horse must work out before the judges on the main track, secure permission of the judges to qualify and then qualify in two consecutive qualifying races before release from the steward's list;

(c) it is sick, lame or unfit to race. Such horse must perform before the State veterinarian and be certified fit to race by the State veterinarian before release from the steward's list;

(d) it is unable to start satisfactorily behind the starting gate. Such horse must work out behind the starting gate, be approved by the starter and then qualify once before release from the steward's list;

(e) it has been high nerved;

(f) it has performed poorly. Such horse shall qualify once before release from the steward's list.

(g) it has tested positively for a drug. Such horse shall qualify in a workout and thereafter test negative for drugs before release from the steward's list.

(i) it has been the subject of a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from the horse. Such horse shall test negative for the antibodies of erythropoietin or darbepoietin in a test conducted by the laboratory before release from the steward's list.

THOROUGHBRED:

4043.7 Reserpine and Fluphenazine

(a) Notwithstanding any inconsistent provision of this Part, a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from a horse shall result in the disqualification of the horse from the race and from any share of the purse in the race.

(b) The trainer of a horse which has been the subject of a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from that horse shall not be subject to application of trainer's responsibility based solely upon the finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample.

HARNESS:

4120.11 Reserpine and Fluphenazine

(a) Notwithstanding any inconsistent provision of this Part, a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from a horse shall result in the disqualification of the horse from the race and from any share of the purse in the race.

(b) The trainer of a horse which has been the subject of a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from that horse shall not be subject to application of trainer's responsibility based solely upon the finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample.

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 October 30, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Robert A. Feuerstein, Counsel, Racing and Wagering Board, One Watervliet Ave. Ext., Suite 2, Albany, NY 12206-1668, (518) 453-8460, e-mail: info@racing.state.ny.us

Regulatory Impact Statement

Statutory Authority: The Board is authorized to promulgate these rules pursuant to Racing, Pari-Mutuel Wagering and Breeding Law Section 101, 301, and 902. The Board has general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. The Board is authorized to promulgate rules necessary to prevent the administration of drugs or other improper acts to racehorses prior to a race. The Legislature has directed that the Board promulgate any rules necessary to implement equine drug testing so that the public's confidence and the high degree of integrity in racing are assured.

Legislative Objectives: To enable the New York State Racing and Wagering Board to preserve the integrity of pari-mutuel racing.

Needs and Benefits: These rule amendments are necessary to provide an effective mechanism to address and deter the use in the racing horse of the tranquilizers reserpine and fluphenazine, as well as the substances erythropoietin and darbepoietin. Both drugs are being abused in an effort to gain an improper advantage in pari-mutuel racing. The substances erythropoietin and darbepoietin, which stimulate red cell production, are similarly being abused. This information is derived from tests on samples from horses in competition and research conducted by the Board's Equine Drug Testing and Research Program at Cornell University. The Board's existing time-based equine drug rules do not provide effectively for the determination of use or sanctions. The continued and undeterred use of these drugs and substances undermines public confidence in the integrity of racing with corresponding loss of wagering handle. Wagering handle generates significant revenues for the State, municipalities, breeders and tracks. In addition, the continued abuse of the regulated drugs and substances poses a threat to the health of the horse and the safety of both the equine and human participants.

Costs: These rules will impose no new costs for state or local governments. The rule will not impose any new costs on the Racing and Wagering Board for the implementation and continued administration of the rule. The costs of manpower, testing and incidental expenses will be accomplished within existing budget limitations. These rules will impose no costs upon regulated parties in order to comply with limitations concerning the use of the regulated drugs and substances. The only costs are those associated with the sanctions in the event of non-compliance.

Paperwork: There is no additional paperwork required by or associated with these rule amendments.

Local Government Mandates: This rule would impose no local government mandates.

Duplication: There are no other state or federal requirements similar to the provisions contained in the rule amendment.

Alternative Approaches: There are no other significant alternatives to this rule, which was drafted to accomplish the stated benefits with the least negative impact upon the pari-mutuel racing industry. No action would fail to address the existing problems associated with continued abuse of the drugs and substances that are the subject of these rules.

Federal Standards: The rule does not exceed any minimum standards of the federal government because there are no applicable federal rules.

Compliance Schedule: Compliance can be accomplished immediately.

Regulatory Flexibility Analysis

1. **Effect of Rule:** The rules do not apply to and thus will not adversely affect local government. The rules will impact all licensed owners and trainers of racehorses that seek to compete in pari-mutuel racing. There are thousands of such licensed owners and/or trainers. The number of horses owned or trained by such licensees may range from one to hundreds. These individuals operate businesses that generally employ less than one hundred persons.

2. **Compliance Requirements:** There are no required reporting or recordkeeping requirements for small businesses. There are no professional services that are likely to be needed to comply with these rules. The rules do not impose any technological requirements on the industry. The compliance component of the rules, *i.e.* the exclusion of a horse from pari-mutuel racing competition, is a consequence of the report of a positive test. In that situation, the horse may not participate again until the horse has been retested without a positive result.

3. **Professional Services:** There are no professional services required to comply with the proposed rules.

4. **Compliance Costs:** There are few anticipated compliance costs. The licensees should already be monitoring use of drugs and other substances to assure conformity with Board rules. There will be a potential loss of purse monies associated with the exclusion of horses until a clearance test. This cost cannot be estimated due to the competitive nature of horse racing. During this time there might be lower costs associated with the care of the

horse if the horse is not maintained in active training status. The cost of the necessary retest will be borne by the Board.

5. **Economic and Technological Feasibility:** There are no technological requirements associated with compliance. There should be no costs associated with compliance. Erythropoietin and darbepoietin have no legitimate use in the racing horse and therefore no affirmative compliance requirement exists. The drugs reserpine and fluphenazine are tranquilizers for which alternatives exist. Horsemen may comply with the prohibitions of the rule by use of alternative drugs at an equal or lesser cost.

6. **Minimizing Adverse Impact:** The Board attempted to minimize adverse impact, consistent with the need to assure public safety and general welfare, by excluding a horse from competition only for the limited period necessary for a negative retest and by providing for limitation of disciplinary sanctions from the otherwise general application of the trainer's responsibility rule.

7. **Small Business and Local Government Participation:** The Board provided notice of the concepts and general requirements of these rules to various segments of the regulated racing industry. Among those segments were the representative horsemen's associations. These associations (one per track) include most if not all of the small business industry participants (owners and trainers) as members.

Rural Area Flexibility Analysis

1. **Types and estimated numbers of rural areas:**

The rules will impact all licensed owners and trainers of racehorses that seek to compete in pari-mutuel racing. Many of the licensees affected by these rules are located within "rural areas" as that term is defined in New York State Executive Law Section 481(7). The impact of compliance of those entities located in rural areas should be substantially the same as, if not identical to that in other than rural areas.

2. **Reporting, recordkeeping and other compliance requirements:**

There are no required reporting or recordkeeping requirements for small businesses. There are no professional services that are likely to be needed to comply with these rules. The rules do not impose any technological requirements. The compliance component of the rules, *i.e.* the exclusion of a horse from pari-mutuel racing competition, is a consequence of the report of a positive test. In that situation, the horse may not participate again until the horse has been retested without a positive result.

3. **Costs:**

There are few anticipated compliance costs. The licensees should already be monitoring use of drugs and other substances to assure conformity with Board rules. There will be a potential loss of purse monies associated with the exclusion of horses until a clearance test. This cost cannot be estimated due to the competitive nature of horse racing. During this time there might be lower costs associated with the care of the horse if the horse is not maintained in active training status. The cost of the necessary retest will be borne by the Board.

4. **Minimizing adverse impact:**

As a consequence of the location of horsemen in rural areas, these rules have similar impact on rural areas as on non-rural areas of the State. The geographic location of the horses and horsemen is incidental to the substance of the rule. Consequently, there is no way to design the rule to minimize impact on rural areas.

5. **Rural area participation:**

The Board provided notice of the concepts and general requirements of these rules to various segments of the regulated racing industry. Among those segments were the representative horsemen's associations. These associations (one per track) include most if not all of the rural area small business industry participants (owners and trainers) as members.

Job Impact Statement

A job impact statement is not submitted with this notice because the New York State Racing & Wagering Board has determined that these rules will not have a substantial adverse impact on jobs and employment opportunities. The area of potential impact is that which will result from the exclusion of a horse from pari-mutuel competition until such time as the horse tests negative for the drug or substance that resulted in the ineligibility to participate. For the drugs reserpine and fluphenazine, it is estimated that the period of exclusion following the reported result of a positive test would be very short. Based upon the facts that these drugs may not be lawfully administered to the horse within one week before the start of the racing program and the typical ten-day period between the collection of a sample and report of a positive test, there should be a relatively short period of exclusion provided the horse is subject to a prompt retest. Although reserpine and fluphenazine are detectable beyond the one-week period, this situation differs little from the existing situations involving other drugs. Based upon experience, there will be relatively few positive

tests and no substantial adverse impact on jobs for industry participants such as trainers and grooms. For the substances erythropoietin and darbepoietin, it is estimated that the period of exclusion following the reported result of a positive test would range from several weeks to a period in excess of 120 days. However, based upon the results of preliminary testing, which involved approximately 37,000 horses, it is estimated that less than one percent of horses actually tested will test positive. All horses are not subject to post-race testing. Although a single horse may be excluded potentially for a period of several months, most owners and trainers do not race only one horse. Thus there should be no likelihood of substantial adverse impact on jobs due to the temporary exclusion of these horses from racing. Furthermore, these horses will still require care even if not actively training or racing.

The New York State Racing and Wagering Board has made this determination based upon the above information and its knowledge and familiarity with the conduct of pari-mutuel wagering throughout New York State.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Trifecta Wagering

I.D. No. RWB-33-04-00006-EP

Filing No. 869

Filing date: Aug. 2, 2004

Effective date: Aug. 2, 2004

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

Action taken: Amendment of section 4011.22(i) of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1) and 227

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

Specific reasons underlying the finding of necessity: This rule amendment provides authorization for the conduct of trifecta wagering on thoroughbred stakes races, handicap races or allowance races in the event there are five betting entries in the race, rather than the mandatory minimum of six as prescribed by the current rule. Vast amounts of wagers would be subject to loss in the event trifecta wagering was cancelled due to the reduction in available betting entries from six to five. This would result in the loss of significant revenues to the State, breeders and the industry. An emergency rule making is necessary because the Board has determined that emergency adoption is necessary for the preservation of the general welfare and that standard rule making procedures would be contrary to the public interest.

Subject: Trifecta wagering in thoroughbred stakes races, handicap races or allowance races in those situations where there are five betting entries.

Purpose: To authorize the conduct of trifecta wagering in thoroughbred stakes races, handicap races or allowance races in those situations where there are five betting entries at the discretion of the board steward. This would avoid the mandatory cancellation of the trifecta betting pool, thereby preserving the wagering opportunities and corresponding revenues associated with this type of wager.

Text of emergency/proposed rule: Paragraph i of 9 N.Y.C.R.R. Section 4011.22 Trifecta is hereby amended to read:

(i) No trifecta wagering shall be conducted on any race having fewer than six betting entries, *provided however, that in a stakes race, handicap race or allowance race no trifecta wagering shall be conducted on any race having fewer than five betting entries.* If fewer than six betting entries start in other than a stakes race, handicap race or allowance race, the trifecta shall be declared off and the gross pool refunded. *If fewer than five betting entries start in a stakes race, handicap race or allowance race, the trifecta shall be declared off and the gross pool refunded. The board's steward may, in the exercise of discretion to protect the wagering public, require that there be at least six betting entries for the conduct of trifecta wagering.* If a trifecta pool is cancelled and if time permits, with the approval of the board's steward, a track may schedule exacta wagering in place of trifecta wagering.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire October 30, 2004.

Text of rule and any required statements and analyses may be obtained from: Mark A. Stuart, Assistant Counsel, Racing and Wagering Board, One Watervliet Ave. Ext., Suite 2, Albany, NY 12206, (518) 453-8460, e-mail: info@racing.state.ny.us

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

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

Regulatory Impact Statement

Statutory authority: Section 101(1) of the Racing, Pari-Mutuel Wagering and Breeding Law vests the Board with general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. Section 227 of the Racing, Pari-Mutuel Wagering and Breeding Law provides that the Board shall make rules regulating the conduct of pari-mutuel betting.

Legislative objectives: This amendment advances the legislative objective of regulating the conduct of pari-mutuel wagering in a manner designed to maintain the integrity of racing while generating a reasonable revenue for the support of government.

Needs and benefits: This rule amendment is necessary to address those situations where, in Graded Stakes, handicap and allowance races, the trifecta wagering opportunity would be eliminated or cancelled because there are not six betting interests, as required by the existing Rule 4011.22(i). The benefit of the rule amendment would be the retention of the wagering opportunities with the corresponding preservation of revenues to the State, localities, and the racing and breeding industries.

It will prevent the loss of trifecta wagering to out-of-state horseracing events. When a trifecta is lost because of an inadequate field size, the bettor immediately looks to another track (most likely out-of-state) for another trifecta betting opportunity. Some do switch from the cancelled trifecta bet to an exacta on the same race but many do not. At off track sites, many in-state and out-of-state simulcast signals are accepted simultaneously. Multiple types of bets (like exactas) and exotic types of bets (like trifectas) are the most popular forms of pari-mutuel wagering. In these simulcast venues, the loss of in-state trifecta pools will result in the loss of wagering on New York State racing to trifecta wagering on out-of-state racing.

The rule applies to graded stakes, handicap and allowance races because these races are highly competitive. These higher class races find the horses competing more consistently and truer to bettor's expectations. The lower class races may lack this consistency. The horses competing in a lower class race may have infirmities or lack inherent racehorse ability that hinders their individual production of consistent performance.

The role of the Board steward will be to ensure that the integrity of the race is safeguarded at all times for the betting public. The Board steward is uniquely qualified by his knowledge of the horses, track conditions, jockeys, wagering situations, and the interrelationships among them all. With this knowledge, the Board steward has the ability to identify situations where collusion or mischief may occur, and prevent a trifecta pool from continuing in light of a questionable scratch. The steward will scrutinize the health of the horse, track conditions, and wagering schemes to ensure that the decision to scratch the sixth horse in a trifecta opportunity is based on a bona fide racing decision rather than a decision intended to exploit a trifecta wagering opportunity. In fact, these expert qualities are the basis for a steward's current authority in making discretionary determinations and rulings. The Board steward is the only public official of the three track stewards who has an express duty to protect the betting public. Therefore, it is only logical that the Board steward be allowed to make such expert determinations.

Costs: This rule amendment affects only the required minimum number of betting interests in thoroughbred trifecta Graded Stakes, handicap and allowance races. The rule will impose no new costs for state or local governments. The rule will impose no costs upon regulated parties. The rule will not impose any new costs on the Racing & Wagering Board for the implementation and continued administration of the rule.

Betting pools are weakened when a trifecta wagering pool is lost because of field size. Situations that cause a field to drop from 6 to 5 range from weather conditions to track conditions to injury or illness to a horse. The amounts wagered into trifecta pools vary widely depending on the time of the year. A recent NYRA day and their slowest day of the year (Dec. 11th) found one of the trifecta pools over \$200,000 with many others over \$150,000. On Travers Day in August at Saratoga or Belmont Day in June at Belmont Park, the trifecta pools are in the range of \$2-\$3 million dollars per race.

The cost of not implementing this rule can best be gauged in part by looking at the impact on State taxes on exotic wagering. For every dollar bet on a NYRA race, nearly 86 cents of that dollar is wagered off-track.

The State tax on an exotic bet like a trifecta is 1.6% when this bet is made on-track. It is the same as the 1.6% tax on an on-track exacta. At the 250 New York off-track betting branches however, the State tax on a trifecta is 1.5% while on an exacta it is only 0.5%. At the OTB teletheaters the State tax on a trifecta is 3.0% while the State tax on an exacta is 1.5%. Therefore, State tax proceeds are adversely impacted when an exacta replaces a cancelled trifecta.

Paperwork: There is no additional paperwork required by or associated with this rule amendment.

Local government mandates: This rule would impose no local government mandates.

Duplication: There are no other state or federal requirements similar to the provisions contained in the rule amendment.

Alternative approaches: There are no other significant alternatives to this rule, which was narrowly drafted to accomplish the stated benefits in thoroughbred races of significant merit and interest.

One alternative that was considered was a proposal to limit the rule to Grade I stakes, such as the Travers Stakes or the Belmont Stakes. It was determined that the competitive nature of handicap and allowance races is such that the rule could be applied to these races without impairing the integrity of the race. If the Board did not adopt this rule, the state would lose tax revenue from trifecta wagering at simulcast venues and racing associations would suffer wagering pool losses, most likely to other racing associations located out of state.

Federal standards: The rule does not exceed any minimum standards of the federal government because there are no applicable federal rules.

Compliance schedule: This emergency rule amendment is effective upon filing. Compliance can be accomplished immediately without need for modification of existing procedures.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because the rule will not impose any adverse economic impact or reporting, record-keeping or other compliance requirements on small businesses or local governments. The rule will apply only to associations and corporations that conduct pari-mutuel thoroughbred racing and those facilities that accept wagers on races conducted at those facilities. Those associations, corporations and entities do not qualify as a small business or local government.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because the rule amendment will not impose any adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in rural areas.

The Racing & Wagering Board has made this determination based upon the nature of the rule amendment, which merely changes the number of required betting interests for trifecta wagering on certain thoroughbred races. Trifecta wagering is an existing form of approved wagering. Further, the Racing & Wagering Board has made these determinations based upon its knowledge and familiarity with the various pari-mutuel wagering operations throughout New York State.

Job Impact Statement

A job impact statement is not submitted with this notice because the New York State Racing & Wagering Board has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. This is evident from the nature of the rule, which preserves wagering opportunities and associated revenues. The New York State Racing and Wagering Board has made this determination based upon its knowledge and familiarity with pari-mutuel wagering operations throughout New York State.

Workers' Compensation Board

EMERGENCY RULE MAKING

Waiver Agreements

I.D. No. WCB-33-04-00001-E

Filing No. 864

Filing date: July 28, 2004

Effective date: July 28, 2004

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

Action taken: Amendment of section 300.36 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 32, 117 and 141

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

Specific reasons underlying the finding of necessity: WCL § 32, as amended Chapter 635 of the Laws of 1996, permits the parties to a workers' compensation claim to enter into an agreement settling upon and determining the compensation and other benefits due to the claimant or the claimant's dependents, subject to approval by the Board. At first, few waiver agreements were submitted to the Board, and a meeting was held before a Board Commissioner in all cases to question the parties about the agreement. However, in the late 1990's, the number of waiver agreement submitted to the Board increased so dramatically that it was not feasible to hold a meeting in every case in which an agreement was filed. Moreover, most agreements submitted to the Board were routine. Beginning in 2000, Board Commissioners began reviewing routine agreements administratively, without holding a meeting to discuss the agreement with the parties. The majority of settlement agreements are reviewed and approved by the Board without the need for a meeting with the parties. On April 22, 2004, the Appellate Division, Third Department rendered a Memorandum and Order in Matter of Hart v. Pageprint/Dekalb, __ A.D.2d __, 775 N.Y.S.2d 195 (3rd Dept., Slip Op. No. 94339, 2004), finding that the administrative review of waiver agreements was invalid insofar as it conflicted with the terms of 12 NYCRR 300.36. The purpose of this amendment is to amend 12 NYCRR 300.36, consistent with WCL § 32, to permit the Board to review and approve or disapprove routine waiver agreements administratively, without the need for a meeting with the parties, which benefits everyone. Requiring meetings for all waiver agreements would greatly increase the time it takes for such an agreement to be approved as the Board has limited calendar time. Additionally, the Board has numerous agreements which have been processed administratively and are ready for approval, but cannot be approved due to the above referenced decision. If the Board is to continue to efficiently and timely review and issue decisions regarding waiver agreements, it must process the routine agreements administratively.

Subject: Waiver agreements.

Purpose: To provide for the administrative review of waiver agreements.

Text of emergency rule: Subdivision (b) of section 300.36 of Title 12 NYCRR is amended to read as follows:

(b) Any agreement submitted to the board for approval shall be on a form prescribed by the chair or, alternatively, contain the information prescribed by the chair. [For the purposes of section 32 of the Workers' Compensation Law and this section, an agreement shall be deemed submitted when it is received by the board at the time a hearing is conducted to question the parties about the agreement. No agreement shall be approved for a period of 10 calendar days after submission to the board.]

Subdivision (c) of section 300.36 of Title 12 NYCRR is amended to read as follows:

(c) The [submission] receipt of an agreement [to] by the board for approval shall act as a stay on all related proceedings before the board.

Subdivision (e) is renumbered (f), a new subdivision (e) is added and renumbered (f) is amended to read as follows:

(e) The agreement shall be reviewed by the chair, a designee of the chair, a member of the board, or a Workers' Compensation Law Judge, who will make a determination whether to approve or disapprove the agreement. The chair, designee of the chair, member of the board, or Workers' Compensation Law Judge reviewing the agreement may approve

or disapprove the agreement administratively, based on a review of the record before the board, or may choose to schedule a meeting to question the parties about the agreement. If the agreement is reviewed administratively, the Board shall advise the parties in writing of the date the agreement shall be deemed submitted for the purposes of Section 32 of the Workers' Compensation Law and this section. If a meeting is scheduled to question the parties about the agreement, the agreement will be deemed submitted for the purposes of Section 32 of the Workers' Compensation Law and this section at such meeting. No agreement shall be approved for a period of 10 calendar days after submission to the board.

([e]f) The board will advise the parties of the approval or disapproval of all agreements by duly filing and serving a notice of [decision] approval or disapproval.

Subdivisions (f), (g), (h) and (i) of Section 300.36 of 12 NYCRR are renumbered (g), (h), (i) and (j).

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 October 25, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Workers' Compensation Board, 20 Park St., Rm. 401, Albany, NY 12207, (518) 473-8626, e-mail: OfficeofGeneralCounsel@wcb.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.36. Workers' Compensation Law Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Workers' Compensation Law Section 117(1) further authorizes the Board to adopt reasonable rules consistent with the provisions of the Workers' Compensation Law and the Labor Law.

Section 141 of the Workers' Compensation Law provides that the Chair shall be the administrative head of the Board and authorizes the Chair, in the name of the Board, to enforce all the provisions of the WCL and to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports. Section 142 of the Workers' Compensation Law confers upon the Board the power to hear and determine all claims for compensation or benefits and to approve agreements.

Section 32 of the Workers' Compensation Law provides that whenever a claim for workers' compensation has been filed, the claimant or the deceased claimant's dependents and the employer or its insurance carrier may enter into a written agreement settling upon and determining the compensation and other benefits due to the claimant or the claimant's dependents. Such agreement shall not be binding unless approved by the Board. Once approved by the Board, the agreement shall be final and conclusive upon the parties. An agreement may be modified at any time by written agreement of all the interested parties provided it is approved by the Board.

2. Legislative objectives:

Section 73 of Chapter 635 of the Laws of 1996 amended Section 32 of the Workers' Compensation Law to permit the parties to a workers' compensation claim to enter into an agreement settling upon and determining the compensation and other benefits due to the claimant or the claimant's dependents. This rule would amend the regulations adopted in 1997 implementing Section 73 of Chapter 635 of the Laws of 1996 to provide for the administrative review of waiver agreements.

3. Needs and benefits:

Prior to the enactment of Section 73 of Chapter 635 of the Laws of 1996, a workers' compensation claimant was not permitted to permanently waive his or her right to benefits under the Workers' Compensation Law (hereinafter "WCL"). The 1996 amendment to WCL § 32 permits the parties to a workers' compensation claim to enter into an agreement settling upon and determining the compensation and other benefits due to the claimant or the claimant's dependents, subject to approval by the Board. At first, few waiver agreements were submitted to the Board, and a meeting was held before a Board Commissioner in all cases to question the parties about the agreement. However, in the late 1990's, the number of waiver agreement submitted to the Board increased so dramatically that it was not feasible to hold a meeting in every case in which an agreement was filed. Moreover, most agreements submitted to the Board were routine. Beginning in 2000, Board Commissioners began reviewing routine agreements administratively, without holding a meeting to discuss the agreement with the parties. The majority of settlement agreements are reviewed

and approved by the Board without the need for a meeting with the parties. On April 22, 2004, the Appellate Division, Third Department rendered a Memorandum and Order in *Matter of Hart v. Pageprint/Dekalb*, ___ A.D.2d ___, 775 N.Y.S.2d 195 (3rd Dept., Slip Op. No. 94339, 2004), finding that the administrative review of waiver agreements was invalid insofar as it conflicted with the terms of 12 NYCRR 300.36. On April 29, 2004, the Board filed an emergency regulation with the Department of State, effective immediately, to amend 300.36 to permit the Board to review waiver agreements submitted pursuant to Workers' Compensation Law § 32 administratively. The purpose of this amendment is to permanently amend 12 NYCRR 300.36, consistent with WCL § 32, to permit the Board to review and approve or disapprove routine waiver agreements administratively, without the need for a meeting with the parties.

Permitting the Board to review and approve or disapprove routine waiver agreements administratively, without the need for a meeting benefits all participants to the workers' compensation system. The Board receives approximately 1,000 new waiver agreements each month. Requiring meetings for all waiver agreements would greatly increase the length of time it would take to review each agreement, as the Board has limited calendar time and only a small number of Board Commissioners. Additionally, claimants would be required to take time during the work day to appear at a Board district office for the meeting. The waiver agreements that are reviewed administratively are routine and the claimants represented. The Board is working to ensure that the parties who have entered into a routine waiver agreement have that agreement reviewed and a decision issued without delay. By redirecting the simple or routine cases from the meeting calendar and processing them administratively, the complex cases that remain on the meeting calendar will progress more quickly.

In addition, this proposed amendment makes two minor changes to 12 NYCRR 300.36 which reflect the current practice of the Board, and have minimal impact on regulated parties. These changes (1) require the Board to stay all proceedings in a case upon the receipt by the Board of a waiver agreement and (2) reflect that the written approval or disapproval by the Board of a waiver agreement is a "notice of approval" or "notice of disapproval," rather than a "notice of decision."

In essence this rule conforms the regulations to practices and procedures that have been in effect since 2000.

4. Costs:

The proposed amendment will not result in any new or additional costs to private regulated parties, State, local governments or the Workers' Compensation Board. This proposal merely adds a second process for the review and approval or disapproval of waiver agreements, which does not require personal appearances before the Board by the parties. By eliminating the need for personal appearances before the Board for all waiver agreements, parties will experience savings in travel costs, appearance costs and claimants will not have to take time away from work to attend.

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants in the workers' compensation system, this proposal merely adds a second process for the review and approval or disapproval of waiver agreements, which does not require personal appearances before the Board by the parties.

6. Paperwork:

The proposed amendment does not add any reporting requirements.

7. Duplication:

This amendment will not duplicate any existing Federal or State requirements.

8. Alternatives:

One alternative discussed was to hold a meeting in every case to question the parties about the agreement submitted. However, in most instances, waiver agreements submitted to the Board are routine, questioning of the parties concerning the agreement is not necessary, and a meeting would result in a delay in the processing of such agreements. Pursuant to the proposed amendment, the Board could schedule a meeting to discuss the agreement with the parties when circumstances so warrant.

Representatives of the Board have been meeting with different constituent groups across the State at which this topic is discussed. At a meeting with representatives of both carriers and claimants, it was suggested, to improve the administrative process and alleviate concerns expressed, that the Board modify its internal processing when reviewing waiver agree-

ments administratively. The Board is currently reviewing this suggestion to determine impact and feasibility of implementation.

9. Federal standards:

There are no federal standards applicable to this proposed amendment.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage.

Small businesses that are self-insured will also be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage.

Small businesses which are self-insured employers and self-insured local governments may voluntarily enter into waiver agreements settling upon and determining claims for compensation. This amendment will speed the processing and approval of such agreements.

2. Compliance requirements:

The amendment will not require any additional reporting or record-keeping by small businesses or local governments.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. This amendment is intended simply to speed the processing and approval of waiver agreements submitted pursuant to Workers' Compensation Law § 32.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed amendment. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed amendment to comply.

6. Minimizing adverse impact:

This proposed amendment is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business participation and local government participation:

This emergency regulation is necessitated by a Memorandum and Order of the Appellate Division, Third Department issued April 22, 2004 in *Matter of Hart v. Pageprint/Dekalb*, __ A.D.2d __, __ N.Y.S.2d __ (3rd Dept., Slip Op. No. 94339, 2004). Since the decision was issued when representatives of the Board meet with different constituent groups across the State this topic is discussed. While some members of the regulated community have indicated a preference that a meeting be held in every case to question the parties about the agreement submitted, the majority of comments received support the amendment allowing the Board to review and approve routine agreements administratively. Further, the Board has received numerous inquiries from the regulated community regarding the approval of waiver agreements they have pending. Many of the individuals the Board has met with and/or spoken with regarding this subject are representatives of small businesses and local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rule applies to all claimants, insurance carriers and self-insured employers in all rural areas of the state which are subject to the provisions of the Workers' Compensation Law.

2. Reporting, recordkeeping and other compliance requirements:

The amendment will not impose any additional reporting, recordkeeping or compliance requirements on regulated parties in rural areas.

3. Costs:

This proposal will not impose any compliance costs on rural areas. This amendment is intended simply to speed the processing and approval of waiver agreements submitted pursuant to Workers Compensation Law § 32.

4. Minimizing adverse impact:

This proposed amendment is designed to minimize adverse impact for regulated parties in rural areas. This proposed amendment provides only a benefit to regulated parties in rural areas.

5. Rural area participation:

This emergency regulation is necessitated by a Memorandum and Order of the Appellate Division, Third Department issued April 22, 2004 in *Matter of Hart v. Pageprint/Dekalb*, __ A.D.2d __, __ N.Y.S.2d __ (3rd Dept., Slip Op. No. 94339, 2004). Since the decision was issued when representatives of the Board meet with different constituent groups across the State this topic is discussed. While some members of the regulated community have indicated a preference that a meeting be held in every case to question the parties about the agreement submitted, the majority of comments received support the amendment allowing the Board to review and approve routine agreements administratively. Further, the Board has received numerous inquiries from the regulated community regarding the approval of waiver agreements they have pending. Many of the individuals the Board has met with and/or spoken with regarding this subject are located in rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended simply to speed the processing and approval of waiver agreements submitted pursuant to WCL § 32 and will therefore ultimately benefit the participants to the workers' compensation system.