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

Captive Cervids

I.D. No. AAM-31-04-00008-E
Filing No. 822
Filing date: July 14, 2004
Effective date: July 14, 2004

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

Action taken: Repeal of section 62.8 and addition of Part 68 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18(6), 72 and 74

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

Specific reasons underlying the finding of necessity: The proposed repeal of section 62.8 of 1 NYCRR and the adoption of 1 NYCRR Part 68 will help to prevent the introduction of chronic wasting disease (CWD) into New York State and permit it to be detected and controlled if it were to arise within the captive cervid population of the State. CWD is an infectious and communicable disease of deer belonging to the Genus Cervus (including elk, red deer and sika deer) and the Genus Odocoileus (including white-tailed deer and mule deer). CWD has been detected in free-ranging deer and elk in Colorado, Wyoming, Nebraska, Wisconsin, South Dakota, New Mexico and Illinois. It has been diagnosed in captive deer and elk herds in South Dakota, Nebraska, Colorado, Oklahoma, Kansas, Minnesota, Montana, Wisconsin and the Canadian provinces of Saskatchewan and Alberta.

The origin of CWD is unknown. The mode of transmission is suspected to be from animal to animal. The disease is progressive and always fatal. There is no live animal test for CWD, so it is impossible to determine whether a live animal is positive, nor is there a vaccine to prevent the disease. The incubation period is lengthy and 3 to 5 years of continued surveillance is needed with no new infection found before a herd can be declared free of CWD through quarantine. The United States Secretary of Agriculture has declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program. On December 24, 2003, the USDA proposed CWD regulations establishing a Federal CWD Herd Certification Program and governing the interstate movement of captive deer and elk. The proposed Federal regulations permit herd owners to enroll in State programs that it determines are equivalent to the proposed Federal program. The Department believes that the State CWD herd certification program established by this rule is equivalent to the proposed Federal program.

New York State has 564 entities engaged in raising approximately 9,944 deer and elk in captivity with a value of several million dollars, and many of these entities have imported captive bred deer and elk from other states, including Wisconsin, a state with confirmed CWD. The rule repeals a prohibition on the importation of captive cervids susceptible to CWD and adopts a prohibition on the importation or movement of captive cervids into or within the State unless a permit authorizing such movement has been obtained from the Department prior to such importation or movement. Except for cervids moving directly to slaughter, permits shall be issued only for captive cervids that meet the health requirements established by the rule.

The rule establishes general health requirements for captive cervids, special provisions for captive cervids susceptible to CWD, requirements for CWD Certified Herd Program, requirements for a CWD Monitored Herd Program, requirements for approved susceptible cervid slaughter facilities, requirements for the importation of captive susceptible cervids for immediate slaughter and requirements for the management of CWD positive, exposed or suspect herds of captive cervids. This is an essential disease control measure that will help to prevent the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the captive cervid population of the State.

The promulgation of this regulation on an emergency basis is necessary because the introduction and spread of CWD into and within New York State would be devastating from both an animal health and economic standpoint given the threat the disease poses to the approximately 9,944 captive deer in the State and the 564 entities which raise them.

Subject: Captive cervids.

Purpose: To prevent the introduction and spread of chronic wasting disease into and within the State.

Substance of emergency rule: Section 62.8 of 1 NYCRR is repealed.

Section 68.1 of 1 NYCRR sets forth definitions for "CWD susceptible cervid," "CWD exposed cervid," "CWD positive cervid," "CWD negative cervid," "CWD suspect cervid," "CWD infected zone," "captive," "CWD Certified Herd Program," "Cervid," "Chronic Wasting Disease," "Commingling," "Department," "Enrollment Date," "Herd," "Herd Inventory,"

"CWD Herd Plan," "CWD Herd Status," "CWD positive herd," "CWD Suspect herd," "Special purpose herd," "CWD Exposed herd," "CWD certified herd," "Official identification," "CWD Monitored herd," "Owner," "Premises," "CWD Premises plan," "Quarantine," "State animal health official," "Status date," "Official test," and "USDA/APHIS."

Section 68.2 of 1 NYCRR establishes general health requirements for captive cervids including requirements relating to mandatory reporting, the movement of captive cervids, enforcement, facilities, fencing, herd integrity, sample collection and premises location.

Section 68.3 of 1 NYCRR establishes special provisions for captive cervids susceptible to chronic wasting disease including requirements relating to importation, enrollment in the CWD Herd Certification program, Monitored herd program, licenses and permits issued by the Department of Environmental Conservation, fencing, premises inspection and record keeping.

Section 68.4 of 1 NYCRR establishes requirements for the CWD Certified Herd program including requirements for captive susceptible cervid operations engaged in breeding and/or the sale or removal of live cervids from the premises for any purposes, the establishment of a CWD herd status, sampling and testing, animal identification, annual physical herd inventory and additions to CWD Certified Herd program herds.

Section 68.5 of 1 NYCRR establishes requirements for CWD Monitored Herds including requirements for special purpose herds consisting of one or more susceptible cervids, sampling and testing, additions to CWD monitored herds, and animal identification.

Section 68.6 of 1 NYCRR establishes requirements for approved susceptible cervid slaughter facilities, including requirements for holding pens, sample retention and holding facilities, susceptible cervid offal disposal plans and inspection.

Section 68.7 of 1 NYCRR establishes requirements for the importation of captive susceptible cervids for immediate slaughter including requirements for source herds, permits, direct movement, samples, waste and slaughter.

Section 68.8 of 1 NYCRR establishes requirements for the management of CWD positive, exposed or suspect herds including premises quarantine, establishment of a herd plan, depopulation, cleaning and disinfection, future land use restrictions, restocking constraints and timeframes, fencing requirements, risk analysis, official herd quarantines, elimination of high-risk cervids within the herd, special fencing requirements and the disposal of carcasses.

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 11, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: John Huntley, DVM, State Veterinarian, Director, Division of Animal Industry, Department of Agriculture and Markets, One Winners Circle, Albany, NY 12235, (518) 457-3502

Regulatory Impact Statement

1. Statutory Authority:

Section 18(6) 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.

Section 72 of the Law authorizes the Commissioner to adopt and enforce rules and regulations for the control, suppression or eradication of communicable diseases among domestic animals and to prevent the spread of infection and contagion.

Section 72 of the Law also provides that whenever any infectious or communicable disease affecting domestic animals shall exist or have recently existed outside this State, the Commissioner shall take measures to prevent such disease from being brought into the State.

Section 74 of the Law authorizes the Commissioner to adopt rules and regulations relating to the importation of domestic or feral animals into the State. Subdivision (10) of said Section provides that "feral animal" means an undomesticated or wild animal.

2. Legislative Objectives:

The statutory provisions pursuant to which these regulations are proposed are aimed at preventing infectious or communicable diseases affecting domestic animals from being brought into the State. The Department's proposed repeal of 1 NYCRR section 62.8 and adoption of 1 NYCRR Part 68 will further this goal by preventing the importation of deer which may be infected with chronic wasting disease (CWD), and permitting CWD to be detected and controlled if it were to arise within the captive cervid population of the State.

3. Needs and Benefits:

CWD is an infectious and communicable disease of deer belonging to the Genus Cervus (including elk, red deer and sika deer) and the Genus Odocoileus (including white-tailed deer and mule deer). It has been detected in Colorado, Wyoming, Nebraska, Montana, Oklahoma, South Dakota, Wisconsin and, most recently, New Mexico. Initially, it was found to be present in captive herds of elk and white-tailed and mule deer. It has now been confirmed in free-ranging white-tailed deer, elk and mule deer in Colorado, Nebraska, Wisconsin, Saskatchewan and New Mexico.

The origin of CWD is unknown. The mode of transmission is suspected to be from animal to animal. The disease is progressive and always fatal. There is no live animal test for CWD, so it is impossible to determine whether a live animal is positive, nor is there a vaccine to prevent the disease. The incubation period is lengthy and 3 to 5 years of continued surveillance is needed with no new infection found before a herd can be declared free of CWD through quarantine. The United States Secretary of Agriculture has declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program.

New York State has 564 entities engaged in raising approximately 9,944 deer and elk in captivity with a value of several million dollars, and many of these entities import captive bred deer and elk from other states, including Wisconsin, a state with confirmed CWD. This rule repeals a rule that had prohibited, with certain exceptions, the importation of captive cervids susceptible to CWD and adopts a prohibition on the importation or movement of captive cervids into or within the State unless they are accompanied by a valid certificate of veterinary inspection and a permit authorizing such importation or movement has been obtained from the Department, in consultation with the New York State Department of Environmental Conservation. The rule establishes general health requirements for captive cervids, special requirements for captive cervids susceptible to CWD, requirements for a CWD Certified Herd Program, requirements for a CWD Monitored Herd Program, requirements for approved susceptible cervid slaughter facilities, requirements for the importation of captive susceptible cervids for immediate slaughter and requirements for the management of CWD positive, exposed or suspect herds of captive cervids. This is an essential disease control measure that will help to prevent the introduction of CWD into New York State, and permit it to be detected and controlled if it were to arise within the captive cervid population of the State.

4. Costs:

(a) Costs to regulated parties:

There are approximately 564 entities raising a total of approximately 9,944 captive deer in New York State. These farms produce venison with a value of approximately $1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk range from $500 to $2,000 per animal. The value of deer range from $50 to $1,500 per animal. Using the most recent annual import data, average values of $1,250 per animal for elk and $775 per animal for deer, the prior prohibition on the importation of captive cervids susceptible to CWD prevented the importation of 195 elk with a value of $243,750 and 165 deer with a value of $127,875 on an annual basis. It is not known how many captive cervids will meet the health requirements of 1 NYCRR Part 68 or otherwise qualify for importation or movement within the State of New York. The number and value of the captive cervids that will continue to be prohibited from importation will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with white-tailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer in the State that do not have white-tailed deer. Assuming that half of these farms do not have adequate fences, that they have an average of 20 adult cervids and a 160-acre square enclosure, it would require two miles of fence extensions to raise the fence to eight feet. Assuming the farms will use post extensions and wire or tape at a cost of $1.00 a foot, the cost to each of the 41 farms that will need to upgrade their fences will be $10,560.

The rule also requires that captive cervid operations, with the exception of special purpose herds, have proper restraining facilities, chutes, gates and corrals to capture and restrain cervids for diagnostic testing and inventory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms

that will need to upgrade their capture and restraint facilities. The owners of those farms will have to build catch pens and chutes at an approximate cost of $10,000 to $20,000 per farm.

White-tailed deer experience a five to ten percent death loss when handled for purposes such as testing. The majority (1,975 out of 2,950) of captive white-tailed deer in the State are in quarantined premises and will not have to be handled. Handling the other white-tailed deer can be expected to produce a total death loss of 49 to 98 deer on 43 farms for a loss of $1,700 to $3,400 per farm per year, assuming the deer each have a value of $1,500.

The labor costs associated with the handling of captive cervids required by this Part will average three person days, or $250.00 per year. It is estimated that the recordkeeping associated with this rule will require less than one hour annually on the average farm.

The 102 herds designated as special purpose herds will require an area in which to keep, for testing purposes, the heads of captive cervids that have died. It is estimated that this will result in a one-time cost of $400 to $500 per farm.

(b) Costs to the agency, state and local governments:

There will be no cost to local government or the State, other than the cost to the Department. The cost to the Department will be between $500 and $1,000 per farm annually, or between $121,500 and $243,000 annually to carry out necessary inspections and to collect and process samples.

(c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry.

5. Local Government Mandates:

The proposed amendments would not impose any program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The rule requires that captive cervids being imported or moved into or within New York State be accompanied by a permit. Such permits will be issued by the Department in consultation with the New York State Department of Environmental Conservation after a determination that the deer in question qualify for importation. A valid certificate of veterinary inspection must also accompany all cervids imported into New York State, with the exception of those moving directly to slaughter. Accurate records documenting purchases, sales, interstate shipments, intrastate shipments, escaped cervids and deaths (including divested cervids) will have to be established by herd owners and maintained for at least sixty months for all captive susceptible cervids. A report of the required annual inventory of CWD certified herds must be made and submitted to the Department. For each natural death, clinical suspect and cervid harvested from a CWD Monitored Herd, tag numbers must be entered into the CWD Monitored Herd record along with the corresponding information that identifies the disposition of the carcass. A CWD herd plan must be developed by each herd owner, in conjunction with the Department and USDA/APHIS officials containing the procedures to be followed for positive or trace herds that will be implemented within sixty days of a diagnosis of CWD.

7. Duplication:

None.

8. Alternatives:

Various alternatives, from the imposition of a total prohibition against the importation of all cervids, to no restriction on their importation were considered.

Due to the spread of CWD in other states and the threat that this disease poses to the State's captive deer population, the proposed rule was determined to be the best method of preventing the introduction of this disease into New York State and permitting it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of captive cervids susceptible to CWD was not necessary if health standards and a permit system were established. It was also concluded that a failure to regulate the importation of cervids was an alternative that posed an unacceptable risk of introducing CWD to the State's herds of captive cervids.

9. Federal Standards:

The federal government currently has no standards restricting the interstate movement of cervids due to CWD, but has proposed CWD regulations establishing a Federal CWD Herd Certification Program and governing the interstate movement of captive deer and elk. The proposed Federal regulations permit herd owners to enroll in State programs that are determined to be equivalent to the proposed Federal program. The Department believes that the State CWD program established by this rule is equivalent to the proposed Federal program.

10. Compliance Schedule:

It is anticipated that regulated parties can immediately comply with the rule.

Regulatory Flexibility Analysis

1. Effect of Rule:

There are approximately 564 small businesses raising a total of approximately 9,944 captive cervidae (the family that includes deer and elk) in New York State. The rule would have no impact on local governments.

2. Compliance Requirements:

Regulated parties are prohibited from importing captive cervids, other than those moving directly to slaughter, without a valid certificate of veterinary inspection. In addition, regulated parties importing or moving captive cervids into the State or within the State for any purpose must first obtain a permit from the Department, in consultation with the New York State Department of Environmental Conservation, authorizing such movement.

Captive cervid operations, with the exception of special purpose herds, must have proper restraining facilities to capture and restrain cervids for testing, as well as storage facilities for samples.

Captive cervid operations must have a continuous barrier fence and maintain herd integrity.

Regulated parties will be able to import CWD susceptible cervids only if they are moved from a herd which has achieved CWD certified herd status and the state of origin has adopted mandatory reporting and quarantine requirements equivalent to those set forth in 1 NYCRR Part 68. Regulated parties may not hold CWD susceptible cervids in captivity in New York State unless they are enrolled in the CWD Certified Herd Program or the CWD Monitored Herd Program or have a license or permit issued by DEC pursuant to ECL section 11-0515. Application for enrollment of existing herds in the CWD Certified Herd Program and CWD Monitored Herd Program must take place within thirty days of the effective date of 1 NYCRR Part 68.

Regulated parties with herds containing at least one CWD susceptible cervid must have a perimeter fence that is at least eight feet high. Captive CWD susceptible cervid facilities and perimeter facilities must be inspected and approved by a state or federal regulatory representative. Captive CWD susceptible cervid herds established prior to the effective date of 1 NYCRR Part 68 must meet the facility standards within six months of said date.

Regulated parties must keep accurate records documenting purchases, sales, interstate shipments, escaped cervids and deaths, including harvested cervids, and maintain them for at least sixty months for all captive CWD susceptible cervid operations. The owners of all CWD susceptible cervid herds enrolled in the CWD Certified Herd Program shall establish and maintain accurate records that document the results of the annual herd inventory.

All captive CWD susceptible cervid herds that are not special purpose herds or held at an approved CWD susceptible cervid slaughter facility must participate in the CWD Certified Herd program. Samples must be submitted for testing as required by the Program. As of the first annual inventory after the effective date of 1 NYCRR Part 68, each herd member and herd addition shall have a minimum of two official/approved unique identifiers. At least one of these identification systems shall include visible identification. A physical herd inventory shall be conducted between ninety days prior to and ninety days following the annual anniversary date established based upon the CWD Certified Herd Program enrollment date. Cervids that were killed or died during the course of the year must be tested. A state or federal animal health official must validate the annual inventory. A report of the validated annual inventory containing all man-made identification of each animal must be submitted to the Department.

All special purpose herds consisting of one or more CWD susceptible cervid shall participate in the CWD Certified Herd Program. Samples shall be submitted for testing as required by the Program. Each herd addition must have a minimum of two official/approved unique identifiers affixed to the animal. Carcass and sample identification tags must be affixed to unidentified harvested captive cervids, natural deaths, and clinical suspects.

Approved CWD susceptible slaughter facilities must have holding pens constructed to prevent contact with captive or free-ranging cervid populations. Sample retention and holding facilities must be adequate to preserve and store diagnostic tissues for seventy-two hours after slaughter. A CWD susceptible cervid offal disposal plan must be developed, implemented and approved by the Department in consultation with the Department of Environmental Conservation.

Herd owners, in conjunction with the Department and USDA/APHIS, must develop CWD herd plans for any CWD positive, exposed or suspect herd. Perimeter fencing adequate to prevent fence line contact with captive and free-ranging cervids must be established for all CWD positive herds and positive premises. The carcasses of CWD positive cervids that are depopulated shall be disposed of in accordance with disposal plans approved by the Department and USDA/APHIS.

The rule would have no impact on local governments.

3. Professional Services:

It is not anticipated that regulated parties will have to secure any professional services in order to comply with this rule.

4. Compliance Costs:

(a) Costs to regulated parties:

There are approximately 564 entities raising a total of approximately 9,944 captive deer in New York State. These farms produce venison with a value of approximately $1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk ranges from $500 to $2,000 per animal. The value of deer ranges from $50 to $1,500 per animal. Using the most recent annual import data, average values of $1,250 per animal for elk and $775 per animal for deer, it is estimated that the prior prohibition on the importation of captive cervids susceptible to CWD prohibited the importation of 195 elk with a value of $243,750 and 165 deer with a value of $127,875 on an annual basis. The number and value of the captive cervids that will be prohibited from importation as a result of this rule will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with white-tailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer that do not have white-tailed deer. Assuming that half of these farms do not have adequate fences; that these farms have on average 20 adult cervids and a 160-acre, square, enclosure, it would require 2 miles of extensions to raise the fence to eight feet. Assuming the farms will use post extensions and wire or tape, the cost to each of the 41 farms that will need to upgrade their fences will be $10,560, at $1.00 per foot.

The rule also requires that captive cervid operations, with the exception of special purpose herds have proper restraining facilities, chutes, gates and corrals to capture and restrain cervids for diagnostic testing and inventory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms with 1,646 deer that will need to upgrade their capture and restraint facilities. The owners of those farms will have to build catch pens and chutes at an approximate cost of $10,000 to $20,000 per farm.

White-tailed deer experience a five percent to ten percent death loss when handled for purposes such as testing. The majority, 1,975 out of 2,950, of captive white-tailed deer in the State are in quarantined premises and will not have to be handled. Handling the other captive white-tailed deer in the State can be expected to produce a death loss of 49 to 98 deer on 43 farms for a loss of $1,700 to $3,400 per farm per year, assuming a $1,500 value per deer.

The labor costs associated with the handling of captive cervids required by this Part will average three person days or $250.00 per year per farm. It is estimated that the recordkeeping associated with this rule will require less than one hour each year on the average farm.

The 102 herds designated as special purpose herds will require an area in which to keep, for testing purposes, the heads of captive cervids that have died. It is estimated that this will result in a one-time cost of $400 to $500 per farm.

(b) Costs to the agency, state and local governments:

There will be no cost to local government or the State, other than the cost to the Department. The cost to the Department will be between $500 and $1,000 per farm annually, or between $121,500 and $243,000 to carry out necessary inspections and to collect and process samples.

(c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry.

5. Economic and Technological Feasibility:

The economic and technological feasibility of complying with the proposed amendments has been assessed. The rule is economically feasible. Although the regulation of the importation of captive deer into New York State will have an economic impact on the entities that imported a total of 360 captive deer into New York State in 2002, the economic consequences of the infection or exposure to CWD of the approximately 9,944 captive cervids already in the State would be far greater. The rule is technologically feasible. Captive deer imported into the State are already required to be accompanied by a health certificate. Endorsement of that certificate with the number of the permit issued by the Department presents no technological problem. The structural, recordkeeping and testing requirements of the rule involve existing technologies that are already in use.

6. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-b(1), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those which comply with the proposed USDA requirements for state CWD programs and which are necessary to prevent the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of cervids susceptible to CWD was not necessary, given the imposition of a permit system, health requirements and a CWD Certified Program. These requirements will protect the health of the State's captive cervid population, while giving herd owners access to healthy animals from states with comparable regulatory programs.

The rule would have no impact on local governments.

7. Small Business and Local Government Participation:

In developing this rule, the Department has consulted with representatives of the approximately 400 deer owners known to the Department. In addition, the Department is notifying public officials and private parties of the adoption of the proposed rule on an emergency basis, as required by the State Administrative Procedure Act.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas:

The approximately 400 entities raising captive deer in New York State are located throughout the rural areas of New York.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

The rule requires that captive cervids being imported or moved into or within New York State be accompanied by a permit. Such permits will be issued by the Department in consultation with the New York State Department of Environmental Conservation after a determination that the deer in question qualify for importation. A valid certificate of veterinary inspection must also accompany all cervids imported into New York State, with the exception of those moving directly to slaughter. Accurate records documenting purchases, sales, interstate shipments, intrastate shipments, escaped cervids and deaths (including divested cervids) will have to be established by herd owners and maintained for at least sixty months for all captive susceptible cervids. A report of the required annual inventory of CWD certified herds must be made and submitted to the Department. For each natural death, clinical suspect and cervid harvested from a CWD Monitored Herd, tag numbers must be entered into the CWD Monitored Herd record along with the corresponding information that identifies the disposition of the carcass. A CWD herd plan must be developed by each herd owner, in conjunction with the Department and USDA/APHIS officials containing the procedures to be followed for positive or trace herds that would be implemented within sixty days of a diagnosis of CWD. It is not anticipated that regulated parties in rural areas will have to secure any professional services in order to comply with the rule.

3. Costs:

(a) Costs to regulated parties:

There are approximately 564 entities raising a total of approximately 9,944 captive deer in New York State. These farms produce venison with a value of approximately $1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk ranges from $500 to $2,000 per animal. The value of deer ranges from $50 to $1,500 per animal. Using the most recent annual import data, average values of $1,250 per animal for elk and $775 per animal for deer, it is estimated that the prior prohibition on the importation of captive cervids susceptible to CWD prohibited the importation of 195 elk with a value of $243,750 and 165 deer with a value of $127,875 on an annual basis. The number and value of the captive cervids that will be prohibited from importation as a result of this rule will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with white-tailed deer.

DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer that do not have white-tailed deer. Assuming that half of these farms do not have adequate fences; that these farms have on average 20 adult cervids and a 160-acre, square, enclosure, it would require 2 miles of extensions to raise the fence to eight feet. Assuming that the farms will use post extensions and wire or tape, since at that height, only a visual barrier is needed, the cost to each of the 41 farms that will need to upgrade their fences will be $10,560, at $1.00 per foot.

The rule also requires that captive cervid operations, with the exception of special purpose herds have proper restraining facilities, chutes, gates and corrals to capture and restrain cervids for diagnostic testing and inventory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms that will need to upgrade their capture and restraint facilities. Since the Department currently owns three portable deer chutes, the owners of those farms will only have to build catch pens and chutes at an approximate cost of $10,000 to $20,000 per farm.

White-tailed deer experience a five percent to ten percent death loss when handled for purposes such as testing. The majority, 1,975 out of 2,950, of captive white-tailed deer in the State are in quarantined premises and will not have to be handled. Handling the other captive white-tailed deer in the State can be expected to produce a death loss of 49 to 98 deer on 43 farms for a loss of $1,700 to $3,400 per farm per year, assuming a $1,500 value per deer.

The labor costs associated with the handling of captive cervids required by this Part will average three person days or $250.00 per year per farm. It is estimated that the recordkeeping associated with this rule will require less than one hour each year on the average farm.

The 102 herds designated as special purpose herds will require an area in which to keep, for testing purposes, the heads of captive cervids that have died. It is estimated that this will result in a one-time cost of $400 to $500 per farm.

(b) Costs to the agency, state and local governments:

There will be no cost to local government or the State, other than the cost to the Department. The cost to the Department will be between $500 and $1,000 per farm annually, or between $121,500 and $243,000 to carry out necessary inspections and to collect and process samples.

(c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry.

4. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those which comply with the proposed USDA requirements for state CWD programs and which are necessary to prevent the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of cervids susceptible to CWD was not necessary, given the imposition of a permit system, health requirements and a CWD Certification Program. These requirements will protect the health of the State's captive cervid population, while giving herd owners access to healthy animals from states with comparable regulatory programs.

5. Rural Area Participation:

In developing this rule, the Department has consulted with representatives of the approximately 400 deer owners known to the Department. In addition, the Department is notifying public officials and private parties of the adoption of the proposed rule on an emergency basis, as required by the State Administrative Procedure Act.

Job Impact Statement

1. Nature of Impact:

It is not anticipated that there will be an impact on jobs and employment opportunities.

2. Categories and Numbers Affected:

The number of persons employed by the 564 entities engaged in raising captive deer in New York State is not known.

3. Regions of Adverse Impact:

The 564 entities in New York State engaged in raising captive deer are located throughout the rural areas of the State.

4. Minimizing Adverse Impact:

By helping to protect the approximately 9,944 captive deer currently raised by approximately 564 New York entities from the introduction of CWD, this rule will help to preserve the jobs of those employed in this agricultural industry.

Department of Civil Service

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-31-04-00001-P

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

Proposed action: Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Law.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Law, by increasing the number of positions of Investigator from 113 to 121.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-31-04-00002-P

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

Proposed action: Amendment of Appendix(es) 1 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 exempt class in the Executive Department.

Text of proposed rule: Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading of "Office for Technology," by deleting therefrom the position of Director of Public Information and by increasing the number of positions of Special Assistant from 1 to 2.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-31-04-00003-P

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

Proposed action: Amendment of 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 State University of New York.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the State University of New York under the subheading "State University Colleges," by increasing the number of positions of ϕSecretary 2 at SUC at Oswego from 3 to 4.

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-31-04-00004-P

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

Proposed action: Amendment of 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 Department of Family Assistance.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Temporary and Disability Assistance," by adding thereto the position of ϕInformation Security Officer (1).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-31-04-00005-P

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

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To delete positions from and classify positions in the non-competitive class in the State Department Service and Executive Department.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the State Department Service under the subheading "All State Departments and Agencies," by deleting therefrom the title of Supervising Greenskeeper; and, in the Executive Department under the subheading "Office of Parks, Recreation and Historic Preservation," by adding thereto the positions of Assistant Golf Course Superintendent (5), Golf Course Superintendent 1 (8) and Golf Course Superintendent 2 (4).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-31-04-00006-P

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

Proposed action: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To delete positions from and classify positions in the non-competitive class in the Executive Department.

Text of proposed rule: Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of Parks, Recreation and Historic Preservation," by deleting therefrom the positions of Building Restoration Specialist 1 (2) and Building Restoration Specialist 2 (1) and by adding thereto the positions of Building Restoration Specialist (3).

Text of proposed rule and any required statements and analyses may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Emission Standards for Motor Vehicles and Motor Vehicle Engines

I.D. No. ENV-14-04-00003-E
Filing No. 830
Filing date: July 20, 2004
Effective date: July 20, 2004

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

Action taken: Amendment of sections 200.9, 218-4.1 and 218-4.2 of Title 6 NYCRR.

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

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

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

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

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

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

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

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

Text of emergency rule: Subpart 4 ZERO EMISSION VEHICLE SALES MANDATE

§ 218-4.1 ZEV percentages.

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

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

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

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

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

Table 1: Northeast Phase In Multiplier

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

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

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

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

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

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

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

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

2006 AT PZEV/ZEV requirement. A manufacturer who qualifies for the [2004] *2005* AT PZEV/ZEV carryforward and generates twice as many PZEV credits as necessary for model-year [2005] *2006* has through model-year [2008] *2009* to comply with the model-year [2006] *2007* AT PZEV/ZEV requirement.

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

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

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

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

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

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

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

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

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

(Section 200.1 through 200.8 remains unchanged)

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

218-1.2(d)	Clean Air Act 42 U.S.C. Section 7543 (1988) as amended by Public Law 101-549 (1990)	**
	Clean Air Act 42 U.S.C. Section 7507 (1988) as amended by Public Law 101-549 (1990)	**
218-1.2(e)	California Health and Safety Code, Section 39003 (2000)	** ***
218-1.2(j)	California Vehicle Code, Section 165 (2000)	** ***
218-1.2(k)	California Code of Regulations, Title 13, Section 1900(b)(3) (12-22-99)	** ***
218-1.2(v)	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
218-1.2(w)	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ ++
218-1.2(x)	California Code of Regulations, Title 13, Section 1905 (7-3-96)	** ***
218-1.2(ad)	California Code of Regulations, Title 13, Section 1960.5 (9-30-91)	** ***
218-1.2(ai)	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** ***+ ++
218.-1.2(al)	40 CFR Section 86.1827-01 (July 1, 2000)	*
218-1.2(aq)	California Code of Regulations, Title 13, Section 2112 (11-27-99)	** ***
218-1.2(at)	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ ++
218-1.2(au)	California Code of Regulations, Title 13, Section 1900(b)(21) (12-07-01) and (5-24-02)	** ***+ ++
218-2.1(a)	California Code of Regulations, Title 13, Section 1956.8 (7-25-01)	** ***
	California Code of Regulations, Title 13, Section 1956.9 (3-6-96)	** ***
	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1960.1.5 (9-30-91)	** ***
	California Code of Regulations, Title 13, Section 1960.5 (9-30-91)	** ***
	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ ++
	California Code of Regulations, Title 13, Section 1964 (2-23-90)	** ***
	California Code of Regulations, Title 13, Section 1965 (12-22-99)	** ***
	California Code of Regulations, Title 13, Section 1968.1 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 1976 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 1978 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2030 (9-25-97)	** ***
	California Code of Regulations, Title 13, Section 2031 (9-25-97)	** ***
	California Code of Regulations, Title 13, Section 2047 (5-31-88)	** ***
	California Code of Regulations, Title 13, Section 2065 (7-25-01)	** ***
	California Code of Regulations, Title 13, Section 2235 (9-17-91)	** ***
	California Code of Regulations, Title 13, Article 1.5 (7-25-01)	** ***
218-2.1(a)	Clean Air Act 42 U.S.C. Section 7521 (1988) as amended by Public Law 101-549 (1990)	**
218-2.1(b)(5)	Clean Air Act 42 U.S.C. Section 7401 et seq. (1988) as amended by Public Law 101-549 (1990)	**
218-2.1(b)(8)	California Health and Safety Code, Section 43656 (2000)	***
218-2.1(d)	Clean Air Act 42 U.S.C. Section 7507 (1988) as amended by Public Law 101-549 (1990)	**
218-3.1	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++
	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
218-3.1(a)	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** ***+ ++
218-3.1(b)	California Code of Regulations, Title 13, Section 1960.1 (12-07-01) and (5-24-02)	** *** ++
	California Code of Regulations, Title 13, Section 1961 (5-30-01)	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) (12-07-01) and (5-24-02)	** ***+ ++

	California Code of Regulations, Title 13, Section 1961(d) (12-07-01) and (5-24-02)	** ***+ ++
218-4.1	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ [++]
218-4.2	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)*	** ***+ [++]
218-5.1(a)	California Code of Regulations, Title 13, Section 2061 (10-23-96)	** ***
	California Code of Regulations, Title 13, Section 2062 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2065 (7-25-01)	** ***
	California Code of Regulations, Title 13, Section 2106 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2107 (11-27-99)	** ***
	California Code of Regulations, Title 13, Article 1.5 (7-25-01)	** ***
218-5.1(b)	California Code of Regulations, Title 13, Section 2061 (10-23-96)	** ***
	California Code of Regulations, Title 13, Section 2062 (11-27-99)	** ***
	California Code of Regulations, Title 13, Section 2065 (7-25-01)	** ***
	California Code of Regulations, Title 13, Article 1.5 (7-25-01)	** ***
218-5.2(a)	California Code of Regulations, Title 13, Section 2065 (7-25-01)	** ***
	California Code of Regulations, Title 13, Section 2109 (11-30-83)	** ***
	California Code of Regulations, Title 13, Section 2110 (11-27-99)	** ***
	California Code of Regulations, Title 13, Article 1.5 (7-25-01)	** ***
218-5.2(b)(1)	California Code of Regulations, Title 13, Section 2106 (11-27-99)	** ***
218-5.3(b)	California Code of Regulations, Title 13, Section 2101 (11-27-99)	** ***
218-6.2	Clean Air Act 42 U.S.C. Section 7401 et seq. (1988) as amended by Public Law 101-549 (1990)	**
218-7.3(a)(1)	California Code of Regulations, Title 13, Section 2221 (11-30-83)	** ***
	California Code of Regulations, Title 13, Section 2224 (8-16-90)	** ***
218-7.3(a)(2)	California Code of Regulations, Title 13, Section 2224(a) (8-16-90)	** ***
218-7.4(b)(3)(i)	California Code of Regulations, Title 13, Section 2222 (8-16-90)	** ***
218-7.4(b)(3)(ii)	California Code of Regulations, Title 13, Section 2222 (8-16-90)	** ***
218-7.5(b)	California Code of Regulations, Title 13, Section 2222 (8-16-90)	** ***

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 September 17, 2004.

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

Summary of Regulatory Impact Statement

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

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

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

The ZEV revisions: adopt regulations identical to California's; remove all references to fuel economy; modify the 15-year, 150,000-mile Partial ZEV (PZEV) warranty required for hybrid electric vehicles; modify the compliance requirements and options in response to the current state of ZEV technology; and define three fuel cell development stages which start in 2003.

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

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

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

Businesses involved in manufacturing, selling, or purchasing passenger cars or trucks could be affected by the regulations. However, these are not expected to impact automobile manufacturers significantly since manufacturers are already required to certify vehicles to standards appropriate for each state's requirements. The ZEV requirements are not expected to have

a major cost impact on automobile dealers. Dealerships will experience some cost increases associated with sale and service of PZEVs and AT PZEVs, since in some cases these are a technology that a dealership has not previously handled, and is thus required to train service personnel to service these vehicles.

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

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

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

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

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

Regulatory Flexibility Analysis

1. Effect of rule:

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

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

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

2. Compliance requirements:

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

3. Professional services:

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

4. Compliance costs:

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

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

5. Minimizing adverse impact:

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

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

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

6. Small business and local government participation:

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

7. Economic and technological feasibility:

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

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

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

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

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

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

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

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

3. Costs:

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

Job Impact Statement

1. Nature of impact:

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

2. Categories and numbers affected:

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

3. Regions of adverse impact:

None.

4. Minimizing adverse impact:

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

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

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

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

5. Self-employment opportunities:

None.

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Importation of Wild or Captive-Bred Cervids

I.D. No. ENV-31-04-00011-EP
Filing No. 823
Filing date: July 14, 2004
Effective date: July 14, 2004

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

Action taken: Amendment of section 189.3(a) of Title 6 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The Department of Agriculture and Markets recently adopted an emergency regulation, 1 NYCRR Part 68 "Captive Cervid Health Requirements," which establishes a herd certification program and allows for the importation of captive bred Cervids. The Department of Environmental Conservation's chronic wasting disease regulations, 6 NYCRR Part 189, currently prohibit the importation of all cervids and would directly conflict with 1 NYCRR Part 68. Adoption of this amendment to 6 NYCRR Part 189 will address the conflict and allow the importation of cervids in accordance with 1 NYCRR Part 68.

The Department's prohibition on the importation of cervids is aimed at preventing the introduction of Chronic Wasting Disease into New York. This amendment will create an exception to the prohibition and allow importation of cervids if they meet the requirements of the Department of Agriculture and Markets herd certification program and comply with 1 NYCRR Part 68. The herd certification program will enable participants to import live cervids only from monitored herds that have been determined to be CWD free. Therefore, these cervids will not pose a risk of introducing CWD into New York.

The primary incentive for participation in the Cervid Herd Certification program established in 1 NYCRR Part 68 is the ability to import and market live cervids. Removal of the importation prohibition in 6 NYCRR Part 189 will encourage participation in this program. This will ultimately lead to better compliance and monitoring of live cervid importations and increase the ability of both agencies to prevent CWD introduction, provide early detection of CWD, and aid in rapid response and control in the event that CWD is detected.

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

Purpose: To authorize the importation of captive cervids where the Department of Agriculture and Markets has issued an importation permit, in consultation with the Department, pursuant to section 68.2 of Title 1 NYCRR.

Text of emergency/proposed rule: Title 6 of the Codes, Rules and Regulations of the State of New York, Part 189, "Chronic Wasting Disease," is amended as follows:

Subdivision a of Section 189.3 is amended to read as follows:

(a) Importation of Animals of the Genus Cervus or the Genus Odocoileus. No person shall import into New York State any wild or captive animal of the Genus Cervus or the Genus Odocoileus except under permit issued by the New York State Department of Agriculture and Markets, in consultation with the department, pursuant to section [62.8] *68.2* of Title 1 NYCRR [for zoological or exhibition purposes only].

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 11, 2004.

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

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

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

Regulatory Impact Statement

Statutory authority:

The Commissioner of Environmental Conservation, pursuant to Environmental Conservation Law (ECL) Section 3-0301, has authority to protect the wildlife resources of New York State.

Environmental Conservation Law Section 11-0325 provides the Department of Environmental Conservation (Department) with authority to take action necessary to protect fish and wildlife from dangerous diseases. Where a disease is a threat to livestock, as well as to the fish and wildlife populations of the state, Section 11-0325 requires that the Department consult the Department of Agriculture and Markets. If the Department and the Department of Agriculture and Markets jointly determine that a disease, which endangers the health and welfare of fish or wildlife populations, or of domestic livestock, is in imminent danger of being introduced into the state, the Department is authorized to adopt measures or regulations necessary to prevent the introduction of such disease.

ECL Section 11-1905 provides the Department with authority to regulate the possession, propagation, transportation and sale of captive-bred white-tailed deer.

Legislative objectives:

The legislative objective of ECL Section 3-0301 is to grant the Commissioner the powers necessary for the Department to protect New York's natural resources, including wildlife, in accordance with the environmental policy of the state.

The legislative objective of ECL Section 11-0325 is to provide the Department with broad authority to respond to the threat of a disease that endangers the health or welfare of fish or wildlife populations. In addition, this Section provides for collaboration between the Department and the Department of Agriculture and Markets when such disease also poses a threat to livestock.

The legislative objective of ECL Section 11-1905 is to provide the Department with authority to regulate the captive-bred white-tailed deer population in New York.

Needs and benefits:

The Department of Agriculture and Markets recently adopted an emergency regulation, 1 NYCRR Part 68 "Captive Cervid Health Requirements," which establishes a herd certification program and allows for the importation of captive bred cervids. The Department of Environmental Conservation's chronic wasting disease regulations, 6 NYCRR Part 189, currently prohibit the importation of all cervids and would directly conflict with 1 NYCRR Part 68. Adoption of this amendment to 6 NYCRR Part 189 will address the conflict and allow the importation of cervids in accordance with 1 NYCRR Part 68.

The white-tailed deer herd in New York is estimated to be approximately one million animals. In 2000-01, over 650,000 licenses were sold to hunt white-tailed deer in New York, resulting in expenditures by hunters and for hunting related activities of approximately $1 billion dollars.

Chronic wasting disease is an infectious neurological disease that belongs to a group of diseases known as transmissible spongiform encephalopathies. CWD is a progressively fatal disease with no known immunity, vaccine or treatment. Management of CWD is further complicated by the fact that it is a poorly understood disease with clinical signs not apparent for 18-36 months and an unknown mode of transmission. To date, CWD has been found only in members of the deer family in North America. There has never been a case reported in a human or in livestock other than captive-bred elk or deer. At this time, there are no confirmed cases of CWD in deer or elk in New York.

Chronic wasting disease has been diagnosed in captive deer or elk in Colorado, Wyoming, Nebraska, Montana, Oklahoma, South Dakota, Minnesota and the Canadian provinces of Saskatchewan and Alberta. It has also been confirmed in wild white-tailed deer and/or mule deer populations, in Colorado, Wyoming, Nebraska, South Dakota, Wisconsin, New Mexico and, most recently, Illinois. At this time, the primary source of introduction of CWD into an area is thought to be the importation of infected captive-bred deer or elk. In New York, there are approximately 150 deer farmers licensed by the Department to possess captive-bred white-tailed deer for various purposes. In addition, the Department of Agriculture and Markets reports that there are approximately 250 additional deer or elk farmers who possess other captive-bred species of elk and deer.

The proposed rulemaking will directly affect those people engaged in deer and elk farming by allowing the live importation of deer under the requirements of 1 NYCRR Part 68. The Department collaborated with the Department of Agriculture and Markets to develop a CWD herd certification program that would allow qualified deer and elk farmers to import CWD-free deer and elk into New York. The deer and elk farm industry has been involved in the development of this certification program.

Costs:

There will be no costs to state or local governments or small businesses from this rulemaking.

Local government mandates:

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

Paperwork:

For those deer and elk businesses that seek to import cervids, a permit will be required from the Department of Agriculture and Markets pursuant to 1 NYCRR Part 68.

Duplication:

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

Alternatives:

No Action: The Department has rejected this option. Failing to amend the current regulation would unnecessarily restrict the importation of deer and elk. The Department of Agriculture and Markets recently adopted regulations which place adequate protections and safeguards on imported deer and elk to ensure that they do not introduce CWD.

Federal standards:

The United States Department of Agriculture-Animal and Plant Health Inspection Service (USDA-APHIS) developed an Environmental Assessment (EA) in 2002. The EA outlined the role of the Federal Government in CWD management. This role included providing coordination and assistance with research, surveillance, disease management, diagnostic testing, technology, communications, information dissemination, education and funding for State CWD Programs. At this time, there are no Federal Standards governing captive deer or elk or wild deer or elk management.

Compliance schedule:

Immediate compliance will be required.

Regulatory Flexibility Analysis

1. Effect of rule:

No local governments will be affected by this rule. The proposed rulemaking will affect small businesses engaged in deer and elk farming by allowing these businesses to import deer or elk under certain circumstances. Currently, Department regulations prohibit the importation of live cervids.

The Department of Agriculture and Markets estimates that there are approximately 400 deer and elk farms in New York State with an industry

value of approximately $2 million. Generally speaking, these deer and elk farms are small operations that may be selling: urine, meat, antlers, live animals for stock, and the opportunity to shoot a captive-bred animal. In addition, this rulemaking will affect individuals who import live captive deer or elk for slaughter and sale of meat. The number of people engaged in these types of businesses is unknown, but believed to be relatively small.

2. Compliance requirements:

The Department of Environmental Conservation's chronic wasting disease regulations, 6 NYCRR Part 189, currently prohibit the importation of all cervids. The proposed rulemaking will affect businesses engaged in deer and elk farming by allowing the live importation of deer and elk under the requirements of 1 NYCRR Part 68. Therefore, members of this industry who seek to import deer or elk into New York will be required to obtain a permit from the Department of Agriculture and Markets.

3. Professional services:

The rule will not require local governments or small businesses to engage professional services in order to comply with this rule.

4. Compliance costs:

There will be no costs to state or local governments or small businesses from this rulemaking.

5. Economic and technological feasibility:

This rulemaking will not impose any adverse economic or technological affect on local governments or small businesses. Deer and elk farmers will now be able to import live cervids belonging to the Genus Cervus or the Genus Odocoileus into New York if they obtain a permit from the Department of Agriculture and Markets. This change may result in some economic benefit to businesses affected by the rule by allowing them to acquire cervids from outside New York. The rule will not require any technological changes or capital expenditures.

6. Minimizing adverse impact:

This rulemaking should not have any adverse impact on small businesses. To the contrary, this rulemaking may have positive impacts on small businesses in the deer and elk industry by allowing them to import cervids from outside the state if the appropriate permit is obtained.

7. Small business and local government participation:

The Department has been working with the Department of Agriculture and Markets to develop a CWD certification program that would allow deer and elk farmers to obtain a 'certified CWD free' herd status over a three to five year period. This program is now contained within 1 NYCRR Part 68. Consequently, the Department is proposing amendments to its CWD regulations in order to allow importation of deer and elk that are certified as "CWD-free." The deer and elk farm industry have been actively involved in the development of the Department of Agriculture and Markets' program at both state and national levels.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed rulemaking will affect those people engaged in deer and elk farming. The Department of Agriculture and Markets estimates that there are approximately 400 deer and elk farms in New York State with an industry value of approximately $2 million. Generally speaking, these deer and elk farms are small operations that may be selling: urine, meat, antlers, live animals for stock, and the opportunity to shoot a captive-bred animal. In addition, this rulemaking will affect individuals who import live captive deer or elk for slaughter and sale of meat. The number of people engaged in these types of businesses is unknown, but believed to be relatively small.

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

The Department of Environmental Conservation's chronic wasting disease regulations, 6 NYCRR Part 189, currently prohibit the importation of all cervids. The proposed rulemaking will affect those people engaged in deer and elk farming by allowing the live importation of deer under the requirements of 1 NYCRR Part 68. Therefore, members of this industry who seek to import deer or elk into New York will be required to obtain a permit from the Department of Agriculture and Markets. There are no additional reporting, recordkeeping, or other compliance requirements, and no professional services are required to comply with the proposed rule.

3. Costs:

There will be no costs to state or local governments or small businesses from this rulemaking.

4. Minimizing adverse impact:

This rulemaking should not have any adverse impact on small businesses. To the contrary, this rulemaking may have positive impacts on small businesses in the deer and elk industry by allowing them to import cervids from outside the state if the appropriate permit is obtained.

5. Rural area participation:

The Department has been working with the Department of Agriculture and Markets to develop a CWD certification program that would allow deer and elk farmers to obtain a 'certified CWD free' herd status over a three to five year period. This program is now contained within 1 NYCRR Part 68. This rulemaking amends the Department's current CWD regulations to allow the importation of deer and elk that are certified as "CWD-free." The deer and elk farm industry have been actively involved in the development of the Department of Agriculture and Markets' program at both state and national levels.

Job Impact Statement

The Department of Agriculture and Markets recently adopted an emergency regulation, 1 NYCRR Part 68 "Captive Cervid Health Requirements," which establishes a herd certification program and allows for the importation of captive bred cervids. The Department of Environmental Conservation's chronic wasting disease regulations, 6 NYCRR Part 189, currently prohibit the importation of all cervids and would directly conflict with 1 NYCRR Part 68. Adoption of this amendment to 6 NYCRR Part 189 will address the conflict and allow the importation of cervids in accordance with 1 NYCRR Part 68.

The proposed rulemaking will directly affect those people engaged in deer and elk farming by allowing the live importation of deer under the requirements of 1 NYCRR Part 68. The Department of Agriculture and Markets estimates that there are approximately 400 deer and elk farms in New York State with an industry value of approximately $2 million. The Department of Environmental Conservation (Department) collaborated with the Department of Agriculture and Markets to develop a CWD herd certification program that would allow qualified deer and elk farmers to import CWD-free deer and elk into New York. The deer and elk farm industry has been involved in the development of this certification program.

The Department has determined that this rulemaking will not have a substantial adverse impact on jobs and employment opportunities. There may however be positive effects in that members of this industry will now be able to acquire animals from outside New York if they comply with requirements of the Department of Agriculture and Markets. Prior to this rule, no animals could be imported from outside New York due to the threat of Chronic Wasting Disease. Therefore, the Department has concluded that a job impact statement is not required.

Department of Health

EMERGENCY RULE MAKING

Payment for Psychiatric Social Work Services

I.D. No. HLT-31-04-00007-E
Filing No. 820
Filing date: July 14, 2004
Effective date: July 14, 2004

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

Action taken: Amendment of section 86-4.9 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 201.1(v)

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

Specific reasons underlying the finding of necessity: The amendment to 10 NYCRR 86-4.9 will permit Medicaid billing for individual psychotherapy services provided by certified social workers in Article 28 Federally Qualified Health Centers (FQHCs). In conjunction with this change, DOH is also amending regulations to prohibit article 28 clinics from billing for group visits and to prohibit such services from being provided by part-time clinics.

Based upon the Department's interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are

reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

Subject: Payment for psychiatric social work services in article 28 federally qualified health centers.

Purpose: To permit psychotherapy by certified social workers a billable service under circumstances.

Text of emergency rule: Pursuant to the authority vested in the State Hospital Review and Planning Council, and subject to the approval of the Commissioner of Health by Section 2803(2)(a) of the Public Health Law, section 86-4.9 of Subpart 86-4 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended as follows to be effective upon filing with the Secretary of State:

86-4.9 Units of service. (a) The unit of service used to establish rates of payment shall be the threshold visit, except for dialysis, abortion, sterilization services and free-standing ambulatory surgery, for which rates of payment shall be established for each procedure. For methadone maintenance treatment services, the rate of payment shall be established on a fixed weekly basis per recipient.

(b) A threshold visit, including all part-time clinic visits, shall occur each time a patient crosses the threshold of a facility to receive medical care without regard to the number of services provided during that visit. Only one threshold visit per patient per day shall be allowable for reimbursement purposes, except for transfusion services to hemophiliacs, in which case each transfusion visit shall constitute an allowable threshold visit.

(c) Offsite services, visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the following services shall not constitute threshold visits: pharmacy, nutrition, medical social services *with the exception of clinical social services as defined in paragraph (g) of this section,* respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

(e) Rates for separate components of a procedure may be established when patients are unable to utilize all of the services covered by a procedure rate. No separate component rates shall be established unless the facility includes in its annual financial and statistical reports the statistical and cost apportionments necessary to determine the component rates.

(f) Ordered ambulatory services may be covered and reimbursed on a fee-for-service basis in accordance with the State medical fee schedule. Ordered ambulatory services are specific services provided to nonregistered clinic patients at the facility, upon the order and referral of a physician, physician's assistant, dentist or podiatrist who is not employed by or under contract with the clinic, to test, diagnose or treat the patient. Ordered ambulatory services include laboratory services, diagnostic radiology services, pharmacy services, ultrasound services, rehabilitation therapy, diagnostic services and psychological evaluation services.

(g)(1) For purposes of this section, clinical social services are defined as,

(i) before September 1, 2004, individual psychotherapy services provided in a Federally Qualified Health Center by a certified social worker with psychotherapy privileges certification by the New York State Education Department, or by a certified social worker who is working in a clinic under qualifying supervision in pursuit of a psychotherapy privileges certification by the New York State Education Department.

(ii) on or after September 1, 2004, individual psychotherapy services provided in a Federally Qualified Health Center by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status by the New York State Education Department.

(2) Clinical social services provided in a part time clinic shall be ineligible for reimbursement under this paragraph. Clinical social services shall not include group psychotherapy services or case management services.

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 11, 2004.

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

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2803(2)(a) of the Public Health Law which authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner. Section 702 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 made changes to the Social Security Act affecting how prices are set for Federally Qualified Health Centers and rural health centers. Section 1902(a)(10) of the federal Social Security Act [42 U.S.C. 1396a(a)(10)] and 1905(a)(2) of the Social Security Act [42 U.S.C. 1396d(a)(2)] require the State to cover the services of Federally Qualified Health Centers. Additionally, section 1861(aa) of the Social Security Act [42 U.S.C. 1395x(aa)] defines the services that a Federally Qualified Health Center provides, including the services of a clinical social worker.

Legislative Objective:

The legislative objective of this authority is to allow, in limited instances, social work visits to be a billable threshold service in Article 28 clinics. This amendment will allow psychotherapy by certified social workers (CSWs) as a billable visit under the following circumstances:

- Services are provided by a certified social worker with psychotherapy privileges (on their SED certification), or a CSW who is working in a clinic under qualifying supervision in pursuit of such certification.
- Payment will only be made for services that occur in Article 28 clinic base and extension clinics only. Billings by part-time clinics will not be allowed.
- Psychotherapy services only will be permitted, not case management and related services.
- Billings for group psychotherapy will not be permitted in Article 28 clinics.
- Payment will only be made for services that occur in Federally Qualified Health Centers (FQHCs).

Needs and Benefits:

For some time, the Department of Health (DOH) has interpreted existing regulation 10 NYCRR Part 86-4.9(c) as restricting threshold reimbursement for medical social work services in Article 28 outpatient and diagnostic and treatment center (D&TC) clinics. Advocacy groups (*e.g.,* United Cerebral Palsy (UCP), Community Health Care Association of New York (CHCANYS)) have challenged this policy interpretation arguing that the prohibition only relates to the provision of social work services coincident to medical care, not to medical/behavioral health services provided by certified social workers.

In addition, DOH's policy interpretation has also been inconsistent with the billing practices of the Office of Alcoholism and Substance Abuse Services (OASAS), the Office of Mental Health (OMH), and the Office of Mental Retardation and Developmental Disabilities (OMRDD). It is clear that permitting certified social workers to be reimbursed for behavioral health services is the generally accepted practice model. Thus, this amendment will, to some extent, provide consistency with billing practices of other state agencies in Articles 31, 16 and 32 clinics. Furthermore, recent Federal changes related to Medicaid reimbursement for FQHCs mandate that psychotherapy services provided by a social worker be considered a billable service.

This approach will ensure access to social work services in the most underserved areas and increase consistency with the policies of other state agencies.

Costs:

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

Annually the estimated gross Medicaid cost for all CSW psychotherapy visits in FQHCs totals $600,000, with a state share of $150,000. This increase is anticipated to be partially offset by the savings associated with the elimination of clinic payments for group psychotherapy and the prohibition of CSW psychotherapy in part-time clinics.

Cost to the Department of Health:

There will be no additional costs to DOH.

Local Government Mandates:

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

Paperwork:

This amendment will increase the paperwork for providers only to the extent that providers will bill for social work services.

Duplication:

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

Alternatives:

Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for the services of certified social workers. In light of this federal requirement, no alternatives were considered.

Federal Standards:

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

Compliance Schedule:

The proposed amendment will become effective on the 1st day of the month following publication of a Notice of Adoption in the *State Register*.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments: No impact on small businesses or local governments is expected.

Compliance Requirements: This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Professional Services: No new professional services are required as a result of this proposed action. The proposed regulation will allow threshold visits to be billed in Article 28 clinics by CSW's with a "P" or "R" designation on their State Education Department's (SED) Certification or by CSWs who are working in a supervised situation towards that certification, in a primary or extension (not part-time) clinic. Although some providers might experience problems hiring the higher level of supervision, the new prospective reimbursement system for FQHCs should ease the hiring of this staff.

Compliance Costs: This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Economic and Technological Feasibility: DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpretation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

Minimizing Adverse Impact: There is no adverse impact.

Opportunity for Small Business Participation: Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

With the exception of part-time clinics, this rule will apply to all Article 28 primary and extension clinics (not part-time clinics) in New York that have been designated by the Centers for Medicare and Medicaid Services (CMS) as Federally Qualified Health Centers. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

No new reporting, recordkeeping or other compliance requirements and professional are needed in a rural area to comply with the proposed rule.

Compliance Costs:

There are no direct costs associated with compliance. However, part-time clinic providers that perform fraudulent billing may be investigated and subsequently realize reduced Medicaid reimbursement.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Rural Area Participation:

The Department has had conversations with the National Association of Social Workers Association (NASW), UCP, and CHCANYS to discuss Medicaid reimbursement for social work services and the impact of this new rule on their constituents. These groups and Association represent social workers from across the State, including rural areas.

Job Impact Statement

Nature of Impact:

It is not anticipated that there will be any impact of this rule on jobs or employment opportunities.

Categories and Numbers Affected:

There are approximately 58 FQHCs, FQHC look-alikes, and rural health clinics.

Regions of Adverse Impact:

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program as an Article 28 clinic and that has been designated by the Centers for Medicare and Medicaid Services (CMS)as a Federally Qualified Health Center.

Minimizing Adverse Impact:

The Department is required by federal rules to reimburse FQHCs for the provision of primary care services, including clinical social work services, based upon the Center's reasonable costs for delivering covered services.

Self-Employment Opportunities:

The rule is expected to have no impact on self-employment opportunities since the change affects only services provided in a clinic setting.

EMERGENCY RULE MAKING

Controlled Substances in Emergency Kits

I.D. No. HLT-31-04-00015-E
Filing No. 827
Filing date: July 19, 2004
Effective date: July 19, 2004

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

Action taken: Amendment of sections 80.11, 80.47, 80.49 and 80.50 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3308(2)

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

Specific reasons underlying the finding of necessity: We are proposing that these regulations be adopted on an emergency basis because immediate adoption is necessary to protect the public health and safety. Having consulted closely with administrators, nursing personnel and consultant pharmacists of Class 3a health care facilities (nursing homes, adult homes, and other long-term facilities), the Department has determined that the current Part 80 and Part 400 regulations do not ensure timely access to controlled substances by practitioners and patients when immediate administration is medically necessary.

Current regulations require controlled substances to be administered to patients in Class 3a facilities only pursuant to a prescription. On urgent occasions, such as when a patient suffers a sudden seizure or onset of acute pain, the severity of the situation may make it impossible for a practitioner to first issue a prescription to promptly treat the condition. Even if a practitioner is able to first issue a prescription in an emergency, the prescription may not immediately be dispensed by a pharmacy. In these situations, a patient is deprived of timely relief from severe symptoms and suffering.

The proposed amendments will allow controlled substances to be maintained in an emergency medication kit in a Class 3a facility and administered to a patient in an emergency situation. To simultaneously protect the public health against the potential for diversion of such drugs, the amendments also specify limitations on their quantities, recordkeeping requirements for their administration, and security requirements for their safeguarding. Immediate adoption of these regulations is necessary to enhance and ensure the quality of health care of every patient in a long-term care facility. Ensuring timely access to controlled substances for immediate administration during medical emergencies will result in substantial benefit to the public health and safety.

Subject: Controlled substances in emergency kits.

Purpose: To allow class 3A facilities to obtain, possess and administer controlled substances in emergency kits.

Text of emergency rule: Paragraph (6) of subdivision (b) of Section 80.11 is amended to read as follows:

(6) [be] not *be*, and not have been, a habitual user of narcotics or any other habit-forming drugs.

Paragraph (6) of subdivision (c), of Section 80.11 is amended to read as follows:

(6) [be] not *be*, and not have been, an habitual user of narcotics or other habit-forming drugs; and

Subdivision (f) of Section 80.11 is amended to read as follows:

(f) Persons conducting distributing activities of controlled substances within the State of New York shall obtain a class 2 license from the department, *except that*;

(1) A pharmacy may distribute a controlled substance to a practitioner in a Class 3a institutional dispenser limited solely for stocking in sealed emergency medication kits. Such distribution shall be pursuant only to a written request by the Class 3a facility indicating the name and address of the facility, the name and address of the pharmacy, the date of the request, the type and quantity of the drug requested and the signature of the authorized person making the request. With each distribution, the pharmacy shall provide the Class 3a facility with an itemized list indicating the name and address of the pharmacy, the name and address of the Class 3a facility, the date of the distribution, the type and quantity of the drug distributed, and the signature of the pharmacist.

Section 80.47 is amended by creating subdivisions (a), (b) and (c) and new subdivision (b) is amended to read as follows:

Section 80.47 Institutional dispenser, limited. *(a)* Nursing homes, convalescent homes, health-related facilities, homes for the aged, dispensaries or clinics not qualifying as institutional dispensers in license class 3 shall apply for an institutional dispenser, limited license. Such institutional dispensers qualifying for controlled substances privileges shall obtain a class 3a license from the department.

(b) An institutional dispenser licensed in class 3a may administer controlled substances to patients only pursuant to a prescription issued by an authorized physician or other authorized practitioner and filled by a registered pharmacy; except that [an] *controlled substances in emergency medication kits may be administered to patients as provided in Section 80.49(d) of this Part.*

(c) An institutional dispenser, limited, licensed in class 3a, which is operated as an integral and physical part of a facility licensed as a class 3 institutional dispenser may be provided with bulk stocks of controlled substances obtained pursuant to such class 3 institutional dispenser license. Records of distribution and administration of such bulk stocks of controlled substances shall be kept as provided in section 80.48(a) of this Part.

Subdivision (c) of section 80.49 is amended and a new subdivision (d) is added to read as follows:

(c) A separate record shall be maintained of the administration of *prescribed* controlled substances indicating the date and hour of administration, name and quantity of controlled substances, name of the prescriber, patient's name, signature of person administering and the balance of the controlled substances on hand after such administration.

(d) In an emergency situation, a controlled substance from a sealed emergency medication kit may be administered to a patient by an order of an authorized practitioner. An oral order for such controlled substance shall be immediately reduced to writing and a notation made of the condition which required the administration of the drug. Such oral order shall be signed by the practitioner within 48 hours.

(1) For purposes of this subdivision, emergency means that the immediate administration of the drug is necessary and that no alternative treatment is available.

(2) A separate record shall be maintained of the administration of controlled substances from an emergency medication kit. Such record shall indicate the date and hour of administration, name and quantity of controlled substances, name of the practitioner ordering the administration of the controlled substance, patient's name, signature of the person administering and the balance of the controlled substances in the emergency medication kit after such administration.

(3) The institutional dispenser limited shall notify the pharmacy furnishing controlled substances for the emergency medication kit within 24 hours of each time the emergency kit is unsealed, opened, or shows evidence of tampering.

Subdivision (e) of section 80.50 is amended and a new paragraph (1) is added to read as follows:

(e) *Except as provided in paragraph (1) of this subdivision,* [I]*i*nstitutional dispensers limited may only possess controlled substances prescribed for individual patient use, pursuant to prescriptions filled in a registered pharmacy. These controlled substances shall be safeguarded as provided in subdivision (d) of this section.

(1) Institutional dispensers limited may possess limited supplies of controlled substances in sealed emergency medication kits for use as provided in section 80.49(d) of this Part. Each kit may contain up to a 24-hour supply of a maximum of ten different controlled substances in unit dose packaging, no more than three of which may be in an injectable form. Each kit shall be secured in a stationary, double-locked system or other secure method approved by the Department.

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 16, 2004.

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

Regulatory Impact Statement

Statutory Authority:

Section 3308(2) of the Public Health Law authorizes and empowers the Commissioner to make any regulations necessary to supplement the provisions of Article 33 of the Public Health Law in order to effectuate its purposes and intent.

Section 3321(1)(b) authorizes the commissioner to make regulations that exempt a pharmacy from the licensing requirements of article 33 for the sale of controlled substances to a practitioner for the immediate needs of the practitioner receiving such substances.

Legislative Objectives:

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted in 1972 to govern and control the possession, prescribing, manufacturing, dispensing, administering, and distribution of licit controlled substances within New York. Section 3300-a expressly states that one of the statute's purposes is to allow the legitimate use of controlled substances in health care.

Needs and Benefits:

This regulation effectuates the above stated legislative purpose of section 3300-a of the New York State Controlled Substances Act. It will ensure timely access to controlled substances by practitioners and patients for emergency situations in extended care facilities and other health care facilities licensed by the Department as Class 3a, institutional dispenser limited. (See section 3302(18) of the Public Health Law for the definition of "institutional dispenser".)

Section 80.47 of Title 10 regulations requires that controlled substances be administered to patients in healthcare facilities licensed by the Department as Class 3a institutional dispensers limited (*i.e.,* nursing homes, convalescent homes, health-related facilities, adult homes, homes for the aged, correctional facilities) only pursuant to a prescription issued by an authorized practitioner. The regulation also requires that such prescriptions must be dispensed by a registered pharmacy.

Administrators, nursing personnel, and consultant pharmacists of Class 3a facilities have expressed their concern to the Department that the prescription requirements of Section 80.47 are a restriction to timely access to controlled substances by practitioners and patients when immediate administration is medically necessary. On urgent occasions such as a sudden seizure or onset of intractable pain, the severity of the situation may make it impossible for a practitioner to first issue a prescription for the drug in order to promptly treat the condition. Further, Class 3a facilities do not have onsite pharmacies. Even if a practitioner is able to first issue a prescription for a controlled substance to treat a patient in an emergency, that prescription may not immediately be dispensed by an outside pharmacy because the pharmacy may be too distant from the Class 3a facility or the emergency may have occurred during the pharmacy's non-business hours. These situations can, and do, result in needed medications not being administered in a timely fashion to relieve a patient's severe symptoms or suffering.

The proposed amendment to Section 80.47 of the regulations authorizes the administration of a controlled substance from an emergency medication kit to a patient in an emergency situation in a Class 3a healthcare facility. Necessary complements to this amendment are the proposed amendments to Sections 80.11(f), 80.49 and 80.50(e) of Title 10 regulations. The proposed changed to Section 80.11(b)(6) is merely grammatical.

The amendment to Section 80.11(f) authorizes a licensed pharmacy to supply controlled substances to a practitioner in a Class 3a facility for stocking in emergency medication kits. The amendments to Section 80.50(e) authorize a Class 3a healthcare facility to possess a limited supply of controlled substances in an emergency medication kit and specify limitations on the quantities of such substances and requirements for their safeguarding. The amendment to Section 80.49 specifies recordkeeping requirements for controlled substances administered from emergency kits. When instituted together, these amendments will provide for timely access to controlled substances by practitioners and patients in the long-term care facility environment while simultaneously requiring adequate measures to ensure the security of such substances.

The federal Drug Enforcement Administration (DEA) also recognizes the need for storing controlled substances in emergency kits for administration to patients during urgent situations in long-term care facilities that are not eligible to hold a DEA registration. Since 1980, the DEA has issued a Statement of Policy containing guidelines for state regulatory agencies to follow when authorizing long-term care facilities to maintain such kits. Such guidelines have been incorporated in the proposed regulatory amendments.

The proposed regulatory amendments will enhance the quality of care of every patient in a long-term care facility licensed by the Department of Health. Such regulation will result in substantial benefit to the public health, which the Department has both a civic and legislative responsibility to ensure.

Costs:

Costs to Regulated Parties:

Healthcare facilities licensed as Class 3a institutional dispensers limited already possess required secure cabinets for safeguarding controlled substances. Such secure cabinets can also safeguard emergency kits containing controlled substances. Those facilities choosing to maintain such emergency kits will incur minimal costs to do so. These costs will be reflected in the purchase of the limited supplies of controlled substances and the sealable emergency kits required to secure and store them.

Costs to State and Local Government:

There will be no costs to state or local government.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

The proposed rule does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other specific district.

Paperwork:

Class 3a healthcare facilities are currently required by regulations to keep records of the receipt of all controlled substances prescribed for individual patients. Such facilities are also required to record all controlled substances dispensed and administered to such patients. These recordkeeping requirements would include the requisition and receipt of controlled substances for stocking in emergency medication kits.

Practitioners authorized to prescribe controlled substances are required by regulations to make a notation in a patient record of all controlled substances prescribed for that patient. The amendment to Section 80.47 requires that the administration of a controlled substance to a patient from an emergency kit in a Class 3a facility be pursuant to the written or oral medical order of a practitioner.

The Department anticipates a minimal increase in paperwork documenting the requisition, distribution, medical order, and administration of controlled substances contained in emergency medication kits. Such increase will be more than offset by the enhancement of healthcare for patients in the long term care environment.

Duplication:

The requirements of this proposed regulation do not duplicate any other state or federal requirement.

Alternatives:

The intent of the proposed regulation is to ensure access to controlled substance medications when urgently needed. The department believes it is in the best interest of the public health to authorize such accessibility to relieve pain or suffering. There are no alternatives that would ensure accessibility to controlled substances by practitioners and patients for emergency situations in long term care facilities and other health care facilities licensed as Class 3a, institutional dispenser limited.

Federal Standards:

The regulatory amendment does not exceed any minimum standards of the federal government. This amendment achieves consistency with existing federal and New York State laws and regulations promulgated to authorize the legitimate use of controlled substances in health care.

Compliance Schedule:

These regulations will become effective immediately upon filing a Notice of Emergency Adoption with the Secretary of State. At that time, in order that the public health derive maximum benefit from this regulatory amendment, all Class 3a license holders will be authorized to possess and administer controlled substances in an emergency medication kit to meet the immediate, legitimate need of a patient.

Regulatory Flexibility Analysis

Effect of Rule on Small Business and Local Government:

This proposed rule will affect practitioners, pharmacists, retail pharmacies, and nursing homes, adult homes, convalescent homes, homes for the aged, and other healthcare facilities licensed by the Department as Class 3a institutional dispensers limited. Local government will only be affected if it operates one of the above facilities.

According to the New York State Department of Education, Office of the Professions, as of April, 2003, there were 113,666 licensed and registered practitioners authorized to prescribe and order the administration of controlled substances. However, this rule will affect only those practitioners who prescribe or order the administration of controlled substances for patients and residents of long term care facilities or supply such facilities with controlled substances for emergency medication kits.

According to the New York State Board of Pharmacy, as of June 30, 2003, there were a total of 4,521 pharmacies in New York State. Of these, 60 are sole proprietorship, 297 are partnerships, 73 are small chains (fewer than 3 pharmacies per chain) and the rest are large chains or other corporations (some of which may be small businesses) or located in public institutions. According to the New York State Education Department's Office of the Professions, as of April 1, 2003, there were 18,950 licensed and registered pharmacists in New York. However, this rule will affect only those pharmacies and pharmacists that dispense prescriptions for controlled substances to patients and residents of long term care facilities or supply such facilities with controlled substances for emergency medication kits.

Of the 1,282 healthcare facilities licensed by the department as Class 3a institutional dispensers limited, the rule will affect only those facilities that choose to maintain controlled substances in emergency medication kits.

Compliance Requirements:

There are no compliance requirements. While the proposed amendment authorizes Class 3a facilities to possess and administer controlled substances from emergency medication kits, the regulation does not require such facilities to do so.

Professional Services:

No additional professional services are necessary.

Compliance Costs:

Other than the cost of the controlled substances and sealable emergency medication kits for those Class 3a facilities choosing to possess such kits, there are no compliance costs associated with the proposed regulation.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. Class 3a healthcare facilities that choose to possess and administer controlled substances from emergency medication kits will use existing equipment for security and recordkeeping requirements.

The Department anticipates that these facilities will incur minimal expenditures for limited supplies of controlled substances and the sealable emergency kits in which to store them. Such expenditures will be more than offset by the enhancement of medical care for patients in Class 3a healthcare facilities.

Minimize Adverse Impact:

The agency considered the approaches in section 202-b(1) of SAPA and found them inapplicable. The proposed regulation minimizes any adverse impact by not requiring pharmacies to supply controlled substances to Class 3a facilities for emergency medication kits. Pharmacies are authorized to engage in such activity strictly on a voluntary basis.

Small Business and Local Government Participation:

To ensure that small businesses were given the opportunity to participate in this rule making, the Department met with the pharmacy societies representing independent pharmacies. Local governments are not affected.

During the drafting of this regulation, the Department met with the Pharmaceutical Society of the State of New York (PSSNY), the Chain Pharmacy Association of New York State, the New York Council of Health Systems Pharmacists, and the New York State Chapter of American Society of Consultant Pharmacists.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

The proposed rule will apply to participating pharmacies and Class 3a healthcare facilities located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain widespread rural areas. These can range in extent from small towns and villages, and their surrounding areas, to locations that are very sparsely populated.

Compliance Requirements:

There are no compliance requirements. The proposed amendment authorizes pharmacies to distribute limited supplies of controlled substances to Class 3a facilities for maintaining in emergency medication kits. The regulation also authorizes those healthcare facilities to possess and administer controlled substances to patients from such kits in an emergency

situation. However, these actions are undertaken on a voluntary basis by both pharmacy and healthcare facility. The regulation does not require either party to participate.

Present regulations require pharmacies and Class 3a facilities to maintain specified records of dispensing, receipt, and administration of controlled substances. The proposed regulation requires a minimum of additional recordkeeping to ensure limited access to emergency medication kits and safeguarding of the controlled substances contained therein.

Professional Services:

Pharmacies already employ the professional services of licensed and registered pharmacists. Class 3a healthcare facilities employ the services of practitioners, nurses, and consultant pharmacists. The proposed regulation would require no additional professional services, either public or private, in rural areas.

Compliance Costs:

Compliance costs to pharmacies opting to distribute limited supplies of controlled substances to Class 3a facilities will be negligible, since these pharmacies already maintain an existing inventory of such controlled substances. Other than the cost of the controlled substances and the sealable medication kits in which to store them, the compliance cost to Class 3a facilities choosing to possess such kits will be minimal.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. Class 3a healthcare facilities that choose to possess and administer controlled substances from emergency medication kits will use existing equipment for security and recordkeeping requirements.

The Department anticipates that these facilities will incur minimal expenditures for limited supplies of controlled substances and the sealable emergency kits in which to store them. Such expenditures will be more than offset by the enhancement of medical care for patients in Class 3a healthcare facilities.

Minimizing Adverse Impact:

The agency considered the approaches in Section 202-bb(2) of SAPA and found them inapplicable.

In ensuring access to controlled substances for legitimate medical treatment by practitioners and patients in Class 3a healthcare facilities, the proposed amendment does not impose any adverse impact upon rural areas. In fact, because in a rural setting pharmacies supplying prescriptions for controlled substances may be located at increased distances from long term care facilities, it is anticipated that these healthcare facilities would derive maximum benefit for their patients by being authorized to maintain limited supplies of controlled substances in sealed medication kits for use in emergency situations.

Rural Area Participation:

During the drafting of this regulation, the Agency met with and solicited comment from consultant pharmacists to Class 3a facilities, many of which are located in rural areas. It was the overwhelming consensus that pharmacists could better meet and greatly enhance the healthcare of the patients they serve in such facilities by being authorized to supply controlled substances for emergency medication kits. Administrative and nursing personnel in such facilities have also voiced to the Agency their need for emergency access to controlled substances for administration to patients to alleviate suffering in urgent situations. The agency addressed many of these concerns in the proposed regulation.

Job Impact Statement

Nature of Impact:

This proposal will not have a negative impact on jobs and employment opportunities. In benefitting the public health by ensuring access to controlled substances for legitimate healthcare needs, the proposed amendment is not expected to either increase or decrease jobs overall.

EMERGENCY RULE MAKING

Nursing Home Pharmacy Regulations

I.D. No. HLT-31-04-00016-E
Filing No. 828
Filing date: July 19, 2004
Effective date: July 19, 2004

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

Action taken: Amendment of section 415.18(g) and (i) of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803

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

Specific reasons underlying the finding of necessity: There is an increasing need to have available to nursing home residents a wider number of antibiotic and pain management medications to respond quickly in the event of a health crisis to these medically fragile residents. Presently, emergency medication kits are limited as to their content and facilities are not permitted to have certain medications including controlled substances in the emergency kits. Delay in responding to resident needs because a medication is not immediately available in the facility, and has to be secured from the pharmacy, is resulting in needless suffering on the part of nursing home residents.

Subject: Nursing home pharmacy regulations.

Purpose: To make available in nursing home emergency medication kits, a wider variety of medications to respond to the needs of residents and allow verbal orders from a legally authorized practitioner.

Text of emergency rule: Subdivisions (g) and (i) of Section 415.18 are amended to read as follows:

Section 415.18 Pharmacy Services.

(g) Emergency medications. The facility shall ensure the provision of (an) emergency medication kit(s) as follows:

(1) The contents of each kit shall be approved by the medical director, pharmacist and director or nursing.

(2) [Controlled Substances shall be prohibited in emergency kits.] *Limited supplies of controlled substances for use in emergency situations may be stocked in sealed emergency medication kits.*

(i) Each such kit may contain up to a 24 hour supply of a maximum of ten different controlled substances in unit dose packaging, three of which may be injectable drugs.

(ii) Controlled substances contained in emergency medication kits may be administered by authorized personnel pursuant to an order of an authorized practitioner to meet the immediate need of a resident. Such authorized personnel shall include the facility's director of nursing services, registered nurse on duty, licensed practical nurse on duty or the pharmacist or the authorized practitioner supplying such controlled substances.

(iii) The facility shall maintain all records of controlled substances furnished or transferred from the pharmacy and the disposition of all controlled substances in emergency kits, as required by article 33 of the Public Health Law and corresponding regulations.

(3) For medications other than controlled substances [The] the medication contents of each kit shall be limited to injectables except that the kit may also include:

(i) sublingual nitroglycerine; and

(ii) up to five noninjectable, prepackaged medications not to exceed a 24-hour supply; [which are the same noninjectable, prepackaged medications in all emergency kits throughout the facility.] *The total number of noninjectables may not exceed 25 medications for the entire facility;*

(4) Each kit shall be kept and secured within or near the nurses' station.

(i) Verbal orders. All medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order, in which case the verbal order shall be given to a licensed nurse, or to a licensed pharmacist, immediately reduced to writing, authenticated by the nurse or registered pharmacist and countersigned by the prescriber within 48 hours. In the event a verbal order is not signed by the prescriber or a *legally* designated alternate [physician] *practitioner* within 48 hours, the order shall be terminated and the facility shall ensure that the resident's medication needs are promptly evaluated by the medical director or another legally authorized prescribing practitioner.

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 16, 2004.

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

Regulatory Impact Statement

Statutory Authority:

These regulation revisions of 10 NYCRR Section 415.18, Pharmacy Services, in nursing homes, are proposed under the authority granted to the Commissioner of Health under PHL Section 2803. The PHL outlines the responsibility to conduct inspections of health care facilities to determine

compliance with statutes and regulations promulgated under the provisions of those statutes and authorizes the commissioner to propose rules, regulations and amendments thereto for consideration by the State Hospital Review and Planning Council "the Council". The Council, by a majority vote of its members, shall amend rules and regulations, subject to the approval of the commissioner, to effectuate the provisions and purposes as stated in the PHL.

Legislative Objectives:

The Department of Health possesses the comprehensive responsibility for the development and administration of programs, standards and methods of operation, and all other matters of policy with respect to nursing home services. Furthermore, through the Social Security Act, the federal government authorizes the State to administer programs and services through Medical Assistance (*i.e.,* Medicaid). This includes responsibility for standards of care within those settings, in order to ensure the health needs of recipients are met. These amended regulations will enable nursing homes to respond more quickly and efficiently to the health care needs of residents requiring emergency medications. The regulation will ensure the protection of the nursing home resident and promote the highest quality of care.

Needs and Benefits:

This proposal to amend 10 NYCRR sections 415.18(g) and 415.18(i) responds to the fact that current regulations for nursing home emergency medication kits and verbal orders are outdated and not in keeping with actual practice.

The State's nursing homes provide a variety of clinical services which were not anticipated when the current pharmacy services regulations were promulgated. The Rug-II case mix reimbursement methodology which began in 1986, has allowed nursing homes to open their doors to residents who require resources which were previously unavailable. Currently, nursing homes accept residents whose clinical needs at one time were met in a hospital. In addition, some nursing homes have units that address the unique needs of special populations such as HIV, traumatic brain injury (TBI), or ventilator residents.

The present regulation, section 415.18(g), provides for emergency medication kits but limits the contents to injectables. It also provides for the kit to contain sublingual nitroglycerine and up to five noninjectable prepackaged medications. At the time this regulation was promulgated, the extensive array of oral medications currently available did not exist and emergency medications were primarily viewed in terms of injectable medications. With the greater complexity of clinical conditions often seen in today's nursing home, resident issues of pain management have taken on greater significance. The availability of oral medications for pain and the wide range of antibiotics that did not exist at the time the regulations were written would significantly affect how nursing homes could respond to an emergency need of a resident.

The present regulations call for the contents of the emergency medication kits to be identical on every unit throughout the facility. At a time when the needs of residents were similar in terms of clinical management, this made sense. However, with nursing homes providing care to special populations including HIV, TBI and ventilator care, this requirement inhibits the most efficient use of emergency medications kits to best meet the unique clinical needs of special populations. When promulgated, these regulations were seeking to address concerns that facilities would establish "mini" pharmacies by having a wide range of noninjectables in the emergency medication kit and that the presence of a high number of medications may result in administration errors. With safe product packaging that is present today, safety concerns have been significantly reduced. In addition, the proposed regulation changes would limit the total number of noninjectables that would be available in emergency kits to no more than twenty-five. This would further ensure resident safety and eliminate the concern that nursing homes might stock an unlimited amount of noninjectables in the emergency kits. The proposed revisions would also allow for the presence of controlled substances in nursing home emergency kits. This would allow for the nursing home to respond quickly to pain management concerns that are a major issue for some residents.

Regulations at 415.18(i) provide that all medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order. At the time the original regulations were promulgated only physicians could order medications. The proposed changes would insert the phrase designated alternate practitioner in place of designated alternate physician. This change would be reflective of current practices in which other prescribers, such as a nurse practitioner can order medications.

Costs:

Costs to Regulated Parties:

There will be no additional costs to regulated parties.

Costs to State and Local Government:

There will be no additional costs to State or local governments.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

The proposed regulation imposes no program, duty, service, or other responsibility upon any city, town, village, school, fire or other special district.

Paperwork:

The regulation imposes no additional reporting requirements, forms or other paperwork.

Duplication:

The regulation does not duplicate any federal or state regulation.

Alternative Approaches:

No alternative approaches were considered, since all nursing homes would be allowed flexibility in determining the contents of the emergency medication kit in their facility.

Federal Standards:

This regulatory amendment does not exceed any minimum standards of the federal government.

Compliance Schedule:

The proposed regulation will be effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

For the purposes of this Regulatory Flexibility Analysis, small businesses are considered any nursing home within New York State which is independently owned and operated, and employs 100 individuals or less. Approximately 100 nursing homes would therefore be considered "small businesses".

Compliance Requirements:

The regulation would impose no additional recordkeeping or other affirmative acts.

Professional Services:

The regulation would impose no additional professional services.

Compliance Costs:

The regulation would impose no additional costs.

Economic and Technological Feasibility Assessment:

The proposed regulation would impose no compliance requirements which would raise technological or feasibility issues.

Minimizing Adverse Impact:

The agency considered the approaches listed in section 202-b(1) of SAPA and found them inapplicable. The regulation would impose no adverse impact on small businesses or local governments.

Small Business and Local Government Input:

The regulation would have no impact on small businesses and local governments. The regulation is supported by provider and consumer groups and feedback from these groups have been gathered. The proposed revisions will be sent to the Codes and Regulations Committee of the Council and appear on the agenda of the Codes and Regulations Committee which is made up of representatives of groups that have as their members representatives of small business and local government.

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

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

Genesee	St. Lawrence	Yates
Greene	Saratoga	

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

The regulation would impose no additional reporting, recordkeeping or other affirmative acts.

Professional Services:

The regulation would not require additional professional services.

Compliance Costs:

The regulation would not impose additional costs.

Minimizing Adverse Impact:

The regulation would not result in any adverse economic impact on providers. The agency considered the approaches listed in section 202-bb(2) of SAPA and found them inapplicable.

Opportunity for Rural Area Participation:

The following groups are in support of the modification of 10 NYCRR 415.18:

New York Association of Homes and Services for the Aging
Nursing Home Community Coalition
New York State Health Facilities Association
New York State Office for Aging Long Term Care Ombudsman
Health Facility Association of New York
New York State Board of Pharmacy
New York Chapter of the American Society of Consulting Pharmacists

The proposed revisions will be sent to the Code Committee of the Council and appear on the agenda of the Code Committee which is made up of representatives of groups that have as their members representatives of rural areas.

Job Impact Statement

A Job Impact Statement is not necessary because it is apparent from the nature and purpose of the proposed regulation that it will not have a substantial adverse impact on jobs or employment opportunities. The proposal simply clarifies what drugs can be stocked in emergency medication kits, as well as who may sign verbal orders.

EMERGENCY RULE MAKING

Part-Time Clinics

I.D. No. HLT-31-04-00017-E
Filing No. 829
Filing date: July 19, 2004
Effective date: July 19, 2004

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

Action taken: Amendment of sections 703.6 and 710.1 of Title 10 NYCRR.

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

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

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

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

- The provision of radiology services in stationary sites and mobile vans where shielding may be inadequate.
- The provision of a full range of primary care services where minimum physical plant standards may not be met, as part-time clinics are exempt from most physical plant requirements. Inadequate space to provide the range of services safely compromised patient safety with narrow corridors which, if an emergency arises, would not provide for stretcher or wheelchair access or egress.
- The provision of a variety of complex services where more extensive supervision would be expected.
- The provision of services to all the residents in a given location, such as an Adult Home, raises questions about appropriate utilization.
- The provision of specialty services, such as pediatric cardiology utilizing sophisticated equipment, is considered inappropriate for a part-time clinic setting, since a comprehensive, integrated plan of care is needed to treat these patients effectively.
- The use of part-time clinics by some patients as their main source of health care compromises the continuity of their care, as the link to emergency and after-hours treatment becomes problematic.
- The improper application of infection control principles for sterilizing equipment.
- The persistence of these problems warrants the issuance of these rules on an emergency basis.
- The principal changes in the proposed rules are:
- A more detailed description of the types of services permitted in part-time clinics.
- Explicit exclusion of certain types of locations and premises as acceptable sites for part-time clinics.
- Addition of a requirement that part-time clinics be in sufficient proximity to the sponsoring hospital or diagnostic an treatment center to ensure adequate supervision.
- Enhanced operating standards, including requirements for quality assurance and improvement and for credentialing of staff.
- Addition of a requirement for prior limited review of all new part-time clinic sites and the continuation or proposed relocation of existing clinics.
- Recognition that part-time clinics which are operated by city and county health departments are governed by section 614 of the Public Health Law.

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

Subject: Part-time clinics.

Purpose: To clarify and enhance the requirements that apply to part-time clinics and require prior limited review of all part-time clinic sites.

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

Section 703.6 Part-time clinics

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

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

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

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

(b) Department approval and/or notification.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) disposal of solid wastes and sharps;

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

(vi) a fire plan consistent with local laws;

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

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

(ix) utilization review;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(7) smoking is prohibited within patient care areas.

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

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

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

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

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

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

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

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

(4) Proposals not requiring an application.

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 16, 2004.

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

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

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

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

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

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

An emergency regulation addressing part-time clinics was adopted effective August 15, 2000. Additional emergency regulations were adopted effective on November 13, 2000, February 12, 2001, May 14, 2001, August 10, 2001, November 8, 2001, February 7, 2002, May 6, 2002, August 1, 2002, October 29, 2002, January 27, 2003, April 25, 2003, July 24, 2003, October 22, 2003, January 20, 2004 and April 20, 2004. The last emergency adoption is scheduled to expire on July 19, 2004. This new emergency regulation will repeal and/or amend the regulations which would have gone back into effect upon the expiration of the April 20, 2004 emergency regulation.

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

- A more detailed description of the types of services permitted in part-time clinics
- Explicit exclusion of certain types of locations and premises as acceptable sites for part-time clinics
- A requirement that part-time clinics be in sufficient proximity to the sponsoring hospital or diagnostic and treatment center to ensure adequate supervision
- Enhanced operational standards, including requirements for quality assurance and improvement and for credentialing of staff

- A requirement for prior limited review of new part-time clinic sites and proposed relocations of existing clinics. Requests for prior limited review must be submitted to the Department's central office at least 45 days in advance of the proposed commencement of service, instead of the 15 business days required for notification to the appropriate Department regional office.
- Recognition that part-time clinics which are operated by city and county health departments are governed by Section 614 of the Public Health Law.

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

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

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

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

Cost to State and Local Government:

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

Cost to the Department of Health:

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

Local Government Mandates:

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

Paperwork:

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

Duplication:

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

Alternative Approaches:

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

Federal Requirements:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect of rule:

New York State has 9 hospitals, 167 diagnostic and treatment centers and approximately 455 adult homes and 53 congregate living centers that could be considered small businesses affected by this rule. Physician offices, of which the Department has no statistics on how many there are, also could be considered small businesses and impacted by this regulation. The Office of Mental Health approved approximately 980 outpatient mental health programs, the majority of which are small businesses. The Office of Mental Retardation and Developmental Disabilities approves Intermediate Care Facilities (ICFs) many of which would be considered small businesses and which also could be impacted by the regulation. With respect to local governments, to the extent the New York City Department of Health and 57 county health departments operate or propose to operate part-time clinics, they would be impacted by this regulation.

Compliance requirements:

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

Professional services:

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

Compliance costs:

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

The cost impact of the proposed regulations will depend on the number of operators that seek to establish new part-time clinics, relocate existing clinics or change services in existing sites. For the individual provider, costs will vary with the condition of the existing or proposed site. For sites

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

Economic and technological feasibility:

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

Minimizing adverse impact:

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

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

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

Small business and local government participation:

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

Rural Area Flexibility Analysis

Effect on Rural Areas

This rule applies uniformly throughout the state including all rural areas. Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements

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

Professional Services

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

Compliance Costs

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

Minimizing Adverse Impact

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

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

whether the sponsor can provide appropriate supervision and oversight of staff and services at the proposed site.

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

Opportunity for Rural Area Participation

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

Job Impact Statement

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

NOTICE OF ADOPTION

Arboviral Infection Reporting

I.D. No. HLT-18-04-00002-A
Filing No. 821
Filing date: July 14, 2004
Effective date: August 4, 2004

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

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

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

Subject: Arboviral infection reporting.

Purpose: To add arboviral infection to the communicable disease list.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-18-04-00002-P, Issue of May 5, 2004.

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

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

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

DRGs, SIWs, Trimpoints and Arithmetic Mean LOS

I.D. No. HLT-31-04-00013-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 86-1.62 and 86-1.63 of Title 10 NYCRR.

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

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

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

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): Summary of Regulation:

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

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

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

86-1.63 - Non-Medicare Trimpoints

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

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

Provider/Payor Fiscal Impact:

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

Reasons for Initiating Regulation:

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

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: regsqna@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:

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

Legislative Objectives:

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

Needs and Benefits:

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York are intended to make current regulations consistent with changes made to the diagnosis related group (DRG) classification

system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

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

Costs:

Costs to State Government:

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

Costs of Local Government:

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

Costs to Private Regulated Parties:

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

Costs to the Department of Health:

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

Local Government Mandates:

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

Paperwork:

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

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

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

Federal Standards:

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

Compliance Schedule:

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

Contact Person: Mr. William R. Johnson
New York State Department of Health
Office of Regulatory Reform
Corning Tower Building, Room 2415
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(518) 473-7488
(518) 486-4834 (FAX)
REGSQNA@health.state.ny.us

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

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments

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

Compliance Requirements

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

Professional Services

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

Economic and Technological Feasibility

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

Compliance Costs

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

Minimizing Adverse Impact

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

Small Business and Local Government Participation

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

Rural Area Flexibility Analysis

Effect on Rural Areas

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements

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

Professional Services

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

Compliance Costs

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

Minimizing Adverse Impact

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

Opportunity for Rural Area Participation

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

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

Job Impact Statement

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

Department of Law

NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED

Senior Residential Communities

I.D. No. LAW-07-04-00012-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. LAW-07-04-00012-P was published in the *State Register* on February 18, 2004.

Subject: Senior residential communities.

Purpose: To insure residents receive material disclosures.

Substance of rule: The proposed regulations will govern mandatory disclosures in offerings of occupancy in Senior Residential Communities ("Residences"). These Residences are generally characterized by (1) restrictions limiting occupancy to senior citizens in good health, (2) payment of a substantial entrance fee as a prerequisite for admission in the Residence, and (3) execution of a residency agreement which enumerates the terms and conditions of occupancy in the Residence. Residents generally do not acquire an ownership interest in the Residence despite the payment of entrance fees, making this type of residential organization significantly different from cooperative, condominium or homeowners association organization. Where ownership is not offered, resident's interest in the Residence most closely resembles a leasehold interest, although a significant distinguishing factor is that residents often may select an entrance fee option that offers a substantial percentage refund of the entrance fee upon termination of occupancy. Residents are generally required to pay a monthly service fee in addition to the entrance fee.

Typically, Residences provide some health-related services, but are not licensed to provide the level of care provided at nursing home or assisted living communities. Thus, residents are generally required to pass an entrance physical examination or otherwise satisfy management that they are able to provide for their own health care needs on a day-to-day basis. In many instances, a residency agreement may be terminated by the Residence if a resident's physical or mental health requires a higher level of care.

The regulation will be enacted to insure that prospective residents of Senior Residential Communities receive material disclosures prior to executing residency agreements, making deposits or paying entrance fees, or taking occupancy. The disclosures must be presented in the form of an Offering Prospectus, which must conform to format and content requirements set forth in the regulation, and must be submitted according to the procedure described in the regulation. The structure of the regulation follows those regulations governing condominiums, cooperatives, and homeowners associations, and has analogous requirements for the submission of amendments, certifications, and descriptions of property specifications and/or building condition. However, if the Residence is organized as a coop, condominium, or homeowner's association, it must comply with all of the applicable requirements in Parts 20, 21, or 22 respectively, as well as the applicable requirements of Part 25. Additionally, the regulation defines specific terms such as "Senior Residential Community", "entrance fee", and "residency agreement".

Sponsors of Senior Residential Communities must disclose, among other things, the following:

- the amount of entrance fees, the amount of deposits, monthly fees, and various entrance fee options, including refund options.
- annual budgets for the operation, annual certified financial statements, a statement of the tax implications of living in a Residence.
- the procedure to reserve units and establish residency, including the proper procedure for maintaining deposits in escrow as well as all alternatives to the use of escrow accounts (e.g., surety bonds or letters of credit).
- the specific residential services and amenities provided, including food service and meal plans, housekeeping and laundry services, etc. The disclosure must indicate which services are included in the price of the entrance or monthly service fees, and which are available at extra cost.
- the specific health-related services provided, including whether a health care facility in available on premises, whether assistance with the administration of medication is provided, whether assistance with activities of daily living is provided, etc.
- a description of all staffing information.
- the procedure for termination of residency agreement and all restrictions, requirements, circumstances of default, etc.
- all relevant rights and obligations of both residents and Sponsor.

In addition, all pertinent documents must be included with the offering prospectus, including copies of the residency agreement, the confidential date statement, floor plans, asbestos reports, "house rules", and sponsor's engineering or architectural reports.

Changes to rule: No substantive changes.

Expiration date: February 17, 2005.

Text of proposed rule and changes, if any, may be obtained from: Kenneth E. Demario, Department of Law, Investment Protection Bureau, 120 Broadway, 23rd Fl., New York, NY 10271, (212) 416-8134, e-mail: kenneth.demario@oag.state.ny.us

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

Division of the Lottery

EMERGENCY RULE MAKING

Video Lottery Gaming

I.D. No. LTR-31-04-00012-E
Filing No. 824
Filing date: July 14, 2004
Effective date: July 15, 2004

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

Action taken: Addition of Part 2836 to Title 21 NYCRR.

Statutory authority: Tax Law, section 1617-a

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

Specific reasons underlying the finding of necessity: (1) The nature and location of the general welfare need:

The New York Lottery operates lottery games to fund education in New York State. The current financial situation in New York State is such that funds are urgently needed to meet revenue shortfalls, particularly after the September 11th disaster and the general economic downturn that followed. It is projected that the operation of video lottery gaming in New York State may generate over $1 billion for education annually when fully implemented. Any game delay that jeopardizes start up of video lottery gaming this fiscal year could result in a loss of approximately $1 to 4 million weekly in aid to education.

Since passage of the legislation in October 2001 authorizing the Division to license the operation of video lottery gaming at racetracks around New York State, the Division has worked diligently with contractors and racetrack owners to develop the game and the gaming facilities. With commencement of gaming anticipated sometime around the end of this year, the Division continues to finalize the gaming product and to work with the racetracks to design their business operations. These regulations are a result of that product development, and have only now been completed. Consequently, this is the earliest the regulations could have been drafted, leaving inadequate time prior to the anticipated start date to comply with the normal rulemaking procedure set forth in the State Administrative Procedure Act Section 202(1).

(2) Description of the cause, consequences, and expected duration of the need to file emergency rules:

The cause of the need is set forth in paragraph #1 above. The consequence of filing this emergency rulemaking is that the Division will begin to generate needed aid to education through the operation of video lottery gaming. In July 2003, the first draft of these regulations was published. The Division received a number of comments during the public comment period. Revisions to the proposed regulations based on comments received from the public and arising from internal product development are included in these emergency regulations. The Division intends to file shortly a Notice of Revised Rulemaking pursuant the State Administrative Procedure Act Section 202(4-a) to continue the normal rulemaking procedures relative to these regulations.

(3) Compliance with the requirements of § 202(1) of the State Administrative Procedure Act would be contrary to the public interest because it would delay implementation of the game and deprive the state of needed revenue to education. The approximately $1 to 4 million in weekly aid to education lost this fiscal year by this delay would need to be taken from other revenue sources.

(4) Circumstances necessitate that the public and interested parties be given less than the minimum period of 30 days for notice and comment because any game delay would result in a loss of approximately $1 to 4 million weekly this fiscal year in aid to education. As mentioned above, the Division continues to finalize the gaming product and to work with the racetracks to design their business operations. These regulations are a result of that product development, and have only now been completed. Consequently, this is the earliest the regulations could have been finalized, leaving inadequate time prior to the anticipated start date to comply with the normal rulemaking procedure set forth in the State Administrative Procedure Act Section 202(1). Delaying the commencement of gaming for the time needed to utilize the normal rulemaking process would mean a loss in aid to education of approximately $1 to 4 million per week which would have to be made up from other state revenues.

Subject: Video lottery gaming.

Purpose: To allow for the licensed operation of video lottery gaming.

Substance of emergency rule: Chapter 383 of the Laws of 2001 as amended by Chapter 85 of the Laws of 2002, as amended by Chapter 62 of the Laws of 2003, codified as § 1617-a of the New York State Tax Law, authorized the Division of the Lottery to license the operation of video lottery gaming at eligible racetracks around New York State. That legislation directed the Division to promulgate rules and regulations for the licensing and operation of those games.

The regulations begin by setting forth the general provisions, construction, and application of the rules. This section contains the definitions for key terms that are used throughout the body of the document.

Many of the regulations set forth the licensing procedures for the various participants needed to bring video lottery gaming into operation. Licensees include the racetracks that are eligible under the enabling legislation to operate video lottery gaming, and their employees, as well as gaming and non-gaming vendors that will supply goods and services to both the Division and the racetracks. Licensing procedures include financial disclosure and, in some instances, background investigations for principles and key employees. Non-gaming vendors supplying goods and services below a certain threshold will not be required to undergo the licensing process, but will have to register as suppliers.

The racetracks, referred to in the regulations as video lottery gaming agents, will be required to submit business plans for approval by the Division prior to licensing, and to establish a set of internal control procedures pursuant to guidelines provided by the Division. The agents will be required to submit periodic financial reports and undertake other financial controls. The regulations set forth the continuing obligations of video lottery gaming agents following licensure, and identify penalties that may be imposed on licensees for violation of the regulations.

The regulations establish rules for the conduct and operation of video lottery gaming. Movement of the terminals is closely regulated, and surveillance and security systems are established at each facility.

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 11, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Robert J. McLaughlin, General Counsel, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301, e-mail: rmclaughlin@lottery.state.ny.us

Additional matter required by statute: A negative declaration has been prepared and is on file for this rule making.

Regulatory Impact Statement

1. Statutory Authority: On October 31, 2001, Governor Pataki signed into law Part C of Chapter 383 of the Laws of 2001, as amended by Chapter 85 of the laws of 2002, as amended by Chapters 62 and 63 of the Laws of 2003, codified as 1617-a and 1612 of the New York State Tax Law, which authorizes the New York State Division of the Lottery ("Division") to license the operation of video lottery gaming at racetrack locations around the state. That legislation directs the Division to promulgate regulations allowing for the licensed operation of video lottery gaming. These regulations fulfill that mandate, enabling the licensing and operation of video lottery gaming at authorized racetracks.

2. Legislative Objectives: These proposed regulations advance the legislative objective of raising additional revenue for education by establishing video lottery gaming.

3. Needs and Benefits: The regulations satisfy a legislative mandate directing the Division to promulgate regulations for the design, licensing and implementation of video lottery gaming. Pursuant to a Memorandum of Understanding between the Division and the Racing and Wagering Board, potential duplicative licensing requirements for the racetrack employees have been eliminated.

The regulations set forth the manner in which the regulated community will be licensed to conduct video lottery gaming. Additionally, they describe the game operation, financial operations, terminal design, the manner in which the security systems must operate, and certain requirements for the physical layout of the gaming facilities. These regulations provide the regulated community with the details and guidance to effectively implement video lottery gaming in New York State.

While the Division considers video lottery gaming to be very similar to other lottery games that the Division has successfully conducted for over twenty-five years, some components set it apart from those more tradi-

tional games. For example, most of the Division's current licensed agents are food and beverage retailers. Video lottery gaming will require the Division to license racetrack venues as video lottery gaming agents, in addition to licensing video lottery gaming and non-gaming suppliers, as well as principals, key employees, and employees.

In furtherance of its statutory mandate to design a game that is comparable to others in the industry, the Division has spent a considerable amount of time since the legislation was signed studying video lottery gaming venues in other states, namely, Delaware, Rhode Island, and West Virginia. In some respects, the video lottery gaming design in these regulations is modeled after those states; however, there are significant differences. For example, the video lottery games and the video lottery terminals are designed to meet specific legal requirements unique in this state.

A Notice of Proposed Rule Making was published in July 2003. Since that time, the game design has continued to develop during the start up phase of the project. Because of this, and based on comments received during the public comment period, it was necessary to revise the proposed regulations. These emergency regulations include the revisions. By way of example, sections were added authorizing the issuance of badges for temporary employees, expressly setting forth a procedure to request exemption from the regulations, and authorizing the video lottery gaming agents to use Division logos and other copyrighted material to advertise and promote video lottery gaming at the licensed facilities.

In response to comments received from prospective licensees, the video lottery gaming agents were given increased latitude in managing their business operations. For example, rather than adhering to internal controls procedures prescribed by the Division, each agent will design their own in compliance with guidelines established by the Division. License applications with minor deficiencies can be resubmitted without the need to wait a lengthy resubmission time. If temporary employees are needed intermittently, they may utilize a badging system instead of undergoing a lengthy licensing process. Gaming agents will be able to utilize a Division logo in their advertising program, and will be able to sell all lottery products. Grammatical and formatting changes were made for clarity and ease of use.

These regulations will assist the regulated parties to fully understand and comply with all the requirements of the operation of video lottery gaming, while generating sales and revenue to aid education in the State of New York.

4. Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

According to data provided by the racetracks, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will approximate $450 million if all eligible venues participate. Each racetrack's proposed project differs. The cost for each facility ranges from $4 million to $250 million dollars. The regulations require video lottery gaming agents housing over 2500 terminals to equip the facility with an alternate emergency power source. It is estimated that this could cost those agents an additional $250-$300 per video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electrical and communication upgrades.

The racetracks will incur certain labor costs associated with operating video lottery gaming. The gaming facilities throughout the state are expected to employ upwards of a total estimated 4,000 people. Individual gaming agents will be employing approximately 200 to 1,200 people. The average number of employees at each facility is estimated to be over 500. Hourly wages are expected to range from minimum wage to $65 per hour, with annual salaries ranging from $22,000 to $250,000. Total annual payroll for each racetrack could range from $3.0 million to over $15 million.

There are other incidental costs that will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. It is anticipated that most of these controls will be established through sufficient experienced racetrack personnel. Additional external auditing costs are expected to average approximately $65,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a $10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately $100 to cover the cost of fingerprints.

Total costs for the State, the tracks and vendors for start up and a full year of operations are estimated to be approximately $500 million, with total revenue for the project for that time period estimated to be over $1.2 billion.

5. Local Government Mandates: No local mandates are imposed by rule upon any county, city, village, etc. The legislation permits local communities which have racetracks not expressly identified in the legislation to pass local laws authorizing video lottery gaming at racetracks in their communities, if they so choose.

6. Paperwork: The regulations require that the regulated entities complete a licensing application, including fingerprints, and to update and renew the application periodically. The application will follow a standard multi-state format used by other states that license similar gaming activities. Completion of these applications will be a new responsibility for the video lottery gaming agents, their principals, and key employees. Agents, their principals and key employees will be required to provide more detailed disclosure than they have previously been required to provide for licensure. This level of disclosure is common in other gaming states. Provisional licenses will be granted under certain circumstances, so that the licensing review process is not expected to pose a barrier to immediate entry into the business.

The regulated vendors should be familiar with these licensing forms and reporting requirements as they are similar to those required in other states where these vendors currently do business. In fact, gaming vendors routinely have regulatory compliance departments to assist in fulfillment of these requirements.

Vendors supplying goods or services not directly related to gaming must register to do business with the video lottery gaming agents. However, if their contracts exceed certain thresholds outlined in the regulations, they will be required to undergo a full licensing procedure. In particular, non-gaming vendors will be required to submit license applications if any of the following conditions exist:

(a) the non-gaming vendor has a contract with a video lottery gaming agent that exceeds $100,000.00 in any twelve (12) month period;

(b) the non-gaming vendor has contracts with more than one video lottery gaming agent that combined exceed $150,000.00 in any twelve (12) month period;

(c) the non-gaming vendor has contract(s) for a portion of a video lottery gaming facility construction project that exceeds $500,000.00 in any twelve (12) month period;

(d) the non-gaming vendor has combined contracts for a portion of more than one video lottery gaming facility construction project exceeding $1,000,000.00 within any twelve (12) month period.

Agents will be required to submit business plans that will include floor plans of the gaming areas, staffing plans, internal control procedures, marketing plans, and security plans. These will need to be updated periodically.

In order to ensure the financial integrity and security of video lottery gaming, the video lottery gaming agents will be required to develop internal control procedures, to undergo an auditing process and to submit financial reports. These financial reports are produced during the regular course of business, and their submission should not prove burdensome. These will need to be updated periodically.

7. Duplication: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules. Currently, the New York State Racing and Wagering Board must license the operation of pari-mutuel wagering at the racetracks as well as licensing racetrack employees. Because the operation of video lottery gaming is separate and distinct from pari-mutuel wagering, and further because only the Division may license the operation of video lottery gaming, dual licensing of the racetracks is not duplicative. Pursuant to a Memorandum of Understanding between the Division and that agency, potential duplicative licensing requirements for the racetrack employees have been eliminated.

8. Alternatives: In furtherance of its statutory mandate to design a game that is comparable to others in the industry, the Division has spent a considerable amount of time since the legislation was signed studying video lottery gaming venues in other states, namely, Delaware, Rhode

Island, and West Virginia. In some respects, the video lottery gaming design in these regulations is modeled on those states; however, there are significant differences. For example, the video lottery games and the video lottery terminals are designed to meet specific legal requirements unique in this state.

Prior to publication of the first proposed regulations, members of the regulated community were contacted and comments to the proposed draft regulations solicited. In response, the Division received hundreds of comments that were carefully and thoroughly examined. These comments fell broadly into the following general categories:

(a) That the requirements to become licensed and operate video lottery gaming appeared oftentimes unclear or vague;

(b) That many of the requirements established in the proposed draft regulations were overly burdensome;

(c) That the licensing authority of the Division was questionable;

(d) That the regulations imposed excessive costs to satisfy unnecessary regulatory requirements; and

(e) That the regulations contained definitions that were inconsistent, inaccurate or ambiguous.

As a result of this outreach effort, a number of revisions were made and included in the first proposed regulations published in July 2003. The public comment period which followed elicited a number of comments primarily from prospective licensees. Many of those comments proved valuable in drafting these emergency regulations which both meet the needs of the regulated community while maintaining the high standards established by the Division to operate and regulate its games. All comments received are available for public review by contacting Robert J. McLaughlin, Esq., General Counsel, New York State Division of the Lottery at One Broadway Center, P.O. Box 7500, Schenectady, New York 12301 or by calling 518-388-3408 or e-mailing to rmclaughlin@lottery.state.ny.us.

While the majority of requests for revision were accommodated whenever feasible, the Division did not accept any requests for change that in its estimation would undermine the security and integrity of the game. For example, when asked to make changes which would reduce the costs of developing or operating their businesses, the Division generally accommodated those requests when possible. Conversely, though comments were received that the stringent licensing application process was overly burdensome, the Division did not lessen these requirements.

As another alternative, the Division entered into a Memorandum of Understanding with the Racing and Wagering Board to avoid potential duplicative licensing requirements for the racetrack employees.

9. Federal Standards: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules.

10. Compliance Schedule: The licenses must be issued prior to commencement of video lottery gaming. In many instances, the license applicants will be issued provisional licenses immediately upon filing their application. All requirements concerning the conduct and operation of video lottery gaming must be complied with prior to actual commencement of the games and maintained on-goingly throughout the operation of the games.

Regulatory Flexibility Analysis

1. Effect of Rule: The Division of the Lottery finds that the rule will not adversely affect local government. The rule will impact a number of different types of businesses:

(a) Licensed racetracks: It is expected that the racetracks will employ greater than 100 employees at their facilities and, therefore, are not "small businesses" as that term is defined in New York State Administrative Procedure Act § 102;

(b) Gaming vendors: Vendors wishing to supply gaming products and services must be licensed. These include the supplier of the central computer system that will support the video lottery games, the companies supplying the games and terminals, management companies and certain leaders. It is anticipated that once video lottery gaming has commenced, these companies will recoup any costs associated with licensing and start-up;

(c) Non-gaming vendors: Most vendors supplying goods and services not directly related to gaming will be required to complete a registration process. However, if their contract exceeds a certain value, they will be required to comply with licensing provisions. While it is difficult to estimate all costs associated with doing business with a video lottery gaming agent, the costs of registration will be minimal. The costs of licensing, should that be necessary, will conform to the costs of licensing discussed in paragraph (c) below. However, non-gaming vendors who must undergo a licensing process will not be required to pay a licensing fee other than the costs of fingerprinting.

Participation in video lottery gaming by any of these entities is voluntary and it is expected they will use good business judgment when deciding whether or not to participate in these games. It is expected there will be no adverse economic impact on any of these regulated businesses.

2. Compliance Requirements: These rules will not require small businesses to complete burdensome forms or reports. To the extent that any small business becomes a non-gaming vendor to a video lottery agent, a contract value threshold of $100,000 applies before licensing is necessary. Completion of the licensing application will be required. Certain small vendors may not even be required to register.

3. Professional Services: It is not anticipated that any professional services by a small business or local government will be needed to comply with these proposed rules.

4. Compliance Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

Based on forecasted estimates provided by the racetracks themselves, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will exceed $240 million if all eligible venues participate. Each facility's proposed project differs. The cost for each facility ranges is from $4 million to over $100 million dollars. The regulations require video lottery gaming agents housing over 2,500 terminals to equip the facility with an alternate emergency power source. It is estimated that this will cost those agents an additional $250-$300 per installed video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electric and communication upgrades.

The gaming facilities throughout the state are expected to employ upwards of a total estimated 1900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to $65 per hour, with annual hourly salaries between $22,000 to $250,000. Total annual payroll for each racetrack will range from $1.8 million to over $10.8 million, with an average payroll of over $6.6 million.

There are other incidental costs which will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Lottery guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. The majority of these controls are put in place through adequate experienced personnel and the personnel costs are set forth above. Additional external auditing costs are expected to average approximately $65,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a $10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately $100 to cover the cost of fingerprints.

5. Economic and Technological Feasibility: The economic and technological impact of these rules on local government is minimal.

There are no expected adverse economic or technological impact on small businesses in complying with these regulations.

6. Minimizing Adverse Impact: In the case of smaller, non-gaming vendor contracts, these vendors will not be required to comply with licensing and background checks. Small businesses supplying non-gaming goods and services pursuant to contracts valued at less than $25,000 annually will be exempt from any registration or licensing requirements, and businesses supplying non-gaming goods and services pursuant to contracts valued at less than $100,000 will only need to complete a registration process.

7. Small Business and Local Government Participation: During the pre-proposal stage of the regulatory process, members of the regulated community were contacted and given the opportunity to participate in the formation of these regulations. The New York Lottery received numerous

comments from members of the community, many of which were incorporated during the final drafting of the proposed regulations. After publication of the Notice of Proposed Rule Making on July 16, 2003, the Lottery received numerous comments mostly from prospective licensees, during the public comment period. These emergency regulations include revisions made to the regulations as a result of that comment period.

Rural Area Flexibility Analysis

Many of the racetracks eligible for video lottery gaming licenses are located within "rural areas" as that term is defined in New York State Executive Law Section 481(7): Batavia Downs in Genesee County, Finger Lakes Racetrack in Ontario County, Saratoga Harness Track in Saratoga County, and Monticello Racetrack in Sullivan County.

However, the Division has determined that these regulations will impose no adverse impact on these rural areas. The rule places no additional requirements on racetracks, other businesses or communities located within the rural areas than it does on racetracks, businesses or communities located outside rural areas.

The Division believes that there will be positive impact on these rural areas, as this new industry brings increased levels of business and employment to the communities.

Job Impact Statement

The Division has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. To the contrary, the agency has determined the rule will have a positive impact on jobs and employment opportunities.

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

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

Public Service Commission

NOTICE OF ADOPTION

Rehearing and Clarification of Revised Uniform Business Practices by Niagara Mohawk Power Corporation, *et al.*

I.D. No. PSC-06-04-00011-A
Filing date: July 15, 2004
Effective date: July 15, 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 8, 2004, adopted an order in Case 98-M-1343 granting in part and denying in part petitions for reconsideration and clarification of certain provisions of the commission's Nov. 21, 2003 order adopting revised Uniform Business Practices (UBP).

Statutory authority: Public Service Law, sections 22, 65, 66 and 16 NYCRR section 3.7

Subject: Petitions for rehearing of the commission's Nov. 21, 2003 order.

Purpose: To incorporate the revised UBP requirements in the distribution utilities' tariffs and operating procedures.

Substance of final rule: The Commission granted in part and denied in part petitions by Niagara Mohawk Power Corporation, Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation and Multiple Intervenors for reconsideration and clarification of certain provisions of the Commission's November 21, 2003 Order adopting revised Uniform Business Practices, 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.

(98-M-1343SA11)

NOTICE OF ADOPTION

Transmission Service Overcharges

I.D. No. PSC-08-04-00013-A
Filing date: July 14, 2004
Effective date: July 14, 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 8, 2004, adopted an order in Case 04-E-0117 directing the Village of Silver Springs (Silver Springs) to use a refund from New York State Electric and Gas Corporation for imminent extraordinary capital projects.

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

Subject: Allocation of a refund related to transmission service overcharges.

Purpose: To authorize Silver Springs to use refund proceeds to offset the cost of capital projects in the fiscal year ending May 31, 2005.

Substance of final rule: The Commission denied a request by the Village of Silver Springs (Silver Springs) to use a transmission service refund received from New York State Electric and Gas Corporation to retire outstanding debt and directed Silver Springs to use the refund to offset the expenses to future plant additions, 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-0117SA1)

NOTICE OF ADOPTION

Mini Rate Increase by the Village of Silver Springs

I.D. No. PSC-13-04-00007-A
Filing date: July 14, 2004
Effective date: July 14, 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 8, 2004, adopted an order in Case 04-E-0117 approving revisions to the Village of Silver Springs's tariff schedule, P.S.C. No. 1—Electricity.

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

Subject: Minor rate filing.

Purpose: To allow the Village of Silver Springs to increase annual base electric revenues.

Substance of final rule: The Commission authorized an increase in the Village of Silver Springs' annual electric revenues by $45,641 or 17.1%, 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-0269SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Telephone Network Reliability

I.D. No. PSC-31-04-00019-P

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

Proposed action: On July 21, 2003, the commission issued an order instituting a proceeding, Case 03-C-0922—proceeding on motion of the commission to examine telephone network reliability. The purpose of the proceeding is to examine the current state of reliability of the telecommunications network and identify what steps should be taken to achieve or maintain an optimum level of reliability in the State. The commission may adopt telecommunications network reliability requirements applicable to telecommunications providers in the State regarding the optimum level of network reliability.

Statutory authority: Public Service Law, art. 5, sections 91 and 98

Subject: Telephone network reliability.

Purpose: To establish requirements designed to achieve the optimum level of telephone network reliability in New York State.

Substance of proposed rule: On July 21, 2003, the Commission issued an order instituting a proceeding, Case 03-C-0922—Proceeding on Motion of the Commission to Examine Telephone Network Reliability. The purpose of the proceeding is to examine the current state of reliability of the telecommunications network and identify what steps should be taken to achieve or maintain an optimum level of reliability in the state. The Commission may adopt telecommunications network reliability requirements applicable to telecommunications providers in the state regarding the optimum level of network reliability.

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

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

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

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

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

(03-C-0922SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Commodity Pricing Option Enrollments by Rochester Gas and Electric Corporation

I.D. No. PSC-31-04-00020-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 Rochester Gas and Electric Corporation to establish commodity pricing option enrollment period rules and procedures, introduce commodity pricing options and set forth the rules and procedures for changing commodity pricing options during the commodity rate period. The proposal was filed pursuant to commission's order adopting provisions of joint proposals with conditions, issued May 20, 2004, in Case Nos. 03-E-0765 and 02-E-0198.

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

Subject: Commodity pricing option enrollments.

Purpose: To set forth the commodity pricing option enrollment period rules and procedures, introduce the commodity pricing options to be effective Jan. 1, 2005 and set forth the rules and procedures for changing commodity pricing options during the commodity rate period.

Substance of proposed rule: The Public Service Commission is considering whether to approve, reject, or modify in whole or in part, a proposal filed by Rochester Gas and Electric Corporation pursuant to the Commission's Order Adopting Provisions of Joint Proposals with Conditions, issued May 20, 2004, in Case Nos. 03-E-0765 and 02-E-0198 to set forth commodity pricing option enrollment period rules and procedures to be effective October 1, 2004, introduce commodity pricing options to be effective January 1, 2005, and set forth the rules and procedures for changing commodity pricing options during the commodity rate 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.

(03-E-0765SA3)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Submetering of Electricity by New 19 West, LLC

I.D. No. PSC-31-04-00021-P

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

Proposed action: The Public Service Commission is considering a request filed by New 19 West, LLC to submeter electricity at 18-20 West St., New York, NY.

Statutory authority: Public Service Law, sections 65(1), 66(1), (2), (3), (4), (5), (12) and (14)

Subject: Case 26988—submetering of electricity for new master metered residential rental units owned or operated by private or government entities.

Purpose: To allow electric submetering at 18-20 West St., New York, NY.

Substance of proposed rule: The Commission will consider a proposal by New 19 West, LLC to master meter and submeter a new residential complex that is undergoing renovation. The total electric building usage for this complex will be master metered and each residential unit will be individually submetered.

The submetering plan sets forth proposals on electric rates, security, grievance procedures and dispute resolution, economic benefits and metering systems in compliance with the Home Energy Fair Practices Act (HEFPA). The Commission may accept, deny or modify, in whole or in part, the proposal to submeter electricity at 18-20 West Street, New York, New York.

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-0772SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Lightened Regulation by Bethpage Energy Center 3, LLC

I.D. No. PSC-31-04-00022-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, reject, or modify requests of Bethpage Energy Center 3, LLC (Bethpage 3) for an order providing for lightened regulation and approving financing.

Statutory authority: Public Service Law, sections 4(1), 66(1), 69, 70 and 110

Subject: Bethpage 3's requests for lightened regulation as an electric corporation and for financing approval of up to $55 million (including flexibility to change terms and entities) in addition to the $95 million amount it requested in Case 03-E-1581.

Purpose: To consider the requests in connection with an electric generating facility now under construction.

Substance of proposed rule: By petition filed July 19, 2004 in Case 04-E-0884, Bethpage 3 seeks an order providing for lightened regulation of it as an electric corporation operating in the wholesale electric market. In a petition filed in Case 03-E-1581, it had sought, among other things, financing approval in connection with an electric generating facility, which is now under construction, of up to $95 million. While that request is separately being considered, Bethpage 3 now seeks financing approval of up to an additional $55 million, together with the approval of flexibility to change financing entities and mechanisms, payment terms and payment amounts up to the additional $55 million.

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-0884SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Distributed Generation Service by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-31-04-00023-P

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

Proposed action: The 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 to become effective Sept. 23, 2004.

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

Subject: Application form for distributed generation.

Purpose: To provide an application form for customers applying for distributed generation service under Rider H.

Substance of proposed rule: Consolidated Edison Company of New York, Inc. made a tariff filing for approval to provide an application form for customers applying for distributed generation service under Rider H of the company's schedule for gas service to become effective on September 23, 2004. The information provided in this form shall be used for purposes of determining a customer's initial eligibility for service under Rider H and obtaining other useful information.

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-0875SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

810 Invoice—Utility Rate Ready

I.D. No. PSC-31-04-00024-P

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

Proposed action: The Public Service Commission is considering modifications in the Electronic Data Interchange (EDI) standard for the 810 invoice - utility rate ready. The proposed changes affect the manner in which amounts billed customers for taxes would be described in the TXI segment of an 810 invoice transaction. Changes in the 810 invoice—utility rate ready standard would subsequently be published in version 1.2 of the 810 invoice standard.

Statutory authority: Public Service Law, section 5(2)

Subject: Rules and guidelines for the exchange of retail access data between jurisdictional utilities and eligible ESCO/marketers.

Purpose: To revise the EDI transaction set standard for the 810 invoice—utility rate ready.

Substance of proposed rule: In its Opinion and Order No. 01-03, issued and effective July 23, 2001, the Commission directed the development of data exchange standards compatible with Electronic Data Interchange (EDI) systems for those transactions that would be necessary to support its retail access billing and payment processing practices, as described in orders issued in Case 98-M-1343, In the Matter of Uniform Business Practices. On June 21, 2002, the Commission published version 1.0 of the TS810 Invoice - Utility Rate Ready (URR)Transaction Standard. This standard governs the structure and content of EDI 810 invoice transactions, used only by utilities offering the Rate Ready model, to report bill details to ESCO/Marketers following issuance of a consolidated bill to the customer.

It has been necessary to modify various EDI data standards to recognize either changes in regulatory policies and/or technological improvements in data exchange systems. Prior changes in the 810 URR Invoice, published in version 1.1 issued on February 23, 2004, amended the rules governing transmission of certain invoice segments when the purpose of transmitting the transaction is to notify ESCO/Marketers that a prior invoice is being cancelled.

In this instance, the Commission seeks comments on a proposed change in the 810 URR Invoice standard regarding how tax amounts billed to customers would be described in an invoice transaction. Specifically, Niagara Mohawk Power Corporation (NMPC) requests that the TXI (tax information) segment in the TS810 Invoice be revised to add a new code (GR -gross receipts tax) to enable more detailed tax information to be communicated to ESCO/Marketers. At the same time, Department of Public Service Staff requests that if a revised standard is issued, that version should also correct the code used in the TXI segment of the URR Invoice transaction to identify amounts billed to customers for state and local sales taxes. For consistency with the 810 Invoice - Utility Bill Ready standard, the code used to describe sales taxes in the 810 URR standard should be 'LS'. No comments on this correction are necessary.

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.

(98-M-0667SA43)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

568 Payment Advisement by Niagara Mohawk Power Corporation

I.D. No. PSC-31-04-00025-P

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

Proposed action: The Public Service Commission is considering modifications in the Electronic Data Interchange (EDI) 568 payment advisement standard. Payment advisement transactions are used by utilities to communicate customer payment information to ESCOs when the customer's bill option is Rate Ready Purchase Receivables with Recourse. The proposed changes would update the text of the uniform business practices cited in the payment advisement business processes to reflect the revised practices issued on July 15, 2004. In addition, Niagara Mohawk Power Corporation requests that a new process rule be added to this document to clarify the data exchange between utility and ESCO when the purchased receivables with recourse model is in effect and the customer is also enrolled in budget billing.

Statutory authority: Public Service Law, section 5(2)

Subject: Rules and guidelines for the exchange of retail access data between jurisdictional utilities and eligible ESCO/marketers.

Purpose: To revise the EDI transaction set standard for the 568 payment advisement.

Substance of proposed rule: In its Opinion and Order No. 01-03, issued and effective July 23, 2001, the Commission directed the development of data exchange standards compatible with Electronic Data Interchange (EDI) systems for those transactions that would be necessary to support its retail access billing and payment processing practices, as described in orders issued in Case 98-M-1343, In the Matter of Uniform Business Practices. On February 24, 2003, the Commission published version 1.0 of the 568 Payment Advisement Transaction Standard. This standard governs the structure and content of the electronic transactions sent by utilities to ESCOs to communicate the details of customer payments (or payment reversals) when the customer's bill option is Utility Rate Ready consolidated billing and the payment processing model is Purchase Receivables with Recourse.

Following the initial publication of an EDI standard it may be necessary to modify the standard to recognize either changes in regulatory policies and/or technological improvements in data exchange systems. In this instance, comments are requested on revisions in the Payment Advisement Business Processes document to comply with revised Uniform Business Practices, issued on July 15, 2004, and the addition of a new business rule, proposed by Niagara Mohawk Power Corporation, intended to clarify the use of a 568 Payment Advisement transaction when the customer receives a rate ready consolidated bill from the utility, is enrolled in budget billing and the utility is purchasing the ESCOs receivables with recourse.

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.

(98-M-0667SA44)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

814 Enrollment Request and Response by Orange & Rockland Utilities, Inc. and Niagara Mohawk Power Corporation

I.D. No. PSC-31-04-00026-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 modifications in the Electronic Data Interchange (EDI) 814 enrollment request and response standard. Enrollment transactions are used by an ESCO to request enrollment of a customer for electric or gas commodity service or by a utility to respond to enrollment requests. Orange & Rockland Utilities, Inc. proposes to modify this standard to enable ESCOs to separately enroll unmetered electric service when both metered and unmetered electric services are present on an account. Niagara Mohawk Power Corporation requests modification of the rules governing use of the 'human needs indicator' segment when a request pertains to enrollment of a residential customer for gas commodity service.

Statutory authority: Public Service Law, section 5(2)

Subject: Rules and guidelines for the exchange of retail access data between jurisdictional utilities and eligible ESCO/marketers.

Purpose: To revise the EDI transaction set standard for the 814 enrollment request and response.

Substance of proposed rule: In its Opinion and Order No. 01-03, issued and effective July 23, 2001, the Commission adopted various data exchange standards, compatible with Electronic Data Interchange (EDI) systems, that were necessary to enable customers to enroll with an ESCO for electric or gas commodity service. Following the initial publication of these EDI standards it has been necessary to modify one or more standards to recognize changes in regulatory policies, technological improvements in data exchange systems or inefficiencies in the content or syntax of the initial standards.

In this instance, comments are requested on proposed revisions to version 1.3 of the Enrollment Request & Response standard. Orange & Rockland Utilities, Inc. (Orange & Rockland) requests modification of the 'front matter notes' and the REF*12 segment (Utility Account Number) in the Enrollment Implementation Guide to enable ESCOs to separately enroll unmetered electric service when both metered and unmetered electric services are present on an account. If the Implementation Guide changes proposed by Orange &Rockland are subsequently adopted by the Commission, corresponding changes would also be made in the Enrollment Data Dictionary and Business Processes document that comprise the Enrollment standard.

Niagara Mohawk Power Corporation (Niagara Mohawk) requests that the Enrollment Implementation Guide be modified to clarify the rules governing use of the REF*ALC (Human Needs Indicator) segment. This segment is currently required on all gas enrollment requests sent to Niagara Mohawk to indicate whether the customer being enrolled meets the tariffed definition of a 'human needs customer'. Niagara Mohawk now believes that it is unnecessary to transmit this segment when the gas enrollment is for a residential customer.

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.

(98-M-0667SA45)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

814 Drop Request and Response by Orange & Rockland Utilities, Inc. and Niagara Mohawk Power Corporation

I.D. No. PSC-31-04-00027-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 modifications in the Electronic Data Interchange (EDI) 814 drop request and response standard. Drop transactions are used by utilities and ESCOs to communicate the termination of electric or gas commodity service for an individual end use customer. Orange & Rockland Utilities, Inc. proposes to modify this standard to enable ESCOs to separately terminate unmetered electric service when both metered and unmetered electric services are present on an account. Niagara Mohawk Power Corporation requests that the ASI segment (action or status indicator) be modified to add a code (AC) to enable utilities receiving drop requests to send an acknowledgement via EDI when the drop request pertains to certain 'off-system' accounts. In addition, the drop business process document has been modified to comply with the revised uniform business practices issued July 15, 2004.

Statutory authority: Public Service Law, section 5(2)

Subject: Rules and guidelines for the exchange of retail access data between jurisdictional utilities and eligible ESCO/marketers.

Purpose: To revise the EDI transaction set standard for the 814 drop request and response.

Substance of proposed rule: In its Opinion and Order No. 01-03, issued and effective July 23, 2001, the Commission adopted various data exchange standards, compatible with Electronic Data Interchange (EDI) systems that were necessary to enable customers to easily change their electric or gas commodity service provider. Following the initial publication of these EDI standards it has been necessary to modify one or more standards to recognize changes in regulatory policies, technological improvements in data exchange systems or inefficiencies in the content or syntax of the initial standards.

In this instance, comments are requested on proposed revisions to version 1.1 of the Drop Request & Response standard. Orange & Rockland Utilities, Inc. (Orange & Rockland) requests modification of the 'front matter notes' and the REF*12 segment (Utility Account Number) in the Drop Implementation Guide to enable ESCOs to terminate unmetered electric commodity service when both metered and unmetered electric services are present on an account. If the Implementation Guide changes proposed by Orange & Rockland are subsequently adopted by the Commission, corresponding changes would also be made in the Drop Data Dictionary and Business Processes document that comprise the Drop standard.

Niagara Mohawk Power Corporation requests that the Drop Implementation Guide and corresponding Data Dictionary and Business Process Documents be revised to add a code (AC) to the ASI segment (Action or Status Indicator) to enable utilities receiving drop requests for certain 'off system' accounts to provide an EDI acknowledgement response followed by an 'accept' or 'reject' response via non-EDI means. This treatment is consistent with the syntax of the ASI segment in the Enrollment Request & Response standard.

The Drop Business Process Document has also been updated to comply with revised Uniform Business Practices issued July 15, 2004.

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.

(98-M-0667SA46)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Rates and Charges by the Aquarion Water Company of Sea Cliff

I.D. No. PSC-31-04-00028-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 the Aquarion Water Company of Sea Cliff to make various changes in the rates and charges contained in its tariff schedule, P.S.C. 3—Water, to become effective Oct. 1, 2004.

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

Subject: Water rates and charges.

Purpose: To increase Acquarion Water Company of Sea Cliff annual revenues by about $127,543 or 5.5 percent.

Substance of proposed rule: On June 30, 2004, the Aquarion Water Company of Sea Cliff (Aquarion) filed tariff revisions to increase its water rates by 5.5% pursuant to Commission Order in Case 02-W-1564 issued October 22, 2003, to become effective October 1, 2004. The proposed revisions will result in an annual revenue increase of approximately $127,543. Aquarion currently provides water service to 4,370 customers and is located in the Town of Oyster Bay, 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, (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.

(02-W-1564SA2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Rates and Charges by the Beekman Water Company, Inc.

I.D. No. PSC-31-04-00029-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 the Beekman Water Company, Inc. to make various changes in the rates and charges contained in its tariff schedule, P.S.C. 3—Water, to become effective Sept. 1, 2004.

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

Subject: Water rates and charges.

Purpose: To increase Beekman Water Company, Inc. annual revenues by about $74,800 or 115 percent.

Substance of proposed rule: On July 16, 2004, the Beekman Water Company, Inc. (Beekman) filed to become effective September 1, 2004, First Revised Leaf No. 12 to its tariff schedule P.S.C. No. 3 - Water. Beekman currently provides water service to 95 customers and is located in the Town of East Fishkill, Dutchess County. The proposed filing would increase the rates by 115% and annual revenues by $74,800. 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, (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-W-0881SA1)

Department of State

EMERGENCY RULE MAKING

Cease and Desist Zone for Real Estate Brokers and Salespersons

I.D. No. DOS-31-04-00014-E
Filing No. 826
Filing date: July 19, 2004
Effective date: July 19, 2004

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

Action taken: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h(3)(a) and (c)

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

Specific reasons underlying the finding of necessity: Based on testimony received at a public hearing, the Secretary of State has determined that some owners of residential property in the Brooklyn community of Canarsie are subject to intense and repeated solicitation by real estate brokers and real estate salespersons and that such solicitations seek to have the owners place their home for sale with the real estate brokers and real estate salespersons. The Secretary of State has further determined that the homeowners have no practical means of stopping the unwanted and intrusive solicitations and that those homeowners need immediate relief. Therefore, compliance with section 201(1) of the State administrative Procedure Act would be contrary to the public interest of providing for the general welfare of those homeowners who seek immediate relief from the continuation of the unwanted and unwelcomed solicitations by real estate brokers and salespersons.

Subject: Cease and desist zone for real estate brokers and salespersons.

Purpose: To establish a cease and desist zone in the Brooklyn community of Canarsie.

Text of emergency rule: Paragraph (c)(2) of section 175.17 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to add the following designated cease and desist zone:

Cease and Desist Zone
(Canarsie)

Zone	*Expiration Date*
County of Kings (Brooklyn)	*November 30, 2007*

Within the County of Kings as follows:

All that area of land in the County of Kings, City of New York, bounded and described as follows:

Beginning at a point at the intersection of Ralph Avenue and the Long Island Railroad right-of-way (between Chase Court and Ditmas Avenue); thence northeasterly along the Long Island Railroad right-of-way to the northern prolongation of Bank Street; thence southeasterly along Bank Street to a point at the intersection of Bank Street and Foster Avenue; thence northeasterly continuing to a point at the intersection to Stanley Street and East 108 Street; thence southeasterly along East 108 Street to Flatlands Avenue; thence northeasterly along Flatlands Avenue to the northern prolongation of Fresh Creek Basin; thence southeasterly along Fresh Creek Basin to Short (Belt) Parkway; thence southwesterly along Shore (Belt) Parkway to Paerdegat Basin; thence northwesterly along Paerdegat Basin, and the northern prolongation of Paerdegat Basin to Flatlands Avenue; thence southwesterly along Flatlands Avenue to Ralph Avenue; thence northwesterly along Ralph Avenue to the Long Island Railroad right-of-way and the point of beginning.

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 16, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Bruce Stuart, Department of State, Division of Licensing Services, 84 Holland Ave., Albany, NY 12208, (518) 473-2728

Regulatory Impact Statement

1. Statutory authority:

Section 442-h(3) (a) of the Real Property Law ("RPL") provides that the Secretary of State may adopt a rule establishing a cease-and-desist zone if the Secretary determines that some homeowners within a defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to list their homes for sale. Upon the establishment of such a zone, a homeowner may file with the Secretary a statement of desire not to be solicited. Thereafter, the Secretary will publish a list of the names and addresses of the persons who have filed the statement, and brokers and salespersons are then prohibited from soliciting persons on that list. That list is commonly referred to as a "cease-and-desist list".

Section 442-h(3)(c) of the RPL provides that no rule establishing a cease and desist zone shall be effective for more than five years; provided, however, that the Department of State may re-adopt the rule to continue a cease and desist zone for additional periods not to exceed five years.

Based testimony received at a public hearing on December 14, 2000, the Secretary of State has determined that some homeowners within the Brooklyn community of Canarsie are subject to intense and repeated solicitations from real estate brokers and salespersons. As a result, the Secretary has express statutory authority to propose and adopt a cease-and-desist zone for that community.

2. Legislative objectives:

According to the Statement of Legislative Findings for section 442-h of the Real Property Law, the Legislature has found that, from time to time, homeowners in some neighborhoods have been subject to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale, with the implication that property values would be decreasing because persons of different ethnic, social or religious backgrounds were moving into the neighborhood in greater numbers. The Statement of Legislative Findings also concluded that this type of solicitation technique constitutes a churning of the market and generated panic selling in the neighborhood. By enacting § 442-h, the Legislature sought to provide a means by homeowners could effectively express their wish not to be solicited by real estate brokers or salespersons. The Secretary has found that some homeowners in the Brooklyn community of Canarsie are subject to intense and repeated solicitations to list their homes for sale. Therefore, this rule accords with the public policy objectives which the Legislature sought to advance by enacting § 442-h of the Real Property Law.

3. Needs and benefits:

A public hearing was held in the Brooklyn Community of Canarsie on December 14, 2000. At the public hearing testimony was given by community leaders who spoke on behalf of their constituents. Speakers included two State Senators, a Member of the Assembly, the Deputy Borough President, members of Community Board 18, representatives of homeowners associations and representatives of civic associations. Each of the speakers spoke in support of the proposed cease-and-desist zone citing the need to curb the aggressive solicitation practices of real estate agents in the Canarsie community. The speakers cited frequent telephone calls, unwanted mail and flyers, as well as door-to-door solicitations, as intrusive and unwanted solicitation practices by real estate brokers and salespersons. Accordingly, the Secretary of State has determined that homeowners in the Brooklyn community of Canarsie have no practical means of stopping the unwanted and intrusive solicitations and that the homeowners need immediate relief. This rule will provide those homeowners who do not wish to be solicited with an effective and practical means of so notifying real estate brokers and salespersons. One thousand sixty-eight homeowner's statements were filed for the previous cease-and-desist list, which expired on February 27, 2001.

On June 29, 2001, the United States District Court for the Eastern District of New York issued a decision and judgement in the matter of *Anderson, et al.* v. *Treadwell,* as Secretary of State of the State of New York declaring the cease-and-desist rules of the Department of State to be invalid as an unconstitutional restriction of free speech. That decision was appealed by the Department of State, and on June 25, 2002, the United State Court of Appeals for the Second Circuit issued a decision reversing the District Court's decision and judgement, and ordering the District Court to enter judgement in favor of the Secretary of State. See *Anderson et al.* v. *Treadwell,* 294 F. 3rd 453 (2d Circuit 2002). On October 8, 2002,

the District Court entered judgement in favor of the Secretary of State. The entry of judgement by the District Court effectively reinstated the cease-and-desist rule, which had been invalidated by the District Court's previous decision and judgement.

4. Costs:

a. Costs to regulated parties:

Regulated parties include licensed real estate brokers and salespersons who do residential sales in the Brooklyn community of Canarsie. There are approximately 1,200 real estate brokers and approximately 1,800 real estate salespersons with offices in Brooklyn.

The Department of State will have the cease-and-desist list available, at no cost, on its web site, www.dos.state.ny.us. The cease-and-desist list will also be sold to the public, including real estate brokers and salespersons, for $10 per copy, in accordance with existing 19 NYCRR Section 175.17(c)(5). Copies will also be made available for inspection and copying at Department of State offices.

We expect that most licensees who do business in Canarsie will access the list, at no cost, on the Department's web site. We expect that some licensees will purchase one or more copies. Some will share the expense by sharing a copy. Others will not access or purchase a copy because they do not solicit residential listings in Canarsie.

In addition, some real estate brokers may use commercial mailing lists to solicit. For those brokers, the cease-and-desist list may increase the cost of using a commercial mailing list. The list will have to be checked against the addresses in the cease-and-desist list, and the broker will have to delete the addresses that appear in the homeowner list. The Department of State is not able to estimate the cost to those brokers because the cost will depend on a number of factors, such as the number of names on the mailing list, the number of addresses in the cease-and-desist list, the technology to the licensee, and the licensee's cost for technology and labor. On the other hand, there may be some reductions in the total cost of the mailing when the "unproductive addresses" are eliminated from the list.

Also, if a licensee uses the telephone, delivery services and personal contact to solicit residential listings, the licensee may have to spend time checking the cease-and-desist list to avoid contact with any person at an address listed. There is, of course, an expense associated with that expenditure of time. On the other hand, there may be savings associated with elimination of unproductive calls or deliveries. Whether there is a net cost or savings will depend on the circumstances and practices of each licensee. Therefore, the Department of State is not able to estimate those costs.

b. Costs to the Department of State:

The estimated costs for preparing the cease-and-desist list are as follows:

Printing owners statements	$2,200
Mailing owners statements	640
Processing statements:	
Staff: SG-14 @ $29,110	
10 weeks	5,600
Data entry:	
Staff: SG-6 (NYC) @ $23,385	
10 days	900
Fringe benefits @ 36.5%	2,372
Total:	$11,712

The costs for printing and mailing are unknown. The Department anticipates that most licensees will access the list, at no cost, on the Department's website. For those few who want to purchase a paper copy, the Department will likely print a copy, on an order-by-order basis, on existing equipment. The mailing costs will be dependent on the number of copies that are ordered. However, the Department expects that the costs for printing and mailing will be incidental to the costs of preparing the list.

The Department of State expects that revenues from the sale of the list will be incidental to the costs of preparing, printing and mailing.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

Homeowners who do not want to be solicited will have to file an "owner's statement" with the Department of State. The owner's statement will indicate the owner's desire not to be solicited and will set forth the owner's name and the address of the property within the cease-and-desist zone. The Department of State will provide homeowners with a standard form although use of the form is not mandatory. Owner's statements will be provided to community leaders for distribution to their constituents. In addition, owner's statements will be available from the Department of State on request, as well as available on the Department's web site. The Department of State will prepare a cease-and-desist list containing the names and addresses of all of the homeowners who filed an owner's statement. The list will be available, at no cost, on the Department's website. The publication will also be sold to the public, including real estate brokers and salespersons. The price will be $10 per copy. Except for orders submitted by mail, real estate brokers and salespersons will not have to complete any paperwork or file any paperwork as a result of this rule.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

The Department of State did not consider any other alternatives.

9. Federal standards:

There are no federal standards regulating the frequency or intensity of solicitations by real estate brokers or salespersons. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

Real estate brokers and salespersons can comply with the cease-and-desist order immediately upon publication of the list.

Regulatory Flexibility Analysis

1. Effect of rule:

This cease-and-desist rule applies to an area generally known as Canarsie in the Borough of Brooklyn. There are approximately 1,170 real estate brokers and approximately 1,852 real estate salespersons in the Brooklyn. Most of those licensees are small businesses, or they work for a small business. This rule will apply to most of the licensees. The exceptions will be those who do not deal in residential properties, and those who do not deal in properties located within the cease-and-desist zone.

The cease-and-desist rule will also apply to licensed real estate brokers and salespersons who are located outside of the Brooklyn but who solicit residential properties within the designated area. The Department of State does not have a practical way of estimating how many brokers and salespersons fall within this category.

The rule does not apply to local governments.

2. Compliance requirements:

The rule does not impose any reporting or record keeping requirements on the licensees. The rule does prohibit each licensee from soliciting the sale, rental or listing from any homeowner whose name appears of a cease-and-desist list published by the Department of State.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

A licensee will not need professional services in order to comply with the rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The cost of compliance and the variations in the costs of compliance are detailed in section 4(c) of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the names and addresses of the homeowners who do not want to be solicited will be published by the Department of State and since the cost of the publication is $10 per copy or free if accessed on the Department's website, it will be economically and technologically feasible for real estate brokers and salespersons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide home-

owners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

To provide homeowners in the designated area with relief from intense and repeated solicitations from real estate brokers and salespersons, the rule must apply equally to all licensees regardless of the size of their business or the size of their employer's business. Consequently, the rule does not make special accommodations for different classes of licensees.

7. Small business participation:

The Department of State conducted an open public hearing on December 14, 2000, at School 211, Avenue J, Brooklyn, New York. The time, date and place of the public hearing was well advertised within the Canarsie community. Testifying at the hearing on behalf of their constituents in Canarsie were two State Senators, a Member of the Assembly, the Deputy President of the Borough of Brooklyn, members of Community Board 18, representatives of homeowners associations and representatives of civic associations.

There were no real estate brokers or real estate salespersons who identified themselves at the public hearing, and no real estate broker or salesperson spoke at the hearing. In addition, no real estate broker or salesperson submitted any written testimony regarding the proposed re-adoption of the cease-and-desist zone.

Rural Area Flexibility Analysis

A rural flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

This rule establishes a cease-and-desist zone in the Brooklyn community of Canarsie, and this rule only affects those real estate brokers and salespersons who do business in that community.

Canarsie is not a rural area and, therefore, a rural flexibility analysis is not required for this rule.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for real estate brokers or real estate salespersons.

The rule provides a means by which homeowners in the designated community can notify real estate brokers and real estate salespersons that the homeowners do not want to be solicited for the purchase, sale or rental of their homes.

Since the homeowners who file a homeowner's statement with the Department of State are not interested in receiving solicitations from real estate brokers or real estate salespersons, publication of names and addresses of those homeowners and the resulting notification to real estate brokers and salespersons will not have any substantial impact on jobs or employment opportunities for real estate brokers or salespersons.

State University of New York

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Traffic and Parking Regulations at the State University of New York College at Old Westbury

I.D. No. SUN-31-04-00010-P

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

Proposed action: Amendment of sections 581.4(a)(1) and (2) of Title 8 NYCRR.

Statutory authority: Education Law, section 360(1)

Subject: Traffic and parking regulations at the State University of New York College at Old Westbury.

Purpose: To increase parking fines from $10 to $35 so as to be more of a deterrent to illegal parking in a handicapped area, in a fire zone or fire lane, and within 15 feet of a fire hydrant or stand pipe connection; increase parking fines from $10 to $15 for all other violations of the campus, traffic and parking regulations; and install parking meters along the roadways in the vicinity of each of the five residence halls.

Text of proposed rule: § 581.4 Enforcement and control.

Subdivision (a) of section 581.4(a)(1) is amended to read as follows:

***

Add new subparagraph *(x) vehicles may not be parked in a metered parking space after the meter has expired.*

Subdivision (a) of section 581.4(a)(2) is amended to read as follows:

***

Violations		Penalty
Parking within 15 feet of a fire hydrant or standpipe connection	[$10]	*$35*
Parking in fire zone or fire lane	[$10]	*$35*
[Parking within the village (major complex area)	$10]	
[Unregistered vehicle	$10]	
Parking in a No Parking Zone	*$15*	
No campus parking permit displayed	*$15*	
Parking out of stall	*$15*	
Parking in a Handicapped Area	*$35*	
Expired parking meter	*$15*	
All other campus motor vehicle regulations	[$10]	*$15*
[For a second and subsequent violation within the same year	$15]	

For second offense of same violation, add $10 to the base fine; for the third and subsequent offenses, add $20 to the base fine.

Text of proposed rule and any required statements and analyses may be obtained from: Joel Pierre-Louis, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: pierrejo@sysadm.suny.edu

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

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

Regulatory Impact Statement

1. Statutory authority: Education Law § 360(1).

2. Legislative objectives: To provide for safety and convenience of students, faculty, employees and visitors within and upon the property, roads, streets and highways under the supervision and control of the State University through the regulation of vehicular and pedestrian traffic and parking.

3. Needs and benefits: Amendments related to parking and registration will allow the State University to better regulate and enforce rules for vehicular traffic and parking. The proposed fine increase is not an additional burden to students, faculty, staff or visitors due to the fact that this fine is only imposed when persons are in violation. Also, the amendments, by increasing parking fines, will provide more of a deterrent to illegal parking.

4. Costs: None.

5. Local government mandates: None.

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: There are no viable alternatives.

9. Federal standards: There are no related Federal standards.

10. Compliance schedule: The campus will notify those affected as soon as the rule is effective. Compliance should be immediate.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on small businesses and local governments. This proposed rule will not impose any adverse economic impact on small businesses and local governments or impose any reporting, recordkeeping or other compliance requirements on small businesses and local governments. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Old Westbury.

Rural Area Flexibility Analysis

No rural area flexibility analysis is submitted with this notice because the proposed rule does not impose any adverse economic impact on rural areas or impose any reporting, record keeping or other compliance requirements on public or private entities in rural areas. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Old Westbury.

Job Impact Statement
No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs or employment opportunities. This regulation governs internal parking and traffic regulations on the campus of the State University of New York College at Old Westbury.

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Eligibility of Refugees, Asylees and Aliens for Public Assistance

I.D. No. TDA-28-03-00008-A
Filing No. 825
Filing date: July 15, 2004
Effective date: August 4, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of sections 349.3(a)(1)(iv), (vii), (2), (b) and 352.33; and addition of section 349.3(c) to Title 18 NYCRR.
Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 122, 131(1) and 355(3)
Subject: Eligibility of refugees, asylees and aliens for public assistance.
Purpose: To implement changes to the public assistance eligibility requirements for refugees, asylees and aliens as set forth in L. 1998, ch. 214.
Text of final rule: Subparagraphs (iv) and (vii) of paragraph (1) of subdivision (a) of section 349.3 are amended to read as follows:

(iv) a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980), *including all Cuban or Haitian parolees;*

(vii) a person paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act for a period of at least one year, *except Cuban or Haitian parolees*;

Paragraph (2) of subdivision (a) of section 349.3 is amended to read as follows:

(2) A "specially qualified alien" is:

(i) a refugee admitted under section 207 of the Immigration and Nationality Act, for a period of [five] *seven* years from the date the person was admitted into the United States as a refugee;

(ii) an asylee granted status under section 208 of the Immigration and Nationality Act, for a period of [five] *seven* years from the date that the asylee was granted status;

(iii) a person for whom deportation was withheld under section 241(b) or 243(h) of the Immigration and Nationality Act, for a period of [five] *seven* years from the date that the deportation was withheld;

(iv) a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980) for a period of [five] *seven* years from the date such status was granted;

(v) an alien admitted into the United States as an Amerasian immigrant as described in section 402(a)(2)(A)[(i)(V)] of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1612[a][2][A]) for a period of [five] *seven* years from the date the person was admitted into the United States;

(vi) a person lawfully admitted for permanent residence into the United States who has worked for *or can be credited with* 40 *qualifying* quarters as defined under Title II of the Federal Social Security Act, or can be credited with such qualifying quarters exclusive of any quarter after December 31,1996, in which such person *or such person's parent or spouse* received any Federal means tested assistance, whose entry into the United States was at least five years earlier or who entered the United States prior to August 22, 1996;

(vii) any qualified alien who is on *active* duty, other than active duty for training, in the United States Armed Forces or who has received a discharge characterized as honorable and not on account of alienage, or the spouse, *unremarried surviving spouse* or unmarried dependent child of any such alien [who] *if such alien, spouse or dependent child* is also a qualified alien.

Subdivision (b) of section 349.3 is amended to read as follows:

(b) Eligibility requirements.

(1) No person except a citizen or a specially qualified alien is eligible for [the Federal Food Stamp Program,] family assistance [,] *or* safety net assistance [, or services funded under title XX of the Federal Social Security Act] except as follows:

(i) A qualified alien who is not a specially qualified alien, who [was a lawful resident of] *entered* the United States before August 22, 1996, [or who was a lawful resident of the United States on or after August 22, 1996 for five or more years] *and continuously resided in the United States until attaining qualified status* is, if otherwise eligible, eligible for family assistance [,] *and* safety net assistance [, services pursuant to title XX of the Federal Social Security Act but is ineligible for the Federal Food Stamp Program].

(ii) A qualified alien who has resided in the United States for five or more years but whose entry into the United States was on or after August 22, 1996, is, if otherwise eligible, eligible for family assistance and safety net assistance.

[(ii)] *(iii)* A qualified alien, who is not a specially qualified alien, who [entered] *has resided in the United States for less than five years and whose entry into the United States occurred* on or after August 22, 1996, [but who was a legal resident of the United States for less than five years] is, if otherwise eligible, eligible for safety net assistance but is ineligible for family assistance [and the Federal Food Stamp Program].

[(iii)] *(iv)* An alien whose status is not within the meaning of the term qualified alien but who is otherwise permanently residing in the United States under color of law; as such term was used on August 21, 1996, by the Federal Administration for Children and Families is, if otherwise eligible, eligible for safety net assistance.

[(iv)] *(v)* A person paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act for a period of less than one year is, if otherwise eligible, eligible to receive any State or local nonfederal assistance provided under this section on the same terms as such programs are available to persons who are qualified aliens.

[(v)] *(vi)* Nothing herein precludes the receipt by an alien of community based noncash assistance in accordance with the directions of the United States Attorney General.

(2) Eligibility for services.

(i) Qualified aliens, if otherwise eligible and except as otherwise provided by Federal law shall be eligible for services funded under title XX of the Federal Social Security Act.

[(vi)] (ii) Any alien, including an alien who is not a qualified alien, is eligible for adult protective services and services and assistance relating to child protection to the extent that such person is otherwise eligible pursuant to the regulations of the Office of Temporary and Disability Assistance and the Office of Children and Family Services of the department.

[(2)] *(3)* An alien is eligible for additional State payments for aged, blind and disabled persons under *the* Social Services Law only to the extent that such person is not ineligible for Federal SSI benefits due to alien status.

[(3)] *(c) Referral and reporting of aliens unlawfully residing in the United States.*

[(i)] *(1) Referral.* Any applicant or recipient who has been determined to be ineligible for family assistance, or safety net assistance because he or she is an alien unlawfully residing in the United States or because he or she failed to furnish evidence that he or she is lawfully residing in the United States must be immediately provided a referral to the United States [Immigration and Naturalization Service] *Bureau of Immigration and Customs Enforcement,* or the nearest consulate of the country of the applicant or the recipient for such service or consulate to take appropriate action or furnish assistance.

[(ii)] *(2) Reporting.* Each social services district must report to the Office of Temporary and Disability Assistance, the name and address and other identifying information known to it with respect to any alien known to be unlawfully in the United States in the manner prescribed by such office. *A determination that an individual is not lawfully present in the United States can be made only about someone who is applying for benefits. Such a determination cannot be made about an individual who is only submitting an application for benefits on behalf of other family members. A determination by a social services district that an applicant is not lawfully present in the United States can only be a result of a finding of fact or conclusion of law that is made as part of a formal determination subject to administrative review and supported by a determination by the Bureau of Immigration and Customs Enforcement or the Executive Office*

of Immigration Review, such as a final order of removal. A response to the social services district through the Systematic Alien Verification for Entitlements System (SAVE) that shows no service record exists for the individual or indicates that the individual has an immigration status rendering him or her ineligible for benefits does not support a finding of unlawful presence in the United States.

The unnumbered paragraph of subdivision (a) of section 352.33 is amended to read as follows:

(a) Except as provided in subdivisions (b) and (c) of this section, all the income and resources of a sponsor of an alien who has signed an affidavit of support pursuant to section 213a of the Immigration and Nationality Act, and all the income and resources of such sponsor's spouse is deemed available to such alien for purposes of determining the eligibility of such alien for family assistance *and federally funded safety net assistance.* A sponsor's income and resources will no longer be deemed available to the alien when the alien is:

Final rule as compared with last published rule: Nonsubstantive changes were made in section 349.3(c)(1) and (2).

Text of rule and any required statements and analyses may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

Revised Regulatory Impact Statement

1. Statutory Authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Department of Social Services to promulgate regulations to carry out its powers and duties. Section 122 of Part B of Chapter 436 of the Laws of 1997 reorganized the Department of Social Services into the Department of Family Assistance with two distinct offices, the Office of Children and Family Services and the Office of Temporary and Disability Assistance (OTDA). Chapter 436 transferred the functions of the former Department of Social Services concerning financial support services to OTDA.

Section 34(3)(f) of the SSL requires the Commissioner of the Department of Social Services to establish regulations for the administration of public assistance and care within the State. Section 122 of Part B of Chapter 436 provides that the Commissioner of the Department of Social Services will serve as the Commissioner of OTDA.

Section 122 of the SSL, as amended by Chapter 214 of the Laws of 1998, contains the public assistance eligibility requirements for certain refugees, asylees and aliens.

Section 131(1) of the SSL provides that social services officials shall, insofar as funds are available, provide adequately for those unable to maintain themselves.

Section 355(3) of the SSL requires OTDA to promulgate regulations for the implementation of the Family Assistance program.

Section 1612(a)(2) of 8 USCA provides that certain aliens who are admitted or residing in the United States are eligible for federal program benefits for a seven year period, after which the aliens are no longer eligible for those benefits.

2. Legislative Objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations and policy so that adequate provision is made for those persons unable to provide for themselves so that, whenever possible, such persons can be restored to a condition of self-support and self-care.

3. Needs and Benefits:

The changes to 18 NYCRR 349.3 relating to citizenship and alien status, and 18 NYCRR 352.33 relating to deeming of a sponsor's income and resources, are required in order to implement provisions in Chapter 214 of the Laws of 1998. That Chapter contains technical corrections to the Welfare Reform Act of 1997. The changes incorporate federal clarification of: (i) the definition of Cuban and Haitian parolees; (ii) qualifying quarters of work to enable an alien to receive certain forms of assistance; (iii) veteran status; (iv) residency and time requirements for "qualified aliens"; and (v) the meaning of the term "unlawfully present" with respect to reporting aliens to the Immigration and Naturalization Service, now the Bureau of Immigration and Customs Enforcement. The proposed amendments also increase from five years to seven years the period that certain "special qualified aliens" are entitled to public assistance. The proposed amendments also delete provisions that bar certain aliens and refugees from receiving food stamps.

The proposed regulations also are consistent with federal policy clarifications concerning eligibility of aliens for public assistance, food stamp program rules and the resource policy changes that were made necessary as a result of the Welfare Reform Act of 1997.

4. Cost:

The proposed amendments will have no fiscal impact upon the State or social services districts since the amendments are purely technical and implement existing policies and procedures.

5. Local Government Mandates:

Social services districts will have to comply with the proposed regulations when determining eligibility for public assistance. Since the social services districts have already been informed of the provisions of Chapter 214 of the Laws of 1998, there will be no new mandates imposed upon the districts.

6. Paperwork:

There will be no new forms or new reporting requirements due to these changes.

7. Duplication:

This proposed amendments do not duplicate, overlap or conflict with any existing State or federal regulations.

8. Alternatives:

One alternative would have been not to develop the amendments as proposed. However, State and federal law require that the proposed amendments be implemented. Therefore, the alternative was rejected.

9. Federal Standards:

This amendment does not conflict with any federal requirement or standard.

10. Compliance Schedule:

Social services districts will be able to comply with the proposed amendments when they become effective.

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

Although changes were made to the proposed amendments, the changes do not require that the regulatory flexibility analysis rural area flexibility analysis or job impact statement be revised

Assessment of Public Comment

Two comments were received on the Office's proposed amendment to 18 NYCRR 349.3 and 352.33 concerning the eligibility of refugees, asylees and aliens for public assistance.

Comment: One comment, from a social services district, objected to the provision of the amended regulation under which refugees, asylees, persons for whom deportation has been withheld, Cuban and Haitian entrants and Amerasian immigrants are defined as "specially qualified aliens" for a period of seven years instead of five years. The comment pointed out that there is no authorization for this change in Chapter 214 of the Laws of 1998 or in federal law, which provided for a seven-year exemption from ineligibility only for the Supplemental Security Income (SSI), food stamp and medical assistance programs and not for TANF funded programs or the Social Services Block Grant.

Response: The term "specially qualified alien" is not a federal or State statutory term. Rather, the term is used in State regulations to describe a group of aliens eligible under federal law for certain programs without any State discretion to deny assistance on the basis of alienage. However, all the groups that are "specially qualified aliens" are also defined under federal law as "qualified aliens", and states have the authority to determine eligibility for TANF funded programs and the Social Services Block Grant with respect to qualified aliens who have been in the United States for five or more years. Under section 122[b][ii] of the Social Services Law, all qualified aliens in the United States for five or more years are eligible for public assistance, including TANF funded programs, and for the Social Services Block Grant. Because specially qualified aliens who are eligible under federal law for SSI, food stamps and medical assistance for seven years are also eligible under State law for public assistance and the Social Services Block Grant in their sixth and seventh years in the United States, it is unnecessary to draw a distinction between the federally guaranteed programs and the programs available under State law. Therefore, the regulation states that specially qualified aliens are eligible for the SSI, medical assistance and public assistance for a period of seven years.

The comment also questioned the fact that the regulation strikes out references to the food stamp program in relation to specially qualified aliens. Because food stamp eligibility differs from other federal programs, it is difficult to fashion a regulation to cover this program in the same terms as other programs and to do so would introduce even greater complexity to an already confusing regulation. There is, however, no need for State regulations to state federal eligibility requirements for federal programs. Therefore, the proposed amendment removed the references to the food stamp program.

A second comment, from an advocacy organization, made several points. First, it stated that the regulation should be amended to reflect the change in name of the Immigration and Naturalization Service (INS) to the

Bureau of Immigration and Customs Enforcement (BICE). The comment is correct and the change has been made.

The commenter urged that the Office delete from the regulation the requirement to refer non-citizens lacking adequate documentation to the BICE, since the requirement is sometimes misinterpreted as requiring social services districts to report such non-citizens to the BICE. However, the referral requirement remains in State law and we have determined to include it here. The meaning of the rule has been clarified to the social services districts in informational issuances.

The commenter also urged that the Office clarify the requirements for deeming a sponsor's income to an alien. The proposed regulation addresses that topic only in relation to making clear that sponsor deeming applies to all federally funded public assistance and not only to family assistance. The Office has issued detailed instructions elsewhere regarding the procedures to be followed.

NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED

Operational Plans for Room and Board Facilities

I.D. No. TDA-06-04-00006-C

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

The notice of proposed rule making, I.D. No. TDA-06-04-00006-P was published in the *State Register* on February 11, 2004.

Subject: Operational plans for room and board facilities.

Purpose: To require an operational plan to be submitted under certain circumstances for facilities that provide room and/or board.

Substance of rule: The proposed regulations would require a social services district to annually notify OTDA if it had provided an allowance to purchase room and/or board from an entity or organization for 20 or more homeless families housed in one or more residential structures throughout the previous three months. A district would be required to provide OTDA with the name and address of the entity or organization to which the allowance is paid, the number of families housed and the rate paid. If OTDA determined that the residential structure or structures should be operated in accordance with 18 NYCRR Part 900, it would advise the district to submit an operational plan, unless the district seeks and the OTDA determines to grant a waiver to this requirement. The factors that OTDA would use to determine if a residential structure or structures should be operated in accordance with 18 NYCRR Part 900 include, but are not limited to the following: the number of families housed and duration of stay; rate charged for the temporary housing; services needed and provided to the families; availability of Part 900 like services in the community; expected term of use of the residential structure or structures; and results of inspections that relate to the structure(s) and services provided.

Changes to rule: No substantive changes.

Expiration date: February 10, 2005.

Text of proposed rule and changes, if any, may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

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