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

Sanitation Requirements for Poultry Dealers and Poultry Transporters

I.D. No. AAM-48-04-00003-E
Filing No. 1272
Filing date: Nov. 10, 2004
Effective date: Nov. 10, 2004

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

Action taken: Amendment of sections 45.1 and 45.6 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18 and 72

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

Specific reasons underlying the finding of necessity: The amendments to Part 45 will expand and strengthen the Department's avian influenza control program by requiring a poultry dealer or poultry transporter holding a valid domestic animal health permit who buys or sells poultry to be sold or offered for sale in a live poultry market, or transports poultry to a live poultry market, to maintain a facility such that it can be cleaned and disinfected on a year round basis, to possess and utilize a mechanical crate washer to clean and disinfect crates between uses on a year round basis, to use an all-season truck or vehicle wash facility to clean and disinfect trucks or vehicles between uses on a year round basis and to compile and maintain records of the dates and times that the crates and the trucks or vehicles were cleaned and disinfected The amendments also clarify the requirement that the certificate of veterinary inspection shall remain with DAHP holder (*i.e.* poultry dealer or poultry transporter) and the invoice shall accompany the poultry to the live poultry market.

Avian influenza is caused by a virus that can strike susceptible poultry populations and may produce severe morbidity and mortality in a short period of time. It spreads rapidly, within and between flocks, through the movement of infected birds and contaminated fomites. The highly pathogenic virus produces the following signs: bloody nasal discharge, swelling and purple discoloration of the wattles and combs, diarrhea, pinpoint hemorrhages, loss of coordination and lack of energy and appetite.

The live poultry markets play a key role in the ability of the avian influenza virus to cause severe morbidity and mortality in a poultry population. The virus becomes established in the markets through the introduction of infected birds by poultry distributors. As additional uninfected birds enter the markets, the virus undergoes changes affecting its pathogenicity as it spreads.

In the past 20 years, avian influenza has posed a threat and has resulted in millions of dollars in damages to the poultry industry in New York State and other northeastern states. In 1983 and 1984, an avian influenza outbreak in the United States was responsible for the destruction of nearly 17 million birds in Pennsylvania, Maryland, New Jersey and Delaware. The eradication effort cost $65 million dollars to complete and was responsible for an increase in poultry prices to the consumer of $349 million dollars.

In December of 1992, avian influenza was diagnosed in a 30,000 bird turkey flock in Pennsylvania. By January of 1993, state officials throughout the northeastern United States were testing live poultry markets for avian influenza. The tests revealed that avian influenza was present in eight markets in New York, five markets in New Jersey and one market in Pennsylvania. The virus was also isolated on farms in Maryland, New Jersey and Pennsylvania as well as a poultry exhibition in Pennsylvania. Although the 1992-1993 avian influenza outbreak did not infect any large commercial flocks, the virus had managed to spread through five states in only two months.

In 1995 and 1996, avian influenza was isolated in flocks supplying poultry markets in the New York City metropolitan area. The costs of clean-up to the state and the owners of the flocks exceeded $100,000 per flock. In 1997, Pennsylvania diagnosed avian influenza in a supply flock which provides birds to live poultry markets in New York City. Avian influenza was later detected in ten nearby commercial operations, the clean-up of which consisted of slaughtering over one million birds at a cost of $5 million dollars.

In 1998, live poultry from all of the 78 live poultry markets in the New York City metropolitan area were tested for avian influenza. The virus was found in birds from 54, or 69%, of those markets. The prevalence of the virus in the live poultry markets prompted the adoption, on an emergency basis, of regulations which immediately prohibited the movement of poultry from infected flocks to the live poultry markets, by requiring that only birds from tested or monitored source flocks be allowed into the markets. Those regulations were subsequently adopted on a permanent basis. It was hoped that the new regulations would prevent the continued reintroduction of the virus. However, these control measures have not been entirely successful.

In June and July 2001, the United States Department of Agriculture (USDA) conducted a survey of live poultry markets. The survey revealed that approximately 60 percent of the markets contained the avian influenza virus. In December 2001 and January 2002, an outbreak of avian influenza in six poultry flocks in Pennsylvania resulted in the destruction of 135,000 birds.

The continuing prevalence of avian influenza in the live poultry markets and the outbreak of the virus in the flocks in Pennsylvania prompted the Department, on January 24, 2002, to adopt, on an emergency basis, a regulation which provided that no live poultry shall be moved anywhere from a poultry market in the City of New York or in the Counties of Nassau and Westchester, unless specifically authorized by the Commissioner or his designee. This regulation was subsequently amended on an emergency basis to prohibit the movement of poultry from any poultry market, rather than just those markets in the City of New York and the Counties of Nassau and Westchester. This regulation, as amended, was ultimately adopted on a permanent basis in an effort to help limit the lateral transmission of avian influenza between the markets. However, this control measure has not been entirely successful, since as of December 2003, approximately 18 percent of the live poultry markets tested positive for the virus.

In the past two years, outbreaks of avian influenza in the United States have resulted in the destruction of approximately 5 million birds. In February 2004, outbreaks of avian influenza in Delaware, Maryland and a broiler flock in Texas resulted in the destruction of 436,600 birds on the farms as well as the depopulation, cleaning and disinfection of the nine live poultry markets in New York City which had received birds from those farms. In response to these latest outbreaks, 35 countries have placed embargoes on poultry and poultry products in the United States, 16 of which are nationwide embargoes that include New York State.

Adequate sanitation practices are key components in the control and eradication of avian influenza. This is evident based upon the results of a cooperative program, implemented In April 2002 by the Department and the USDA, whereby the 80 live poultry markets in the New York City metropolitan area were required to close their premises, depopulate their poultry stock and clean and disinfect their premises prior to reopening. At the same time, five poultry distributors in New York voluntarily closed, depopulated their poultry stock and cleaned and disinfected their premises. The closures took place between April 8 and April 10, 2002, during which time, environmental samples were taken from each market and distributor following the cleaning and disinfection process. These environmental samples were subsequently analyzed and found to be negative for avian influenza.

In conclusion, the Department believes that these amendments are essential disease control measures, since they will limit the transmission of avian between poultry distributors and the live poultry markets, thereby helping to protect the economic viability of New York's $125,000,000 per year poultry industry. Promulgation of these amendments on an emergency basis is necessary because establishment of the virulent avian influenza in New York's domestic poultry populations would be devastating to the State and our poultry industry from both, an animal health and economic standpoint.

Subject: Sanitation requirements for poultry dealers and poultry transporters moving poultry to the live poultry markets.

Purpose: To prevent the spread of avian influenza through the live poultry markets.

Text of emergency rule: Section 45.1 of Title One of the Official Compilation of Codes, Rules and Regulations of the State of New York (1 NYCRR) is amended to read as follows:

(i) [Poultry] *Live poultry* market means any premises where live poultry are assembled and held for sale and slaughter. It does not include livestock auction buildings [regulated pursuant to] *as defined in* Part 49 of this title *or USDA inspected poultry slaughter plants located outside the City of New York and the counties of Nassau and Westchester*.

(m) [Poultry distributor means any person, firm or corporation which assembles live poultry for subsequent distribution to poultry markets.] *Poultry dealer and poultry transporter shall have the meaning accorded those terms in section 90-b of Article 5 of the Agriculture and Markets Law*.

Subdivisions (a), (b) and (c) of section 45.6 of Title 1 of 1 NYCRR are re-lettered subdivisions (b), (c) and (a), respectively, and amended to read as follows:

§ 45.6[(c)] *(a)* No live poultry more than seven days old shall be moved into a *live* poultry market other than [directly from source flocks] *by a poultry dealer or poultry transporter holding a valid domestic animal health permit and from flocks* which meet the requirements of subdivision [(a)] *(b)* of this section.

§ 45.6[(a)] *(b)(1)* No live poultry more than seven days old may be moved into a *live* poultry market unless [accompanied by] *the poultry dealer or poultry transporter possesses* an approved certificate of veterinarian inspection which states that either:

[(1)] *(i)* the poultry identified thereon are moving [directly] *through a poultry dealer or poultry transporter* from a source flock which is certified by the state or country of origin as an avian influenza monitored source; or

[(2)]*(ii)* the poultry identified thereon are moving [directly] *through a poultry dealer or poultry transporter* from a source flock in which a random sample of 10 birds were blood-tested negative for avian influenza within 10 days prior to the date of movement, using a test approved by the United States Department of Agriculture.

(2) The approved certificate of veterinary inspection required by this subdivision shall remain in the possession of the poultry dealer or poultry transporter moving the poultry directly to a live poultry market and further, the poultry shall be accompanied by an invoice setting forth:

(i) the name and address of the poultry dealer or poultry transporter that is moving the poultry;

(ii) the name and address of the live poultry market into which the poultry are being moved;

(iii) the number and type of poultry being moved;

(iv) the avian influenza status of the poultry; and

(v) the date of the movement of such poultry into the market.

§ 45.6[(b)]*(c)* No live poultry more than seven days old which [are] *is* held on premises where *within the previous 12 months* there has been a positive avian influenza serology, [or] culture *or a trace back to said premises of birds that tested positive for avian influenza* [in] *within* the previous 12 months shall be moved into a *live* poultry market unless the State Animal Health Official of the state or country or origin certifies that:

(1) all birds held on the premises at or after the time of the positive serology, [or] culture, *or trace back* and prior to the cleaning and disinfection of the premises were removed to slaughter or slaughtered and the premises were thereafter cleaned and disinfected under official supervision *and the replacement flock complies with (2) below, or*

(2) tracheal and cloacal swabs were obtained for virus isolation from 150 randomly selected birds in a flock held on such premises or from all of the birds in such flock, whichever is less, and such tests demonstrated that avian influenza was not present, and no bird in such flock exhibited clinical signs of avian influenza in the 45 days preceding the date of sampling. *If the birds so tested are waterfowl, then only cloacal swabs shall be required.* Such samples may be pooled in groups of up to five samples per culture.

§ 45.6(f)(1) [A poultry distributor may apply for approved poultry wholesaler status by submitting to the commissioner a statement under oath or affirmation in which it agrees to:] *A poultry dealer or poultry transporter who buys or sells poultry to be sold or offered for sale in a live poultry market, or transports poultry to a live poultry market shall:*

(i) properly maintain, under supervision of the State Animal Health Official of the state in which it resides, the approved certificates of veterinary inspection required by this section, together with records of the poultry it receives and the poultry it ships; *and*

(ii) immediately make such records available for inspection and/or immediately provide copies thereof when requested to do so by representatives of the New York State Department of Agriculture and Markets, the United States Department of Agriculture and/or the appropriate State Animal Health Official; and

(iii) accept only poultry meeting the requirements of this section [.], *and*

(iv) have a facility that can be routinely cleaned and disinfected on a year round basis to prevent survival of avian disease agents including avian influenza, and

(v) possess and utilize a working mechanical crate washer which cleans and disinfects crates between uses on a year round basis, provided such crate washer shall not be located or operated at a live poultry market, auction premises or poultry farming operation and provided further that crates which have been cleaned and disinfected shall not be exposed to or contaminated by crates which have not been cleaned and disinfected; and

(vi) use an all-season truck or vehicle wash facility to clean and disinfect trucks or vehicles between uses, provided such all-season truck or vehicle wash facility shall not be located or operated at a live poultry market, auction premises or poultry farming operation; and

(vii) compile, maintain and make available for inspection, for a period of two years, records of the dates and times such crates and trucks or vehicles were cleaned and disinfected.

[Said statement shall be endorsed by the State Animal Health Official of the state in which the distributor resides. If satisfied of the ability and willingness of the poultry distributor to maintain and make such records available, accept only such poultry, and to otherwise comply with the requirements of this section, the commissioner may grant the distributor approved poultry wholesaler status.

(2) Live poultry from a distributor which has been granted approved poultry wholesaler status may move into a poultry market without being accompanied by the approved certificate of veterinary inspection required by subdivision (a) of this section, provided that such certificate has been issued and is in the possession of the distributor at the time of such movement, and further provided, that the poultry are accompanied by an invoice setting forth:

(i) the name and address of the distributor with approved wholesaler status that is moving the poultry;

(ii) the name and address of the market into which the poultry are being moved;

(iii) the type of poultry being moved;

(iv) the avian influenza status of the poultry; and

(v) the date of the movement of such poultry into the market.

(3) The approved wholesaler status of a poultry distributor may be withdrawn if the commissioner concludes there is reason to believe that the distributor has:

(i) moved or attempted to move into a live poultry market poultry infected with, or exposed to, avian influenza;

(ii) failed to comply with the written agreement it executed and submitted to the department; or

(iii) failed to comply with the requirements of this section.]

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 February 7, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: John Huntley, DVM, Director, Division of Animal Industry, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-3502

Regulatory Impact Statement

1. Statutory authority:

Section 16 of the Agriculture and Markets Law (Law) provides, in part, that the Commissioner shall have the power to execute and carry into effect the laws of the State and the rules of the Department, relative to the production, transportation, storage, marketing and distribution of food.

Section 18 of the 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 a communicable disease affecting domestic animals shall exist or be brought into this State, the Commissioner shall take measures promptly to suppress the same and to prevent such disease from spreading.

2. Legislative objectives:

The statutory provisions pursuant to which these regulations are adopted are aimed at controlling, preventing and eradicating infectious and communicable diseases affecting domestic animals in the State.

The Department's amendments to Part 45 will further these legislative goals by expanding the Department's avian influenza control program to require a poultry dealer or a poultry transporter holding a valid domestic animal health permit who buys or sells poultry to be sold or offered for sale in a live poultry market, or transports poultry to a live poultry market, to have facilities that can be cleaned and disinfected on a year round basis; to possess and utilize mechanical crate washers to clean and disinfect crates between uses on a year round basis; to use all-season truck or vehicle wash facilities to clean and disinfect trucks or vehicles between uses on a year round basis; and to compile and maintain records of the dates and times that the crates and the trucks or vehicles were cleaned and disinfected. The amendments will also clarify the requirement that the certificate of veterinary inspection shall remain with the DAHP holder (*i.e.* poultry dealer or poultry transporter) and the invoice shall accompany the poultry to the live poultry market.

3. Needs and benefits:

Avian influenza is caused by a virus that can strike susceptible poultry populations and may produce severe morbidity and mortality in a short period of time. It spreads rapidly, within and between flocks, through the movement of infected birds and contaminated fomites. The highly pathogenic virus produces the following signs: bloody nasal discharge, swelling and purple discoloration of the wattles and combs, diarrhea, pinpoint hemorrhages, loss of coordination and lack of energy and appetite.

In the past 20 years, avian influenza has posed a threat and has resulted in millions of dollars in damages to the poultry industry in New York State and other northeastern states. In 1983 and 1984, an avian influenza outbreak in the United States was responsible for the destruction of nearly 17 million birds in Pennsylvania, Maryland, New Jersey and Delaware. The eradication effort cost $65 million dollars to complete and was responsible for an increase in poultry prices to the consumer of $349 million dollars.

In December of 1992, avian influenza was diagnosed in a 30,000 bird turkey flock in Pennsylvania. By January of 1993, state officials throughout the northeastern United States were testing live poultry markets for avian influenza. The tests revealed that avian influenza was present in eight markets in New York, five markets in New Jersey and one market in Pennsylvania. The virus was also isolated on farms in Maryland, New Jersey and Pennsylvania as well as a poultry exhibition in Pennsylvania. Although the 1992-1993 avian influenza outbreak did not infect any large commercial flocks, the virus had managed to spread through five states in only two months.

In 1995 and 1996, avian influenza was isolated in flocks supplying poultry markets in the New York City metropolitan area. The costs of clean-up to the state and the owners of the flocks exceeded $100,000 per flock. In 1997, Pennsylvania diagnosed avian influenza in a supply flock which provides birds to live poultry markets in New York City. Avian influenza was later detected in ten nearby commercial operations, the clean-up of which consisted of slaughtering over one million birds at a cost of $5 million dollars.

In 1998, live poultry from all of the 78 live poultry markets in the New York City metropolitan area were tested for avian influenza. The virus was found in birds from 54, or 69%, of those markets. The prevalence of the virus in the live poultry markets prompted the adoption, on an emergency basis, of regulations which immediately prohibited the movement of poultry from infected flocks to the live poultry markets, by requiring that only birds from tested or monitored source flocks be allowed into the markets. Those regulations were subsequently adopted on a permanent basis. It was hoped that the new regulations would prevent the continued reintroduction of the virus. However, these control measures have not been entirely successful.

In June and July 2001, the United States Department of Agriculture (USDA) conducted a survey of live poultry markets. The survey revealed that approximately 60 percent of the markets contained the avian influenza virus. In December 2001 and January 2002, an outbreak of avian influenza in six poultry flocks in Pennsylvania resulted in the destruction of 135,000 birds.

The continuing prevalence of avian influenza in the live poultry markets and the outbreak of the virus in the flocks in Pennsylvania prompted the Department, on January 24, 2002, to adopt, on an emergency basis, a regulation which provided that no live poultry shall be moved anywhere from a poultry market in the City of New York or in the Counties of Nassau and Westchester, unless specifically authorized by the Commissioner or his designee. This regulation was subsequently amended on an emergency basis to prohibit the movement of poultry from any poultry market, rather than just those markets in the City of New York and the Counties of Nassau and Westchester. This regulation, as amended, was ultimately adopted on a permanent basis in an effort to help limit the lateral transmission of avian influenza between the markets. However, this control measure has not been entirely successful, since as of December 2003, approximately 18 percent of the live poultry markets tested positive for the virus.

In the past two years, outbreaks of avian influenza in the United States have resulted in the destruction of approximately 5 million birds. In February 2004, outbreaks of avian influenza in Delaware, Maryland and a broiler flock in Texas resulted in the destruction of 436,600 birds on the farms as well as the depopulation, cleaning and disinfection of the nine live poultry markets in New York City which had received birds from those farms. In response to these latest outbreaks, 35 countries have placed embargoes on

poultry and poultry products in the United States, 16 of which are nationwide embargoes that include New York State.

Adequate sanitation practices are key components in the control and eradication of avian influenza. This is evident based upon the results of a cooperative program, implemented In April 2002 by the Department and the USDA, whereby the 80 live poultry markets in the New York City metropolitan area were required to close their premises, depopulate their poultry stock and clean and disinfect their premises prior to reopening. At the same time, five poultry distributors in New York voluntarily closed, depopulated their poultry stock and cleaned and disinfected their premises. The closures took place between April 8 and April 10, 2002, during which time, environmental samples were taken from each market and distributor following the cleaning and disinfection process. These environmental samples were subsequently analyzed and found to be negative for avian influenza.

Part 45 of 1 NYCRR currently requires the cleaning and disinfection of any truck, coop, cage, crate or other conveyance for the purpose of removing, delivering or transporting live poultry prior to entering New York State and prior to entering any farm in New York State. Part 45 also requires all persons entering any premises containing live poultry within New York State with any poultry truck, feed delivery and/or service vehicle to take every sanitary precaution possible to prevent the introduction or spread of avian influenza, including the disinfection of all footwear before entering and after leaving any premises containing live poultry and the washing and disinfecting of the cabs, tires and bodies of all vehicles between each entry of a premises containing live poultry.

The Department's amendments to Part 45 will expand and strengthen the Department's avian influenza control program by requiring a poultry dealer or a poultry transporter holding a valid domestic animal health permit who buys or sells poultry to be sold or offered for sale in a live poultry market, or transports poultry to a live poultry market, to have facilities that can be cleaned and disinfected on a year round basis; to possess and utilize mechanical crate washers to clean and disinfect crates between uses on a year round basis; to use all-season truck or vehicle wash facilities to clean and disinfect trucks or vehicles between uses on a year round basis; and to compile and maintain records of the dates and times that the crates and the trucks or vehicles were cleaned and disinfected. The amendments will also clarify the requirement that the certificate of veterinary inspection shall remain with the DAHP holder (*i.e.* poultry dealer or poultry transporter) and the invoice shall accompany the poultry to the live poultry market.

In conclusion, the Department believes that the amendments are essential disease control measures, since they will limit the transmission of avian influenza to live poultry markets from poultry dealers and poultry transporters.

4. Costs:

(a) Costs to regulated parties:

Under the amendments, poultry dealers and poultry transporters holding a valid domestic animal health permit who buy or sell poultry to be sold or offered for sale in a live poultry market, or transport poultry to a live poultry market, will have to purchase equipment to clean and disinfect crates between uses. Commercial devices capable of cleaning and disinfecting 400 crates per hour may be purchased new at a cost of $50,000 or purchased used at auction for approximately $12,000. Delivery and installation of either a new or used crate washer would cost between $10,000 and $12,000. However, based upon outreach with industry, the Department has determined that five (5) of the eight (8) poultry dealers and/or poultry transporters in New York State already have crate washers on their premises. Poultry dealers and poultry transporters would also have to use an all-season truck or vehicle wash facility in order to clean and disinfect trucks or vehicles between uses. Based upon outreach with industry, the Department has determined that three (3) of the eight (8) poultry dealers and/or poultry transporters in New York State already have on-site truck wash facilities. In lieu of establishing truck wash facilities, poultry dealers and poultry transporters would be able to comply with the amendments by using a commercial truck wash facility. Such facilities capable of cleaning and disinfecting trucks as large as 18-wheel rigs charge $100 to $400 per washing.

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

None.

(c) Source: Costs are based upon observations of business practices in the industry as well as outreach with regulated parties.

5. Local government mandates:

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

6. Paperwork:

Under the amendments, poultry dealers and poultry transporters holding a valid domestic animal health permit who buy or sell poultry to be sold or offered for sale in a live poultry market, or transport poultry to a live poultry market, will be required to compile, maintain and make available for inspection, for a period of two years, records of the dates and times that crates and trucks or vehicles were cleaned and disinfected. Such poultry dealers and poultry transporters would also be required to retain the certificate of veterinary inspection for the poultry they buy, sell or transport to a live poultry market.

7. Duplication:

None.

8. Alternatives:

The first alternative considered was not to amend the regulations. This alternative was rejected due to the fact that the present regulations do not adequately protect New York State's live poultry markets from avian influenza. The prevalence of the virus in approximately 18% of the live poultry markets in the New York City metropolitan area shows that current control measures are not sufficient. In light of the prevalence of virus in the markets and the recent outbreaks of avian influenza in Delaware and Texas, the Department believes that the proposed amendments are essential disease control measures, since they would limit the transmission of avian influenza from poultry dealers and poultry transporters to the live poultry markets.

The second alternative considered was to require poultry dealers and poultry transporters to establish and maintain a truck wash facility to clean and disinfect trucks and other vehicles used to carry poultry between uses. However, due to the availability of commercial truck wash facilities in New York State, this alternative was rejected as an excessive financial burden on regulated parties.

9. Federal standards:

The federal government has standards regarding the types and methods of testing poultry for the presence of avian influenza. The Department recognizes these as official tests for the detection of this virus. However, the federal government has no standards relative to sanitation requirements for a poultry dealer or a poultry transporter holding a valid domestic animal health permit who buys or sells poultry to be sold or offered for sale in a live poultry market, or transports poultry to a live poultry market.

10. Compliance schedule:

Immediate compliance by the industry is expected.

Regulatory Flexibility Analysis

1. Effect of rule:

There are eight (8) poultry dealers and/or poultry transporters in New York State, all of which are small businesses. There are also 38 poultry dealers and/or poultry transporters in other states and Canada.

The amendments will have no impact upon local governments.

2. Compliance requirements:

Under the amendments, poultry dealers and poultry transporters holding a valid domestic animal health permit who buy or sell poultry to be sold or offered for sale in a live poultry market, or transport poultry to a live poultry market, will be required to compile, maintain and make available for inspection, for a period of two years, records of the dates and times that crates and trucks or vehicles were cleaned and disinfected. Such poultry dealers and poultry transporters will also be required to retain the certificate of veterinary inspection for the poultry they buy, sell or transport to a live poultry market.

The amendments will have no impact upon local governments.

3. Professional services:

None.

4. Compliance costs:

Under the amendments, poultry dealers and poultry transporters holding a valid domestic animal health permit who buy or sell poultry to be sold or offered for sale in a live poultry market, or transport poultry to a live poultry market, will have to purchase equipment to clean and disinfect crates between uses. Commercial devices capable of cleaning and disinfecting 400 crates per hour may be purchased new at a cost of $50,000 or purchased used at auction for approximately $12,000. Delivery and installation of either a new or used crate washer would cost between $10,000 and $12,000. However, based upon outreach with industry, the Department has determined that five (5) of the eight (8) poultry dealers and/or poultry transporters in New York State already have crate washers on their premises. Poultry dealers and poultry transporters will also have to use an all-

season truck or vehicle wash facility in order to clean and disinfect trucks or vehicles between uses. Based upon outreach with industry, the Department has determined that three (3) of the eight (8) poultry dealers and/or poultry transporters in New York State already have on-site truck wash facilities. In lieu of establishing truck wash facilities, poultry dealers and poultry transporters would be able to comply with the amendments by using a commercial truck wash facility. Such facilities capable of cleaning and disinfecting trucks as large as 18-wheel rigs charge $100 to $400 per washing.

5. Economic and technological feasibility:

The economic and technological feasibility of complying with the amendments has been assessed.

The amendments are economically and technologically feasible. The Department has determined that a number of poultry dealers and/or poultry transporters in New York State already have crate washers and on-site truck wash facilities. In lieu of establishing truck wash facilities, poultry dealers and poultry transporters will be able to comply with the proposed amendments by using a commercial truck wash facility.

The amendments will have no impact upon local governments.

6. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-b(1), the amendments were drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses.

The Department has previously implemented less burdensome measures on regulated parties in an effort to help prevent the spread of avian influenza through the live poultry markets. Those measures include the requirement that only birds from tested or monitored source flocks be allowed into the markets and the prohibition against moving poultry between live poultry markets. Unfortunately, these measures have not been entirely successful, as evidenced by the prevalence of the virus in the markets.

The amendments will expand and strengthen the Department's avian influenza control program by requiring poultry dealers and poultry transporters holding a valid domestic animal health permit who buy or sell poultry to be sold or offered for sale in a live poultry market, or transport poultry to a live poultry market, to have facilities that can be cleaned and disinfected on a year round basis; to possess and utilize crate washers to clean and disinfect crates between uses on a year round basis; to use all-season truck or vehicle wash facilities to clean and disinfect trucks or vehicles between uses on a year round basis; and to compile and maintain records of the dates and times that the crates and the trucks or vehicles were cleaned and disinfected. Although the amendments will result in a greater regulatory burden on regulated parties, the Department has nonetheless minimized adverse impact on them by allowing regulated parties to use commercial truck wash facilities rather than establishing and maintaining their own facilities.

The amendments will have no impact upon local governments.

7. Small business and local government participation:

In light of the continued prevalence of avian influenza in the live poultry markets in New York and the recent outbreaks of the virus in poultry flocks in Delaware and Texas, the Department has been in contact with regulated parties, including small businesses, in an effort to determine how to strengthen the avian influenza control program. The need for adequate sanitation of crates housing poultry as well as of trucks or other vehicles transporting poultry was addressed.

Since the amendments will have no impact on local governments, there has been no outreach with local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

There are eight (8) poultry dealers and/or poultry transporters in New York State, a number of which are located in rural areas.

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

Under the amendments, poultry dealers and poultry transporters holding a valid domestic animal health permit who buy or sell poultry to be sold or offered for sale in a live poultry market, or transport poultry to a live poultry market, will be required to compile, maintain and make available for inspection, for a period of two years, records of the dates and times that crates and trucks or vehicles were cleaned and disinfected. Such poultry dealers and poultry transporters will also be required to retain the certificate of veterinary inspection for the poultry they buy, sell or transport to a live poultry market.

3. Costs:

Under the amendments, poultry dealers and poultry transporters holding a valid domestic animal health permit who buy or sell poultry to be sold or offered for sale in a live poultry market, or transport poultry to a live poultry market, including those located in rural areas, will have to purchase equipment to clean and disinfect crates between uses. Commercial devices capable of cleaning and disinfecting 400 crates per hour may be purchased new at a cost of $50,000 or purchased used at auction for approximately $12,000. Delivery and installation of either a new or used crate washer would cost between $10,000 and $12,000. However, based upon outreach with industry, the Department has determined that five (5) of the eight (8) poultry dealers and/or poultry transporters in New York State already have crate washers on their premises. Poultry dealers and poultry transporters, including those in rural areas, will also have to use an all-season truck or vehicle wash facility in order to clean and disinfect trucks or vehicles between uses. Based upon outreach with industry, the Department has determined that three (3) of the eight (8) poultry dealers and/or poultry transporters in New York State already have on-site truck wash facilities. In lieu of establishing truck wash facilities, poultry dealers and poultry transporters will be able to comply with the amendments by using a commercial truck wash facility. Such facilities capable of cleaning and disinfecting trucks as large as 18-wheel rigs charge $100 to $400 per washing.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the amendments were drafted to minimize reporting and testing requirements for all regulated parties, including those in rural areas.

The Department has previously implemented less burdensome measures on regulated parties in an effort to help prevent the spread of avian influenza through the live poultry markets. Those measures include the requirement that only birds from tested or monitored source flocks be allowed into the markets and the prohibition against moving poultry between live poultry markets. Unfortunately, these measures have not been entirely successful, as evidenced by the prevalence of the virus in the markets.

The amendments will expand and strengthen the Department's avian influenza control program by requiring poultry dealers and poultry transporters holding a valid domestic animal health permit who buy or sell poultry to be sold or offered for sale in a live poultry market, or transport poultry to a live poultry market, to have facilities that can be cleaned and disinfected on a year round basis; to possess and utilize crate washers to clean and disinfect crates between uses on a year round basis; to use all-season truck or vehicle wash facilities to clean and disinfect trucks or vehicles between uses on a year round basis; and to compile and maintain records of the dates and times that the crates and the trucks or vehicles were cleaned and disinfected. Although the amendments will result in a greater regulatory burden on regulated parties, the Department has nonetheless minimized adverse impact on them by allowing poultry dealers and poultry transporters to use commercial truck wash facilities rather than establishing and maintaining their own facilities.

5. Rural area participation:

In light of the continued prevalence of avian influenza in the live poultry markets in New York and the recent outbreaks of the virus in poultry flocks in Delaware and Texas, the Department has been in contact with regulated parties, including those in rural areas, in an effort to determine how to strengthen the avian influenza control program. The need for adequate sanitation of crates housing poultry as well as of trucks or other vehicles transporting poultry was addressed.

Job Impact Statement

The amendments will expand the Department's avian influenza control program by requiring poultry dealers and poultry transporters holding a valid domestic animal health permit who buy or sell poultry to be sold or offered for sale in a live poultry market, or transport poultry to a live poultry market, to have facilities that can be cleaned and disinfected on a year round basis; to possess and utilize crate washers to clean and disinfect crates between uses on a year round basis; to use all-season truck or vehicle wash facilities to clean and disinfect trucks or vehicles between uses on a year round basis; and to compile and maintain records of the dates and times that the crates and the trucks or vehicles were cleaned and disinfected. The amendments will also clarify the requirement that the certificate of veterinary inspection shall remain with the DAHP holder (*i.e.* poultry dealer or poultry transporter) and the invoice shall accompany the poultry to the live poultry market.

The amendments will have no detrimental impact on jobs and employment opportunities in New York State but rather, are the most favorable alternative to retaining jobs in New York State. If nothing is done about

controlling the spread of avian influenza to live poultry markets from poultry dealers and poultry transporters, it is possible that outbreaks of the disease will continue. The recent outbreak of avian influenza in poultry flocks in Delaware and Texas have prompted 35 countries to place embargoes on poultry and poultry products from those two states. However, of those 35 embargoes, 16 of them are nationwide in scope and as such, include poultry imports from New York as well as the rest of the United States. If this and other foreign embargoes of poultry products were to continue, it is possible that poultry markets would have to close to protect the poultry industry in the northeast United States. If this scenario were to occur, it is estimated that approximately 750-1,000 jobs in live poultry markets would be lost. It is also estimated that 750 to 1,000 jobs provided by poultry dealers and poultry transporters would be lost, since they would have no markets for their birds.

Banking Department

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

Licensed Cashers of Checks

I.D. No. BNK-44-04-00001-E

This regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and/or job impact statement pertain(s) to a notice of emergency rule making, I.D. No. BNK-44-04-00001-E, printed in the *State Register* on November 3, 2004.

Regulatory Impact Statement

1. Statutory authority:

Banking Law Section 37[3] authorizes the Superintendent to require any licensed casher of checks to make such special reports to her at such times as she may prescribe. Section 369 describes the circumstances under which the Superintendent shall issue a license to permit the cashing of checks, drafts and money orders at a specified location or in a specified area. Section 371 authorizes the Superintendent to make such rules and regulations, and such specific rulings, demands and findings, not inconsistent with Article 9-A of the Banking Law, as she may deem necessary for the proper conduct of the business authorized and licensed under, and for the enforcement of, that Article. Section 372 authorizes the Superintendent to establish by regulation the maximum fees which may be charged by a licensed check casher for cashing a check, draft or money order.

2. Legislative objectives:

As more fully described in response to Item 3, "Needs and benefits" below, the amendments to Part 400 of the Superintendent's Regulations implement, or conform the regulations of the Banking Department to, recently enacted legislation amending the provisions of the Banking Law governing check cashers. The objective of this legislation was to provide for the regulation of the business of check cashing regardless of whether such check cashing was performed for customers that are natural persons or business or other entities. The amendments to Part 400.6 regarding signage requirements for retail check cashing carry out the legislative objective of consumer protection embodied in the provisions of Section 372 of the Banking Law that require a schedule of the fees and charges permitted under that section to be conspicuously and continuously posted in every licensed location.

3. Needs and benefits:

While the Banking Department has had the authority to regulate check cashers under Article 9-A of the Banking Law, an interpretive policy dating back to the initial regulation of check cashers in 1944 applied such regulation only to the cashing of checks for payees that are natural persons (that is, retail or consumer check cashing). However, the Attorney General recently issued a formal opinion (#2004-F5) that commercial check cashers are subject to licensing and regulation under Article 9-A of the Banking Law. At about the same time, a grand jury impaneled by the New York County Supreme Court issued a report calling on the Legislature to ensure that commercial check cashers are subject to licensing and regulation.

In response to these developments, Chapter 432 of the Laws of 2004, which was approved on September 14, 2004, amended the Banking Law in relation to the cashing of checks for payees who are other than natural persons. The new legislation provides for the regulation of the business of check cashing by the Banking Department, whether performed for customers who are natural persons or business entities.

The changes to Part 400 all implement, or conform the regulations of the Banking Department to, specific changes made by the Legislature in Chapter 432, except for certain of the amendments to Part 400.6, which incorporate the provisions of an existing emergency regulation amending the signage requirements of Part 400.6 (BNK-38-04-00001-E). Specifically:

Amendments to Section 400.1(a) make it clear that the requirement that any person engaging in the business of check cashing must first obtain a license from the Superintendent applies whether such activities are conducted for customers who are natural persons or for any business or entity.

New Section 400.1(g) relates to the requirement in Banking Law Section 369 that no license shall be issued for a location which is closer than three tenths of a mile from an existing licensee. Chapter 432 amended Section 369 to make it clear that the Superintendent may permit a location to be licensed which is closer than three tenths of a mile from an existing licensee, so long as the newly licensed location is a "restricted location" as described in subsection 1 of Section 369 of the Banking Law — that is, a location which is restricted to the cashing of checks, drafts or money orders only for payees that are other than natural persons.

New Section 400.1(g) makes it clear that this exemption will not be affected by a change of control of such restricted location, provided that the licensee continues to engage only in commercial check cashing.

Amendments to Section 400.6(a)(1) deal with the requirement that licensees post a schedule of rates. These amendments make it clear that the signage requirement applies only to retail check cashers, and that the posted rate schedule need only cover transactions involving payees that are natural persons.

The amendments to Part 400.6 also incorporate the provisions of a current emergency regulation amending that section. Previously adopted amendments to Part 400.12 of the Superintendent's Regulations increased the maximum fee that licensed check cashers may charge and provide for an annual fee adjustment thereafter based on the increase in the consumer price index for the New York metropolitan area, if any. As a result of the amendments to Part 400.12, licensed check cashers need to revise their posted schedules of fees and charges.

In addition to amending the disclosure of the amount of the check cashing fee, the amendment changes the structure of the disclosure to provide more useful information. Previously under Part 400.6, the signage was required to disclose the fee charged in five cent increments. As a result, the corresponding check amounts were often atypical amounts. Under the amendment to Part 400.6, the disclosure will be governed by the amount of the check and the corresponding check cashing fee set forth on the signage according to the amount of the check in increments of $25.00 ranging from $25.00 to $2,000. The schedule will also indicate the percentage charge imposed on all checks and the $1.00 minimum.

Moreover, since the fee may change in the future due to increases in the Consumer Price Index, the amendment allows signs to be made of durable material instead of specifying that the signs must be made of plastic or metal.

Chapter 432 amended Section 372(1) of the Banking Law to make it clear that while the Superintendent shall establish the maximum fees which may be charged by licensees for cashing checks, such maximum fees shall not apply to the cashing of checks for payees that are other than natural persons. The amendments to Part 400.12 provide for a comparable exception in the relevant regulation.

In addition to the foregoing, the amendments revise Part 400.1(a) and (b) and Part 400.15 to update references to the location of the New York City office of the Department.

4. Costs:

Except as noted below, the amendments to Part 400 of the Superintendent's Regulations are not projected to impose any costs on regulated persons or the state government.

As noted in "Needs and Benefits" above, licensed check cashers will be required periodically to revise their posted schedule of fees and charges as a consequence of previously adopted amendments to Part 400.12. No additional costs will be incurred in complying with the requirement that the new signs reflect the new disclosure structure. Indeed, the new regulations

may reduce the costs of compliance by specifying only that the signs be made of a durable material, rather than requiring that they be made of plastic or metal.

5. Local government mandates:

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

6. Paperwork:

Under Chapter 432 of the Laws of 2004, the existing licensing and regulatory requirements in Article 9-A apply to commercial check cashers, except insofar as they are specifically exempted. These requirements include certain reporting and examination requirements applicable to all check cashers. In addition, Chapter 432 added a new subsection (7) to Section 372 of the Banking Law, requiring a licensee to submit to the Superintendent a copy of any suspicious activity reports or currency transactions reports as are required to be submitted to the federal authorities.

7. Duplication:

The rule making will not result in duplication, overlap or conflict with any rules or other legal requirements of the state and federal governments. While Chapter 432 of the Laws of 2004 added a new subsection (7) to Section 372 of the Banking Law, requiring a licensee to submit to the Superintendent a copy of any suspicious activity report or currency transactions report that is required to be submitted to the federal authorities, a licensee may submit a copy of the report filed with the federal authorities in satisfaction of this requirement.

8. Alternative approaches:

Except as noted with respect to certain of the changes in Part 400.6, the changes in Part 400 are necessary to conform the regulations to the changes in the Banking Law effected by Chapter 432 of the Laws of 2004. One alternative would be to take no action; however not conforming the regulation to the statute was not considered to be a viable alternative. The Banking Department did communicate with the commercial check cashing industry during the process of making recommendations during the legislative process leading to the adoption of Chapter 432.

Consideration was given to leaving the retail check cashing signage provisions Part 400.6 unchanged. However, as the schedule of permissible fees has changed, failing to require changes in the signage would result in inaccurate fee disclosure. Moreover, as noted in "Needs and Benefits" above, it was determined that the need for licensed check cashers to make signage changes to reflect the new fee schedule imposed by the previously adopted amendments to Part 400.12 meant that simultaneously promulgating the changes in the signage requirements contained in the proposed amendments to Part 400.6 would provide an opportunity to improve the quality of disclosure to customers and provide greater flexibility in signage materials without imposing additional costs on licensed entities.

9. Federal standards:

No minimum standards of the federal government for the same or similar subject areas will be exceeded by the amendments to Part 400 of the Superintendent's Regulations. The federal government does not license or regulate check cashers.

10. Compliance schedule:

The amendments to Part 400 reflect changes to the Banking Law effected by Chapter 432 of the Laws of 2004. Section 6 of that Chapter contains certain transitional provisions for the licensing of commercial check cashers. Except as therein provided, check cashers are currently required to comply with the statutory changes, which have already come into effect.

Regulatory Flexibility Analysis

1. Effect of rule:

The amendments to Part 400 all implement the legislative determination, embodied in Chapter 432 of the Laws of 2004, that commercial check cashers, as well as retail check cashers, shall be subject to licensing and regulation.

The amendments make it clear that the existing regulatory requirements applicable to retail check cashers are generally also applicable to commercial check cashers. The amendments also reflect the statutory intent to modify the regulatory scheme applicable to retail check cashers to accommodate certain unique aspects of commercial check cashing.

Commercial check cashers service small business entities and are themselves small businesses. Customers of commercial check cashers typically are such small business entities as construction sub contractors, food and sundry suppliers, and garment industry vendors that receive payment in check for goods and services. These businesses many times operate on a cash basis, and the commercial check cashers facilitate the conduct of these businesses. This service enables owners of such businesses to forego the use of fixed banking facilities, which may be far removed from their place of business and operations, in order to convert payment checks to cash. There is no basis upon which to make a meaningful estimate of the number of small business entities serviced by commercial check cashers.

With respect to the commercial check cashing entities themselves, there exists no definitive list of such entities, essentially because such businesses have not heretofore been regulated. The most comprehensive list is provided by the Financial Crimes Enforcement Network (FinCEN), a federal regulatory entity within the Department of Treasury dedicated particularly to enforcement of federal anti-money laundering and related criminal statutes. Under the US PATRIOT Act requirements, money service businesses, such as check cashers, whether or not regulated by any federal or state government, must register with FinCEN. A list provided to the Department's Criminal Investigation Bureau shows 245 entities. This number includes numerous markets, pharmacies, and educational facilities in addition to a few entities already licensing as retail check cashers. The commercial and educational entities would not be subject to licensing and regulation under Part 400 if they cash checks incidental to their businesses and for a fee not exceeding $1 per check. (It is noted, however, that if such retail vendors are engaging in commercial check cashers with supplier vendors that service these industries, and the activity is more than incidental and the fees charged in excess of the exempted maximum fee of $1, these retail entities may be potentially subject to licensing by the Department.) Removing these entities from the FINCEN list leaves approximately 120 entities that indicate either by name they are engaged in check cashing or for which no description of the business activity is provided. (In certain instances, these entities may be payment agents for billers and would be exempt from the licensing requirements pursuant to Article 9-A.)

Based upon Department's experience from licensing retail check cashers, it may be assumed these commercial check cashing entities are virtually all small businesses, constituted as sole proprietorships, partnerships, Chapter S corporations or limited liability companies or partnerships. The Department does not believe any of these entities are publicly traded corporations.

In addition to this relatively identifiable universe, it is noted that historically in many instances commercial check cashers have not dealt directly with commercial customers, but rather operated through "agents" or series of agents. These agents engage in "intermediate" check cashing, taking checks from commercial entities in exchange for the face amounts minus a fee, subsequently aggregating the checks, and ultimately cashing the checks with a commercial check casher that deposits the checks in a bank account. At that moment, the checks first enter the formal bank payment and clearance process. How many of these "agents" exist is unknown and cannot be meaningfully estimated at this time. However, the Department assumes all such agents would be small businesses. Under the statutory requirements, these agents would either need to be licensed as check cashers or be employed by a licensed check casher.

The regulatory scheme set forth in the amendments to Part 400 will impose a burden upon commercial check cashers, since these entities have heretofore not been subject to licensing and regulation. However, these amendments all implement, or conform the regulations to, specific changes made by the Legislature in Chapter 432. Retail check cashers already operate under this same basic regulatory scheme, and the statutory amendments made by Chapter 432 included provisions intended to accommodate unique aspects of commercial check cashing.

Certain of the amendments to Part 400 also apply to retail check cashers, including the signage amendments in Part 400.6. However, these amendments will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on such entities. Indeed, by improving the structure of the required disclosures and providing additional flexibility regarding signage materials, these amendments provide an economic benefit and reduce regulatory burden.

The amendments to Part 400 will not impose any adverse economic impact, or reporting, recordkeeping or other compliance requirements on local governments.

2. Compliance requirements:

As noted above, under the amendments to Part 400, commercial check cashers will be subject to the same licensing and regulation as retail check cashers, except insofar as modifications in the regulatory scheme set forth in Chapter 432 are reflected in the Part 400 amendments. The compliance requirements thus imposed on commercial check cashers are entirely new.

3. Professional services:

Part 400 imposes extensive reporting and record keeping requirements upon check cashers. Commercial check cashers may need to obtain in-

creased services from accountants, attorneys and data processing entities in order to meet these requirements.

4. Compliance costs:

Since the compliance requirements imposed on commercial check cashers are entirely new, such commercial check cashers will experience increased compliance costs. The amount of such costs will depend on the ease with which the existing business operations and record keeping systems of each entity can be adapted to meeting the operational, record keeping and reporting requirements imposed by Article 9-A and Part 400. The amount of such costs cannot be estimated per entity or in the aggregate.

5. Economic and technological feasibility:

Commercial check cashers presumably have in place a business operational infrastructure that includes an electronic data processing and record keeping capability sufficient to meet federal and state tax reporting requirements as well as US PATRIOT Act requirements. Thus, while compliance with the Part 400 regulatory scheme may require some modification of existing programs in order to meet the reporting and recordkeeping requirements, compliance is expected to be technologically and economically feasible.

6. Minimizing adverse impact:

To the extent the amendments to Part 400 modify the current regulatory scheme, these modifications are made in recognition of certain peculiar operational characteristics of commercial checking that are not pertinent to retail check cashing or, in the case of the signage amendments to Part 400.6, do address regulatory standards whose modification is of interest to the retail check cashers.

The amendments affecting commercial check cashers conform Part 400 to the statutory modifications to Article 9-A contained in Chapter 432. The statutory amendments accomplish the following: (i) permits both existing and new commercial check cashing locations that are within 3/10s of a mile of an existing licensed check casher, provided such locations engage only in commercial check cashing; (ii) removes the maximum fee per check limitation upon the cashing of commercial checks, whether the cashing is performed by retail or commercial check cashers; (iii) removes the cap on the amount of a check that may be cashed with respect to commercial checks and increases the cap amount for retail checks from $6,000 to $15,000; and (iv) authorizes a temporary license for commercial check cashers upon initial application to permit such cashers to continue to operate as their applications are processed and prior to the issuance of a permanent license. Finally, since Chapter 432 excludes commercial checks from the maximum fee per check limitation, Part 400 is amended to limit the signage requirements relating to fees charged by licensed check cashers only to retail checks.

7. Small business and local government participation:

The Department had numerous discussions with the Financial Service Centers of New York, Inc., the state check casher trade association, which primarily represents retail but also a certain number of commercial check cashers, during the development of the legislative proposal which became Chapter 432. There is no trade association which represents the commercial cashers as a group. The Department communicated with a number of identified commercial check cashers during the two (2) years in which it was developing the legislative proposal in order to determine how the industry operates. In addition, the Department has been contacted by individual commercial check cashers that were concerned about the potential recommendations of a Grand Jury empanelled by the New York County Supreme Court regarding commercial check cashing and the possible resulting enforced activities by the New York County District Attorney. These commercial check cashers expressed an interest in obtaining regulation by the Department.

Because of the need to impose the regulatory regime upon commercial check cashers immediately, the Department adopted the amendments to Part 400 as an emergency rule. The Department expects that the experience of check cashers under the emergency rule may lead to further input from the commercial check cashing industry during the rule making process.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted. The amendments to Part 400 will impose no additional regulatory requirements upon public entities in rural communities.

Upon an examination of the addresses of the commercial check cashing entities culled from the FinCEN list, it appears all such entities are located in either large metropolitan areas or small cities of this state. Based on the experience of the Department in licensing and regulating retail check cashers, in virtually all cases they operate in the same types of urban areas. Therefore, it is anticipated that the emergency rule will not impose any additional regulatory requirements upon private entities in rural communities.

Job Impact Statement

A job impact statement is not submitted. The imposition of the regulatory regime for licensed check cashers upon currently non-regulated commercial check cashers can be expected to cause changes in the business operations of such cashers and this may affect employment within the industry. However, it is impossible to estimate the number of potential licensed commercial check cashers at this time, and therefore the size of the work force in this industry. Consequently, there is no way to meaningfully estimate the effect of any changes in business operations on employment within the industry.

A case in point is the "agent" population, discussed Section 1 of the Regulatory Flexibility Analysis relating to these amendments. The Department has no data at this time as to how many individuals are engaged in this intermediate check cashing activity between commercial customers and commercial check cashers. Under the amendments to Part 400, all such persons would either need to be licensed as check cashers or be employed by a licensed check casher. The extent to which such requirements may adversely affect the size of the agent population cannot be meaningfully estimated.

With respect to existing licensed retail check cashers, the proposed regulations should be economically beneficial and may induce business expansion and job growth.

Education Department

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Professional Licensure in Mental Health Counseling

I.D. No. EDU-34-04-00011-RP

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

Revised action: Addition of section 52.32 and Subpart 79-9 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 210 (not subdivided); 6501 (not subdivided); 6504 (not subdivided); 6507(2)(a), (3)(a) and (4)(a); 6508(1); 8402(3)(b), (c) and (d); 8409 (not subdivided); 8411(2)(a), (b) and (3)

Subject: Professional licensure in mental health counseling.

Purpose: To implement the provisions of art. 163 of the Education Law by establishing education, experience, and examination requirements for licensure in the new licensed profession of mental health counseling, and standards for registered college programs leading to licensure in this field.

Substance of revised rule: The State Education Department proposes to add a new section 52.32 and Subpart 79-9 of the Regulations of the Commissioner of Education to establish requirements for the new licensed profession of mental health counseling.

A new section 52.32 is added to establish requirements for college programs leading to licensure in mental health counseling, as follows:

In addition to meeting all applicable provisions of this Part, to be registered as a program recognized as leading to licensure in mental health counseling, which meets the requirements of section 79-9.1 of this Title, the program shall:

(a) be a master's or doctoral degree program in counseling;

(b) through December 31, 2009, include at least 48 semester hours, or the equivalent, of study and on and after January 1, 2010, include at least 60 semester hours, or the equivalent of study;

(c) contain curricular content that includes but is not limited to each of the following content areas:

(1) human growth and development;

(2) social and cultural foundations of counseling;

(3) counseling theory and practice;

(4) psychopathology;

(5) group dynamics;

(6) lifestyle and career development;

(7) assessment and appraisal of individuals, couples, families and groups;

(8) research and program evaluation;

(9) professional orientation and ethics;

(10) foundations of mental health counseling and consultation;

(11) clinical instruction; and

(d) include a supervised internship or supervised practicum in mental health counseling of at least one-year, defined as at least 600 clock hours for purposes of this section.

A new Subpart 79-9 of the Regulations of the Commissioner of Education is added, to establish requirements that an individual must meet to be licensed as a mental health counselor.

Section 79-9.1 establishes education requirements for licensure. Subdivision (a) defines the term acceptable accrediting agency. Subdivision (b) establishes the education requirement, as follows:

(b) To meet the professional education requirement for licensure as a mental health counselor, the applicant shall present satisfactory evidence of completing:

(1) a master's or doctoral program in counseling registered as leading to licensure in mental health counseling pursuant to section 52.32 of this Title, or a master's or doctoral program in counseling that is accredited by an acceptable accrediting agency, or a master's or doctoral program in counseling that is substantially equivalent to such a registered or accredited program, as determined by the department; or

(2) a program located outside the United States and its territories that is recognized by the appropriate civil authorities of the jurisdiction in which the program is located as a program that prepares an applicant for the professional practice of mental health counseling, has been verified in accordance with subdivision (c) of section 59.2 of this Title, and which is determined by the department to be substantially equivalent to a master's or doctoral program in counseling registered by the department as leading to licensure in mental health counseling, pursuant to section 52.32 of this Title, or to a master's or doctoral program in counseling accredited by an acceptable accrediting agency.

Section 79-9.2 establishes the examination requirement for licensure. Subdivision (a) prescribes standards for the examination, subdivision (b) the requirements for admission to the examination, and subdivision (c) the passing score.

Section 79-9.3 establishes the experience requirement for licensure. Subdivisions (a) and (b) establish the general requirements, as follows:

(a) An applicant for licensure as a mental health counselor shall meet the experience requirement for licensure as a mental health counselor by submitting sufficient documentation of having completed a supervised experience of at least 3,000 clock hours providing mental health counseling in a setting acceptable to the department, all in accordance with the requirements of this section.

(b) The supervised experience must be obtained after the applicant completes the program required for licensure as a mental health counselor, as prescribed in section 79-9.1 of this Subpart.

Subdivision (c) establishes the supervision requirements for the experience and subdivision (d) requirements for the setting for the experience.

Section 79-9.4 establishes requirements for a limited permit in mental health counseling, as follows:

(a) An applicant for a limited permit to practice mental health counseling shall:

(1) file an application for a limited permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

(2) meet all requirements for licensure as a mental health counselor, except the examination and/or experience requirements; and

(3) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79-9.3 of this Subpart.

(b) The limited permit in mental health counseling shall be issued for specific employment setting(s), acceptable to the department in accordance with the requirements of section 79-9.3 of this Subpart.

(c) The limited permit in mental health counseling shall be valid for a period of not more than 24 months, provided that the limited permit may be extended for an additional 12 months at the discretion of the department if the department determines that the permit holder has made good faith efforts to successfully complete the examination and/or experience requirements within the first 24 months but has not passed the licensing examination or completed the experience requirement, or has other good cause as determined by the department for not completing the examination and/or experience requirement within the first 24 months, and provided further that the time authorized by such limited permit and subsequent extension shall not exceed 36 months total.

Section 79-9.5 establishes requirements for classifications systems that mental health counselors may use.

Section 79-9.6 establishes special provisions for licensure in mental health counseling. Subdivision (a) implements Education Law section 8411(2)(a) by establishing three alternative licensure pathways, the requirements for which must be met on or before January 1, 2006. All three require the applicant to:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8402(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(1) Alternative route one. In addition to the above requirements, the applicant must have completed a master's or higher degree program in counseling or in a related mental health field that is registered by the department or is an equivalent program as determined by the department. Course content for the program is specified, and the applicant is required to have at least 3,000 clock hours of experience in mental health counseling following completion of the educational program.

(2) Alternative route two. In addition to the above requirements, the applicant must have completed a baccalaureate or higher degree program in counseling or in a related mental health field that is registered by the department or is an equivalent program as determined by the department. Course content for the program is specified, and the applicant is required to have engaged in the practice of mental health counseling, on a full-time basis, for seven years of the immediately preceding ten years prior to application for licensure. In addition, the applicant must submit certifications from three qualified individuals endorsing the applicant's good professional ethics and clinical competence, and must meet one of the following three requirements:

(i) have three years of post-education supervised experience in mental health counseling; or

(ii) be certified or registered by a national certifying or registering body for mental health counselors, acceptable to the department; or

(iii) complete an acceptable post-baccalaureate program in mental health counseling or a related field in accordance with specified requirements.

(3) Alternative route three. In addition to the above requirements, the applicant must have completed a baccalaureate or higher degree program in counseling or in a related mental health field that is registered by the department or is an equivalent program as determined by the department. Course content for the program is specified, and the applicant is required to have engaged in the practice of mental health counseling, on a full-time basis, for ten years of the immediately preceding fifteen years prior to application for licensure. In addition, the applicant must submit certifications from five qualified individuals endorsing the applicant's good professional ethics and clinical competence.

Subdivision (b) establishes alternative requirements for licensure without examination, as follows:

(b) In accordance with section 8411(2)(b) of the Education Law, an applicant who meets all requirements for licensure as a mental health counselor, as prescribed in section 8402(3) of the Education Law, except for the examination requirement, may qualify for a license as a mental health counselor through meeting the requirements of this subdivision, provided that the applicant meets these requirements on or before January 1, 2006. The applicant shall:

(1) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8402(3)(g) of the Education Law;

(2) meet all requirements for the license as a mental health counselor prescribed in section 8402(3) of the Education Law, except the examination requirement; and

(3) either:

(i) have certification or registration by a national certifying or registering body for mental health counselors, acceptable to the department. To be acceptable to the department, the national certifying or registering body must be recognized nationwide as an organization that certifies or registers mental health counselors throughout the United States based upon a review of their qualifications to practice mental health counseling and must have adequate standards for the review of the applicant's qualifications for practicing mental health counseling, as determined by the department. Such standards must include standards for the review of the applicant's education and experience for practicing mental health counseling and may include an examination requirement. For use under this subdivision, such certification or registration need not be current but shall not have been

revoked for misconduct and/or unethical activities. For documentation of the applicant's certification or registration status to be sufficient, the national certifying or registering body must submit documentation verifying the applicant's certification or registration status directly to the department; or

(ii) if there is no national certifying or registering body for mental health counselors acceptable to the department as prescribed in subparagraph (i) of this paragraph, have engaged in the practice of mental health counseling, as defined in section 8402(1) of the Education Law, on a full-time basis for five years of the immediately preceding eight years prior to application for licensure. For purposes of this subparagraph, practice on a full- time basis shall mean 960 clock hours in the practice of mental health counseling, earned over a 52-week period.

Revised rule compared with proposed rule: Substantial revisions were made in sections 52.32, 79-9.3(b)(2), (d)(3) and 79-9.6(a) and (b)(3).

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

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

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

Revised Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, the proposed rule has been revised as follows:

Section 52.32 of the Regulations of the Commissioner of Education is substantially revised to increase the number of semester hours in a registered program leading to licensure from 45 to 48 through December 31, 2009, and to 60 semester hours thereafter, in order to more closely align with accredited programs in this field. The section is also non-substantially revised to restructure it to provide an additional subdivision.

Section 79-9.2(c)(2) is substantially revised to establish qualifications for supervisors of the experience required for licensure in mental health counseling as follows:

(2) Qualifications for supervisors of the required experience. The supervisor of the experience shall meet each of the following requirements:

(i) The supervisor shall have completed a master's or higher degree program in counseling, in the subject of the field in which the supervisor is licensed as prescribed in subparagraph (iii) of this paragraph, or another field related to the field of counseling as determined by the department;

(ii) The supervisor shall have engaged in the practice of mental health counseling for three years or the part-time equivalent. For purposes of this subparagraph, practice on a full-time basis shall mean 960 clock hours in the practice of mental health counseling, earned over a 52-week period; and

(iii) The supervisor shall be licensed and registered in New York State to practice mental health counseling, medicine, as a physician assistant, psychology, licensed clinical social work, or as a registered professional nurse or nurse practitioner, pursuant to Articles 163, 131, 131-b, 139, 153, or 154 of the Education Law, respectively; or be an individual with equivalent qualifications as determined by the department; or for applicants who apply for licensure in mental health counseling on or before December 31, 2007, be an individual with certification or registration by an acceptable national certifying or registering body for mental health counselors. To be acceptable to the department, the national certifying or registering body must be recognized nationwide as an organization that certifies or registers mental health counselors throughout the United States based upon a review of their qualifications to practice mental health counseling and must have adequate standards for the review of the applicant's qualifications for practicing mental health counseling, as determined by the department. Such standards must include standards for the review of the applicant's education and experience for practicing mental health counseling and may include an examination requirement.

This change was necessary to ensure that the supervisors have the necessary education and experience to provide the supervision.

Section 79-9.3(d)(3) is non-substantially revised to add the words "acceptable to the department" after the word "supervisor," to clarify that the supervisor of the required experience must by acceptable to the State Education Department, in accordance with the requirements of section 79-9.3 of this Subpart.

Section 79-9.6(a) is substantially revised to establish alternative requirements for licensure in mental health counseling as follows:

(a) Alternative requirements. In accordance with section 8411(2)(a) of the Education Law, an applicant who does not meet the requirements for licensure as a mental health counselor as prescribed in section 8402(3) of the Education Law, may qualify for a license as a mental health counselor through meeting the alternative requirements prescribed in either paragraphs (1), (2), or (3) of this subdivision, provided that the applicant meets all such requirements on or before January 1, 2006.

(1) Alternative route one. An applicant may qualify for a license as a mental health counselor through meeting the following alternative requirements. The applicant shall:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8402(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(iv) have completed a master's or higher degree program in counseling or in a related mental health field such as social work, psychology, or marriage and family therapy, that is registered by the department pursuant to Part 52 of this Title, or is an equivalent program as determined by the department, provided that the program includes:

(a) coursework that contains curricular content in the study of:

(1) human growth and development;

(2) counseling theory and practice;

(3) assessment and appraisal of individuals, couples, families and groups;

(4) foundation of counseling and consultation;

(5) clinical instruction and counseling;

(6) research and program evaluation; and

(b) a supervised internship in counseling; and

(v) after completing the master's or higher degree program prescribed in subparagraph (iv) of this paragraph, have engaged in the practice of mental health counseling, as defined in section 8402(1) of the Education Law, for at least 3,000 clock hours.

(2) Alternative route two. An applicant may qualify for a license as a mental health counselor through meeting the following alternative requirements. The applicant shall:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8402(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(iv) have completed a baccalaureate or higher degree program in counseling or in a related mental health field such as social work, psychology, or marriage and family therapy, that is registered by the department pursuant to Part 52 of this Title, or is an equivalent program as determined by the department, provided that the applicant demonstrates the completion of coursework within such a program that contains curricular content in the study of human growth and development, counseling theory and practice, and research and program evaluation;

(v) after completing the baccalaureate or higher degree program prescribed in subparagraph (iv) of this paragraph, have engaged in the practice of mental health counseling, as defined in section 8402(1) of the Education Law, on a full-time basis for seven years of the immediately preceding ten years prior to application for licensure. For purposes of this subparagraph, practice on a full-time basis shall mean 960 clock hours in the practice of mental health counseling, earned over a 52-week period;

(vi) have submitted certifications from three individuals who meet the qualifications for supervisors of the experience requirement, as prescribed in section 79-9.3(c)(2), endorsing the applicant's good professional ethics and clinical competence to practice of mental health counseling. Such certifications shall be submitted on forms prescribed by the department; and

(vii) have met one of the following three requirements:

(a) after completing the baccalaureate or higher degree program prescribed in subparagraph (iv) of this paragraph, have three years of supervised experience in the practice of mental health counseling, which may be part of the seven years of experience required in subparagraph (v) of this paragraph. The supervisor of the experience must meet the qualifications for a supervisor of required experience prescribed in section 79-9.3(c)(2) of this Subpart, or

(b) be certified or registered by a national certifying or registering body for mental health counselors, acceptable to the department. To be acceptable to the department, the national certifying or registering body must be

recognized nationwide as an organization that certifies or registers mental health counselors throughout the United States based upon a review of their qualifications to practice mental health counseling and must have adequate standards for the review of the applicant's qualifications for practicing mental health counseling, as determined by the department. Such standards must include standards for the review of the applicant's education and experience for practicing mental health counseling and may include an examination requirement; or

(c) complete an acceptable post-baccalaureate program in mental health counseling or a related field from an institute chartered by the Board of Regents, or an institution authorized its charter or by the Board of Regents to confer degrees in New York State, or the equivalent as determined by the department, provided that such program contains curricular content in the study of:

(1) human growth and development;

(2) counseling theory and practice;

(3) assessment and appraisal of individuals, couples, families and groups;

(4) foundation of counseling and consultation;

(5) clinical instruction and counseling; and

(6) research and program evaluation.

(3) Alternative route three. An applicant may qualify for a license as a mental health counselor through meeting the following alternative requirements. The applicant shall:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8402(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(iv) have completed a baccalaureate or higher degree program in counseling or in a related mental health field such as social work, psychology, or marriage and family therapy, that is registered by the department pursuant to Part 52 of this Title, or is an equivalent program as determined by the department, provided that the applicant demonstrates the completion of coursework within such a program that contains curricular content in the study of human growth and development, counseling theory and practice, and research and program evaluation;

(v) after completing the baccalaureate or higher degree program prescribed in subparagraph (iv) of this paragraph, have engaged in the practice of mental health counseling or psychotherapy on a full-time basis for 10 years of the immediately preceding 15 years prior to application for licensure. For purposes of this subparagraph, practice on a full-time basis shall mean 960 clock hours in the practice of mental health counseling, earned over a 52-week period; and

(vi) have submitted certifications from five individuals who meet the qualifications for supervisors of the experience requirement, as prescribed in 79-9.3(c)(2), endorsing the applicant's good professional ethics and clinical competence to practice of mental health counseling. Such certifications shall be submitted on forms prescribed by the department.

The change is needed to increase requirements for the alternative routes to licensure to ensure that candidates are adequately prepared for licensure under the alternative routes and that the alternative requirements demonstrate substantially equivalent preparation to that required in the regular route to licensure.

Section 79-9.6(b)(3)(i) is non-substantially revised by removing the unnecessary words at the beginning of the subparagraph "document to the satisfaction of the department having" and substituting the word "have."

Section 79-9.6(b)(3)(ii) is non-substantially revised by removing the unnecessary words "document to the satisfaction of the department having" after the word "paragraph". It is also non-substantially revised to add the words "prior to application for licensure" after the word "years" to clarify that the experience must be gained in the eight years prior to application for licensure.

The aforementioned revisions to the proposed rule do not require changes to the Regulatory Impact Statement.

Regulatory Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed regulation, as revised, concerns requirements that an individual must meet to become licensed in the profession of mental health counseling and that college programs must meet to be registered by the State Education Department as leading to licensure in this field. The regulation will not impose any adverse economic, reporting, recordkeeping, or any other compliance requirements on small businesses or local governments. Because it is evident from the rule, as revised, that it will not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The revisions do not necessitate any changes in the Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the State Register on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

Article 163 of the Education Law establishes mental health counseling as a licensed profession in New York State. The proposed regulation, as revised, implements the requirements of Article 163 of the Education Law by establishing education, experience, and examination standards for licensure, as required by that statute. It also sets forth standards for registered college programs that lead to licensure in this field, in accordance with statutory requirements.

The proposed regulation implements statutory requirements and directives and will have no impact on jobs or employment opportunities, beyond the impact of Article 163. In addition, the regulation, which relates to licensure qualifications, will have no impact on labor market demand for mental health counselors. It will not affect the number of jobs or employment opportunities in this field. Because it is evident from the nature of this regulation, as revised, that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of the proposed rule in the *State Register* on August 25, 2004, the State Education Department (SED) received the following comments:

COMMENT: The 45 semester hour requirement in section 52.32 for registered programs leading to licensure in mental health counseling is inconsistent with accreditation standards.

RESPONSE: In response, the number of semester hours has been increased to 48 through December 31, 2009, and 60 semester hours thereafter.

COMMENT: Section 52.32(c) of the proposed regulations should be revised to clarify that the supervised internship requires in-person client contact providing mental health counseling.

RESPONSE: The proposed regulation is consistent with statute and the Department does not believe that the proposed change is necessary.

COMMENT: Certified Rehabilitation Counselors (CRC) with a master's degree in rehabilitation counseling, should be licensed as mental health counselors.

RESPONSE: The proposed regulations provide the flexibility to allow the licensing of individuals with a master's degree in counseling that includes specific course content, to be licensed. An applicant's education and experience would be reviewed to determine if it meets the standards in the Education Law and Commissioner's Regulations. Education programs that lead to a master's or higher degree in rehabilitation counseling would have the opportunity to apply for registration as license-qualifying for mental health counseling by including curricular content that meets the requirements of section 52.32 of the Commissioner's Regulations.

COMMENT: Section 52.32(a) of the proposed regulations require the completion of a master's or doctoral degree in mental health counseling, but does not differentiate between the requirements for the two degrees.

RESPONSE: Section 52.32 specifies minimum requirements for licensure qualifying programs in mental health counseling. The Department would review applications to determine whether programs meet all requirements in Regents Rules and the Regulations of the Commissioner of Education, including duration requirements for master's and doctoral degree programs.

COMMENT: Section 52.32(a) requires the completion of at least 45 semester hours with content in 11 specific areas. Nine of these areas should require at least six semester hours each, so the minimum should be at least 60 semester hours.

RESPONSE: The proposed regulations do not specify the number of semester hours to be met within each area of content. The Department does not believe it necessary to prescribe semester hours for each content area.

COMMENT: Section 52.32(c) should be revised to require the completion of a 750-clock hour supervised internship or practicum.

RESPONSE: The proposed regulation defines one-year of supervised internship or practicum as 600 clock hours. This could be increased at the program's discretion.

COMMENT: Section 52.32(d) should require that faculty who teach or supervise in the psychological clinical areas must be licensed as a physician, physician's assistant, nurse, psychologist, social worker or mental health practitioner.

RESPONSE: Part 52 of the Commissioner's Regulations require that faculty in a registered program must be qualified by training and experience. It is unnecessary to further specify the qualifications of supervisors of internships and practicum in regulation.

COMMENT: The regulation should provide opportunities for individuals who are currently practicing psychotherapy to meet the requirements for licensure.

RESPONSE: An individual may meet alternative requirements for licensure as a mental health counselor. In response to comments from the field, the Department has increased such alternatives requirements in section 79-9.6 of the regulations.

COMMENT: Psychotherapy institutes should be permitted to offer licensure-qualifying programs in mental health counseling.

RESPONSE: Section 8402 of the Education Law requires the program to be a master's or higher degree in counseling from a program registered by the Department, or its equivalent, which would not include a psychotherapy institute.

COMMENT: The proposed regulations do not define practice outside the boundaries of competence, as defined in paragraph 1 of section 8407 of the Education Law. Specific language should define the consultation required with a physician when the mental health counselor is treating a patient with serious mental illness.

RESPONSE: The proposed regulations define the qualifications for licensure as a mental health counselor. The Department will consider addressing this issue, within the bounds of our statutory authority, in future amendments to the definition of unprofessional conduct in the practice of the mental health professions.

COMMENT: The proposed regulations should be revised to allow a student in a psychotherapy training institute to continue providing mental health counseling services for up to three years.

RESPONSE: Education Law restricts the practice of mental health counseling to those licensed or otherwise exempt. It is not possible to create exemptions in regulation that were not prescribed in statute.

COMMENT: The regulations should be revised to ensure that supervisor of the required experience is qualified in mental health counseling and to prohibit supervision by a registered professional nurse, nurse practitioner or physician's assistant.

RESPONSE: The professions identified in the comment are authorized to practice mental health counseling under an exemption in Article 163. In response to comments from the field and in consultation with the State Board for Mental Health Practitioners, the proposed regulations have been strengthened to require master's level education and experience in the field of mental health counseling. The supervisor must be licensed in New York State and authorized to practice mental health counseling, or meet equivalent qualifications. Individuals licensed in the above-referenced professions that meet the prescribed requirements to supervise the experience will be governed by the practice requirements of their profession, including supervision requirements.

COMMENT: The regulations for supervised experience should accommodate the needs of individuals with disabilities or those caring for a child or family member.

RESPONSE: The proposed regulations implement statutory requirements, which authorize only a two-year limited permit, with a one-year extension. The Department cannot extend the duration of the limited permit by regulation beyond the limit set in statute.

COMMENT: Teaching in a graduate mental health counselor program should count toward meeting the 3,000-clock hour experience requirement for licensure.

RESPONSE: Education Law states that the applicant must have 3,000 hours of experience relevant to the practice of mental health counseling and does not define teaching as the practice of mental health counseling.

COMMENT: The proposed regulations should be revised to clarify that only "in-person client contact hours" meet the experience requirement for licensure.

RESPONSE: The statute is silent as to whether or not the experience must consist only of client contact hours. The Department has reasonably interpreted the statute to permit the required experience to other than client contact hours, provided that the applicant is providing mental health counseling services.

COMMENT: The requirement in the regulations that the individual under supervision brief a supervisor on every intake is not feasible and was not in the statute.

RESPONSE: The State Board for Mental Health Practitioners recommended this requirement as an appropriate level of supervision to ensure public protection.

COMMENT: The proposed regulations require that an applicant complete 3,000 hours of supervised experience but there is no such requirement for licensure as a Licensed Master Social Worker (LMSW) under the Education Law. It is not fair that a mental health counselor does not have the same option.

RESPONSE: The comment is accurate that Education Law does not require experience for licensure as an LMSW in New York State and the Department does not have authority to impose such a requirement. On the other hand, Education Law imposes an experience requirement for licensure in a mental health counseling. The regulation implements this statutory requirement.

COMMENT: The regulations should specify that psychological tests may be given by mental health counselors.

RESPONSE: Section 8402 of the Education Law prescribes the practice of mental health counseling and authorizes the use of assessment instruments to "identify, evaluate and treat dysfunctions and disorders for purposes of providing appropriate mental health counseling services." The regulation may not expand the scope of practice beyond that prescribed in statute.

COMMENT: Section 79-9.5 authorizes a licensed mental health counselor to use the Diagnostic and Statistical Manual (DSM) to make formal diagnoses, but the mental health counselor will lack the basic knowledge required to make formal diagnoses. We suggest amending 79-9.5 to require consultation with a qualified licensed mental health professional authorized to make formal diagnoses.

RESPONSE: Section 8411(3) of the Education Law allows a licensed mental health counselor to use accepted classifications of signs, symptoms, dysfunctions and disorders as approved by the Department. The regulation simply specifies the DSM as the classification system that may be used within the practice of mental health counseling, as such practice is prescribed in statute, and does not expand the scope of that practice.

COMMENT: I find it a shame that persons with a bachelor's degree are excluded from licensing. The law should include bachelor's practitioners with appropriate supervision.

RESPONSE: The Education Law establishes a master's or higher degree in counseling as the regular route to licensure, as prescribed by statute. In accordance with statute, the regulation prescribes alternative requirements for applicants who apply for licensure by January 1, 2006, including alternative requirements for baccalaureate holders.

COMMENT: The minimum education requirement for licensure should be completion of a master's degree in counseling.

RESPONSE: In accordance with Education Law section 8411(2)(a), the regulation establishes three alternative routes to licensure. The alternatives permit individuals with appropriate education and experience to be licensed, and would permit baccalaureate education applicants to be licensed. In response to comments from the field and after consultation with the State Board for Mental Health Practitioners, the Department strengthened the alternative requirements to require certifications from qualified individuals endorsing the applicants' good professional ethics and clinical competence, and that the applicant to meet additional requirements relating to experience and/or training.

COMMENT: The grandparenting period that allows the applicant to meet alternative requirements for licensure should be extended beyond one year.

RESPONSE: The duration of the grandparenting period is established in statute and may not be extended by regulation.

COMMENT: The regulations should allow individuals who have a credential from a private organization to meet the requirements for licensure.

RESPONSE: The requirements of Education Law would not permit licensure through being credentialed by a private organization.

COMMENT: The examination should be waived only if an applicant's certification by an acceptable national certifying or registering body for mental health counselors is current.

RESPONSE: Education Law section 8411(2)(b) permits an applicant who applies by January 1, 2006 to be licensed without examination if the applicant has meet all other requirements for licensure and has been certified or registered by a national certifying or registering body acceptable to the Department. The statute does not require such certification or registration to be current.

COMMENT: An individual with a master's degree in counseling of less than 45 semester hours and six years of experience should qualify for licensure during the grandparenting period.

RESPONSE: In response to public comment, the Department has proposed revisions in section 79-9.6(a) to permit additional flexibility in the requirements for licensure for applicants who apply by January 1, 2006, including a requirement for applicants who have completed a master's degree in counseling of less than 48 semester hours and 3,000 clock hours of experience.

COMMENT: Experience in private practice with appropriate supervision should count toward licensing just as much as supervised experience in an agency setting.

RESPONSE: The individual may complete the experience, under supervision, in an agency or private setting. The private setting, however, may not be owned or operated by the applicant.

COMMENT: Section 79-9.3 should be revised to require 3,500 hours of supervised experience in all five areas of practice.

RESPONSE: Education Law specifies that a minimum of 3,000 hours of supervised, post-master's experience is required for licensure. This number is consistent with national standards and is adequate.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Professional Licensure in Marriage and Family Therapy

I.D. No. EDU-34-04-00012-RP

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

Revised action: Addition of section 52.33 and Subpart 79-10 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 210 (not subdivided); 6501 (not subdivided); 6504 (not subdivided); 6507(2)(a), (3)(a) and (4)(a); 6508(1); 8403(3)(b), (c) and (d); 8409 (not subdivided); 8411(2)(a), (b) and (3)

Subject: Professional licensure in marriage and family therapy.

Purpose: To implement the provisions of art. 163 of the Education Law by establishing education, experience, and examination requirements for licensure in the new licensed profession of marriage and family therapy, and standards for registered college programs leading to licensure in this field.

Substance of revised rule: The State Education Department proposes to add a new section 52.33 and Subpart 79-10 of the Regulations of the Commissioner of Education to establish requirements for the new licensed profession of marriage and family therapy.

A new section 52.33 is added to establish requirements for college programs leading to licensure in marriage and family therapy, as follows:

52.33 Marriage and family therapy.

In addition to meeting all applicable provisions of this Part, to be registered as a program recognized as leading to licensure in marriage and family therapy, which meets the requirements of section 79-10.1 of this Title, the program shall:

(a) be a program in marriage and family therapy leading to a master's or doctoral degree, which includes at least 45 semester hours, or the equivalent, of study;

(b) contain curricular content that includes but is not limited to each of the following content areas:

(1) the study of human development, including individual, child and family development, at least three semester hours;

(2) marriage and family therapy clinical knowledge, including but not limited to psychopathology, at least twelve semester hours;

(3) marriage and family therapy theoretical knowledge, including but not limited to marriage and family therapy, at least six semester hours;

(4) family law;

(5) research, at least three semester hours; and

(6) professional ethics, at least three semester hours; and

(c) include a supervised practicum in marriage and family therapy of at least 300 client contact hours.

A new Subpart 79-10 of the Regulations of the Commissioner of Education is added, to establish requirements that an individual must meet to be licensed as a marriage and family therapist.

Section 79.1 establishes education requirements for licensure. Subdivision (a) defines the term acceptable accrediting agency. Subdivision (b) establishes the education requirement, as follows:

(b) To meet the professional education requirement for licensure as a marriage and family therapist, the applicant shall present satisfactory evidence of completing:

(1) a master's or doctoral program in marriage and family therapy registered as leading to licensure in this field, pursuant to section 52.33 of this Title, or a master's or doctoral program in marriage and family therapy that is accredited by an acceptable accrediting agency, or a master's or doctoral program in marriage and family therapy that is substantially equivalent to such a registered or accredited program, as determined by the department; or

(2) a graduate degree program in an allied mental health field acceptable to the department, including but not limited to a graduate degree program in social work, psychology, and mental health counseling, and additional graduate level coursework, if needed, which together are determined by the department to provide the substantial equivalent professional educational preparation as that obtained from a master's or doctoral program in marriage and family therapy registered as leading to licensure in this field, pursuant to section 52.33 of this Title; or

(3) a program located outside the United States and its territories that is recognized by the appropriate civil authorities of the jurisdiction in which the program is located as a program that prepares an applicant for the professional practice of marriage and family therapy, has been verified in accordance with subdivision (c) of section 59.2 of this Title, and which is determined by the department to be substantially equivalent to a master's or doctoral program in marriage and family therapy registered by the department as leading to licensure in this field, pursuant to section 52.33 of this Title, or to a master's or doctoral program in marriage and family therapy accredited by an acceptable accrediting agency.

Section 79-10.2 establishes the examination requirement for licensure.

Subdivision (a) prescribes standards for the examination, subdivision (b) the requirements for admission to the examination, and subdivision (c) the passing score.

Section 79-9.3 establishes the experience requirement for licensure. Subdivision (a), (b), and (c) establish the general requirement, as follows:

(a) An applicant for licensure as a licensed marriage and family therapist shall meet the supervised experience requirement set forth in this section.

(b) An applicant who has met the education requirement prescribed in section 79-10.1 of this Subpart through completing a master's or doctoral program registered by the department as leading to licensure in this field or an equivalent program in marriage and family therapy shall complete at least 1,500 client contact hours of supervised clinical experience in a setting acceptable to the department. That experience may include supervised client contact clock hours completed as part of the program in marriage and family therapy or after completing such program, in accordance with the requirements of section 52.33 of this Title.

(c) An applicant who has met the education requirement prescribed in section 79-10.1 of this Subpart through completing a graduate degree program in an allied mental health field and additional graduate level coursework, if needed, shall complete at least 1,500 client contact clock hours of supervised clinical experience at a setting acceptable to the department, which all must be completed after completing the graduate degree program in the allied mental health field.

Subdivision (d) establishes supervision requirements for the experience and subdivision (e) requirement for the setting for the experience.

Section 79-10.4 establishes requirements for a limited permit in marriage and family therapy, as follows:

(a) An applicant for a limited permit to practice marriage and family therapy shall:

(1) file an application for a limited permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

(2) meet all requirements for licensure as a marriage and family therapist, except the examination and/or experience requirements; and

(3) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79-10.3 of this Subpart.

(b) The limited permit in marriage and family therapy shall be issued for specific employment setting(s), acceptable to the department in accordance with the requirements of section 79-10.3 of this Subpart.

(c) The limited permit in marriage and family therapy shall be valid for a period of not more than 12 months, provided that the limited permit may be extended for an additional 12 months at the discretion of the department if the department determines that the permit holder has made good faith efforts to successfully complete the examination and/or experience requirements within the first 12 months but has not passed the licensing examination or completed the experience requirement, or has other good cause as determined by the department for not completing the examination and/or experience requirement within the first 12 months, and provided further that the time authorized by such limited permit and subsequent extension shall not exceed 24 months total.

Section 79-10.5 establishes requirements for classification systems that marriage and family therapist may use.

Section 79-10.6 establishes special provisions for licensure in marriage and family therapy. Subdivision (a) implements Education Law section 8411(2)(a) by establishing three alternative licensure pathways, the requirements for which must be met on or before January 1, 2006. All three require the applicant to:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8403(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(1) Alternative route one. In addition to the above requirements, the applicant must have completed a master's or higher degree program in marriage and family therapy or in a related field that is registered by the department or is an equivalent program as determined by the department. Course content for the program is specified, and the applicant is required to have at least 1,500 clock hours of experience in marriage and family therapy following completion of the educational program.

(2) Alternative route two. In addition to the above requirements, the applicant must have completed a baccalaureate or higher degree program in marriage and family therapy or in a related field that is registered by the department or is an equivalent program as determined by the department. Course content for the program is specified, and the applicant is required to have engaged in the practice of marriage and family therapy, on a full-time basis, for seven years of the immediately preceding ten years prior to application for licensure. In addition, the applicant must submit certifications from three qualified individuals endorsing the applicant's good professional ethics and clinical competence, and must meet one of the following three requirements:

(i) have three years of post-education supervised experience in marriage and family therapy; or

(ii) be certified or registered by a national certifying or registering body for marriage and family therapists, acceptable to the department; or

(iii) complete an acceptable post-baccalaureate program in marriage and family therapy or a related field in accordance with specified requirements.

(3) Alternative route three. In addition to the above requirements, the applicant must have completed a baccalaureate or higher degree program in marriage and family therapy or in a related field that is registered by the department or is an equivalent program as determined by the department. Course content for the program is specified, and the applicant is required to have engaged in the practice of marriage and family therapy, on a full-time basis, for ten years of the immediately preceding fifteen years prior to application for licensure. In addition, the applicant must submit certifications from five qualified individuals endorsing the applicant's good professional ethics and clinical competence.

Subdivision (b) establishes alternative requirements for licensure without examination, as follows:

(b) In accordance with section 8411(2)(b) of the Education Law, an applicant who meets all requirements for licensure as a marriage and family therapist as prescribed in section 8403(3) of the Education Law, except for the examination requirement, may qualify for a license as a marriage and family therapist through meeting the requirements of this subdivision, provided that the applicant meets these requirements on or before January 1, 2006. The applicant shall:

(1) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8403(3)(g) of the Education Law;

(2) meet all requirements for the license as a marriage and family therapist prescribed in section 8403(3) of the Education Law, except the examination requirement; and

(3) either:

(i) have certification or registration by a national certifying or registering body for marriage and family therapists, acceptable to the department. To be acceptable to the department, the national certifying or registering body must be recognized nationwide as an organization that certifies or registers marriage and family therapists throughout the United States based upon a review of their qualifications to practice marriage and family therapy and must have adequate standards for the review of the applicant's qualifications for practicing marriage and family therapy, as determined by the department. Such standards must include standards for the review of the applicant's education and experience for practicing marriage and family therapy and may include an examination requirement. For use under this subdivision, such certification or registration need not be current but shall not have been revoked for misconduct and/or unethical activities. For documentation of the applicant's certification or registration status to be sufficient, the national certifying or registering body must submit documentation verifying the applicant's certification or registration status directly to the department; or

(ii) if there is no national certifying or registering body for marriage and family therapists acceptable to the department as prescribed in subparagraph (i) of this paragraph, have engaged in the practice of marriage and family therapy, as defined in section 8403(1) of the Education Law, on a full-time basis for five years of the immediately preceding eight years.

Revised rule compared with proposed rule: Substantial revisions were made in sections 52.33, 79-10.3(b), (d)(2) and 79-10.6(a) and (b)(3).

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

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

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

Revised Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, the proposed rule has been revised as follows:

Section 52.33(a) of the Regulations of the Commissioner of Education is substantially revised to increase the number of semester hours in a registered program leading to licensure from 36 to 45 semester hours in order to more closely align with accredited programs in this field.

Section 52.33(b)(2) is substantially revised to require at least 12 semester hours in marriage and family clinical knowledge instead of six semester hours. It is also non-substantially revised to add the words "marriage and family therapy" before the word "clinical." to clarify that the clinical knowledge must be in marriage and family therapy.

Section 52.33(b)(3) is non-substantially revised to add the words "marriage and family therapy" before the word "clinical" to clarify that the theoretical knowledge must be in marriage and family therapy.

Section 79-10.3(b) is substantially revised to remove the prohibition against using the 300 clock hour practicum completed as part of the licensure qualifying registered program in marriage and family therapy to meet part of the 1,500 client contact hour experience requirement. The Department believes that such practicum should be creditable toward the experience requirement, if it meets the other requirements in section 79-10.3 for the experience requirement.

Section 79-10.2(d)(2) is substantially revised to establish qualifications for supervisors of the experience required for licensure in marriage and family therapy as follows:

(2) Qualifications for supervisors of the required experience. The supervisor of the experience shall meet each of the following requirements:

(i) The supervisor shall have completed a master's or higher degree program in marriage and family therapy, in the subject of the field in which the supervisor is licensed as prescribed in subparagraph (iii) of this paragraph, or in another field related to the field of marriage and family therapy as determined by the department.

(ii) The supervisor shall have engaged in the practice of marriage and family therapy for three years or the part-time equivalent. For purposes of this subparagraph, practice on a full-time basis shall mean 960 clock hours

in the practice of marriage and family therapy, earned over a 52-week period;

(iii) The supervisor shall be licensed and registered in New York State to practice marriage and family therapy, medicine, as a physician assistant, psychology, licensed clinical social work, or as a registered professional nurse or nurse practitioner, pursuant to Articles 163, 131, 131-b, 139, 153, or 154 of the Education Law, respectively; or be an individual with equivalent qualifications as determined by the department; or for applicants who apply for licensure in marriage and family therapy on or before December 31, 2007, be an individual with certification or registration by an acceptable national certifying or registering body for marriage and family therapists as a clinical supervisor. To be acceptable to the department, the national certifying or registering body must be recognized nationwide as an organization that certifies or registers marriage and family therapists throughout the United States based upon a review of their qualifications to practice marriage and family therapy and must have adequate standards for the review of the applicant's qualifications for practicing marriage and family therapy, as determined by the department. Such standards must include standards for the review of the applicant's education and experience for practicing marriage and family therapy and may include an examination requirement.

This change was necessary to ensure that the supervisors have the necessary education and experience to provide the supervision.

Section 79-10.3(e)(3) is non-substantially revised to add the words "acceptable to the department" after the word "supervisor," to clarify that the supervisor of the required experience must by acceptable to the State Education Department, in accordance with the requirements of section 79-10.3 of this Subpart.

Section 79-10.6(a) is substantially revised to establish three alternative requirements for licensure in marriage and family therapy. The opening paragraph of the subdivision is non-substantially revised to include the title, Alternative requirements, reference the three paragraphs in the subdivision, and to clarify that "all such requirements" must be met by on or before January 1, 2006.

Alternative route one requires the applicant to:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8403(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(iv) have completed a master's or higher degree program in marriage and family therapy or in a related field such as social work, psychology, or mental health counseling that is registered by the department pursuant to Part 52 of this Title, or is an equivalent program as determined by the department, provided that the program includes:

(a) coursework that contains curricular content in the study of:

(1) human development, including individual, child and family development;

(2) marriage and family therapy clinical knowledge;

(3) marriage and family therapy theoretical knowledge;

(4) research; and

(b) a supervised practicum in marriage and family therapy; and

(v) after completing the master's or higher degree program prescribed in subparagraph (iv) of this paragraph, have engaged in the practice of marriage and family therapy, as defined in section 8403(1) of the Education Law, for at least 1,500 clock hours.

Alternative route two requires an applicant to:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8403(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(iv) have completed a baccalaureate or higher degree program in marriage and family therapy or in a related field such as social work, psychology, or mental health counseling, that is registered by the department pursuant to Part 52 of this Title, or is an equivalent program as determined by the department, provided that the applicant demonstrates the completion of coursework within such a program that contains curricular content in the study of human development, marital and family therapy, and research;

(v) after completing the baccalaureate or higher degree program prescribed in subparagraph (iv) of this paragraph, have engaged in the practice of marriage and family therapy, as defined in section 8403(1) of the Education Law, on a full-time basis for seven years of the immediately preceding ten years prior to application for licensure. For purposes of this subparagraph, practice on a full-time basis shall mean 960 clock hours in the practice of marriage and family therapy, earned over a 52-week period;

(vi) have submitted certifications from three individuals endorsing the applicant's good professional ethics and clinical competence to practice of marriage and family therapy. Such certifications shall be submitted on forms prescribed by the department. The individual making the certification shall meet the qualifications for supervisors of the experience requirement, as prescribed in section 79-10.3(d)(2), except that such individual may be certified or registered by a national certifying or registering body for marriage and family therapists instead of being specifically certified or registered as a clinical supervisor by such body; and

(vii) have met one of the following three requirements:

(a) after completing the baccalaureate or higher degree program prescribed in subparagraph (iv) of this paragraph, have three years of supervised experience in the practice of marriage and family therapy, which may be part of the seven years of experience required in subparagraph (v) of this paragraph. The supervisor of the experience must meet the qualifications for a supervisor of required experience prescribed in section 79-10.3(d)(2) of this Subpart, or

(b) be certified or registered by a national certifying or registering body for marriage and family therapy, acceptable to the department. To be acceptable to the department, the national certifying or registering body must be recognized nationwide as an organization that certifies or registers marriage and family therapists throughout the United States based upon a review of their qualifications to practice marriage and family therapy and must have adequate standards for the review of the applicant's qualifications for practicing marriage and family therapy, as determined by the department. Such standards must include standards for the review of the applicant's education and experience for practicing marriage and family therapy and may include an examination requirement; or

(c) complete an acceptable post-baccalaureate program in marriage and family therapy or a related field from an institute chartered by the Board of Regents, or an institution authorized by its charter or by the Board of Regents to confer degrees in New York State, or the equivalent as determined by the department, provided that such program contains curricular content in the study of:

(1) human development, including individual, child and family development;

(2) marriage and family therapy clinical knowledge;

(3) marriage and family therapy theoretical knowledge; and

(4) research.

Alternative route three requires an applicant to:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8403(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(iv) have completed a baccalaureate or higher degree program in marriage and family therapy or in a related field such as social work, psychology, or mental health counseling, that is registered by the department pursuant to Part 52 of this Title, or is an equivalent program as determined by the department, provided that the applicant demonstrates the completion of coursework within such a program that contains curricular content in the study of human development, marital and family therapy, and research;

(v) after completing the baccalaureate or higher degree program prescribed in subparagraph (iv) of this paragraph, have engaged in the practice of marriage and family therapy, as defined in section 8403(1) of the Education Law, on a full-time basis for 10 years of the immediately preceding 15 years prior to application for licensure. For purposes of this subparagraph, practice on a full-time basis shall mean 960 clock hours in the practice of marriage and family therapy, earned over a 52-week period;

(vi) have submitted certifications from five individuals endorsing the applicant's good professional ethics and clinical competence to practice marriage and family therapy. Such certifications shall be submitted on forms prescribed by the department. The individual making the certification shall meet the qualifications for supervisors of the experience requirement, as prescribed in section 79-10.3(d)(2), except that such individual may be certified or registered by a national certifying or registering body for marriage and family therapists instead of being specifically certified or registered as a clinical supervisor by such body.

The change is needed to increase requirements for the alternative routes to licensure to ensure that candidates are adequately prepared for licensure under the alternative routes and that the alternative requirements demon-

strate substantially equivalent preparation to that required in the regular route to licensure.

Section 79-10.6(b)(3)(i) is non-substantially revised by removing the unnecessary words at the beginning of the subparagraph "document to the satisfaction of the department having" and substituting the word "have."

Section 79-10.6(b)(3)(ii) is non-substantially revised by removing the unnecessary words "document to the satisfaction of the department of having been" after the word "paragraph" and replacing them with the work "have." It is also non-substantially revised to add the words "prior to application for licensure" after the word "years'" to clarify that the experience must be gained in the eight years prior to application for licensure.

The aforementioned revisions to the proposed rule do not require changes to the Regulatory Impact Statement.

Regulatory Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed regulation, as revised, concerns requirements that an individual must meet to become licensed in the profession of marriage and family therapy and that college programs must meet to be registered by the State Education Department as leading to licensure in this field. The regulation will not impose any adverse economic, reporting, recordkeeping, or any other compliance requirements on small businesses or local governments. Because it is evident from the rule, as revised, that it will not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The revisions do not necessitate any changes in the Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

Article 163 of the Education Law establishes marriage and family therapy as a licensed profession in New York State. The proposed regulation, as revised, implements the requirements of Article 163 of the Education Law by establishing education, experience, and examination standards for licensure, as required by that statute. It also sets forth standards for registered college programs that lead to licensure in this field, in accordance with statutory requirements.

The proposed regulation, as revised, implements statutory requirements and directives and will have no impact on jobs or employment opportunities, beyond the impact of Article 163. In addition, the regulation, which relates to licensure qualifications, will have no impact on labor market demand for marriage and family therapists. It will not affect the number of jobs or employment opportunities in this field. Because it is evident from the nature of this regulation that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of the proposed rule in the *State Register* on August 25, 2004, the State Education Department (SED) received the following comments:

COMMENT: The 36-semester hour requirement in section 52.33 for registered programs leading to licensure should be 45 semester hours with increased clinical content.

RESPONSE: In response, the regulations have been revised to increase the program to at least 45 semester hours with at least 12 semester hours of clinical content.

COMMENT: Section 52.33(c) should be revised to clarify that the required practicum includes supervised in-person client contact providing marriage and family therapy.

RESPONSE: The regulation is consistent with statute and the Department does not believe that the suggested change is necessary.

COMMENT: Several individuals commented that the requirement in Part 52.33(c) for a 300-hour supervised practicum should specify marriage and family therapy, not counseling and that it should be clear that the supervised practicum is integrated with the curricular content.

RESPONSE: The use of "counseling" was a typographical error and the regulations is revised to replace counseling with "marriage and family therapy". The regulation is clear that the program must include a supervised practicum.

COMMENT: Family law, as specified in Part 52.33(b)(4) is not a legal course but involves practicing marriage and family therapy within legal requirements and should be included in the content area of professional ethics (Part 52.33(b)(6)).

RESPONSE: The authorizing statute lists "family law" as required course content, separate from professional ethics or other identified curricular areas.

COMMENT: Identify in section 79-10.1(2) all the course work and clinical training required for licensure as a marriage and family therapist.

RESPONSE: Section 79-10.1(2) requires an applicant to demonstrate an education that includes a master's or higher degree from a program registered as leading to licensure in marriage and family therapy under section 52.34 of the Commissioner's Regulations or its equivalent. Section 52.34 contains specific information on the curricular content, supervised practicum, and other criteria that must included in a registered program.

COMMENT: The regulations are not strong enough and do not differentiate between social work and marriage and family therapy to protect the public in their choice of one or the other.

RESPONSE: The regulations implement statutory requirements that prescribe the scope of practice and specify qualifying requirements for licensure.

COMMENT: The regulations do not define practice outside the boundaries of competence, as defined in paragraph 1 of section 8407 of the Education Law. Specific language should define the consultation required with a physician when the marriage and family therapist is treating a patient with serious mental illness.

RESPONSE: The proposed regulations define the qualifications for licensure as a marriage and family therapist. The Department will consider addressing this issue, within the bounds of our statutory authority, in future amendments to the definition of unprofessional conduct.

COMMENT: Several individuals opposed section 79.10-1(2) that would allow an individual with a graduate degree in another field to take one course in marriage and family therapy and meet the education requirement for licensure.

RESPONSE: The comment is incorrect. The applicant who meets the education requirements through completion of a graduate degree program in an allied mental health field must complete professional educational preparation that is substantially equivalent to a registered program in marriage and family therapy.

COMMENT: Several individuals interpreted section 79-10.3(b) to require that an applicant for licensure complete 1,800 hours of supervised experience in marriage and family therapy.

RESPONSE: In response, the regulation has been clarified to provide that the applicant must complete 1,500 client contact hours, which may be completed within a program in marriage and family therapy or after completing such a program.

COMMENT: The curricular content for marriage and family therapy should include multiculturalism, its influence on the organization and the functioning of families, and the use of a cultural lens.

RESPONSE: The proposed course content the content prescribed in the Education Law and the accreditation standards for marriage and family therapy programs. This requirements does not preclude a program from including additional course work in other areas such as multiculturalism.

COMMENT: Training programs for marriage and family therapy should require that supervisors and faculty are licensed and authorized to supervise candidates seeking licensure as marriage and family therapists.

RESPONSE: Part 52 of the Commissioner's Regulations require that faculty in a registered program must be qualified by training and experience. It is unnecessary to further specify the qualifications of supervisors and faculty in regulation. Such qualifications will be examined during the Department's registration review of the program.

COMMENT: Section 79-10.3(c) does not establish supervisor qualifications for an applicant who has met the education requirement through a graduate degree in an allied field.

RESPONSE: The comment is incorrect. All requirements for supervised experience, including supervisor qualifications, apply regardless of education route.

COMMENT: There is a strong discriminatory language against private practice in the regulations and the document should value those of use who pursued licensure through private practice.

RESPONSE: The limited permit allows the individual to gain experience for licensure, under supervision, in an agency or private setting. The private setting, however, may not be owned or operated by the applicant.

COMMENT: A registered professional nurse, nurse practitioner or physician's assistant should be prohibited from supervising the applicant's experience required for licensure.

RESPONSE: The professions identified in the comment are named as exempt under Article 163 and authorized to practice marriage and family therapy under the exemption. In response to comments from the field and in consultation with the State Board for Mental Health Practitioners, the regulations have been revised to require master's level education and experience in the field of marriage and family therapy. Individuals licensed in the above-referenced professions that meet the prescribed education and experience requirement will be able to supervise the experience. Such individuals will however continue to be governed by the practice requirements of their profession, including supervision requirements.

COMMENT: It was suggested that the number of supervised hours required for licensure should be increased to 1,750 hours over three years, to be consistent with other jurisdictions.

RESPONSE: Education Law requires that applicant to complete at least 1,500 client contact hours of supervised experience for licensure. This number is adequate.

COMMENT: Section 79-10.3(d)(2) should require the supervisor of the required experience to be licensed as a marriage and family therapist and designated an approved clinical supervisor by the American Association of Marriage and Family Therapists.

RESPONSE: The regulations have been strengthened to increase requirements for supervisors of the applicant's experience. Such individuals are required to have master's level education and three-year's experience in the practice of marriage and family therapy. In addition, they must be licensed in New York State in specified fields, which permit them to practice marriage and family therapy in New York State, or meet equivalent qualifications.

COMMENT: Applicants may not be able to complete the 1,500 client contact hours of supervised experience during the two-year limited permit period.

RESPONSE: Education Law authorizes the Department to issue a one-year limited permit so an applicant can compete the experience and/or examination requirement, and may extend it for one year. The Department is without statutory authority to extend the duration of the limited permit by regulation.

COMMENT: Section 79-10.3(e) appropriately restricts the applicant from gaining experience in a private practice because this does not provide the breadth of clinical experience, supervision and range of clients required for a quality experience.

RESPONSE: The proposed regulation does not prohibit the applicant from gaining experience for licensure in a private setting. It only prohibits the setting from being a private practice owned or operated by the applicant.

COMMENT: We encourage the Department to adhere to the exact wording of section 8411(3) of the Education Law requiring use of a classification system approved by the department.

RESPONSE: The proposed regulation is consistent with the statute and no change is required.

COMMENT: Many older practitioners with little academic training have enriched our field and we should honor their experience by allowing them to become licensed practitioners.

RESPONSE: The proposed regulations would allow individuals who meet alternative requirements and apply by January 1, 2006 to be licensed. In accordance with Education Law, these applicants will still have to meet requirements that are substantially equivalent to the requirements for licensure established in the regular route.

COMMENT: The minimum education requirement for licensure should be completion of a master's degree in marriage and family therapy.

RESPONSE: In accordance with Education Law section 8411(2)(a), the regulation establishes three alternative routes to licensure. The alternatives permit individuals with appropriate education and experience to be licensed, and would permit baccalaureate education applicants to be licensed. In response to comments from the field and after consultation with the State Board for Mental Health Practitioners, the Department strengthened the alternative requirements to require certifications from qualified individuals endorsing the applicants' good professional ethics and clinical competence, and that the applicant to meet additional requirements relating to experience and/or training.

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

Professional Licensure in Creative Arts Therapy

I.D. No. EDU-34-04-00013-RP

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

Revised action: Addition of section 52.34 and Subpart 79-11 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 210 (not subdivided); 6501 (not subdivided); 6504 (not subdivided); 6507(2)(a), (3)(a) and (4)(a); 6508(1); 8404(3)(b), (c) and (d); 8409 (not subdivided); 8411(2)(a), (b) and (3)

Subject: Professional licensure in creative arts therapy.

Purpose: To implement the provisions of art. 163 of the Education Law by establishing education, experience, and examination requirements for licensure in the new licensed profession of creative arts therapy, and standards for registered college programs leading to licensure in this field.

Substance of revised rule: The State Education Department proposes to add a new section 52.34 and Subpart 79-11 of the Regulations of the Commissioner of Education to establish requirements for the new licensed profession of creative arts therapy.

A new section 52.34 is added to establish requirements for college programs leading to licensure in creative arts therapy, as follows:

In addition to meeting all applicable provisions of this Part, to be registered as a program recognized as leading to licensure in creative arts therapy, which meets the requirements of section 79-11.1 of this Title, the program shall:

(a) be a master's or doctoral degree program in creative arts therapy, which includes at least 48 semester hours, or the equivalent, of study;

(b) contain curricular content that includes but is not limited to each of the following content areas:

(1) preparation in one or more of the creative arts therapies, including but not limited to art, music, dance, drama, psychodrama, or poetry therapies, for the practice of creative arts therapy as defined in section 8404(1) of the Education Law;

(2) human growth and development;

(3) theories in creative arts therapy;

(4) group dynamics;

(5) assessment and appraisal of individuals and groups;

(6) research and program evaluation;

(7) professional orientation and ethics;

(8) foundations of creative arts therapy and psychopathology; and

(9) clinical instruction; and

(c) include a supervised internship or supervised practicum in the practice of creative arts therapy of at least 500 clock hours.

A new Subpart 79-11 of the Regulations of the Commissioner of Education is added, to establish requirements that an individual must meet to be licensed as a creative arts therapist.

Section 79-11.1 establishes education requirements for licensure. Subdivision (a) defines the term acceptable accrediting agency. Subdivision (b) establishes the education requirement, as follows:

(b) To meet the professional education requirement for licensure as a creative arts therapist, the applicant shall present satisfactory evidence of completing:

(1) a master's or doctoral program in creative arts therapy registered as leading to licensure in this field pursuant to section 52.34 of this Title, or a master's or doctoral program in creative arts therapy that is accredited by an acceptable accrediting agency, or a program determined by the department to be substantially equivalent to such a registered or accredited program; or

(2) a program located outside the United States and its territories that is recognized by the appropriate civil authorities of the jurisdiction in which the program is located as a program that prepares an applicant for the professional practice of creative arts therapy, has been verified in accordance with subdivision (c) of section 59.2 of this Title, and which is determined by the department to be substantially equivalent to a master's or doctoral program in creative arts therapy registered by the department as leading to licensure in this field, pursuant to section 52.34 of this Title, or to a master's or doctoral program in creative arts therapy accredited by an acceptable accrediting agency.

Section 79-11.2 establishes the examination requirement for licensure. Subdivision (a) establishes two alternatives: an examination that is offered

by an acceptable organization, as determined by the Department, or a scored assessment of case narratives by the State Board for Mental Health Practitioners. Subdivision (b) establishes requirements for admission to the examination, and subdivision (c) the passing score.

Section 79-11.3 establishes the experience requirement for licensure. Subdivisions (a) and (b) establish the general requirements, as follows:

(a) An applicant for licensure as a creative arts therapist shall meet the experience requirement for licensure as a creative arts therapist by submitting sufficient documentation of having completed a supervised experience of at least 1,500 clock hours providing creative arts therapy in a setting acceptable to the department, all in accordance with the requirements of this section.

(b) The supervised experience must be obtained after the applicant completes the program required for licensure as a creative arts therapist, as prescribed in section 79-11.1 of this Subpart.

Subdivision (c) establishes the supervision requirements for the experience and subdivision (d) requirements for the setting for the experience.

Section 79-11.4 establishes requirements for a limited permit in creative arts therapy, as follows:

(a) An applicant for a limited permit to practice creative arts therapy shall:

(1) file an application for a limited permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

(2) meet all requirements for licensure as a creative arts therapist, except the examination and/or experience requirements; and

(3) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79-11.3 of this Subpart.

(b) The limited permit in creative arts therapy shall be issued for specific employment setting(s), acceptable to the department in accordance with the requirements of section 79-11.3 of this Subpart.

(c) The limited permit in creative arts therapy shall be valid for a period of not more than 12 months, provided that the limited permit may be extended for an additional 12 months at the discretion of the department if the department determines that the permit holder has made good faith efforts to successfully complete the examination and/or experience requirements within the first 12 months but has not passed the licensing examination or completed the experience requirement, or has other good cause as determined by the department for not completing the examination and/or experience requirement within the first 12 months, and provided further that the time authorized by such limited permit and subsequent extension shall not exceed 24 months total.

Section 79-11.5 establishes requirements for classifications systems that creative arts therapists may use.

Section 79-11.6 establishes special provisions for licensure in creative arts therapy. Subdivision (a) defines the term acceptable national certifying or registering body as used in this section. Subdivision (b) implements Education Law section 8411(2)(a) by establishing two alternative licensure pathways, the requirements for which must be met on or before January 1, 2006. Both require the applicant to:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8404(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(1) Alternative route one. In addition to the above requirements, the applicant must have completed a master's or higher degree program in creative arts therapy that is registered by the department or is an equivalent program as determined by the department. Course content for the program is specified, and the applicant is required to have at least 1,500 clock hours of experience in creative arts therapy following completion of the educational program.

(2) Alternative route two. In addition to the above requirements, the applicant must have completed a baccalaureate or higher degree program in counseling or in a related mental health field that is registered by the department or is an equivalent program as determined by the department. Course content for the program is specified, and the applicant is required to have engaged in the practice of creative arts therapy, on a full-time basis, for seven years or the part-time equivalent. In addition, the applicant must submit certifications from three qualified individuals endorsing the applicant's good professional ethics and clinical competence, and must meet one of the following two requirements:

(i) have completed a baccalaureate or higher degree program in creative arts therapy that is registered by the department pursuant to Part 52 of this Title or is an equivalent program, provided that the applicant demonstrates the completion of coursework within such a program that contains curricular content in the study of: one or more of the arts, including but not limited to music, the fine arts, theater, or literature, for the practice of creative arts therapy; human growth and development; theories in creative arts therapy; and research or program evaluation; or

(ii) document to the satisfaction of the department:

(a) having completed a baccalaureate or higher degree program in a program in any field that is registered by the department pursuant to Part 52 of this Title or is an equivalent program; and

(b) certification or registration by an acceptable national certifying or registering body, as defined by subdivision (a) of this section. For use under this subdivision, such certification or registration need not be current but shall not have been revoked for misconduct and/or unethical activities. For documentation of the applicant's certification or registration status to be sufficient, the acceptable national certifying or registering body must submit documentation verifying the applicant's certification or registration status directly to the department.

Subdivision (c) establishes alternative requirements for licensure without examination, as follows:

(c) In accordance with section 8411(2)(b) of the Education Law, an applicant who meets all requirements for licensure as a creative arts therapist, as prescribed in section 8404(3) of the Education Law, except for the examination requirement, may qualify for a license as a creative arts therapist through meeting the requirements of this subdivision, provided that the applicant meets these requirements on or before January 1, 2006. The applicant shall:

(1) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8404(3)(g) of the Education Law;

(2) meet all requirements for the license as a creative arts therapist prescribed in section 8404(3) of the Education Law, except the examination requirement; and

(3) either:

(i) document to the satisfaction of the department certification or registration by an acceptable national certifying or registering body, as defined by subdivision (a) of this section. For use under this subdivision, such certification or registration need not be current but shall not have been revoked for misconduct and/or unethical activities. For documentation of the applicant's certification or registration status to be sufficient, the acceptable national certifying or registering body must submit documentation verifying the applicant's certification or registration status directly to the department; or

(ii) if there is no acceptable national certifying or registering body for creative arts therapists as defined in subdivision (a) of this section, document to the satisfaction of the department of having been engaged in the practice of creative arts therapy, as defined in section 8404(1) of the Education Law, on a full-time basis for five years of the immediately preceding eight years. For purposes of this subparagraph, practice on a full-time basis shall mean 800 clock hours in the practice of creative arts therapy, earned over a 52-week period.

Revised rule compared with proposed rule: Substantial revisions were made in sections 52.34(a), 79-11.1(b)(1), 79-11.3(c)(2), (d)(3) and 79-11.6(b) and (c)(3).

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

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

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

Revised Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, the proposed rule has been revised as follows:

Section 52.34(a) of the Regulations of the Commissioner of Education is substantially revised to increase the number of semester hours in a registered program leading to licensure from 30 to 48, in order to more closely align with accredited programs in this field.

Section 79-11.1(b)(1) is non-substantially revised to change the wording of the last alternative, which was previously limited to a program in creative arts therapy, to "a program determined by the department to be substantially equivalent to such a registered or accredited program." The

change is necessary to clarify the regulation and provide the department needed flexibility to determine programs that are equivalent to registered or accredited master's or doctoral programs in creative arts therapy.

Section 79-11.2(c)(2) is substantially revised to establish qualifications for supervisors of the experience required for licensure in creative arts therapy:

(2) Qualifications for supervisors of the required experience. The supervisor of the experience shall meet each of the following requirements:

(i) The supervisor shall have completed a baccalaureate or higher degree program in creative arts, in the subject of the field in which the supervisor is licensed as prescribed in subparagraph (iii) of this paragraph, or another field related to the field of counseling as determined by the department.

(ii) The supervisor shall have engaged in the practice of creative arts therapy for three years or the part-time equivalent. For purposes of this subparagraph, practice on a full-time basis shall mean 800 clock hours in the practice of creative arts therapy, earned over a 52-week period;

(iii) The supervisor shall be licensed and registered in New York State to practice creative arts therapy, medicine, as a physician assistant, psychology, licensed clinical social work, or as a registered professional nurse or nurse practitioner, pursuant to Articles 163, 131, 131-b, 139, 153, or 154 of the Education Law, respectively; or be an individual with equivalent qualifications as determined by the department; or for applicants who apply for licensure in creative arts therapy on or before December 31, 2007, be an individual with certification or registration by an acceptable national certifying or registering body for creative arts therapists. To be acceptable to the department, the national certifying or registering body must be recognized nationwide as an organization that certifies or registers creative arts therapists throughout the United States based upon a review of their qualifications to practice creative arts therapy and must have adequate standards for the review of the applicant's qualifications for practicing creative arts therapy, as determined by the department. Such standards must include standards for the review of the applicant's education and experience for practicing creative arts therapy and may include an examination requirement.

This change was necessary to ensure that the supervisors have the necessary education and experience to provide the supervision.

Section 79-11.3(d)(3) is non-substantially revised to add the words "acceptable to the department" after the word "supervisor," to clarify that the supervisor of the required experience must by acceptable to the State Education Department, in accordance with the requirements of section 79-9.3 of this Subpart.

Section 79-11.6(b) is substantially revised to establish an additional alternative requirement for licensure in creative arts therapy.

The opening paragraph of the subdivision is non-substantially revised to include the title, Alternative requirements, reference the three paragraphs in the subdivision, and to clarify that "all such requirements" must be met by on or before January 1, 2006.

Alternative route one is the new alternative. It requires the applicant to:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8404(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(iv) have completed a master's or higher degree program in creative arts therapy, including but not limited to art, music, dance, drama, psychodrama, or poetry therapies, that is registered by the department pursuant to Part 52 of this Title, or is an equivalent program as determined by the department, provided that the program includes:

(a) coursework that contains curricular content in the study of:

(1) one or more of the creative arts therapies, including but not limited to art, music, dance, drama, psychodrama, or poetry therapies, for the practice of creative arts therapy as defined in section 8404(1) of the Education Law;

(2) human growth and development;

(3) theories in creative arts therapy;

(4) assessment and appraisal of individuals and groups;

(5) research and program evaluation;

(6) clinical instruction; and

(b) a supervised internship or supervised practicum in the practice of creative arts therapy; and

(v) after completing the master's or higher degree program prescribed in subparagraph (iv) of this paragraph, have engaged in the practice of creative arts therapy, as defined in section 8404(1) of the Education Law, for at least 1,500 clock hours.

Alternative route two is the alternative that was previously published. It has been renumbered. In addition, section 79-11.6(b)(2)(iv) has been substantially revised to permit part-time experience, remove the requirement that the experience be completed in the immediately preceding 12 years, and change the number of hours that defined practice on a full-time basis from 960 clock hours to 800 clock hours, earned over a 52-week period.

Section 79-11.6(b)(2)(v) substantially revises the rule by adding a new requirement in alternative two as follows:

(v) have submitted certifications from three individuals who meet the qualifications for supervisors of the experience requirement, as prescribed in section 79-11.3(c)(2), endorsing the applicant's good professional ethics and clinical competence to practice creative arts therapy. Such certifications shall be submitted on forms prescribed by the department; and

The change is needed to increase requirements for the alternative routes to licensure to ensure that candidates are adequately prepared for licensure under the alternative routes and that the alternative requirements demonstrate substantially equivalent preparation to that required in the regular route to licensure.

Section 79-11.6(c)(3)(i) is non-substantially revised by removing the unnecessary words at the beginning of the subparagraph "document to the satisfaction of the department having" and substituting the word "have."

Section 79-11.6(b)(3)(ii) is non-substantially revised by removing the unnecessary words "document to the satisfaction of the department of having engaged" after the word "paragraph" substituting the word "have." It is also non-substantially revised to add the words "prior to application for licensure" after the word "years" to clarify that the experience must be gained in the eight years prior to application for licensure. It is substantially revised to change the number of hours that defined practice on a full-time basis from 960 clock hours to 800 clock hours, earned over a 52-week period.

The aforementioned revisions to the proposed rule do not require changes to the Regulatory Impact Statement.

Regulatory Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed regulation, as revised, concerns requirements that an individual must meet to become licensed in the profession of creative arts therapy and that college programs must meet to be registered by the State Education Department as leading to licensure in this field. The regulation will not impose any adverse economic, reporting, recordkeeping, or any other compliance requirements on small businesses or local governments. Because it is evident from the rule, as revised, that it will not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The revisions do not necessitate any changes in the Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

Article 163 of the Education Law establishes creative arts therapy as a licensed profession in New York State. The proposed regulation, as revised, implements the requirements of Article 163 of the Education Law by establishing education, experience, and examination standards for licensure, as required by that statute. It also sets forth standards for registered college programs that lead to licensure in this field, in accordance with statutory requirements.

The proposed regulation, as revised, implements statutory requirements and directives and will have no impact on jobs or employment opportunities, beyond the impact of Article 163. In addition, the regulation, which relates to licensure qualifications, will have no impact on labor market demand for creative arts therapists. It will not affect the number of jobs or employment opportunities in this field. Because it is evident from the nature of this regulation, as revised, that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of the proposed rule in the *State Register* on August 25, 2004, the State Education Department (SED) received the following comments:

COMMENT: A person with bachelor's level education in music therapy should not be excluded from licensure. A practitioner with experience and supervisory skills is more skilled than a new graduate from a master's program.

RESPONSE: The Education Law defines a master's or higher degree as the minimum education required for licensure under the regular route. Education Law permits alternative requirements for individuals who apply for licensure by January 1, 2006. The alternative requirements in the regulation permit baccalaureate educated individuals to be licensed, provided that they meet other prescribed requirements.

COMMENT: I am concerned about the vague use of "or the equivalent, of study" in section 52.34(a). There are only five American Dance Therapy Association approved programs in the nation and just one in New York. The ADTA alternative training program approves instructors and course syllabi to provide courses that are as rigorous as those in the approved graduate programs. To eliminate alternate route programs in dance therapy will keep many talented people out of this growing field.

RESPONSE: In accordance with Education Law, the registered licensure qualifying program must lead to a master's or doctoral degree. Therefore, the ADTA programs would not qualify.

COMMENT: I have heard that the State Board proposed increasing the number of hours in a license-qualifying program from 30 to 48 semester hours. I would oppose such an increase as an unfair hardship on people who already have a bachelor's degree in music therapy.

RESPONSE: In consultation with the State Board for Mental Health Practitioners, the proposed regulations have been strengthened to require that registered programs include at least 48 semester hours. This number is consistent with national standards and requirements in related fields. In accordance with statute, such study must all be at the graduate level regardless of undergraduate major.

COMMENT: Section 52.34(a) of the proposed regulations require the completion of a master's or doctoral degree in creative arts therapy, but does not differentiate between the requirements for the two degrees. The regulations should be amended to list the difference in training.

RESPONSE: Section 52.34 specifies minimum requirements for licensure qualifying programs in creative arts therapy. The programs would have to meet other requirements in Regents Rules and the Regulations of the Commissioner of Education, including duration requirements for master's and doctoral degree programs. The Department will review applications for registered programs and determine whether they meet such requirements.

COMMENT: Section 52.34(a) requires the completion of at least 30 semester hours with content in nine specific areas, without detailing the number of content hours for each area. Five of these areas require at least six semester hours each, as they deal with psychological issues and dysfunctions. Therefore, the minimum should be at least 42 semester hours.

RESPONSE: The total number of semester hours has been increased from 30 to 48. However, the proposed regulations do not specify the number of semester hours to be met within each area of content. When a degree-granting institution applies for program registration, the institution must indicate in the application those courses that meet the required content areas. The Department does not believe it necessary to prescribe semester hours for each content area.

COMMENT: Section 52.32(d) should be changed to require that faculty who teach or supervise in the psychological clinical areas must be licensed as a physician, physician's assistant, nurse, psychologist, social worker or mental health practitioner.

RESPONSE: Part 52 of the Commissioner's Regulations require that faculty in a registered program must be qualified by training and experience. It is unnecessary to further specify the qualifications of supervisors of internships and practicum in regulation. Such qualifications will be examined during the Department's registration review of the program.

COMMENT: We recommend that 52.34(c) be revised to clarify that the 500-clock hour internship is "supervised in-person client contact providing creative arts therapy."

RESPONSE: The regulation requires the program leading to licensure in creative arts therapy to include a supervised internship or practicum in the practice of creative arts therapy of 500 clock hours. The Department does not believe that the internship or practicum should be limited to client contact.

COMMENT: The curriculum for creative arts therapy programs does not include sufficient training in psychopathology.

RESPONSE: The regulation requires the program leading to licensure in creative arts therapy to include coursework in the foundations of creative arts therapy and psychopathology, which is sufficient.

COMMENT: The Department should provide provisional licensure for students in baccalaureate programs in music therapy that would allow them to practice while pursuing graduate education and experience necessary for licensure.

RESPONSE: The Education Law does not permit the issuance of provisional licenses as suggested.

COMMENT: The proposed regulations do not define practice outside the boundaries of competence, as defined in paragraph 1 of section 8407 of the Education Law. Specific language should define the consultation required with a physician when the creative arts therapist is treating a patient with serious mental illness.

RESPONSE: The proposed regulations define the qualifications for licensure as a creative arts therapist. The Department will consider addressing this issue, within the bounds of our statutory authority, in future amendments to the definition of unprofessional conduct in the practice of the professions.

COMMENT: I am extremely concerned about the process by which drama therapists will be licensed. I am currently a drama therapy student in the alternative training program of the National Association of Drama Therapy (NADT) and am simultaneously working toward a master's degree in theatre. Now I learn that I and other alternative training students may be disqualified for licensure because I am not graduating from a creative arts program. Alternative training students have to meet strict standards and I urge you to consider not if, but how, you will include alternative training students in the licensure process.

RESPONSE: Section 8404(3) of the Education Law requires an applicant to have a master's or doctoral degree in creative arts therapy from a registered program, or the equivalent. Such equivalent education must be completed in a master's or doctoral program to meet the statutory requirement.

COMMENT: It is not possible to complete the 1,500 hours of supervised experience in one year. There should be more time to complete the experience requirement.

RESPONSE: The Education Law requires 1,500 hours of supervised experience in creative arts therapy for licensure and authorizes the Department to issue a limited permit for the applicant to complete the experience or examination requirement. Education Law states that the limit permit is valid for twelve months and may be renewed for an additional twelve months. The Department does not have the statutory authority to extend the duration of the limited permit.

COMMENT: A registered professional nurse, nurse practitioner or physician's assistant should be prohibited from supervising the applicant's experience required for licensure in creative arts therapy.

RESPONSE: The professions identified in the comment are named as exempt under Article 163 and authorized to practice creative arts therapy under the exemption. In response to comments from the field and in consultation with the State Board for Mental Health Practitioners, the proposed regulations have been revised to require baccalaureate level education and experience in the field of creative arts therapy. Individuals licensed in the above-referenced professions that meet the prescribed education and experience requirement will be able to supervise the experience. Such individuals will however continue to be governed by the practice requirements of their profession, including supervision requirements.

COMMENT: The regulation should be revised to clarify that the experience required for licensure in each case should specify that the experience must be "a supervised clinical experience" and be "in-person client contact hours."

RESPONSE: Education Law section 8404(c) provides that the experience shall include at least 1,500 hours of post-master's supervised experience in one or more creative arts therapies. The regulation is consistent with the statutory requirement, and the Department does not intend to restrict the experience to client contact hours.

COMMENT: Section 79-11.5 authorizes a licensed creative arts therapist to use the Diagnostic and Statistical Manual (DSM) to make formal diagnoses, but the creative arts therapist will lack the basic knowledge required to make formal diagnoses. Since creative arts therapists are not qualified to make formal diagnoses, we suggest amending 79-11.5 to require consultation with a qualified licensed mental health professional who is authorized to make formal diagnoses.

RESPONSE: Section 8411(3) of the Education Law allows a licensed creative arts therapist to use accepted classifications of signs, symptoms, dysfunctions and disorders as approved by the Department. The regulation simply specifies the DSM as the classification system that they may be used within the practice of creative arts therapy, as such practice is prescribed in statute, and does not expand the scope of that practice.

COMMENT: The regulation should include an exemption from licensure for music therapists who are educated at the baccalaureate level and have passed the Certification Board for Music Therapists' examination.

RESPONSE: The Department does not have the authority to establish in regulation an exemption from the licensure requirements. Such exemption must be established in statute.

COMMENT: The minimum education requirement for licensure should be completion of a master's degree in creative arts therapy.

RESPONSE: In accordance with Education Law section 8411(2)(a), the regulation establishes two alternative routes to licensure. The alternatives permit individuals with appropriate education and experience to be licensed, and would permit baccalaureate educated applicants to be licensed. In response to comments from the field and after consultation with the State Board for Mental Health Practitioners, the Department strengthened the alternative requirements to require certifications from qualified individuals endorsing the applicants' good professional ethics and clinical competence.

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

Professional Licensure in Psychoanalysis

I.D. No. EDU-34-04-00014-RP

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

Revised action: Addition of section 52.35 and Subpart 79-12 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 210 (not subdivided); 6501 (not subdivided); 6504 (not subdivided); 6507(2)(a), (3)(a) and (4)(a); 6508(1); 8405(3)(b), (c) and (d); 8409 (not subdivided); 8411(2)(a), (b) and (3)

Subject: Professional licensure in psychoanalysis.

Purpose: To implement the provisions of art. 163 of the Education Law by establishing education, experience, and examination requirements for licensure in the new licensed profession of psychoanalysis, and standards for registered college programs leading to licensure in this field.

Substance of revised rule: The State Education Department proposes to add a new section 52.35 and Subpart 79-12 of the Regulations of the Commissioner of Education to establish requirements for the new licensed profession of psychoanalysis.

A new section 52.35 is added to establish requirements for professional education programs leading to licensure in psychoanalysis, as follows:

In addition to meeting all applicable provisions of this Part, to be registered as a program recognized as leading to licensure in psychoanalysis, which meets the requirements of section 79-12.1 of this Title, the program shall meet the requirements of this section.

(a) The program shall be offered by a psychoanalytic institute chartered by the Board of Regents, or an institution authorized by its charter or by authorization of the Board of Regents to confer degrees in New York State. The program shall lead to a certificate of completion, which shall be conferred upon students who successfully complete the program.

(b) In order to be admitted into the program, the program shall require the student to have completed a master's or higher degree program in any field registered by the department pursuant to this Part, or a substantially equivalent program.

(c) The course of study shall include coursework substantially equivalent to coursework required in a master's degree program in a health or mental health field of study. The course of study shall include a total of at least 1,350 clock hours of study, distributed as set forth in this subdivision in the following four categories: coursework, personal psychoanalysis, supervised analysis, and clinical experience.

(1) Coursework. The program shall include at least 45 clock hours of classroom instruction in each of the following areas, totaling at least 405 clock hours of classroom instruction:

(i) personality development;

(ii) psychoanalytic theory of psychopathology;

(iii) psychoanalytic theory of psychodiagnosis;

(iv) sociocultural influence on growth and psychopathology;

(v) practice technique (including dreams and symbolic processes);

(vi) analysis of resistance, transference, and countertransference;

(vii) case seminars on clinical practice;

(viii) practice in psychopathology and psychodiagnosis; and

(ix) professional ethics and psychoanalytic research methodology.

(2) Personal psychoanalysis. The program shall require the student to complete at least 300 clock hours of personal psychoanalysis.

(3) Supervised analysis. The program shall include at least 150 clock hours of supervised analysis of the student's psychoanalytic cases. The supervised analysis shall include:

(i) 50 clock hours of individual supervision with one supervisor working on one case; and

(ii) at least 100 clock hours of individual supervision with another supervisor working on one or more additional cases.

(4) Clinical experience. The program shall require the student to complete at least 300 clock hours of supervised clinical experience in the practice of psychoanalysis, as defined in section 8405(1) of the Education Law. The clinical experience shall meet the requirements set forth in section 79- 12.3 of this Title. In addition, if the setting for the clinical experience is not within the institution offering the program itself, a written contract or agreement shall be executed between the institution and clinical facility which is designated to cooperate in providing the clinical experience, which shall set forth the responsibilities of each party, and shall be signed by the responsible officer of each party.

A new Subpart 79-12 of the Regulations of the Commissioner of Education is added, to establish requirements that an individual must meet to be licensed as a psychoanalyst.

Section 79-12.1 establishes education requirements for licensure. Subdivision (a) defines the term acceptable accrediting agency. Subdivision (b) establishes the education requirement, as follows:

(b) To meet the professional education requirement for licensure as a psychoanalyst, the applicant shall present satisfactory evidence of:

(1) having received a master's or higher degree through completing a program in any field that is registered by the department pursuant to this Part, or the substantial equivalent; and

(2) either:

(i) completing a program in psychoanalysis that is registered as leading to licensure in this field pursuant to section 52.35 of this Title, or a program in psychoanalysis that is accredited by an acceptable accrediting agency, or a program in psychoanalysis that is substantially equivalent to such a registered or accredited program, as determined by the department; or

(ii) completing a program that is located outside the United States and its territories that is recognized by the appropriate civil authorities of the jurisdiction in which the program is located as a program that prepares an applicant for the professional practice of psychoanalysis, has been verified in accordance with subdivision (c) of section 59.2 of this Title, and which is determined by the department to be substantially equivalent to a program in psychoanalysis registered by the department as leading to licensure in this field, pursuant to section 52.35 of this Title, or to a program in psychoanalysis accredited by an acceptable accrediting agency.

Section 79-12.2 establishes the examination requirement for licensure. Subdivision (a) establishes the requirement, which is either an examination acceptable to the department in accordance with specified criteria or a scored assessment of case narratives by the State Board for Mental Health Practitioners. Subdivision (b) establishes requirements for admission to the examination, and subdivision (c) the passing score.

Section 79-12-3 establishes the experience requirement for licensure. Subdivision (a) and (b) establish the general requirements, as follows:

(a) An applicant for licensure as a psychoanalyst shall meet the experience requirement for licensure as a psychoanalyst by submitting sufficient documentation of having completed a supervised experience of at least 1,500 clock hours providing psychoanalysis in a setting acceptable to the department, all in accordance with the requirements of this section.

(b) All or part of the supervised experience may be obtained within the education program required for licensure as a psychoanalyst, as prescribed in section 79-12.1 of this Subpart.

Subdivision (c) establishes the supervision requirements for the experience and subdivision (d) requirements for the setting for the experience.

Section 79-12.4 establishes requirements for a limited permit in psychoanalysis, as follows:

(a) An applicant for a limited permit to psychoanalysis shall:

(1) file an application for a limited permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

(2) meet all requirements for licensure as a psychoanalyst, except the examination and/or experience requirements; and

(3) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79- 12.3 of this Subpart.

(b) The limited permit in psychoanalysis shall be issued for specific employment setting(s), acceptable to the department in accordance with the requirements of section 79-12.3 of this Subpart.

(c) The limited permit in psychoanalysis shall be valid for a period of not more than 12 months, provided that the limited permit may be extended for an additional 12 months at the discretion of the department if the department determines that the permit holder has made good faith efforts to successfully complete the examination and/or experience requirements within the first 12 months but has not passed the licensing examination or completed the experience requirement, or has other good cause as determined by the department for not completing the examination and/or experience requirement within the first 12 months, and provided further that the time authorized by such limited permit and subsequent extension shall not exceed 24 months total.

Section 79-12.5 establishes requirements for classifications systems that psychoanalysts may use.

Section 79-12.6 establishes special provisions for licensure in psychoanalysis. Subdivision (a) implements Education Law section 8411(2)(a) by establishing two alternative licensure pathways, the requirements for which must be met on or before January 1, 2006. Both require the applicant to:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8404(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(1) Alternative route one. In addition to the above requirements, the applicant must have completed a master's or higher degree program in any field that is registered by the department or is an equivalent program as determined by the department, and must also have completed coursework at a psychoanalytic institute chartered by the Board of Regents or an institution authorized by its charter or by authorization of the Board of Regents to confer degrees in New York State, or equivalent coursework, that is substantially equivalent to coursework required in a master's degree program in a health or mental health field of study. Course content for such coursework is specified, as are requirements for personal psychoanalysis and supervised analysis of the applicant's cases. In addition, the applicant is required to have engaged in the practice of psychoanalysis for at least 1,500 clock hours.

(2) Alternative route two. In addition to the above requirements, the applicant must have completed a baccalaureate or higher degree program in any field that is registered by the department or is an equivalent program as determined by the department, and must also have completed coursework at a psychoanalytic institute chartered by the Board of Regents or an institution authorized by its charter or by authorization of the Board of Regents to confer degrees in New York State, or equivalent coursework. Course content for the program is specified, and the applicant is required to have completed at least 150 clock hours of personal psychoanalysis. In addition, the applicant must have engaged in the practice of psychoanalysis, on a full-time basis, for seven years or the part- time equivalent. Also, the applicant must submit certifications from three qualified individuals endorsing the applicant's good professional ethics and clinical competence, and must meet one of the following two requirements:

Subdivision (b) establishes alternative requirements for licensure without examination, as follows:

(b) In accordance with section 8411(2)(b) of the Education Law, an applicant who meets all requirements for licensure as a psychoanalyst, as prescribed in section 8405(3) of the Education Law, except for the examination requirement, may qualify for a license as a psychoanalyst through meeting the requirements of this subdivision, provided that the applicant meets these requirements on or before January 1, 2006.

The applicant shall:

(1) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8405(3)(g) of the Education Law;

(2) meet all requirements for the license as a psychoanalyst prescribed in section 8405(3) of the Education Law, except the examination requirement; and

(3) either:

(i) have certification or registration by a national certifying or registering body for psychoanalysts, acceptable to the department. To be acceptable to the department, the national certifying or registering body must be recognized nationwide as an organization that certifies or registers psychoanalysts throughout the United States based upon a review of their qualifications to practice psychoanalysis and must have adequate standards for the review of the applicant's qualifications for practicing psychoanalysis, as determined by the department. Such standards must include standards for the review of the applicant's education and experience for practicing psychoanalysis and may include an examination requirement. For use under this subdivision, such certification or registration need not be current but shall not have been revoked for misconduct and/or unethical activities. For documentation of the applicant's certification or registration status to be sufficient, the national certifying or registering body must submit documentation verifying the applicant's certification or registration status directly to the department; or

(ii) if there is no national certifying or registering body for psychoanalysts acceptable to the department as prescribed in subparagraph (i) of this paragraph, have engaged in the practice of psychoanalysis, as defined in section 8405(1) of the Education Law, on a full-time basis for five years of the immediately preceding eight years prior to application for licensure.

Revised rule compared with proposed rule: Substantial revisions were made in sections 79-12.2(a)(1), 79-12.3(c)(2), (d)(3) and 79-12.6(a) and (b)(3).

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

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

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

Revised Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, the proposed rule has been revised as follows:

Section 79-12.2(a) is substantially revised to include an alternative that the applicant licensure pass an acceptable licensing examination, instead of a scored assessment of case narratives. This alternative is added because as an acceptable licensure examination in psychoanalysis may become available.

Section 79-11.2(c)(2) is substantially revised to establish qualifications for supervisors of the experience required for licensure in psychoanalysis:

(2) Qualifications for supervisors of the required experience. The supervisor of the experience shall meet each of the following requirements:

(i) The supervisor shall have completed a baccalaureate or higher degree program in psychoanalysis, in the subject of the field in which the supervisor is licensed as prescribed in subparagraph (iii) of this paragraph, or another field related to the field of psychoanalysis as determined by the department.

(ii) The supervisor shall have engaged in the practice of psychoanalysis for three years or the part-time equivalent. For purposes of this subparagraph, practice on a full-time basis shall mean 800 clock hours in the practice of psychoanalysis, earned over a 52-week period.

(iii) The supervisor shall be licensed and registered in New York State to practice psychoanalysis, medicine, as a physician assistant, psychology, licensed clinical social work, or as a registered professional nurse or nurse practitioner, pursuant to Articles 163, 131, 131-b, 139, 153, or 154 of the Education Law, respectively; or be an individual with equivalent qualifications as determined by the department; or for applicants who apply for licensure in psychoanalysis on or before December 31, 2007, be an individual with certification or registration by an acceptable national certifying or registering body for psychoanalysts. To be acceptable to the department, the national certifying or registering body must be recognized nationwide as an organization that certifies or registers psychoanalysts throughout the United States based upon a review of their qualifications to practice psychoanalysis and must have adequate standards for the review of the applicant's qualifications for practicing psychoanalysis, as determined by the department. Such standards must include standards for the review of the applicant's education and experience for practicing psychoanalysis and may include an examination requirement.

This change was necessary to ensure that the supervisors have the necessary education and experience to provide the supervision.

Section 79-12.4(c)(3) is non-substantially revised to add the words "acceptable to the department" after the word "supervisor," to clarify that the supervisor of the required experience must by acceptable to the State

Education Department, in accordance with the requirements of section 79-12.3 of this Subpart.

Section 79-12.6(a) is substantially revised to establish an additional alternative requirement for licensure in psychotherapy.

The opening paragraph of the subdivision is non-substantially revised to include the title, Alternative requirements, reference the two paragraphs in the subdivision, and to clarify that "all such requirements" must be met by on or before January 1, 2006.

Alternative route one is the new alternative. It requires the applicant to:

(i) file an application for licensure by January 1, 2006 and pay the fee for the initial license and the fee for the first registration period, as prescribed in section 8405(3)(g) of the Education Law;

(ii) be of good moral character as determined by the department;

(iii) be at least 21 years of age;

(iv) have completed a master's or higher degree program in any field that is registered by the department pursuant to Part 52 of this Title, or is an equivalent program as determined by the department;

(v) have completed coursework at a psychoanalytic institute chartered by the Board of Regents or an institution authorized by its charter or by authorization of the Board of Regents to confer degrees in New York State, or equivalent coursework, that is substantially equivalent to coursework required in a master's degree program in a health or mental health field of study. The course of study shall include at least 15 clock hours of classroom instruction in each of the following areas:

(a) personality development;

(b) psychoanalytic theory;

(c) practice techniques, including dreams and symbolic processes;

(d) analysis of resistance, transference, and countertransference;

(e) case seminars on clinical practice;

(f) psychoanalytic research methodology;

(g) professional ethics and psychoanalytic research methodology;

(vi) have completed at least 150 clock hours of personal psychoanalysis;

(vii) have competed at least 100 clock hours of supervised analysis of the applicant's psychoanalytic cases;

(viii) have engaged in the practice of psychoanalysis, as defined in section 8405(1) of the Education Law, for at least 1,500 clock hours.

Alternative route two is the alternative that was previously published. It has been renumbered. Section 79-12.6(a)(2)(v) has been substantially revised to require 15 clock hours of classroom instruction in each of the listed subject areas. In addition, section 79-12.6(a)(2)(vii) has been substantially revised to permit part-time experience, remove the requirement that the experience be completed in the immediately preceding 12 years, and change the number of hours that defined practice on a full- time basis from 960 clock hours to 800 clock hours, earned over a 52-week period. Also, section 79-12.6(v), (vi), and (viii) is non-substantially revised to remove unnecessary language concerning the applicant documenting to the satisfaction of the department having met the requirements.

Section 79-12.6(b)(2)(viii) substantially revises the rule by adding a new requirement in alternative two as follows:

(viii) have submitted certifications from three individuals who meet the qualifications for supervisors of the experience requirement, as prescribed in section 79-12.3(c)(2), endorsing the applicant's good professional ethics and clinical competence to practice psychoanalysis. Such certifications shall be submitted on forms prescribed by the department.

The changes are needed to increase requirements for the alternative routes to licensure to ensure that candidates are adequately prepared for licensure under the alternative routes and that the alternative requirements demonstrate substantially equivalent preparation to that required in the regular route to licensure.

Section 79-12.6(b)(3)(i) is non-substantially revised by removing the unnecessary words at the beginning of the subparagraph "document to the satisfaction of the department having" and substituting the word "have."

Section 79-12.6(b)(3)(ii) is non-substantially revised by removing the unnecessary words "document to the satisfaction of the department of having engaged" after the word "paragraph" substituting the word "have." It is also non-substantially revised to add the words "prior to application for licensure" after the word "years'" to clarify that the experience must be gained in the eight years prior to application for licensure. It is substantially revised to change the number of hours that defined practice on a full-time basis from 960 clock hours to 800 clock hours, earned over a 52-week period.

The aforementioned revisions to the proposed rule do not require changes to the Regulatory Impact Statement.

Regulatory Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed regulation, as revised, concerns requirements that an individual must meet to become licensed in the profession of psychoanalysis and that programs at psychoanalytic institutes chartered by the Board of Regents and colleges must meet to be registered by the State Education Department as leading to licensure in this field. The regulation will not impose any adverse economic, reporting, recordkeeping, or any other compliance requirements on small businesses or local governments. Because it is evident from the rule, as revised, that it will not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The revisions do not necessitate any changes in the Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on August 25, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

Article 163 of the Education Law establishes psychoanalysis as a licensed profession in New York State. The proposed regulation, as revised, implements the requirements of Article 163 of the Education Law by establishing education, experience, and examination standards for licensure, as required by that statute. It also sets forth standards for registered programs that lead to licensure in this field, in accordance with statutory requirements.

The proposed regulation, as revised, implements statutory requirements and directives and will have no impact on jobs or employment opportunities, beyond the impact of Article 163. In addition, the regulation, which relates to licensure qualifications, will have no impact on labor market demand for psychoanalysts. It will not affect the number of jobs or employment opportunities in this field. Because it is evident from the nature of this regulation, as revised, that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of the proposed rule in the *State Register* on August 25, 2004, the State Education Department (SED) received the following comments:

COMMENT: The personal psychoanalysis required as part of the registered licensure qualifying educational program in section 52.35(c) should be at least three sessions per week by a psychoanalyst with at least five years of clinical experience who is licensed as a psychoanalyst or in an exempt licensed profession.

RESPONSE: The proposed regulations establish the requirement that the licensure qualifying registered program must include 300 clock hours of personal psychoanalysis. This is an adequate standard for program registration.

COMMENT: The regulations should require the supervisor for the clinical experience in the registered program have at least five years of clinical experience and be licensed in psychoanalysis or in an exempt profession.

RESPONSE: Part 52 of the Commissioner's Regulations require that faculty in a registered program must be qualified by training and experience. The regulation provides that the supervised clinical experience should meet the requirements of section 79-12.3, which includes appropriate qualifications for the supervisor.

COMMENT: Section 52.35(c)(4) should define "supervised clinical experience" as including clinical experience in psychotherapy, psychoanalysis, and psychoanalytic psychotherapy and a frequency of at least three times a week.

RESPONSE: The regulations establish the minimum requirements for an educational program seeking to be registered as leading to licensure psychoanalysis. The level of detail suggested is unnecessary. As part of the individual's training, the institute may require additional experience and specify frequency of contact with the supervisor.

COMMENT: Section 52.35(a) should require the curriculum to include foundational theories and techniques of psychoanalysis as well as current theories and techniques.

RESPONSE: The regulations implement the curriculum requirements specified in the Education Law. The program may include additional coursework.

COMMENT: Candidates should have a master's or higher degree in a mental health field prior to admission into a registered program leading to licensure so that they have a background in psychodiagnosis and psychopathology.

RESPONSE: The regulations implement the statute, which requires an applicant to have completed a master's or higher degree in any field and have completed a registered program leading to licensure in psychoanalysis.

COMMENT: The regulations should be revised to clarify that the supervised experience required in the registered education program must be in-person client contact hours.

RESPONSE: The statute does not require all 300 clock hours of clinical experience be client contact hours.

COMMENT: The proposed regulations only allow an institute that trains individuals in psychoanalysis to be registered as licensure qualifying, but not institutes that train individuals in psychotherapy. The regulations and law should be changed to allow psychotherapy institutes to educate individuals who will qualify for licensure as psychotherapists.

RESPONSE: Under the Education Law, psychotherapy is not a licensed profession. Therefore, the Department does not have the authority to promulgate regulations to establish licensure in this field.

COMMENT: The proposed regulations do not define practice outside the boundaries of competence, as defined in paragraph 1 of section 8407 of the Education Law. Specific language should define the consultation required with a physician when the psychoanalyst is treating a patient with serious mental illness.

RESPONSE: The proposed regulations define the qualifications for licensure as a psychoanalyst. The Department will consider addressing this issue, within the bounds of our statutory authority, in future amendments to the definition of unprofessional conduct in the practice of the professions.

COMMENT: Section 79-12.1 should restrict a program of study in psychoanalysis at a psychoanalytic institute, and not allow equivalent programs.

RESPONSE: Education Law requires that an applicant create a registered program or the equivalent, as determined by the Department. The regulation provides flexibility that is consistent with the statute so that applicants who completed a program not registered by the Department may meet the education requirement for licensure in psychoanalysis.

COMMENT: The regulations should be amended to clarify that the education, experience and examination requirements are for an applicant "from a field other than mental health".

RESPONSE: There is no basis in the statute for the Department to restrict licensure to individuals with training in other than a mental health field.

COMMENT: A candidate should be able to meet the examination requirement through submission of a case study based on one aspect, vignette or fragment of clinical work or by a fictional clinical situation, as an alternative to the case narrative specified in the regulations.

RESPONSE: Education Law requires an applicant to pass an examination in psychoanalysis. The regulation is revised to allow a candidate to pass an examination acceptable to the Department or to submit a case narrative that is scored by the State Board for Mental Health Practitioners. The applicant will be able to demonstrate competency in psychoanalysis through either option.

COMMENT: There should be a board of examiners that represents the full spectrum of psychoanalytic orientations. This would ensure that the case narrative is evaluated by an individual with the same theoretical orientation as the applicant.

RESPONSE: The Department will consider creating a committee on examinations for the State Board, utilizing licensed psychoanalysts or other qualified practitioners, under the regulation as written.

COMMENT: Section 79-12.3 should define a qualified supervisor as an individual licensed in psychoanalysis or an exempt mental health profession with experience in psychoanalysis.

RESPONSE: In response to comments from the field and in consultation with the State Board for Mental Health Practitioners, the proposed regulations have been revised to require that a supervisor have at least a baccalaureate level education and experience in the field of psychoanalysis, and licensure in a profession authorized to practice psychoanalysis. Qualified supervisors will continue to be governed by the practice requirements of their profession, including supervision requirements.

COMMENT: The regulations should allow supervised hours completed as part of a training program to count toward the experience for licensure.

RESPONSE: The proposed regulations would allow, but not require, experience in the institute to count toward the 1,500 hours of experience required for licensure in psychoanalysis.

COMMENT: Experience in private practice should be acceptable, as should experience in an agency setting.

RESPONSE: The comment is incorrect since an applicant for licensure may complete the 1,500 hours of supervised experience in an agency or private setting. The private setting, however, may not be owned or operated by the applicant.

COMMENT: The proposed regulations should be revised to clarify that only "in-person client contact hours" are acceptable for meeting the required experience for licensure.

RESPONSE: The statute is silent as to whether or not the experience must consist only of client contact hours. The Department has reasonably interpreted the statute to permit the required experience to other than client contact hours, provided that the applicant is providing psychoanalysis.

COMMENT: The proposed regulations should be revised to allow the student's supervisor to determine when the student may see patients in a setting of the student's choosing. This would reflect the supervisor's responsibility for the student's training but provide flexibility to practice in non-institute settings.

RESPONSE: The Education Law requires a student or individual under a limited permit to practice under supervision, as defined in section 79-12.3. The experience may not be in a private practice owned or operated by the applicant.

COMMENT: The regulations should provide more than two years to complete the 1,500 hours of supervised experience.

RESPONSE: The Education Law requires 1,500 hours of supervised experience in psychoanalysis for licensure and authorizes the Department to issue a limited permit for the applicant to complete the experience or examination requirement. Education Law states that the limit permit is valid for twelve months and may be renewed for an additional twelve months. The Department does not have the statutory authority to extend the duration of the limited permit.

COMMENT: The regulations should provide additional time so an applicant can meet the grandparenting requirements for licensure as a psychoanalyst.

RESPONSE: The duration of the grandparenting period is established in statute and may not be extended by regulation.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Acid Deposition Reduction Budget Trading Programs for NO_x and SO_2

I.D. No. ENV-35-04-00024-E
Filing No. 1274
Filing date: Nov. 15, 2004
Effective date: Nov. 15, 2004

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

Action taken: Amendment of section 200.9; repeal of Parts 237 and 238; and addition of new Parts 237 and 238 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305 and 19-0311

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

Specific reasons underlying the finding of necessity: During February 2002, the Department proposed to establish the Acid Deposition Reduction

Program (ADRP) by promulgating 6 NYCRR Part 237, Acid Deposition Reduction NO_x Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO_2 Budget Trading Program, and to revise 6 NYCRR Part 200, General Provisions. The goal of the ADRP was to require fossil fuel-fired electric generators in New York to reduce emissions to protect sensitive areas, such as the Adirondacks and the Catskills, from the devastation of acid deposition. Specifically, electric generators would have to reduce sulfur dioxide (SO_2) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under sections 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. sections 7651 - 7651o. As ultimately adopted, the ADRP directed that these SO_2 reductions be phased in beginning January 1, 2005 through 2007 (Phase 1) and January 1, 2008 (Phase 2). In addition, the ozone season reductions in nitrogen oxides (NO_x) emissions starting in the 2003 ozone season (under 6 NYCRR Part 204) were to be extended to the non-ozone season and thus be in place year-round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. The Department adopted the ADRP regulations on April 15, 2003.

The ADRP regulations were subject to legal challenge and were invalidated on May 26, 2004 by the Supreme Court, Albany County in the joint decision in *Multiple Intervenors, et al.* v. *NYSDEC,* and *NRG Energy* v. *Crotty.*

By the present emergency rule making, the Department is again promulgating the ADRP regulations but with very minor revisions. Although the Department disagrees with the Court's decision and is currently appealing it, the Department believes that the current rule making addresses the deficiencies of the initial rule making that were expressed by the Supreme Court.

In order to forestall the loss of the public health and environmental benefits that were to be realized during the first year of implementation of the ADRP as originally scheduled, the Department is promulgating these emergency regulations. The control periods (the yearly regulatory compliance periods) are scheduled to commence on October 1, 2004 and January 1, 2005, under the Acid Deposition Reduction NO_x Budget Trading Program, 6 NYCRR Part 237, and the Acid Deposition Reduction SO_2 Budget Trading Program, 6 NYCRR Part 238, respectively. Had the Department undertaken only a conventional notice-and-comment rule making pursuant to SAPA section 202.1 in order to reinstate the ADRP, the public health and environmental benefits that would have occurred for the first control periods under the regulations would certainly be lost because the rule making process would not conclude until well after the control periods were scheduled to commence. Because of concerns about the need for the ADRP regulations to be consistent and compatible with, among other things, the operation of the ozone season NO_x Budget Trading Program established at 6 NYCRR Part 204 and emissions monitoring protocols, any failure to implement the ADRP programs by the aforementioned dates would delay implementation of the programs for at least one full year.

Based on data showing 2002 emissions from affected sources, the Department has estimated that an additional 35,000 tons per year of SO_2 (from 2005 through 2007 and 100,000 tons per year beginning 2008) and 6,000 tons per year of NO_x will be released into the atmosphere in the absence of the timely implementation of the regulatory caps of the respective programs. The NO_x emissions reductions are equivalent to removing over 300,000 cars from New York State's roads. The SO_2 emissions reductions are equivalent to eliminating all of the SO_2 emissions from households heated primarily with oil in New York State (2.33 million). These emissions of SO_2 and NO_x contribute to an array of environmental and public health harms in New York.

The study of the harms from air pollution is continually evolving. In accordance with the CAA sections 108 and 109, which govern the establishment, review, and revision of National Ambient Air Quality Standards (NAAQS), EPA is to list pollutants that may reasonably be anticipated to endanger public health or welfare and to issue air quality criteria for them. The air quality criteria are to reflect the latest scientific information useful in indicating the kind and extent of all exposure-related effects on both public health and welfare expected from the presence of the pollutant in ambient air. EPA is obligated to periodically revise the NAAQS based on these criteria to protect against adverse health effects that may be suffered by sensitive population groups, with an adequate margin of safety, and to protect the public welfare.

In April 1996, EPA released the Air Quality Criteria for Particulate Matter (PM)[1], which in turn resulted in the revision to the NAAQS and establishment of thresholds for $PM_{2.5}$.[2] The $PM_{2.5}$ NAAQS and the criteria document described the health impacts associated with emissions of PM. During June 2004, EPA identified which individual counties in New York State that EPA intends to designate as nonattainment for the $PM_{2.5}$ NAAQS. More than 12.4 million New Yorkers, 65% of the entire State population, reside within the counties that EPA proposes to designate as nonattainment with the health based $PM_{2.5}$ NAAQS.

PM is derived either from combustion material that has volatilized and then condenses to form primary PM or precursor gases reacting in the atmosphere to form secondary PM. SO_2 and NO_x react in the atmosphere to create sulfates and nitrates, a secondary form of PM. Fossil fuel-fired electric generators, affected sources under the ADRP, are significant emitters of SO_2 and NO_x . Implementation of the ADRP will have immediate positive impacts on public health due to the reduction in the formation of the secondary PM, including most importantly $PM_{2.5}$. It should be noted that $PM_{2.5}$ has been identified as a non-threshold pollutant. See *Whitman* v. *American Trucking Associations,* 531 U.S. 457, 475 (2001). In other words, health effects are possible from exposure to $PM_{2.5}$ at levels below the standard established by EPA. The Department notes that it would be detrimental to public health and welfare to proceed solely through the rule making process of SAPA section 202.1 and lose one or more control periods.

Health risks associated with the inhalation of PM are influenced by both the penetration and deposition of PM in the various regions of the respiratory tract and the biological responses to these deposited materials. Smaller PM is known to deposit furthest in the respiratory tract. The most significant monetized benefits of reducing ambient concentrations of PM are attributable to reductions in health risks associated with air pollution.[3] These health related benefits are calculated by changes in occurrences of PM-related health effects and the monetary values associated with reductions in: mortality rates from both short and long term exposure, chronic bronchitis, pneumonia, cardiovascular illnesses, occurrences of asthma, and asthma related emergency room visits. In addition, studies also look at illnesses that do not require hospitalization but result in decreased activity or productivity such as: acute bronchitis, upper and lower respiratory symptoms, restricted activity days, work loss days, and asthma attacks. EPA continues to assess the impacts of $PM_{2.5}$ and this new information continues to highlight the impacts that $PM_{2.5}$ has on public health. To protect the public health of all New York residents, the Department has factored this new information into its decision to adopt these regulations on an immediate basis.

On December 29, 2003, the Department issued Commissioner's Policy 33, Assessing and Mitigating Impacts of Fine Particulate Matter Emissions (the $PM_{2.5}$ Policy). The $PM_{2.5}$ Policy provides guidance on the project-specific assessment of the $PM_{2.5}$ impacts of the siting of new stationary sources of air pollution and details when mitigation of such impacts may be necessary. The Department established the $PM_{2.5}$ Policy for purposes of guiding the review of an application for a permit or major permit modification under the State Environmental Quality Review Act, ECL sections 8-0101 - 8-0117. The ADRP will serve to complement the $PM_{2.5}$ Policy in that the ADRP will reduce $PM_{2.5}$ emissions from existing power plants - emissions that previously have gone unaddressed.

During the initial development of the ADRP, the Department had anticipated that EPA would soon promulgate, pursuant to CAA section 112, 42 USC section 7412, a maximum achievable control technology standard for the control of mercury emissions from the fossil fuel-fired electricity generation sector. Unfortunately, EPA's most recent proposals would not mandate mercury emissions reductions at a level and within a time frame to adequately protect the State's vulnerable water bodies. In light of this circumstance, the Department believes that the mercury reduction co-benefit of the ADRP has taken on much greater importance.

Mercury emissions from coal fired electricity generators in New York represent about 33 percent of the mercury emissions from stationary sources in the State.[4] Mercury emissions from electricity generation are released from coal that is burned to generate power. When mercury is released into the air, it is transported and eventually deposited back onto the earth. The distance of this transport and eventual deposition depends on the chemical and physical form of the mercury emitted. In aquatic ecosystems, inorganic mercury is transformed into an extremely toxic organic form of mercury, methylmercury.

Methylmercury bioaccumulates in the food chain as humans and other mammals consume mercury-contaminated organisms, particularly fish. Methylmercury in fish poses a real risk for fish-eating mammals and birds such as otters, mink, bald eagles, kingfishers, ospreys and the common loon. Mercury residues in some of these species have been close to, and in some instances greater than, concentrations associated with observed toxic effects. Humans are most likely to be exposed to methylmercury through

fish consumption. Young children and developing fetuses are particularly sensitive to methylmercury exposure, as demonstrated in both animal studies and accidental human poisonings. In the Minamata, Japan episode, human fatalities and devastating neurological damage were associated with the daily consumption of fish contaminated with high levels of methylmercury.[5] Children of women exposed to relatively high levels of methylmercury during pregnancy have exhibited a variety of abnormalities, including delayed onset of walking and talking, cerebral palsy and reduced neurological test scores. Children exposed to far lower levels of methylmercury in the womb have exhibited delays and deficits in learning ability. In addition, children exposed after birth potentially are more sensitive to the toxic effects of methylmercury than adults, because their nervous systems are still developing.[6] The National Research Council recently concluded the population at highest risk is the offspring of women of child-bearing age who consume large amounts of fish and seafood during their pregnancy.[7] Because of the bioacculumation of methylmercury in freshwater fish, thousands of water bodies nationwide, including all of the Great Lakes and their connecting waters, have fish consumption advisories. In New York State, numerous bodies of freshwater across the State have advisories or bans on consuming fish.

Since 2002, the Department has added to the "Section 303(d) list" 23 water body segments as impaired by mercury from atmospheric deposition.[8] In addition, and subsequent to the amendments to the Section 303(d) list, the New York State Department of Health issued new health advisories concerning the consumption of fish from 13 Adirondack lakes and ponds, 3 New York City reservoirs located in the Catskills and one Otsego County lake based on elevated levels of mercury found in fish in those water bodies. These additional health advisories brings to 51 the total number of water bodies that are the subject of fish consumption advisories for mercury.[9] In addition, the Health Department issues a general fish advisory alerting the public not to eat more than one meal (one-half pound) per week of fish taken from New York's fresh waters and some marine waters at the mouth of the Hudson River. This list of restricted water bodies and fish species continues to grow each year. Many of the lakes sampled are in remote rural and mountainous areas of the State that do not have any known mercury inputs other than atmospheric deposition.

As a result of the controls implemented to comply with this regulation, mercury emissions from electricity generators will be reduced. The vast majority of the coal burned in the State is bituminous coal and the amount of mercury captured by a given control technology is better for bituminous coal. In addition to existing particulate controls, several coal burning facilities in the State are likely to install flue gas desulfurization equipment and post-combustion NO_x controls to comply with the ADRP. The range of mercury reductions from coal-fired units with flue gas desulfurization combined with either or both particulate and post-combustion NO_x controls ranges from 48 to 98 percent.[10] To protect the health of New York's residents and to reduce the number of impaired water bodies, the Department is implementing these regulations on an emergency basis to maintain the mercury co-benefit that will be gained from the combinations of control equipment needed by affected sources to reduce SO_2 and NO_x emissions.

Acid deposition does not only affect public health and the State's water ways, it also impacts public welfare and quality of life. It has been identified as a contributing cause of forest degradation, especially among high-elevation spruce throughout the Appalachian Mountains. The same forest areas directly impacted by the effects of acid deposition are also some of the nation's most pristine wilderness areas (such as the Adirondack Park) and national parks. These wilderness areas, visited by hundreds of thousands of people each year for their scenic vistas and natural beauty, are impacted by sulfates and nitrates in the atmosphere. Under certain conditions sulfate and nitrate particles in the atmosphere reduce visibility. This visibility phenomenon, also known as "haze" has been marring public enjoyment of national parks such as Shenandoah, the Great Smoky Mountains, and the Grand Canyon. New York State sources are thought to contribute to a reduction in visibility in Class I areas, such as the Lye Brook Wilderness area in southwest Vermont and the White Mountains in New Hampshire.

One of the areas most affected by acid deposition is New York's Adirondack Park. This park consists of over 6 million acres of forests, lakes, streams and mountains, and represents the largest wilderness area east of the Mississippi River. The thin calcium-poor soils and igneous rocks of the Adirondacks make this area particularly sensitive to acid deposition. In addition, many of the Adirondack's lakes have an acid neutralizing capacity of less than zero, which means that they are no longer able to neutralize any acid entering the lake. Some of these lakes have been found to suffer from chronic acidity (constant levels of low pH). In some cases, the acidification has completely eliminated certain fish species and extreme levels of acidification have rendered the water ways lifeless. This problem is amplified when brief periods of low pH from snowmelt and/or heavy downpours (episodic acidification) are factored into the equation. These events, sometimes short in duration, have been known to cause large scale fish kills because of the high levels of acidity and the rapid rate at which the water way reaches peak acidity. Approximately 26% of the lakes surveyed in the Adirondacks have completely lost their ability to neutralize acid entering the lakes and over 70 percent of the sensitive lakes in the Adirondacks are at risk of episodic acidification.

Acid deposition also impairs tree growth in several ways. Acidic cloud water in higher elevations may increase the susceptibility of the red spruce to winter injury, while acid deposition has been stripping forest soils of vital nutrients necessary for forest productivity. Inputs to soils of sulfates from SO_2 and nitrates from NO_x cause a depletion of base cations such as, calcium, magnesium, potassium and sodium that naturally exist in soils. These metals are components of soil which originate from rocks and minerals and are essential for healthy growing forests. The depletion of base cations from soils has been linked to increased mortality and reduced growth of red spruce. Acid deposition, in combination with natural stress factors has resulted in reduced growth and viability of red spruce across the high-elevation part of its range.[11]

Deposition of NO_x to surface waters contributes directly to the widespread accelerated eutrophication of coastal waters and estuaries. Nitrogen is the nutrient that determines the amount of algae growth. The deposition of NO_x results in accelerated algae and aquatic plant growth causing adverse ecological effects and economic impacts that range from nuisance alga blooms to oxygen depletion and fish kills.[12] This is true for Long Island Sound which experiences hypoxia (low dissolved oxygen levels) in bottom waters during late summer (July - September). This results in use impairments, including a decrease in bathing area quality, an increase in unhealthy areas for aquatic marine life, an increase in mortality of sensitive organisms, poor water clarity for scuba divers, a reduction in commercial and sport fishing values, a reduction in wildlife habitat value, degradation of sea grass beds, impacts on tourism and real estate, and poorer aesthetics. Atmospheric deposition represents over 16 percent of the in-basin nitrogen loading and nearly 11 percent of the total nitrogen loading to Long Island Sound.[13] Part 237 will reduce nitrogen loading to surface waters. This will aid in mitigating the eutrophication of coastal waters and estuaries, including Long Island Sound which has recently experienced alga blooms and increased hypoxia conditions.

National treasures, including the Washington Monument, have been impacted by acid deposition. Wet and dry deposited particles contribute to the corrosion of metals, stone and paint on buildings, statues and cars. Structural and automotive corrosion has not only resulted in increased maintenance (cleaning) and material costs (acid resistant paints) but also in significant losses in terms of what value society places on the fine details of a statue that are lost forever due to acid rain. It is the continued degradation to these recreation areas, national forests, scenic views, and the continued damage to and corrosion of historic structures and buildings that call for the immediate adoption of these regulations. As noted above, each control season that is lost results in the loading of an additional 35,000 tons of SO_2 and 6,000 tons of NO_x into the atmosphere that further harms the State's natural and historic landmarks.

In addition, while a few affected sources challenged the original promulgation of Part 237, Part 238, and Part 200, the great majority did not. All affected sources had previously had reason to expect that the ADRP programs would begin on October 1, 2004 (Part 237) and January 1, 2005 (Part 238). All affected sources had received their allocations under the programs and have already submitted applications for required permit modifications under both programs. Some affected sources submitted applications for the distribution of early reduction allowances under Part 237. For the majority of affected sources that had planned for the timely implementation of the ADRP, the loss of one or more control periods will disrupt compliance plans including the installation of emissions control devices. Installation of emissions control devices results in the generation of excess allowances that may be sold to then recoup some of the costs of installation. Early emissions reductions may qualify a source for the award of early reduction allowances. With the loss of one or more of the initial control periods, sources that had been making good faith efforts to comply by restricting emissions will be unfairly penalized by not being able to recover some of the capital investment for control equipment. These complying sources are also placed at an economic disadvantage in relation to

those affected sources that have opposed the regulations and done nothing to comply.

As noted above, any delay in implementation of the ADRP would continue to negatively impact public health and the general welfare in New York. Failure to obtain the reductions from the first control periods under the ADRP (October 1, 2004 for NO_x and January 1, 2005 for SO_2) will have negative impacts on public health from the secondary formation of $PM_{2.5}$ and, will result in the continued degradation of the State's water bodies as a result of mercury, nitrate, and sulfate deposition. The emissions that result from the loss of the first control periods will continue to negatively impact regional haze, high elevation forests, as well as coastal waters and estuaries. In addition, the mercury reduction co-benefits mentioned above would be lost. For these reasons, emergency adoption is necessary for the preservation of the public health, safety and general public welfare and that compliance with the normal regulatory process would be contrary to public interest.

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[1] Air Quality Criteria for Particulate Matter, Volumes I, II and III, EPA/600/P-95/001aF, U.S. Environmental Protection Agency, April 1996.

[2] $PM_{2.5}$ refers to any particulate matter with a mass median diameter of less than 2.5 microns.

[3] The Particulate-Related Health Benefits of Reducing Power Plant Emissions, Abt Associates Inc., October 2000.

[4] New York State Department of Environmental Conservation. 2003. Mercury Emissions Inventory for 2002. Division of Air Resources. Bureau of Air Quality Analysis and Research.

[5] Tsubaki, T., and Irukayama, K. (eds.) Minamata Disease. Kodansha Ltd. Tokyo: Elsevier Scientific Pub. Co., Amsterdam. 1977.

[6] Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units. U.S. Environmental Protection Agency. Federal Register, Vol. 65, No. 245, pp. 79825-79831. December 20, 2000.

[7] Toxicological Effects of Methylmercury, National Research Council, National Academy Press, Washington, DC, Copyright 2000.

[8] The federal Clean Water Act, 33 USC sections 1251-1387, requires state officials to periodically assess and report on the quality of waters in their state. Section 303(d) of the Act, 33 USC section 1313(d), also require state officials to identify impaired waters, where specific designated uses are not fully supported. For these impaired waters, state officials must consider the development of a Total Maximum Daily Load or other strategy to reduce the input of the specific pollutant(s) that restrict water body uses, in order to restore and protect such uses.

[9] New York State Department of Health. Chemicals in Sportfish and Game 2004-2005.

[10] Technical Memorandum. Control of Mercury Emissions from Coal-fired Electric Utility Boilers, James D. Kilgroe, Ravi K. Srivastava, Charles B. Sedman, and Susan A. Throneloe, U.S. Environmental Protection Agency, October 25, 2000.

[11] National Acid Precipitation Assessment Program Biennial Report to Congress: An Integrated Assessment, 1998.

[12] Nitrogen Oxides: Impacts on Public Health and the Environment, U. S. Environmental Protection Agency, August 1997.

[13] A Total Maximum Daily Load Analysis to Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound, New York State Department of Environmental Conservation and Connecticut Department of Environmental Protection, December 2000.

Subject: New York State acid deposition reduction budget trading programs for NO_x and SO_2.

Purpose: To reduce emissions of NO_x and SO_2 from fossil fuel-fired electric generating sources statewide to protect the sensitive ecosystems in the Northeast from the damaging effects of acid deposition.

Substance of emergency rule: Part 237 establishes the Acid Deposition Reduction (ADR) NO_x Budget Trading Program and Part 238 establishes the ADR SO_2 Budget Trading Program. These programs are designed to reduce acid deposition in New York State by limiting emissions of NO_x during the non-ozone season and SO_2 year-round from fossil-fuel fired electricity generating units.

Parts 237 and 238 establish emission budgets for NO_x and SO_2 , respectively. Parts 237 and 238 establish trading programs by creating and allocating allowances that are limited authorizations to emit up to one ton of NO_x or SO_2 in the respective control periods or any control period thereafter. Affected units are required to hold for compliance deduction, at the respective allowance transfer deadlines, the tonnage equivalent to the emissions at the unit for the control period immediately preceding such deadline.

For Part 237, the first control period commences on October 1, 2004 and concludes on April 30, 2005. Subsequent control periods begin on October 1 and conclude on April 30 the next calendar year. Part 237 applies to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sells any amount of electricity. The control period for Part 238 runs from January 1 to December 31 starting in 2005. Part 238 applies to units that are defined as affected units under the SO_2 portion of Title IV of the Clean Air Act, the federal acid rain program.

Part 237 includes limited exemption provisions that allow units otherwise affected by the regulation to be exempt from nearly all of the reporting, permitting and allowance compliance requirements. All units at a single source may apply for a limited exemption of Part 237 if they accept an emission limitation restricting NO_x emissions from the source during a control period to 25 tons or less. A limited exemption is also available to units that restrict the supply of the unit's electrical output to the grid during a control period to less than 10 percent of the gross generation of the unit. Units that shutdown will no longer be considered NO_x or SO_2 budget units and shall no longer be subject to Parts 237 and 238.

Part 237 requires each NO_x budget unit to have a NO_x authorized account representative (AAR) who shall be responsible for, among other things, complying with the NO_x budget permit requirements, the monitoring requirements, the allowance provisions, and the recordkeeping and reporting requirements. Similarly for Part 238, each SO_2 budget unit needs to have an SO_2 AAR designated to perform these duties. The owner and/or operator of the unit may also designate an alternate NO_x or SO_2 AAR to perform the above duties.

The NO_x AAR shall submit a complete NO_x budget permit application to the Department by the later of October 1, 2004 or 12 months before the date on which the NO_x budget unit commences operation. The NO_x AAR shall submit to the Department a compliance certification report for each control period by September 30 immediately following the relevant control period. The SO_2 AAR shall submit a complete SO_2 budget application by the later of October 1, 2004 or 12 months before the date on which the SO_2 budget unit commences operation and a compliance certification report for each control period by March 1 immediately following the relevant control period.

The Statewide ADR NO_x Trading Program Budget is 39,908 tons for each control period. By September 1, 2004, the Department will make the NO_x allowance allocations for the 2004-05, 2005-06, 2006-07 and 2007-08 control periods. By September 1 of each subsequent year, the Department will make the NO_x allowance allocations for the control period that commences in the year three years after the deadline for submission.

The Department will determine the number of NO_x allowances to be allocated to each NO_x budget unit by: (1) multiplying the greatest heat input experienced by the unit for any single control period among the three most recent control periods, for which data is available by 0.15 pounds per million Btu (first round calculation); (2) determining the allocation factor by dividing 92 percent of the Statewide NO_x budget by the sum of all the above first round calculations (second round calculation); (3) multiplying the allocation factor by each unit's first round calculation result (third round calculation); and, (4) allocating the lesser of the unit's control period potential to emit or the third round calculation plus the unit's proportional share of any additional allowances remaining in the 92 percent portion of the Statewide NO_x budget.

The Statewide SO_2 trading program budget is 197,046 tons for the 2005 through 2007 control periods and 131,364 tons for each control period starting in 2008. By October 1, 2004, the Department will make the SO_2 allowance allocations for the 2005, 2006 and 2007 control periods. By January 1 of each year thereafter, the Department will make the SO_2 allocations for the control period in the year that is three years after the year of submission.

The Department will determine the number of SO_2 allowances to be allocated to each SO_2 budget unit in 2005, 2006, and 2007 by: (1) multiplying the greatest heat input experienced by the unit for any single control period among the three preceding control periods by the lesser of either 0.9 pounds per million Btu for coal units or 0.45 pounds per million Btu for non-coal units and the highest actual annual average emission rate from 1998 to 2001 (first round calculation); (2) determining the allocation factor by dividing 94 percent of the Statewide SO_2 budget by the sum of all the above first round calculations (second round calculation); (3) multiplying the allocation factor by each unit's first round calculation result (third round calculation); and, (4) allocating the lesser of the unit's control period

potential to emit or the third round calculation plus the unit's proportional share of any additional allowances remaining in the 94 percent portion of the Statewide SO_2 budget. For the 2008 and beyond control periods, SO_2 allocations will be made in the same manner as above except the first round calculation will be made using 0.6 pounds per million Btu for coal and 0.3 pounds per million Btu for fuels other than coal.

For both Parts 237 and 238, new units will be allocated from set-aside accounts which consist of five percent of the Statewide NO_x budget and three percent of Statewide SO_2 budget. The NO_x AAR and SO_2 AAR of the new unit may submit a written request to the Department to reserve for the new unit allowances in an amount no greater than the unit's control period potential to emit. For Part 237, the request must be made prior to October 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For Part 238, the request must be made prior to January 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For both Parts 237 and 238, the unit must have all of its required permits for the Department to consider these requests.

The Department will set-aside three percent of both the Statewide NO_x and SO_2 budgets for energy efficiency and renewable energy projects. The Department will award allowances to projects that reduce Statewide NO_x and SO_2 emissions through end-use efficiency measures, renewable energy generation, in-plant efficiency measures or that generate electricity more efficiently than the average heat rate in the State. End-use efficiency and renewable energy projects have priority in reserving award of these allowances.

For both the new unit and energy efficiency and renewable energy set-asides, if more than one project requests allowances from the set-aside and the number requested exceeds the number in the set-aside account, the Department will reserve allowances in the order in which approvable requests were submitted. Requests will be considered to be simultaneous if received in the same calendar quarter. Should approvable requests in excess of the set-aside be submitted in the same quarter, the Department will reserve allowances to each project in an amount proportional to the allowances requested. Unused set-aside allowances will flowback to the NO_x and SO_2 budget units in proportion to their original allocation.

The Department may award supplemental allowances to specific NO_x or SO_2 budget units for NO_x or SO_2 reductions achieved at an upwind source. The NO_x budget unit has until December 31 each year to submit its application for the immediately prior control period. The SO_2 budget unit has until July 1 each year to submit its application for the immediately prior control period. The upwind source must be located in a State that the Administrator has approved revisions to that State's implementation plan (SIP) mandated by the EPA NO_x SIP Call. The Department will award one supplemental allowance for every three tons of emission reductions at the upwind unit. The number of supplemental allowances that may be awarded for each control period is limited to a set percentage of either the Statewide NO_x or SO_2 budgets. The percentage starts at 10 percent for the first control period, then decreases to 8 percent for the second control period, 6 percent for the third control period, 5 percent for the fourth control period and 4 percent for each subsequent control period. Supplemental allowances will be awarded in the order in which complete and approvable applications are submitted. Supplemental allowances must be used for compliance within two control periods after award.

The Department will award early reduction allowances to NO_x and SO_2 budget units that achieve reductions beyond a specified emission rate (0.15 pounds NO_x per million Btu, 0.9 pounds SO_2 per million for coal units and 0.45 pounds SO_2 per million Btu for non-coal units), permitted allowable emissions and the actual average emission rate for the 1999-2000 and 2000-01 control periods for NO_x and the 2000 and 2001 control periods for SO_2. NO_x budget units may apply for early reduction allowances for reductions achieved during the 2001-02, 2002-03 and 2003-04 control periods. SO_2 budget units may apply for early reduction allowances for reductions achieved during the 2002, 2003 and 2004 control periods. NO_x budget units must apply for early reductions allowances by September 1, 2004 and SO_2 budget units must apply by May 1, 2005. Early reduction allowances may only be used for the first two control periods for both the NO_x and SO_2 ADR Programs.

The Department will establish one NO_x and one SO_2 compliance account for each NO_x and SO_2 budget unit and one NO_x and one SO_2 overdraft account for each source with two or more NO_x or SO_2 budget units. Allocations will made into compliance accounts and deductions of allowances for compliance purposes will be made from compliance account and overdraft accounts. Allowances may be held without discount until deducted for compliance, except those created as supplemental or early reduction allowances. The NO_x or SO_2 AAR may specify the allowances by serial number to be deducted for compliance purposes in the compliance certification report or utilize the first in, first out protocols in the regulation. In order to meet the unit's budget emissions limitation for the control period immediately preceding, NO_x allowances must be submitted for recordation in a unit's compliance account or the source's overdraft account by midnight of September 30 and SO_2 allowances must be submitted for recordation by midnight of March 1. After making the deductions for compliance, if a unit has excess emissions the Department will deduct from the unit's compliance account or the source's overdraft account, allocated for a subsequent control period, allowances equal to three times the unit's excess emissions.

In the case of electric grid reliability emergency, NO_x or SO_2 budget units may use for compliance purposes allowances allocated for future control periods. The Department must receive by the allowance transfer deadline a certification from the New York State Department of Public Service that the unit is located in an area that experienced one or more electric system reliability emergencies during the control period stating the starting and ending times of each emergency. The Department must receive from the NO_x or the SO_2 AAR a statement of intent to use future control period allowances and a report detailing the number of NO_x or SO_2 tons emitted during each electric grid reliability emergency. The number of future year allowances is limited to the number of tons emitted during certified emergencies. The Department will deduct allowances pursuant to the first in, first out protocols in the regulations.

Parts 237 and 238 both rely on the provisions of Part 75 for emissions monitoring and reporting. Units that are in compliance with Title IV of the Clean Air Act and 6 NYCRR Part 204 provisions for emissions monitoring and reporting should be in compliance with Parts 237 and 238.

Units that are not NO_x budget units may qualify to become a NO_x budget opt-in unit. A unit may become a NO_x budget opt-in unit if it conforms to all of the permitting, monitoring, recordkeeping and reporting requirements of a NO_x budget unit. Opt-in units receive NO_x allowance allocations by May 31 for each control period based on the lesser of its baseline heat input or heat input for the previous control period multiplied by the lesser of its baseline NO_x emission rate or the most stringent applicable NO_x emission limitation. Opt-in units may withdraw from the program.

Part 200 cites the portions of federal statute and regulations that are incorporated by reference into Parts 237 and 238.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. ENV-35-04-00024-P, Issue of September 1, 2004. The emergency rule will expire January 13, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Michael P. Sheehan, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, e-mail: mpsheeha@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to art. 8 of the State Environmental Quality Review Act, a short environmental assessment form, a negative declaration and a coastal assessment form has been prepared and are on file.

Summary of Regulatory Impact Statement

On October 14, 1999, Governor Pataki announced that fossil fuel-fired electric generators in New York would be required to reduce emissions to protect sensitive areas, such as the Adirondacks and the Catskills, from the devastation of acid rain. Specifically, electric generators would have to reduce sulfur dioxide (SO_2) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651 - 7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO_x) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program.

In order to comply with the Governor's announcement, the Department of Environmental Conservation (the Department) is proposing to establish the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Part 237, Acid Deposition Reduction NO_x Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO_2 Budget Trading Program, and to revise 6 NYCRR Part 200, General Provisions.

The promulgation of Parts 237 and 238 and attendant revisions to Part 200 are authorized by the following provisions of State law: Environmental Conservation Law (ECL) §§ 1-0101, 3-0301,19-0103, 19-0105, 19-

0301, 19-0303, 19-0305, 19-0311, Energy Laws §§ 3-101 and 3-103. The legislative objectives underlying the above statutory authority are essentially directed toward protecting the environment and public health while assuring a safe, dependable and economical supply of energy to the people of the State.

The main chemical contaminants in the air pollution that contribute to the formation of acid rain are SO_2 and NO_x. Acid rain usually forms in clouds where SO_2 and NO_x chemically react with water, oxygen and oxidants to form a mild solution of sulfuric and nitric acid. These forms of acid rain are sometimes collectively referred to as wet deposition. Half of acidity in the atmosphere falls to the earth's surface as dry deposition (gases and dry particles). These acidic particles and gases are carried by the prevailing winds and deposited onto cars, buildings, homes, trees and the earth's surface (sometimes hundreds of miles from the source and across state and national borders). The combination of dry and wet deposited acid is called acid deposition.

Acid deposition causes acidification of lakes and streams and has resulted in damage to plant species at high elevations (for example, red spruce trees above 2,000 feet in elevation). Prior to falling to earth as dry or wet deposition, SO_2 and NO_x gases, as well as their particulate forms, sulfates and nitrates, contribute to visibility degradation and impact public health.

One of the areas most affected by acid deposition is New York's Adirondack Park. Many of the Adirondack's lakes have an acid neutralizing capacity of less than zero, which means that they are no longer able to neutralize any acid entering the lake. Some of these lakes have been found to suffer from chronic acidity (constant levels of low pH). Approximately 26% of the lakes surveyed in the Adirondacks have completely lost their ability to neutralize acid entering the lakes and over 70 percent of the sensitive lakes in the Adirondacks are at risk of episodic acidification. However, because of the loss of soil buffering capacity and the lack of a cap on annual national NO_x emissions, pH levels in the most acid lakes have not changed. Scientists have predicted that without further reductions in SO_2 and NO_x the number of acidic waters in sensitive ecosystems will remain high or dramatically worsen.

Studies done by the federal government to date show that even with the emission reductions called for in the Title IV program, sensitive areas in the Adirondacks will continue to degrade. The 1998 National Acidic Deposition Assessment Program (NAPAP) report - 'Biennial Report to Congress: An Integrated Assessment' found that 24 percent of Adirondack lakes are seriously acidic and nearly 50 percent are sensitive to acidic deposition. In October 1995, EPA issued the - 'Acid Deposition Standard Feasibility Study: Report to Congress'. Both the October 1995 EPA report and NAPAP report concluded that, to realize the protection of sensitive ecosystems, additional reductions of SO_2 and NO_x emissions in the range of 40-50 percent or more were needed.

The Hubbard Brook Research Foundation, a leading authority on acid rain and forest ecosystems, has concluded that sensitive areas in the Adirondacks need an 80 percent reduction in SO_2 emissions to have biological recovery within the next fifty years.[1] The Department believes, in order to effectuate recovery in the Adirondacks, these additional reductions are required on the national level. The Department has been, and will continue to, advocate for and participate in the development of federal programs that are needed to achieve these reductions. At this time, however, the Department is implementing reductions that it believes are technically and economically feasible in the near term across the State.

In accordance with the Clean Air Act (CAA) sections 108 and 109, which govern the establishment, review, and revision of National Ambient Air Quality Standards (NAAQS), EPA is to list pollutants that may reasonably be anticipated to endanger public health or welfare and to issue air quality criteria for them. The air quality criteria are to reflect the latest scientific information useful in indicating the kind and extent of all exposure-related effects on both public health and welfare expected from the presence of the pollutant in ambient air. In April 1996, EPA released the Air Quality Criteria for Particulate Matter (PM)[2], which in turn resulted in the revision to the NAAQS and establishment of thresholds for $PM_{2.5}$.[3] During June 2004, EPA identified individual counties in New York State that EPA intends to designate as nonattainment for the $PM_{2.5}$ NAAQS. More than 12.4 million New Yorkers, 65% of the entire State population, reside within the counties that EPA proposes to designate as nonattainment with the health based $PM_{2.5}$ NAAQS.

PM is derived either from combustion material that has volatilized and then condenses to form primary PM or precursor gases reacting in the atmosphere to form secondary PM. SO_2 and NO_x react in the atmosphere to create sulfates and nitrates, a secondary form of PM. Fossil fuel-fired electric generators, affected sources under the ADRP, are significant emitters of SO_2 and NO_x. Implementation of the ADRP will have immediate positive impacts on public health due to the reduction in the formation of the secondary PM including, most importantly, $PM_{2.5}$. In an analysis of epidemiology studies completed to date, evidence exists that shows a statistically significant association between outdoor concentrations of sulfate aerosols, $PM_{2.5}$, or both and the following human health effects: premature mortality, chronic respiratory disease, hospital emissions, aggravation of asthma symptoms, restricted activity days, and acute respiratory symptoms.[4]

Deposition of NO_x to surface waters contributes directly to the widespread accelerated eutrophication of coastal waters and estuaries. This is true for Long Island Sound which experiences hypoxia (low dissolved oxygen levels) in bottom waters during late summer (July - September). Atmospheric deposition represents over 16 percent of the in-basin nitrogen loading and nearly 11 percent of the total nitrogen loading to Long Island Sound.[5]

Mercury emissions from coal fired electricity generators in New York represent about 33 percent of the mercury emissions from stationary sources in the State.[6] In aquatic ecosystems, inorganic mercury is transformed into an extremely toxic organic form of mercury, methylmercury. Methylmercury bioaccumulates in the food chain as humans and other mammals consume mercury-contaminated organisms, particularly fish. Methylmercury in fish poses a real risk for fish-eating mammals and birds such as otters, mink, bald eagles, kingfishers, ospreys and the common loon. Because of the bioacculumation of methylmercury in freshwater fish, thousands of water bodies nationwide, including all of the Great Lakes and their connecting waters, have fish consumption advisories. Since 2002, the Department has added to the "Section 303(d) list" 23 water body segments as impaired by mercury from atmospheric deposition.[7] In addition, and subsequent to the amendments to the Section 303(d) list, the New York State Department of Health issued new health advisories concerning the consumption of fish from 13 Adirondack lakes and ponds, 3 New York City reservoirs located in the Catskills and one Otsego County lake based on elevated levels of mercury found in fish in those water bodies. These additional health advisories brings to 51 the total number of water bodies that are subject of fish consumption advisories for mercury.[8.]

The Department sought input from NYSERDA and the New York Department of Public Service (DPS) with respect to the costs associated with compliance of the ADRP and any impacts to the reliability of New York's energy supply. DPS mailed questionnaires to eight electricity generators that the agencies believed would be most directly impacted by the ADRP. DPS tabulated the information submitted and provided it to NYSERDA which analyzed the information pursuant to the mathematical model - MAPS. The total capital expenditures, as recorded in the facilities' responses, indicated that facilities in New York will require capital investments of approximately $430 million to comply with the regulations. It is expected that plant owners who install emissions controls would increase their bid prices to recoup the added capital cost of controls.

The MAPS model for the 2008 compliance case (full implementation of the program) predicts that wholesale electricity prices will increase from 1 percent in the Capital District to 9 percent in the Rochester area and 16 percent on Long Island. The Statewide average increase in wholesale electricity prices is 5.4 percent. The percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage in wholesale prices.

The Department anticipates a small impact on the State's rail freight industry due to a possible decrease in coal shipments to the State because of the modeled reduction in coal-fired generation.

The MAPS model predicts an estimated increase of $370 million for the wholesale price of electricity as a result of the ADRP. It must be noted that the $370 million increase is a worst case estimate and is based on the compliance assumptions of the individual companies without regard to the allowance trading program that will implement the reductions in NO_x and SO_2 emissions of the ADRP and the fact that the MAPS model predicted significant over-compliance with the emissions reduction goals of the program.

The Department recognizes that the above referenced MAPS modeling was done when more new generation was predicted to come on-line than is currently anticipated. As a result, the Department, with assistance from NYSERDA, has analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan. Based on the projected SO_2 emissions reductions of 184,000 tons in 2008 in the ADRP compliance case compared to the ADRP base case, it could be inferred that SO_2 compliance under the "No Additional Construction" scenario might result in a 17

percent increase in the number of tons of SO_2 reduction needed (32,000/184,000). With respect to NO_x emissions, in the "No Additional Construction" scenario, annual NO_x emissions in 2008 are projected to be 72,200 tons, exceeding the proposed ADRP NO_x cap of 70,000 tons by 2,200 tons, or about 3 percent. This result suggests that the impacts on NO_x compliance costs, while not negligible, are not expected to be substantial.

While the delay of new capacity additions may increase compliance costs, it would also be likely to result in additional running time for existing units. It is important to recognize that while the "No Additional Construction" scenario is useful for analytical purposes, system reliability requirements would not be achieved under these circumstances, so this should not be considered to be a viable operational scenario. Since the completion of the MAPS modeling in October 2001, new generation has been built and is now operational, new generation has been permitted and is now under construction, new generation has been permitted that is not yet under construction, and permit applications are currently under review. Although the Department has analyzed a "No Additional Construction" scenario to address concerns that the new construction figure used in the MAPS modeling was unrealistic, it is evident from the permitting, construction and operational figures above, that the prediction of new generation by DPS and NYSERDA was reasonable.

There will be costs associated with the administration of the ADRP. The Department estimates that between 3 to 4 person years will be required to implement these programs at cost of $100,000 per person year or $400,000 annually. The Department will also need to reimburse its agent for its costs in administering the emission and allowance tracking and reporting system. Based on contractor estimates, the capital start up costs for designing and implementing a system for tracking allowance transactions is approximately $400,000. The Department's contractor estimates the annual operating costs for administering an emission and allowance tracking and reporting system to be between $150,000 and $180,000.

The owners and operators of each source subject to the ADRP and each unit at the source shall keep each of the following documents for a period of five years from the date the document is created: (i) the account certificate of representation form; (ii) all emissions monitoring information, unless a three year period is specified; (iii) copies of all reports, compliance certifications, and other submissions and all records made or required under the ADRP; and (iv) copies of all documents used to complete a permit application and any other submission under the ADRP or to demonstrate compliance with the ADRP.

For each control period in which one or more units at a source are subject to the ADRP emission limitation, the ADRP authorized account representative of the source shall submit to the Department, a compliance certification report for each source covering all such units. This must be submitted by the September 30 following the relevant control for the units subject to Part 237 and by the March 1 following the relevant control period for the units subject to Part 238.

The Department examined two alternatives, these were emission rate based programs and a sulfur-in-fuel limitation. The Department has concluded that these alternatives are less cost-effective than the proposed ADRP and implementation of them would be more difficult for sources. The Department determined such reductions, therefore, would be no more protective of the public health and the environment.

The Department also considered a number of variations of the emissions cap-and-trade construct that could result in programs that share many or most of the features of the ADRP as proposed. These alternatives included: (1) programs that contain features that cause sources to be treated differently depending on their proximity to sensitive receptor areas in the State; (2) a regional trading program; (3) a fuel neutral allowance allocation approach for Part 238 that does not limit total allocation to maximum permitted levels; (4) an electrical output-based allocation methodology; (5) an allowance auction; (6) a larger cap on the creation of supplemental allowances; (7) no discounting of emission reductions from upwind areas when creating supplemental allowances; (8) no commensurate surrender of federal SO_2 allowances; (9); allowing the use of federal SO_2 allowances for compliance; (10) allowing use of NO_x allowances allocated under Part 204 for compliance with the requirements of Part 237 and; (11) applicability of smaller sources.

In carrying out its statutory obligation to assess all relevant technical and scientific factors in developing an appropriate control program that is most cost-effective, the Department determined that emissions cap-and-trade programs that are characterized by unencumbered trading of allowances are the most appropriate programs for the control SO_2 and NO_x emissions from the subject sources.

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[1] 'Acid Rain Revisited: Advances in Scientific Understanding Since the Passage of the 1970 and 1990 Clean Air Act Amendments'. Hubbard Brook Research Foundation. Science Links Publication. Vol. 1 No. 1. 2001.

[2] 'Air Quality Criteria for Particulate Matter, Volumes I, II and III', EPA/600/P-95/001aF, U.S. Environmental Protection Agency, April 1996.

[3] $PM_{2.5}$ refers to any particulate matter with a mass median diameter of less than 2.5 microns.

[4] 'Human Health Benefits From Sulfate Reductions Under Title IV of the Clean Air Act Amendments', U.S. Environmental Protection Agency, Office of Air and Radiation, November 1995. See also: 'Power Plant Emission: Particulate Matter-Related Health Damages and the Benefits of Alternative Emission Reduction Scenarios', Abt Associates Inc., June 2004; 'Estimating the Mortality Impacts of Particulate Matter: What Can be Learned From Between-Study Variability?', Levy, *et al.* 2000, Environmental Health Perspectives 108(2): 109-117; 'Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution', Journal of the American Medical Association, C. Arden Pope III, Vol. 287 No. 9, March 6, 2002.

[5] 'A Total Maximum Daily Load Analysis to Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound', New York State Department of Environmental Conservation and Connecticut Department of Environmental Protection, December 2000.

[6] New York State Department of Environmental Conservation. 2003. Mercury Emissions Inventory for 2002. Division of Air Resources. Bureau of Air Quality Analysis and Research.

[7] The federal Clean Water Act, 33 USC sections 1251-1387, requires state officials to periodically assess and report on the quality of waters in their state. Section 303(d) of the Act, 33 USC section 1313(d), also requires state officials to identify impaired waters, where specific designated uses are not fully supported. For these impaired waters, state officials must consider the development of a Total Maximum Daily Load or other strategy to reduce the input of the specific pollutant(s) that restrict water body uses, in order to restore and protect such uses.

[8] New York State Department of Health. 'Chemicals in Sportfish and Game' 2004-2005.

Regulatory Flexibility Analysis

The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO_x Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO_2 Budget Trading Program and to revise 6 NYCRR Part 200, General Provisions.

In order to protect the natural resources of New York, including the Adirondacks and Catskills from the damaging effects of acid rain, the Department proposes the ADRP in order to reduce emissions from fossil fuel fired electric generators. Specifically, electric generators would have to reduce sulfur dioxide (SO_2) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. § 7651-7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO_x) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. Part 200 is being revised to incorporate by reference the relevant federal Clean Air Act sections and the federal monitoring regulations applicable to the programs (40 CFR Part 75).

1. Effects on Small Businesses and Local Governments. No small businesses will be directly affected by the adoption of new Parts 237 and 238 and the amendments to Part 200.

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

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

Part 238 will require affected sources and units to comply with the emission limitation of the program beginning with the 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each SO_2 subject unit shall submit to the Department a complete SO_2 Budget permit application, by October, 2004 or 12 months before the date the unit commences operation.

Each year, the owners and operators of each source subject to Part 238 and each unit at the source shall hold a number of SO_2 allowances available for compliance deductions, as of the SO_2 allowance transfer deadline (Midnight of March 1 or, if March 1 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of SO_2 emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2005 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 238, the authorized account representative of the source must submit to the Department by the March 1 following the relevant control period, a compliance certification report for each source covering all such units.

Part 237 will require affected sources and units to comply with the emission limitation of the program beginning with the 2004 - 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each NO_x trading program unit shall submit to the Department a complete NO_x Budget permit application by October 1, 2004 or 12 months before the unit commences operation.

The owners and operators and, to the extent applicable, the authorized account representative of each source subject to Part 237 and each unit at the source shall comply with the monitoring and reporting requirements of the regulation.

Each year, the owners and operators of each source and unit at the source shall hold a number of NO_x allowances available for compliance deductions, as of the NO_x allowance transfer deadline (midnight of September 30, or if September 30 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of NO_x emissions for the control period. A unit is subject to this requirement starting on the later of October 1, 2004 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 237, the authorized account representative of the source must submit to the Department by the June 30 following the relevant control period, a compliance certification report for each source covering all such units.

3. Professional Services. The one local government affected by the ADRP, the JBPU, may need to hire outside professional consultants to comply with new Parts 237 and 238 and the amendments to Part 200. This work would likely be associated with any analyses needed to determine the optimal manner in which to comply with the regulations. If it is determined that capital investments are needed to comply, design and construction management services will likely need to be procured.

4. Compliance Costs. The JBPU will need to either limit emissions at the SACGS to no more than its allowance allocations under Parts 237 and 238 or purchase allowances equal to the number of tons emitted in excess of the number of allowances initially allocated to it. Given the highly variable nature of control equipment cost, the Department limited the analysis of control costs to the purchase of allowances to comply with the program and assumed that costs of allowances will be $500 per ton for SO_2 and $2000 per ton for NO_x. The Department estimated allocations for SACGS and subtracted those allocations from 2000 facility emissions. The estimated cost for purchasing allowances was determined to be approximately $1.5 million annually. However, these costs are based on the facility as it existed in 2000 and not on the facility as it exists today.

In 2001, a new natural gas-fired turbine was added to SACGS. This new unit emits significantly less SO_2 and NO_x than the older coal units and its utilization offers JBPU a significant amount of flexibility to comply with this regulation. The operation of the new unit could allow the facility to meet its SO_2 and NO_x obligations either without or with significantly fewer controls at any of the coal units. To operate within the estimated 2005 and 2008 allocations the new natural gas-fired turbine would need to operate at 40 and 50 percent capacity, respectively. By operating this unit at these levels, SACGS will be below its estimated NO_x allocations. There are additional costs associated with the operation of the natural gas-fired turbine. The JBPU will experience additional fuel costs as a result of the price difference between natural gas and coal. It is expected that these costs will be somewhat lower than the costs of purchasing allowances and even permit the JBPU to sell excess allowances. The JBPU has a range of compliance options open to it and can use the operational flexibility it has at the SACGS and the flexibility inherent under a cap and trade program to comply with the regulations.

Increased operation of the natural gas-fired turbine would also provide a short term option to SACGS as a means for lowering SO_2 emissions at the facility. While this might provide a short term alternative to controlling SO_2 emissions from the coal units, any benefits gained would eventually diminish because the allocation methodology in Part 238 (*i.e.*, oil and gas are allocated at 0.3 lbs/mmbtu compared to coal at 0.6 lbs/mmbtu in 2008). The shift in heat input from coal to gas will eventually lead to reduced allocations. Depending on the difference between allocations and actual emissions from the facility once this allocation change occurs, JBPU might have to purchase allowances or control emissions to comply.

JBPU also has the ability to change the physical characteristics of it older coal boilers pursuant to section 237-1.5, "Shutdown or change in physical characteristics of a NO_x budget unit," and no longer be subject to the requirements of Part 237. This would eliminate the need for the new unit to offset NO_x emissions from the coal units and allow JBPU to sell all its excess NO_x allowances on the market. JBPU has worked with the Department's permitting staff and has completed changes to its coal units and the generators associated with them to reduce the nameplate capacity of the units below the 25 MW applicability threshold in Part 237.

5. Minimizing Adverse Impact. The promulgation of new Parts 237 and 238 and the amendments to Part 200 do not directly affect small businesses. One local government is affected by the ADRP - the JBPU. The ADRP constitutes an emissions allowance based cap and trade program. Cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the ADRP in such a manner, the Department has attempted to minimize the adverse economic impacts of the program on the JBPU.

The Department considered establishing differing compliance or reporting requirements or timetables that take into account the resources available to small businesses and local governments. The Department determined that the provisions included in the regulations provide sufficient flexibility for compliance to the JBPU, as well as the other sources affected by the program. The Department chose not to use different allocation methodologies for the JBPU. The Department also considered the specifics in the situation of the JBPU in determining not to use separate allocation methodologies. The allocation formulae in Part 238 provide allowances to coal units at twice the rate applicable to non-coal units. This allocation procedure (albeit not designed to minimize impacts to JBPU specifically) mitigates the impacts the program will have on the SACGS.

The Department also considered exempting the SACGS from the rule, but did not because of the amount of emissions generated at the facility and the contribution of these emissions to acid deposition in New York State. In 2001, SACGS emitted 3,223 tons of SO_2. This was the 12th highest total of SO_2 emissions out of the approximately 38 facilities in New York State that will be SO_2 budget sources under Part 238. SACGS emitted SO_2 at a rate of 2.65 pounds per million Btu. This is the 5th highest SO_2 emission rate and nearly 3.5 times the average of the approximately 38 affected New York State facilities (0.76 pounds/mmBtu). NO_x emissions at SACGS were 507 tons in 2001. This was the 23rd highest total of NO_x emissions out of approximately 69 facilities in New York State that will be NO_x Budget sources under Part 237. SACGS emitted NO_x at a rate of 0.42 pounds per million Btu. This is the 4th highest NO_x emission rate and nearly twice the average of the approximately 69 affected New York State facilities (0.23 pounds/mmBtu).

In considering whether to exempt J BPU from these regulations, the Department evaluated the impact this exemption would have on the other sources included in the program. Reducing SO_2 emissions at SACGS to the level of allocation ("expected SO_2 reductions" = actual emissions - 0.9 pounds per million Btu $\times$ greatest heat input in the past 3 years) represents a reduction of about 2,200 tons or about 1.75 percent of the total SO_2 reductions expected from the program. The 2,200 tons of "expected SO_2 reductions" represent about 4 percent of the emissions and 13.5 percent of the "expected SO_2 reductions" from the largest SO_2 source in the State. Therefore, exempting SACGS from the ADRP would result in a significant burden to the other affected sources in the State by forcing them to make up this amount of SO_2 emission reductions.

The Department also considered the impact on the most sensitive areas in the State. While the combined contribution of all sources in New York State represents about 20 percent of the total sulfate deposition in New York State,[1] emission reductions from within New York State are crucial to meeting either the 40 to 50 percent reduction in sulfur and nitrogen

deposition needed to return the condition in the Adirondack lakes to the levels observed in the mid-1980's[2] or the 80 percent reduction needed for significant improvements in chemical conditions to change watersheds similar to the Hubbard Brook Experimental Forest from acidic to non-acidic in 20 to 25 years in order to support biological recovery in 50 years.[3] In other words, the Department deems the emission reductions from the SACGS important to the ability to adequately address the acid deposition problem in New York State.

Under 6 NYCRR Part 204, NO_x Budget Trading Program, the SACGS was given a specific allocation for each year as opposed to being included in the formulaic allocation procedures. This is different than how SACGS will be allocated under the ADRP. To determine the allocation procedures for Part 204, the Department convened a series of allocation workshops which resulted in an agreed upon allowance allocation procedure with all of the affected parties. This agreed upon procedure treated SACGS differently than the remainder of the sources through the allocation of a specific number of allowances prior to the remaining sources being allocated through the formulae. The Department felt it was proper to allocate SACGS differently because the allocation was based on a broad consensus among the affected parties. In this rule making, the Department did not convene such an allocation process because the intervening deregulation of the electricity generating industry put sources into a more competitive position and the prospect for an agreed upon allocation procedure was deemed to be remote. Instead, the Department devised an allocation procedure that it deemed fair and equitable to all affected sources. This procedure did not include a separate allocation mechanism for any one particular source. In other words, all affected electric generators were treated the same.

Due to the widely different emission profiles between coal burning and non-coal burning units, the Department did not adopt a fuel neutral allowance allocation procedure under Part 238. Adoption of a fuel neutral methodology would have resulted in a pronounced bias against coal burning units. Coal burning units remain vital to the reliability of the State's electric grid and enhance fuel diversity. Having a fuel diverse electric generating system provides the State with a more competitive electricity generation market that is less susceptible to variations in the price of a particular fuel. Although SACGS has a natural gas fired unit that offers it flexibility in complying with the regulation, it also has several coal burning units that are allocated under the coal specific allowance allocation formulae in the SO_2 portion of the ADRP.

6. Small Business and Local Government Participation. The JBPU actively participated in the public forums established by the Department to discuss the ADRP with interested parties and provided input in the development of the allocation methodologies contained in new Parts 237 and 238 and the amendments to Part 200.

7. Economic and Technological Feasibility. The JBPU has the option to do any combination of the following to comply with the ADRP: Control NO_x and SO_2 emissions from the facility, increase operation of the low emitting new natural gas-fired turbine, or purchase allowances. There are NO_x and SO_2 control technology options available to the SACGS. It has never been demonstrated that any or all of these options are technologically or economically infeasible to apply to SACGS.

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[1] 'The Sulfur Deposition Control Program', New York State Department of Environmental Conservation, June 1985.

[2] 'Acid Deposition Feasibility Study: Report to Congress', U.S. EPA, EPA 430-R-95-001a, October 1995.

[3] 'Acid Rain Revisited: advances in scientific understanding since the passage of the 1970 and 1990 Clean Air Act Amendments'. Hubbard Brook Research Foundation. Science Links Publication. Vol. 1 No. 1. 2001.

Summary of Rural Area Flexibility Analysis

The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO_x Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO_2 Budget Trading Program and to revise 6 NYCRR Part 200, General Provisions.

In order to protect the natural resources of New York, including the Adirondacks and Catskills from the damaging effects of acid rain, the Department proposes the ADRP in order to reduce emissions from fossil fuel fired electric generators. Specifically, electric generators would have to reduce sulfur dioxide (SO_2) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651-7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO_x) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. Part 200 is being revised to incorporate by reference the relevant CAA sections and the federal monitoring regulations applicable to the Program (40 CFR Part 75).

TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED

The promulgation of a new Parts 237 and 238 and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations regardless of location, including those in rural areas, will be affected.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

The promulgation of a new Parts 237 and 238 and the amendments to Part 200, apply to affected sources statewide. All public and private businesses subject to the regulations, that are located in rural areas, will be subject to the reporting, recordkeeping and compliance requirements detailed below.

Part 237 will require affected sources and units to comply with the emission limitation of the program beginning with the 2004 - 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each NO_x trading program unit shall submit to the Department a complete NO_x Budget permit application by October 1, 2004 or 12 months before the unit commences operation.

The owners and operators and, to the extent applicable, the authorized account representative of each source subject to Part 237 and each unit at the source shall comply with the monitoring and reporting requirements of the regulation.

Each year, the owners and operators of each source and unit at the source shall hold a number of NO_x allowances available for compliance deductions, as of the NO_x allowance transfer deadline (midnight of September 30, or if September 30 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of NO_x emissions for the control period. A unit is subject to this requirement starting on the later of October 1, 2004 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 237, the authorized account representative of the source must submit to the Department by the June 30 following the relevant control period, a compliance certification report for each source covering all such units.

Part 238 will require affected sources and units to comply with the emission limitation of the program beginning with the 2005 control period. In order to meet the necessary permit requirements, the authorized account representative of each SO_2 subject unit shall submit to the Department a complete SO_2 Budget permit application, by October 1, 2004 or 12 months before the date the unit commences operation.

Each year, the owners and operators of each source subject to Part 238 and each unit at the source shall hold a number of SO_2 allowances available for compliance deductions, as of the SO_2 allowance transfer deadline (Midnight of March 1 or, if March 1 is not a business day, midnight of the first business day thereafter), in the unit's compliance account and the source's overall overdraft account that is not less than the total tons of SO_2 emissions for the control period. A unit is subject to this requirement starting on the later of January 1, 2005 or date the unit commences operation.

For each control period in which one or more units at a source are subject to Part 238, the authorized account representative of the source must submit to the Department by the March 1 following the relevant control period, a compliance certification report for each source covering all such units.

COSTS

In the past, with a regulated electric utility industry, the capital cost of the emission control equipment required by the new regulation would have been added to the utility's rate base and recovered through increased electricity rates. In a competitive electricity market as exists now in New York State, there is no guaranteed recoupment of such expenditures.

The Department sought input from NYSERDA and the New York Department of Public Service (DPS) with respect to the costs associated with compliance of the ADRP and any impacts to the reliability of New York's energy supply. DPS mailed questionnaires to eight electricity generators that the agencies believed would be most directly impacted by the

ADRP. DPS tabulated the information submitted and provided it to NYSERDA which analyzed the information pursuant to the mathematical model - MAPS. The total capital expenditures, as recorded in the facilities' responses, indicated that facilities in New York will require capital investments of approximately $430 million to comply with the regulations. In a competitive electricity market as exists now in New York State, there is no guaranteed recoupment of such expenditures. The MAPS model considers only fuel and variable operation and maintenance costs in determining bid prices, which in turn determines the order of system dispatch. Fixed capital costs are not considered in the model. It is expected that plant owners who install emissions controls would increase their bid prices to recoup the added capital cost of controls.

The MAPS model for the 2008 compliance case (full implementation of the program) predicts that wholesale electricity prices will increase from 1 percent in the Capital District to 9 percent in the Rochester area and 16 percent on Long Island. The Statewide average increase in wholesale electricity prices is 5.4 percent. It is important to recognize that wholesale electricity prices comprise only a portion of the retail electricity prices, and that there is not an instantaneous and direct relationship between the wholesale and retail price. As a result, the percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage in wholesale prices.

The Department anticipates a small impact on the State's rail freight industry due to a possible decrease in coal shipments to the State because of the modeled reduction in coal-fired generation. New York's rail system provides a valuable service to businesses throughout the state. The Department does not anticipate significant losses in coal transportation services in New York as a result of this proposal. The modeled percentage reduction in coal generation is within the range of annual fluctuations caused by other factors and is not anticipated to have a major impact on the freight system. The use of unit trains further protects the system from these fluctuations because other products are not coupled with coal.

The MAPS model predicts an estimated increase of $370 million for the wholesale price of electricity as a result of the ADRP. It must be noted that the $370 million increase is a worst case estimate and is based on the compliance assumptions of the individual companies without regard to the allowance trading program that will implement the reductions in NO_x and SO_2 emissions of the ADRP and the fact that the MAPS model predicted significant over-compliance with the emissions reduction goals of the program.

The Department recognizes that the above referenced MAPS modeling was done when more new generation was predicted to come on-line than is currently anticipated. As a result, the Department, with assistance from NYSERDA, has analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan (SEP). Based on the projected SO_2 emissions reductions of 184,000 tons in 2008 in the ADRP compliance case compared to the ADRP base case, it could be inferred that SO_2 compliance under the "No Additional Construction" scenario might result in a 17 percent increase in the number of tons of SO_2 reduction needed (32,000/184,000). With respect to NO_x emissions, in the "No Additional Construction" scenario, annual NO_x emissions in 2008 are projected to be 72,200 tons, exceeding the proposed ADRP NO_x cap of 70,000 tons by 2,200 tons, or about 3 percent. This result suggests that the impacts on NO_x compliance costs, while not negligible, are not expected to be substantial.

While the delay of new capacity additions may increase compliance costs, it would also be likely to result in additional running time for existing units. It is important to recognize that while the "No Additional Construction" scenario is useful for analytical purposes, system reliability requirements would not be achieved under these circumstances, so this should not be considered to be a viable operational scenario. Since the completion of the MAPS modeling in October 2001, 2,030.2 MW of new generation have been built and are now operational in the State. An additional 2,439.9 MW of new generation have been permitted and are under construction, 4,881.6 MW of new generation have been permitted but are not yet under construction, and permit applications for another 2744.6 MW are currently under review. Although the Department has analyzed a "No Additional Construction" scenario to address concerns that the new construction figure used in the MAPS modeling was unrealistic, it is evident from the permitting, construction and operational figures above, that the prediction of new generation by DPS and NYSERDA was reasonable.

MINIMIZING ADVERSE IMPACT

The promulgation of a new Parts 237 and 238 and the amendments to Part 200, apply to affected sources statewide, including those located in rural areas. Since the regulations apply equally to affected facilities statewide, rural areas are not impacted any differently than other areas in the State. In actuality, since one of the goals of the program is to reduce the impacts of acid rain on the Adirondacks, some of the most rural areas in the State will receive an environmental benefit from the further reduction in acid rain precursors associated with these regulations. The Department is implementing the ADRP through a cap and trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources, therefore the Department has attempted to minimize the adverse economic impacts of the program to all sources on a statewide basis.

RURAL AREA PARTICIPATION

Since the announcement of the ADRP in October of 1999, Department staff held numerous stakeholder meetings with affected parties and various representative coalitions and consultants to the electric industry. Copies of the draft regulations were forwarded to all affected parties prior to initiating the promulgation of the regulations and interested parties afforded informal opportunities for public comment.

Job Impact Statement

1. Nature of Impact: The Department of Environmental Conservation (Department) proposes to adopt the Acid Deposition Reduction Program (ADRP) by promulgating 6 NYCRR Parts 237, Acid Deposition Reduction NO_x Budget Trading Program, and 6 NYCRR Part 238, Acid Deposition Reduction SO_2 Budget Trading Program and to revise 6 NYCRR Part 200, General Provisions.

In order to protect the natural resources of New York, including the Adirondacks and Catskills from the damaging effects of acid rain, the Department proposes the ADRP in order to reduce emissions from fossil fuel fired electric generators. Specifically, electric generators would have to reduce sulfur dioxide (SO_2) emissions to 50 percent below the levels allowed by Phase 2 of the federal acid rain program (the Title IV Program). The Title IV program is established under §§ 401-416 of the federal Clean Air Act (CAA), 42 U.S.C. §§ 7651-7651o. These reductions will be phased in between 2005 and 2008. In addition, the summertime reductions in nitrogen oxides (NO_x) emissions starting in the 2003 ozone season would apply year round beginning on October 1, 2004. Such reductions will be achieved through an allowance based cap and trade program. Part 200 is being revised to incorporate by reference the relevant federal Clean Air Act sections and the federal monitoring regulations applicable to the programs (40 CFR Part 75).

The ADRP will have both adverse and beneficial impacts on job and employment opportunities. Electricity generators will incur costs related to the emissions controls needed to comply with the regulations and, based on the modeling used by the Department, this will translate into increased electricity prices. Based on the modeling used by the Department, the ADRP may have a corresponding negative impact on employment. There are also positive impacts related to the implementation of the ADRP, including jobs created through the construction of control devices and appurtenances needed to comply with the regulations and the additional electricity generation needed to meet increased demand. It is also expected that the travel and tourism industry will benefit from reductions in acid deposition and commensurate improvements in visibility.

2. Categories and Numbers Affected: The Department sought input from NYSERDA and the New York Department of Public Service (DPS) with respect to the costs associated with compliance of the ADRP and any impacts to the reliability of New York's energy supply. DPS mailed questionnaires to eight electricity generators that the agencies believed would be most directly impacted by the ADRP. DPS tabulated the information submitted and provided it to NYSERDA which analyzed the information pursuant to the mathematical model - MAPS. The total capital expenditures, as recorded in the facilities' responses, indicated that facilities in New York will require capital investments of approximately $430 million to comply with the regulations. In a competitive electricity market as exists now in New York State, there is no guaranteed recoupment of such expenditures. The MAPS model considers only fuel and variable operation and maintenance costs in determining bid prices, which in turn determines the order of system dispatch. Fixed capital costs are not considered in the model. It is expected that plant owners who install emissions controls would increase their bid prices to recoup the added capital cost of controls.

The MAPS model for the 2008 compliance case (full implementation of the program) predicts that wholesale electricity prices will increase from 1 percent in the Capital District to 9 percent in the Rochester area and 16 percent on Long Island. The Statewide average increase in wholesale electricity prices is 5.4 percent. It is important to recognize that wholesale electricity prices comprise only a portion of the retail electricity prices, and

that there is not an instantaneous and direct relationship between the wholesale and retail price. As a result, the percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage in wholesale prices.

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The Department recognizes that the above referenced MAPS modeling was done when more new generation was predicted to come on-line than is currently anticipated. As a result, the Department, with assistance from NYSERDA, has analyzed the MAPS modeling that was developed in the context of the 2002 State Energy Plan (SEP). Based on the projected SO_2 emissions reductions of 184,000 tons in 2008 in the ADRP compliance case compared to the ADRP base case, it could be inferred that SO_2 compliance under the "No Additional Construction" scenario might result in a 17 percent increase in the number of tons of SO_2 reduction needed (32,000/184,000). With respect to NO_x emissions, in the "No Additional Construction" scenario, annual NO_x emissions in 2008 are projected to be 72,200 tons, exceeding the proposed ADRP NO_x cap of 70,000 tons by 2,200 tons, or about 3 percent. This result suggests that the impacts on NO_x compliance costs, while not negligible, are not expected to be substantial.

While the delay of new capacity additions may increase compliance costs, it would also be likely to result in additional running time for existing units. It is important to recognize that while the "No Additional Construction" scenario is useful for analytical purposes, system reliability requirements would not be achieved under these circumstances, so this should not be considered to be a viable operational scenario. Since the completion of the MAPS modeling in October 2001, 2,030.2 MW of new generation have been built and are now operational in the State. An additional 2,439.9 MW of new generation have been permitted and are under construction, 4,881.6 MW of new generation have been permitted but are not yet under construction, and permit applications for another 2744.6 MW are currently under review. Although the Department has analyzed a "No Additional Construction" scenario to address concerns that the new construction figure used in the MAPS modeling was unrealistic, it is evident from the permitting, construction and operational figures above, that the prediction of new generation by DPS and NYSERDA was reasonable.

Regulatory flexibility provisions built into the ADRP could not be analyzed as this is beyond the scope of the MAPS model. Specifically, these provisions are allowance banking, early reduction allowances and out-of-state source reductions. Each of these allows sources additional flexibility which lead to lower compliance costs. The allowance banking provisions permit sources to retain unused allowances for compliance obligations that will arise in the future. This flexibility permits sources to deal with the natural variations in generation between control periods and, in the case of a phased program (Part 238), allows full credit for reductions in the first phase to carry over to the second more stringent phase. Early reduction allowances are created when a source reduces emissions prior to the start of the programs. The Department has included provisions to allow for the creation of early reduction allowances at a 50 percent discount for those reductions that are greater that the target collective emission rate of the program but are below an historic baseline or rate. Full credit will be given for all reductions below the collective target emission rate of the program before the first year of implementation. This gives a generator with a source that is inexpensive to control the ability to create additional allowances which either may be expended for compliance purposes in the future or may be sold in the allowance market. The program also provides that demonstrated emissions reductions from sources located in 10 upwind States can be used as the basis for awarding up to 10 percent of the annual NO_x and SO_2 budgets in the first year of the programs (declining to 8 percent in the second year, 6 percent in the third, 5 percent in the fourth and to 4 percent in the fifth year and beyond). The upwind reductions provisions act as a mechanism which allows any generator subject to the program to pursue less expensive emission reductions in upwind states to create additional allowances which will result in some decrease in allowance prices generally. The Department is not able to quantify the relative impact of the above flexibility provisions except to say that they are expected to reduce the overall cost of compliance with the regulation.

The ADRP will have some positive impact on employment. Generator companies will need to purchase control equipment and construct the facilities to house this equipment. The total capital expenditures as provided by the generators indicated capital investments of approximately $430 million were necessary to comply with the regulations. While the above discussion clearly demonstrates that the Department believes that these costs are over-estimated, for discussion purposes these costs are cited to assess the relative impact on employment. Total capital expenditures include the costs for emissions control equipment, construction materials, labor and design. Each of these activities should have positive impacts on employment in New York. However, because of the lack of detailed information provided to the Department regarding these costs it is impossible to estimate the actual number of jobs that will be created by this capital expenditure. Still, based on United States Department of Commerce Bureau of Economic Analysis statistics for New York State in 1999, the Department calculated 11.7 jobs (14.3 construction jobs) are created for every $1 million spent (Total non-farm jobs/Total non-farm gross state product). If half of the capital investments made to comply with the regulations could be applied to the New York Gross State Product, then these expenditures would be expected to result in an estimated 2,515 jobs.

The MAPS modeling predicts increased generation from firing natural gas. This increase will likely necessitate increased operation of existing natural gas transmission capacity and the construction of new natural gas transmission capacity. While the quantification of the additional capacity is beyond the scope of the analysis performed for this effort, the additional natural gas transmission can be expected to increase employment opportunities in both the construction and operation facets.

The ADRP will also have a positive impact on the travel and tourism industry. Mitigation of the devastating effects of acid rain will aid in keeping New York State as a preferred vacation destination. In addition to reducing acid deposition, these regulations will also assist in the reduction of primary and secondary formation of fine particulate matter that plays a prominent role in regional haze. Because of regional haze, rural and urban vistas of New York are often obscured which reduces the desirability of travel in and around the State. While it is not possible to quantify the economic or the employment impact of these regulations, it is clear that their implementation will make New York State an even more attractive vacation destination.

3. Regions of Adverse Impact: The MAPS modeling predicts that the statewide average increase in wholesale electricity prices will be 5.4 percent. The greatest impacts will be in Buffalo, Rochester and Long Island with increases of 6, 9 and 16 percent, respectively. It can be expected that if any negative employment impacts result from this program, these areas will experience it. It is important to recognize the wholesale electricity prices comprise only a portion of the retail electricity prices, and that there is not an instantaneous and direct relationship between the wholesale and retail price. The proportion of retail price comprised by the wholesale price is highly variable and cannot be precisely known, but might be expected to be in the range of one-third to one-half. As a result the percentage increase in retail electricity prices due to the ADRP would be substantially less than the percentage of wholesale prices. The increase in wholesale electricity price and the commensurate increase in retail price assumes that the generators will react to the program as indicated in their responses to the DPS and install controls and otherwise over-control emissions as predicted by the MAPS model. Over-compliance to the extent predicted by the MAPS model is based on the generators' responses and is an unlikely scenario because of the economics of controlling beyond the levels called for in the ADRP.

4. Minimizing Adverse Impact: The Department is implementing the ADRP through a cap and trade program. Allowance based cap and trade systems are the most cost effective means for implementing emission reductions from large stationary sources. By implementing the ADRP through an allowance based cap and trade system, the Department has attempted to minimize the adverse economic impacts including the adverse employment impacts of the program.

5. Self-Employment Opportunities: Not applicable.

NOTICE OF ADOPTION

Emission Standards for Motor Vehicles and Motor Vehicle Engines

I.D. No. ENV-14-04-00003-A
Filing No. 1299
Filing date: Nov. 16, 2004
Effective date: 30 days after filing

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

Action taken: Amendment of Parts 200 and 218 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

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 final rule: (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)] [2-20-04 and] *3-26-04*	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
	California Code of Regulations, Title 13, Section 1961(d) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
218-1.2(w)	California Code of Regulations, Title 13, Section 1960.1 [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
	California Code of Regulations, Title 13, Section 1961 [(5-30-01)] [(2-20-04) and] *(3-26-04)*	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
	California Code of Regulations, Title 13, Section 1961(d) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)* [, (2-20-04)] *and (3-26-04)*	** [***+] *** [++]
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)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
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)* [, (2-20-04)] *and (3-26-04)*	** [***+] *** [++]
218-1.2(au)	California Code of Regulations, Title 13, Section 1900(b)(21) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
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)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
	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)] [(2-20-04) and] *(3-26-04)*	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
	California Code of Regulations, Title 13, Section *1961*(d) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)* [, (2-20-04)] *and (3-26-04)*	** [***+] *** [++]
	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)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
	California Code of Regulations, Title 13, Section 1961 [(5-30-01)] [(2-20-04) and] *(3-26-04)*	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
	California Code of Regulations, Title 13, Section 1961(d) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
218-3.1(a)	California Code of Regulations, Title 13, Section 1960.1 [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
218-3.1(b)	California Code of Regulations, Title 13, Section 1960.1 [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** *** [++]
	California Code of Regulations, Title 13, Section *1961* [(5-30-01)] [(2-20-04) and] *(3-26-04)*	** ***
	California Code of Regulations, Title 13, Section 1961(a)(8)(B) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]

	California Code of Regulations, Title 13, Section 1961(d) [(12-07-01) and (5-24-02)] [(2-20-04) and] *(3-26-04)*	** [***+] *** [++]
218-4.1	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)* [, (2-20-04)] *and (3-26-04)*	** [***+] *** [++]
218-4.2	California Code of Regulations, Title 13, Section 1962 [(12-07-01) and (5-24-02)] *(12-19-03)* [, (2-20-04)] *and (3-26-04)*	** [***+] *** [++]
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)	** ***

6 NYCRR Part 218, Emission Standards for Motor Vehicles and Motor Vehicle Engines

Subpart 4 ZERO EMISSION VEHICLE SALES MANDATE

Section 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 requirements 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.

Section 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] *New York* Phase In Multiplier

Model Year	Requirement	PZEV Credit Multiplier	*ATPZEV Credit Multiplier*	ZEV Credit Multiplier
2002	Voluntary Early Introduction	1.5	*1.5*	3
2003	Voluntary Early Introduction	1.5	*1.5*	3
2004	[Mandatory Compliance] *Voluntary Early Introduction*	1.5	*2.25*	3
2005	[Mandatory Compliance] *Voluntary Early Introduction*	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 *except that if such manufacturer opts into California's alternative requirements for large volume manufacturers as provided in California Code of Regulations, title 13, section 1962(b)(2)(B), model year 2007 and 2008 minimum ZEV percentage requirements may be met in the manner identified in California Code of Regulations, title 13, section 1962(b)(2)(B)(2):*

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]	[1]	[9]
2006	[1]	[2] *0*	[7] *10*
2007*	[2] *Combined*	[2]	[6] *9*
2008	*1*	*2*	*7*

** In MY 2007, 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 projects that advance infrastructure to encourage full development of alternative vehicle programs. 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. *(1)* Credit 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] *2006* or earlier PZEVs as required for model-year [2004] *2006* has through model-year [2007] *2009* to comply with the model-year [2005] *2007* AT PZEV/ZEV requirement. A manufacturer who qualifies for the [2004] *2006* AT PZEV/ZEV carryforward and generates twice as many PZEV credits as necessary for model-year [2005] *2007* has through model-year [2008] *2010* to comply with the model-year [2006] *2008* AT PZEV/ZEV requirement.

(2) A manufacturer who produces and delivers for sale in New York model year 2003, 2004, 2005 or 2006 PZEVs that generate credits exceeding (prior to the application of any credit multipliers from Table 1) the number of credits equal to 6 percent (10 percent for model year 2006) of the average annual sales volume of 1997, 1998 and 1999 PC and LDT1 vehicles delivered for sale in New York by the manufacturer, the manufacturer may use such excess credits as AT PZEV credits in the 2007 and 2008 model years.

(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.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 200.9.

Revised rule making(s) were previously published in the State Register on July 21, 2004.

Text of 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 (518) 402-8292, e-mail: seflint@gw.dec.state.ny.us

Regulatory Impact Statement

There were no changes to the previously published Regulatory Impact Statement. The effect of the regulations remains the same.

Regulatory Flexibility Analysis

There were no changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments. The effect of the regulations on small businesses and local governments remains the same.

Rural Area Flexibility Analysis

There were no changes to the previously published Rural Area Flexibility Analysis. The effect of the regulations on rural areas remains the same.

Job Impact Statement

There were no changes to the previously published Job Impact Statement. The effect of the regulations remains the same.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Project XL for Public Utilities

I.D. No. ENV-48-04-00001-P

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

Proposed action: Amendment of Part 372 and Subpart 373-1 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, art. 3, title 3; art. 27, title 9 and art. 71, title 27

Subject: Pilot project under United States Environmental Protection Agency's (USEPA) National XL Program. The department has applied to and been accepted as a participant in the USEPA Project XL, part of the National Performance Review Regulatory Reinvention Initiative. Project XL gives regulated entities the flexibility to develop alternative strategies that will replace or modify specific environmental regulatory requirements on the condition that the strategies produce superior environmental performance.

Purpose: To propose flexible implementation of certain specific hazardous waste management regulations with respect to the management of certain hazardous wastes generated by public utilities in New York State. USEPA has promulgated a project-specific rule and entered into a final project agreement (FPA) with the department. The FPA requires that the department adopt the USEPA regulatory language into State regulation in order to implement this project in the State.

Public hearing(s) will be held at: Department of Environmental Conservation, 625 Broadway, Rm. 129A/B, Albany, NY, Feb. 1, 2005 at 2:00 p.m.; Department of Environmental Conservation, Region 2 Office, 11-15 47th Ave., Rm. 106, Annex Bldg. Long Island City, NY, Feb. 8, 2005 at 2:00 p.m.

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

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

Substance of proposed rule (Full text is posted at the following State website: www.dec.state.ny.us): Subparagraph 372.1(e)(9)(i) intro is amended to read as follows:

(9) Exemption for Public Utilities

(i) Hazardous waste *generated by a public utility and* transported by a [public utility maintenance vehicle incidental to the primary function of the] vehicle *owned or operated by that utility* [,] is exempt from regulation under this Part if the following conditions are met:

New subdivision 372.2(d) is adopted to include:

(d) Project XL for Public Utilities in New York State

(1) Definitions are provided for "utility", "right-of-way", "remote location", and "Utility's central collection facility (UCCF)".

(2) A UCCF designated pursuant to paragraph (5) of this subdivision may consolidate hazardous waste (with the exception of mixed waste) generated by that Utility at its remote locations (and at that UCCF) for up to 90 days without a permit or without having interim status, provided that:

(i) The Utility complies with generator requirements (except subparagraphs 372.2(a)(8)(iii), (iv) and (v)) for hazardous waste generated at its remote locations and at the UCCF.

(ii) The Utility transports the hazardous waste from the remote location to a UCCF immediately after collection of all hazardous waste at the remote location is complete or when the staff collecting the hazardous waste leave the remote location, whichever comes first.

(iii) The Utility complies with applicable transporter requirements.

(iv)('a') The utility complies with paragraphs 372.2(a)(1) through (7) and subparagraphs 372.2(a)(8)(i) and (ii) of this Part, regardless of the total quantity generated or consolidated at the UCCF per calendar month.

('b') The Utility complies with subdivision 373-2.9(i) of this Title; and

('c') Secondary containment is provided for liquid hazardous waste consolidated in containers if required, pursuant to subparagraphs 373-1.1(d)(1)(iii) or (iv) of this Title.

(v) The Utility submits an annual report including all hazardous waste shipped from remote locations to the UCCF.

(vi) Waste generated at a remote location that is not sent to a UCCF is fully regulated.

(vii) The Utility maintains records at the UCCF.

(viii) The UCCF obtains an EPA identification number.

(ix) The UCCF receives hazardous waste only from a remote location.

(x) The Utility reinvests at least one third of the direct savings described in paragraph (8) in one or more environmentally beneficial projects.

(3) Utilities seeking to have UCCFs designated under paragraph (5) of this subdivision must comply with the following requirements:

(i) Any New York State Utility seeking approval to consolidate hazardous waste under this subdivision must notify local governments and communities of the Utility's intent to designate specific UCCFs.

(ii) In carrying out subparagraph (3)(i), the Utility must solicit public comment using specified methods. Each Utility must also notify by mail all parties who commented on the proposed federal or state rule

(iii) All outreach efforts made under subparagraph (3)(ii) shall at a minimum include the following information:

('a') A brief description of the XL project, the intended new use of the facility, and a request for comments on the proposed UCCF.

('b') The name, if any, and address of the proposed UCCF and its current status under the New York State's hazardous waste regulatory program.

('c') The intended duration of use of the UCCF under the requirements of this subdivision.

('d') Names, addresses, and telephone numbers of contact persons, representing the Utility, to whom questions or comments may be directed.

('e') Notification of when the comment period of no less than 30 days will close.

(iv) Prior to the solicitation of public comment pursuant to subparagraph (3)(ii) of this subdivision, the Utility must submit copies of each notice, announcement or mailing directly to local governments and to the Department and USEPA.

(v) At the close of the comment period, the Utility shall prepare a Responsiveness Package containing a summary of public outreach efforts, all comments and questions received as a result of its outreach efforts, and the Utility's written responses to all comments and questions. The Utility shall provide copies of its Responsiveness Package to any citizens that participated in the public notice process, local governments and the Department and USEPA.

(4) Upon completion of the public notice procedures described in paragraph (3) of this subdivision, the Utility must provide written notice to the Department and USEPA of its intent to participate. The Notice of Intent must contain the following information:

(i) The name of the Utility, corporate address, and corporate mailing address, if different.

(ii) The name, mailing address, and telephone number of a corporate-level contact person to whom communications and inquiries may be directed. This contact person may be changed by written notification to the Department and USEPA.

(iii) A list of the names, addresses, and EPA identification numbers of all Utility-owned facilities in New York State that are proposed UCCFs and the names and telephone numbers of a designated contact person at each facility.

(iv) A summary of public outreach efforts undertaken pursuant to paragraph (3) of this subdivision.

(v) A commitment that one third of the direct cost savings outlined in paragraph (8) of this subdivision due to project participation will be reinvested in one or more environmentally beneficial projects which are over and above existing legal requirements and which have not been initiated prior to the Utility's receipt of approval to consolidate hazardous waste pursuant to this subdivision.

(vi) An acknowledgment that the signatory is personally familiar with the terms and conditions of this subdivision and has the authority to obligate and does obligate the Utility to comply with all such terms and conditions. The Utility shall comply with the signatory requirements set forth in clause 373-1.4(a)(5)(i)('a') of this Title.

(5) The procedures for designating UCCFs are as follows:

(i) Subject to subparagraphs (5)(ii)-(v) of this paragraph, the Utility and specified UCCF shall receive approval to comply with the requirements set forth in paragraph (2) of this subdivision upon the receipt of written acknowledgment from the Department that the Notice of Intent described in paragraph (4) of this subdivision has been received and found to be complete and in compliance with all the requirements set forth in paragraph (4) of this subdivision. This acknowledgment will state whether the UCCF has been designated under this subdivision and any additional limitations which have been placed on the UCCF.

(ii) Based on information provided and comments received during the public notice and comment period, the Department shall prepare a response to the comments received. The response to comments shall be attached to the acknowledgment described in subparagraph (5)(i) of this paragraph. Both the acknowledgment and the response to comments shall be sent to all persons who commented on the designation of the UCCF(s) that are the subject of the acknowledgment.

(iii) Based on information provided and comments received during or after the public notice and comment period, designated UCCFs may be rejected for the proposed use, or, if the Department determines that acceptance for the proposed use under the conditions of paragraph (2) of this subdivision may not fully protect human health and the environment based on the Utility's compliance history or other appropriate factors, the acknowledgment may impose conditions in addition to those in paragraph (2) of this subdivision.

(iv) If the Department determines that a site-specific informational public meeting is warranted prior to determining the acceptability of a designated UCCF, the acknowledgment will so state.

(v) Subsequent to any public meeting, the Department may reject or prohibit UCCFs from participating in this project based on information provided or comments received during or after the public notice process or based on a determination that acceptance for the proposed use under the conditions of paragraph (2) of this subdivision may not fully protect human health and the environment based on the Utility's compliance history or other appropriate factors.

(6) At any time, a Utility may add or remove UCCF designations by complying with the following requirements:

(i) A Utility must notify the Department and USEPA of its intent to designate additional UCCFs. Such a notification shall be submitted to both agencies and processed by the Department in the manner indicated in paragraphs (4) and (5) of this subdivision.

(ii) To have one or more additional UCCFs designated, the Utility must comply with paragraph (3) of this subdivision.

(iii) A Utility can discontinue use of a facility as a UCCF by notifying the Department and USEPA in writing.

(7) Each Utility that receives approval to consolidate hazardous waste pursuant to this subdivision shall submit an Annual Progress Report with the following information for the preceding year:

(i) The number of remote locations statewide for which hazardous waste was handled in accordance with paragraph (2) of this subdivision.

(ii) The total tonnage of each type of hazardous waste handled by each UCCF.

(iii) The number of remote locations statewide from which 1,000 kilograms or more of hazardous waste were collected per calendar month.

(iv) The number of remote locations statewide from which between 100 and 1,000 kilograms of hazardous waste were collected per calendar month.

(v) An estimate of the monetary value, on a Utility-wide basis, of the direct savings realized by participation in this project. Direct savings at a minimum include those outlined in paragraph (8) of this subdivision.

(vi) Descriptions of the environmental compliance, remediation, or pollution prevention projects or activities into which the savings, described in paragraph (8) of this subdivision, have been reinvested, with an estimate of the savings reinvested in each. Any such projects must consist of activities that are over and above existing legal requirements and that have not been initiated prior to the Utility's receipt of approval to consolidate hazardous waste pursuant to this subdivision.

(vii) The addresses and EPA identification numbers for all facilities that served as UCCFs for hazardous waste from remote locations.

(8) Utilities that receive approval to consolidate hazardous waste pursuant to this subdivision must assess the direct savings realized as a result. Cost estimates shall include direct savings based on relief from any regulatory requirements, which the facility expects to be relieved from due to compliance with the provisions of this subdivision, including but not limited to, the following:

(i) database management for each remote location as an individual generator;

(ii) Annual Report preparation costs; and/or

(iii) Cost savings realized from consolidation of waste for economical shipment (including no longer shipping waste directly to a TSD from remote locations).

(9) If any UCCF or Utility that receives approval under this subdivision fails to comply with any of the requirements of this subdivision, the Department may terminate or suspend the UCCF's or Utility's participation. The Department will provide a UCCF or Utility with 15 days written notice of its intent to terminate or suspend participation. During this period, the UCCF will have the opportunity to come back into compliance or provide a written explanation as to why it was not in compliance with the terms of this subdivision and how it will come back into compliance. If the Department then issues a written notice terminating or suspending participation, the Utility must take immediate action to come into compliance with all otherwise applicable state and federal requirements. USEPA or the Department may also take enforcement action against a Utility for non-compliance with the provisions of this subdivision.

(10) This subdivision will expire on January 10, 2010.

New subparagraph 373-1.1(d)(1)(xxi) is adopted to read as follows:

(xxi) A New York State Utility central collection facility consolidating hazardous waste in accordance with subdivision 372.2(d) of this Title. This exemption expires January 10, 2010.

Text of proposed rule and any required statements and analyses may be obtained from: Mark Moroukiam, Department of Environmental Conservation, Division of Solid and Hazardous Materials, 625 Broadway, Albany, NY 12233-7251, (518) 402-8633, e-mail: hwregs@gw.dec.state.ny.us

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

Public comment will be received until: five days after the last scheduled public hearing required by statute.

Additional matter required by statute: Negative declaration pursuant to SEQR.

Summary of Regulatory Impact Statement

1. Statutory Authority

Article 3, Title 3; Article 27, Title 9 and Article 71, Title 27 of the Environmental Conservation Law (ECL) authorize this regulatory package. The New York State Department of Environmental Conservation (Department) is authorized to promulgate regulations and standards applicable to the generation, storage, transportation, treatment and disposal of hazardous waste, as necessary to protect human health and the environment. By statute (ECL Section 27-0900), these regulations and standards must be at least as stringent as those established by the United States Environmental Protection Agency (USEPA) under authority of the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA) (42 USC Sections 6901 *et seq.*). On July 11, 1999, USEPA amended Subpart I of 40 CFR Part 262 to authorize this regulatory package (64 FR No. 132, pages 37623-37638). However, USEPA's regulations cannot be implemented until the Department also adopts these regulations.

2. Legislative Objective

The Legislature intended that the Department implement and administer the comprehensive hazardous waste management program created by Chapter 639, Laws of 1978 (New York State Industrial Hazardous Waste Management Act), ECL Article 27, Title 7 (Solid Waste Management and Resource Recovery), and ECL Article 27, Title 9 (Industrial Hazardous Waste Management). Under these statutes, the Department must promulgate solid and hazardous waste management regulations necessary to protect human health and the environment. These regulations must be at least as stringent as the federal regulations.

3. Needs and Benefits

The Department has been accepted as a participant in EPA's Project XL, part of the National Performance Review Regulatory Reinvention Initiative. Project XL allows regulated entities the flexibility to develop alternative strategies that will replace or modify specific environmental regulatory requirements if the strategies produce superior environmental performance.

The Department is amending Part 372 and Subpart 373-1 to provide flexible implementation of certain specific regulations, promulgated pursuant to the Resource Conservation and Recovery Act (RCRA) and Article 27, Title 9 of the New York State Environmental Conservation Law (ECL), with respect to the management of certain hazardous wastes generated by utilities in New York State.

Participation by utilities is voluntary, those that do not participate will remain subject to current standard hazardous waste management regulations.

Utilities maintain rights-of-way, such as oil and gas pipelines, telephone lines, and electric power distribution systems. Frequently, hazardous wastes will be generated at remote locations along rights-of-way where there are no utility-owned or staffed facilities to store and otherwise manage the wastes.

For electric power and telephone systems, the locations involved are usually access manholes and street vaults. To service the system, considerable amounts of drainage and infiltration water must be removed, which sometimes includes sediment. When sediments are included, these materials commonly fail the Toxicity Characteristic (TC) for lead, particularly in urban areas.

For oil and gas pipelines, the waste may consist of condensate which collects in "drip" pipes downstream of pressure regulating stations, and commonly exhibits ignitability, fails the TC for benzene and may contain PCBs.

Since no staffed facility exists at these remote locations, it is very difficult to store hazardous wastes there and secure them against releases through accidents or vandalism. The disruption of normal traffic patterns endangers public safety. These wastes should be transported to a secured location as soon as the hazardous waste has been collected. However, if the waste must be transported directly to a permitted treatment, storage and disposal facility (TSDF), the Utility must wait for authorization from the TSDF. This causes a delay.

If hazardous wastes must be transported to a TSDF directly from remote locations, more vehicle trips would be required, each carrying smaller loads. Utilities would prefer to transport hazardous wastes immediately from remote locations to a utility-owned central collection facility (UCCF). At staffed, secured UCCFs the utilities could consolidate compatible hazardous wastes to achieve important efficiencies in transportation.

RCRA hazardous waste regulations generally do not allow shipment of hazardous waste to off-site facilities, other than a permitted or interim status TSDF. In addition, each remote location that is not conditionally exempt needs an EPA identification number and a record file opened, both in state-only databases and in the federal database RCRIS. For each remote location that generates over 1,000 kilograms per event, the utility must prepare and submit a Hazardous Waste Report/Biennial Report. The Department must process each report and enter the data into state-only databases and RCRIS.

Thus, unless utilities have UCCFs permitted as TSDFs, the present handling of hazardous wastes from remote locations results in potentially unsafe storage, hazardous conditions, inefficiencies in transportation, and unnecessary paperwork and expenditure of time and labor.

Alternative requirements are needed for hazardous waste generated at remote locations by utilities. Therefore, USEPA promulgated, on July 12, 1999, a regulation, set forth in Subpart I of 40 CFR Part 262. On the same date, USEPA and The Department entered into a Final Project Agreement (FPA). The regulation and FPA would allow participating New York State utilities to consolidate hazardous waste, which they generate at remote locations, at designated UCCFs for up to 90 days subject to specified requirements, very similar to those for hazardous waste generators. The federal regulation and FPA expire on January 10, 2005. It is expected that they will be extended to January 10, 2010.

Remote locations will utilize the same EPA identification number as the UCCF to which the wastes will be brought. Such hazardous wastes can be accounted for in a combined Hazardous Waste Report submitted for the UCCF, instead of the Utility having to submit a report for each remote location.

Protection of public health and the environment will be enhanced through the expeditious removal of hazardous wastes that cannot be properly secured at remote locations. Such wastes will be moved to a secured location immediately after collection is complete or when the staff collecting the hazardous waste leave the site, whichever comes first. Hazardous traffic conditions that endanger public safety would end simultaneously.

Utilities with interstate service networks, such as interstate oil and gas pipelines, may participate, but only for remote locations and UCCFs located within New York State. To implement this project, the Department must promulgate an equivalent State regulation, which will be set forth in 6 NYCRR Part 372 and expire no later than the date the corresponding federal regulation expires.

For wastes that are State-hazardous only, due to PCB content, the Department shall permanently modify 6 NYCRR 372.1(e)(9) (Exemption for Public Utilities.) The modification will allow the exemption to apply to PCB-only hazardous wastes when transported by any vehicle, owned or operated by the utility. Presently, the exemption allows only the use of maintenance vehicles. The modification would allow utilities to use vehicles that are designed for and dedicated to transporting wastes safely. Such non-maintenance vehicles would be fully subject to permitting as hazardous waste transporting vehicles under 6 NYCRR Part 364.

The use of permitted, dedicated waste transporting vehicles provides greater assurance of safe transportation and minimizes possibilities for accidental releases or exposure.

4. Costs

a. Costs to the Regulated Community

Participating utilities will have direct monetary savings due to project participation. One-third of these savings must be reinvested into environmentally beneficial projects. Industry estimates of savings range from $8-10 million for one corporation that would otherwise be required to obtain TSDF permits, to several thousand dollars for other large utilities who do not plan to obtain TSDF permits. Industry estimates may include both direct and indirect savings. Since participation is voluntary, utilities that do not anticipate such significant cost savings can chose to not participate.

Participating utilities are required to identify, in annual progress reports, the direct cost savings resulting from the project, and the environ-

mental activities in which one-third of these direct cost savings have been reinvested.

Utilities will realize direct cost savings in many ways, including the following:

i. Reduced EPA ID Number acquisition process costs;

ii. No database management for each remote location as an individual generator;

iii. Reduced annual Hazardous Waste Report preparation costs;

iv. Cost savings realized from consolidation of waste for economical shipment; and/or

v. Eliminating costs for temporary storage of hazardous wastes at remote locations.

Indirect cost savings, including paperwork reduction, will be achieved in two ways. First, utilities will not need to obtain EPA identification numbers for remote locations. Second, utilities will not have to submit Hazardous Waste Reports for remote locations that generate in excess of 1,000 kilograms of hazardous waste per calendar month. Instead, the hazardous waste generated at remote locations would be included in the Hazardous Waste Reports of the utility-owned UCCFs to which they are brought.

Participating utilities will incur small additional costs in:

i. Preparation of the annual Project XL Progress Report. Each utility submits one report on all project-related activities for the calendar year covered.

ii. Public notice and outreach requirements which apply when a utility seeks authorization for specific UCCFs to operate in accordance with the FPA.

The hazardous waste generator fee and special assessment liability will not be affected by merely receiving, consolidating or shipping RCRA hazardous wastes from remote locations, as the UCCF is not considered to be the actual generator of the waste. If any generator fee or special assessment liability is incurred for remote locations (unlikely), the utility company shall be responsible for payment.

b. Costs to the Department, State and Local Government

The Department and USEPA will realize indirect savings through reduced resource demands, time saved, and reduced paperwork.

Region II of USEPA will not need to issue EPA identification numbers for remote locations or create a new data file on RCRIS for each new number issued.

Utilities will not need to submit Hazardous Waste Reports for each remote location that generates in excess of 1,000 kilograms of hazardous waste per event as long as the quantities and types of hazardous waste from these locations are still accounted for. Hazardous Waste Reports for non-facilities would no longer need to be processed. This may result in a reduction of hundreds of Hazardous Waste Reports filed each year.

The Department, as the project sponsor, will incur some costs for project oversight, to be addressed with existing staff. These include:

i. Compiling annual Project XL Progress Reports received from utilities into an annual statewide Project XL Progress Report to USEPA.

ii. Approval of UCCFs to operate in accordance with the FPA.

iii. Annual inspection of each designated UCCF.

There are no additional costs expected for local governments or other State agencies.

5. Local Government Mandates

No additional record keeping, reporting, or other requirements will be imposed on local governments by this rule making.

6. Paperwork

Utilities, the Department and USEPA will all realize indirect savings through reduced paperwork. See section 4.

7. Duplication

The proposed amendments will not result in any duplication of State regulations.

8. Alternatives

There are no other viable regulatory alternatives. A rule, equivalent to the project-specific USEPA rule, must be adopted. Similarly, there are no viable non-regulatory options.

The proposed permanent change to the exemption for public utilities found at 372.1(e)(9) is not required by the USEPA rule. However, the proposed change is needed to allow (not mandate) the utilities to use vehicles designed for and dedicated to waste transportation for that purpose, without sacrificing eligibility for the exemption. The use of such dedicated vehicles enhances environmental safety. Such dedicated vehicles would be subject to permitting as hazardous waste transportation vehicles under Part 364.

9. Federal Standards

The proposed changes will make state regulations consistent with project-specific federal standards that must be adopted in order to implement this project.

10. Compliance Schedule

As the proposed regulations generally decrease the regulatory burden there is no need for a compliance schedule. Before a utility-owned UCCF is approved to operate in accordance with the project conditions, it must already be capable of complying with all project requirements. Participation can begin only after approval.

Regulatory Flexibility Analysis

1. Effect of Rule

The proposed rule making does not affect or place any additional burdens on small businesses or local governments. The rule making will only affect public utilities who choose to operate in accordance with these rules and none are small businesses or local governments.

2. Compliance Requirements

There are no new reporting, recordkeeping, or other compliance requirements for small businesses or local governments as a result of the proposed rule making. This rule making provides a voluntary streamlined management program for specific hazardous wastes in specific situations. It is estimated that up to 15 facilities statewide will take advantage of this rule making. All of these facilities who may choose to participate are expected to already be large quantity generators of hazardous waste. They are not small businesses or local governments.

3. Professional Services

The quantity and types of service needed by small businesses and local governments will remain unaffected by this proposed rule making. This rule making provides a voluntary streamlined management program for specific hazardous wastes in specific situations. It is estimated that up to 15 facilities statewide will take advantage of this rule making. All of these facilities who may choose to participate are expected to already be large quantity generators of hazardous waste. They are not small businesses or local governments.

4. Compliance Costs

Small businesses and local governments should not incur any additional costs, either initial capital costs or annual compliance costs, as a result of the proposed rule making. This rule making provides a voluntary streamlined management program for specific hazardous wastes in specific situations. It is estimated that up to 15 facilities statewide will take advantage of this rule making. All of these facilities who may choose to participate are expected to already be large quantity generators of hazardous waste. They are not small businesses or local governments.

5. Minimizing Adverse Impact

The proposed rule making will not cause any economic burden to the small business community or local governments. This rule making provides a voluntary streamlined management program for specific hazardous wastes in specific situations. It is estimated that up to 15 facilities statewide will take advantage of this rule making. All of these facilities who may choose to participate are expected to already be large quantity generators of hazardous waste. They are not small businesses or local governments.

6. Small Business and Local Government Participation

During the development of the Final Project Agreement and the federal rule, public outreach was done including significant outreach to public utilities. The proposed regulations appeared in the *Federal Register* as did the final. The Department published notices in the Environmental Notice Bulletin on May 28, 1997 and in the *State Register* on June 4, 1997 which provided opportunity to the public, including small business and local governments, to comment on the XL project.

7. Economic and Technological Feasibility

This rule making provides a voluntary streamlined management program for specific hazardous wastes in specific situations. It is estimated that up to 15 facilities statewide will take advantage of this rule making. All of these facilities who may choose to participate are expected to already be large quantity generators of hazardous waste. They are not small businesses or local governments. For these large businesses, the necessary technology to comply with the requirements of the rule involves being able to track waste generation, movement and handling. Methods to do this are already in place at these facilities. Some modification of existing tracking systems may be necessary to participate in this voluntary program. These modifications are technically and economically feasible.

Rural Area Flexibility Analysis

1. Types and Estimated Number of Rural Areas:

This rule will apply Statewide, to all 44 rural counties and 71 additional rural towns.

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

No additional reporting, recordkeeping or professional services will be imposed on local governments by this rule making. Required paperwork for affected facilities will be reduced. Utilities who choose to participate will not need to expend any resources, time, or paperwork to secure temporary or permanent EPA identification numbers for remote locations. Utilities will experience reduced paperwork by not having to submit Hazardous Waste Reports for remote locations that generate in excess of 1,000 kilograms of hazardous waste per calendar month. Instead, the hazardous waste generated at remote locations would be included in the Hazardous Waste Reports of the Utility's Central Collection Facility (UCCF) to which they are brought. All such hazardous wastes will still be fully accounted for while reducing the number of Hazardous Waste Reports that the utility must prepare and submit.

3. Costs:

No local mandates will be created by this rule, nor will this rule impose any costs on rural areas. Costs for existing facilities owned by public utilities which handle certain hazardous wastes will decrease.

Utilities who choose to participate will realize direct cost savings in many ways, including the following:

i. Reduced EPA ID Number acquisition process costs;

ii. No database management for each remote location as an individual generator;

iii. Reduced annual Hazardous Waste Report preparation costs;

iv. Cost savings realized from consolidation of waste for economical shipment (*i.e.*, not shipping waste to a TSD directly from the remote locations); and/or

v. Eliminating costs for temporary storage of hazardous wastes at remote locations.

Indirect cost savings, including paperwork reduction, will be achieved in two ways. First, utilities will not need to expend any resources, time, or paperwork to secure temporary or permanent EPA identification numbers for remote locations. Second, utilities will realize indirect savings in resources, time, and reduced paperwork by not having to submit Hazardous Waste Reports for remote locations that generate in excess of 1,000 kilograms of hazardous waste per calendar month. Instead, the hazardous waste generated at remote locations would be included in the Hazardous Waste Reports of the utility-owned UCCFs to which they are brought. All such hazardous wastes will still be fully accounted for while greatly decreasing the number of Hazardous Waste Reports that the utility must prepare and submit.

Each utility's savings depend on the extent and location of its remote infrastructure and the degree to which that infrastructure tends to produce hazardous wastes. Estimated savings for utilities expected to participate range up to $1,600,000 annually.

Participating utilities will incur small additional costs in two areas:

i. Preparation of the annual Project XL Progress Report. Each utility submits one report, which covers all project-related activities for the calendar year covered.

ii. Public notice and outreach requirements which apply when a utility seeks authorization for specific UCCFs to operate in accordance with the FPA.

Of course, the aforementioned savings and costs will only be incurred by utilities that participate in the pilot project. Those who choose not to participate incur neither.

Participating companies will be obligated to reinvest part of their direct savings in environmental benefit projects. Moreover, such projects must be over and above those which the participant would be obligated to carry out under one or more environmental statutes.

4. Minimizing Adverse Impact:

These regulations will not have any adverse impact in rural areas. In fact, the expeditious removal of hazardous waste from remote, unstaffed, unsecured locations to staffed, secured facilities will enhance protection of public health and safety. The regulatory burden on affected facilities who choose to participate will be reduced as discussed in the Reporting, Recordkeeping, Other Compliance Requirements, and Need for Other Professional Services section and in the Costs section, above.

5. Rural Area Participation:

An announcement of this Project XL proposal was published in the Environmental Notice Bulletin on May 28, 1997 and in the State Register on June 4, 1997. A major mailing of the announcement to environmental interest groups, regulated community, and other potentially interested parties sent information directly to approximately 576 people or organizations. The announcement included information about the project itself and how to participate as a stakeholder or interested party. On September 16, 1997, a Stakeholders Meeting was held, as mandated by procedures of the XL program. This public meeting was held in Albany, New York and was attended by at least 20 interested parties, in addition to government staff. Rural areas were included in this Statewide Outreach effort.

Job Impact Statement

A Job Impact Statement has not been prepared for this rule as it is not expected to create a substantial adverse impact on jobs and employment opportunities in New York State.

The Department of Environmental Conservation (Department) has applied to and been accepted as a participant in the United States Environmental Protection Agency Project XL, part of the National Performance Review Regulatory Reinvention Initiative. Project XL gives regulated entities the flexibility to develop alternative strategies that will replace or modify specific environmental regulatory requirements on the condition that the strategies produce superior environmental performance. The Department proposes flexible implementation of certain specific hazardous waste management regulations with respect to the management of certain hazardous wastes generated by public utilities in New York State.

The identifiable impacts are as follows and may well result in no net change in employment:

Positive Job Impacts

a) Each participating utility must reinvest one-third of the direct savings, realized as a result of participation, in environmental improvement projects that would not otherwise have been required by any environmental statute or regulation. This could result in job creation.

b) Participation will encourage utilities to operate waste transportation vehicles themselves, securing Department waste transportation permits and hiring staff to drive and maintain such vehicles.

Negative Job Impacts

a) Consolidation of waste loads will diminish the need for the services of commercial waste transporters.

b) Reduced paperwork (*e.g.* preparing annual hazardous waste reports) may slightly diminish the utilities' needs for administrative staff.

The proposed rule is not expected to result in a decrease of more than one hundred full-time annual jobs and employment opportunities which would otherwise be available to the residents of the State in the next two years. Up to 15 facilities, representing as many as five utility companies, are expected to participate in this program. If one administrative position at each utility is lost (and this is doubtful as the administrative workload may diminish but will not disappear), that would total five positions. If each utility experiences reduced need for a commercial transporter in the service area of each facility, each transporter may release one driver, for a total of 15 positions. (However, the utilities may decide to self transport, in which case they will be hiring drivers.) The total worst-case potential loss of jobs is 20 positions. This is less than 100 full-time annual jobs and employment opportunities. In addition, the program may add jobs as well, however this impact has not been quantified.

Department of Health

NOTICE OF ADOPTION

Medicaid Enteral Nutrition Reimbursement Methodology

I.D. No. HLT-34-04-00005-A
Filing No. 1278
Filing date: Nov. 16, 2004
Effective date: Jan. 1, 2005

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

Action taken: Amendment of section 505.5 of Title 18 NYCRR.

Statutory authority: L. 1997, ch. 433

Subject: Medicaid enteral nutrition reimbursement methodology.

Purpose: To decrease Medicaid reimbursement for enteral nutrition.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-34-05-00005-P, Issue of August 25, 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 public comment period ended on October 11, 2004 for proposed amendments to section 505.5 of Title 18 NYCRR: Medicaid Enteral Nutrition Reimbursement Methodology. The regulations implement Chapter 433 of the Laws of 1997. In response to the request for public comments, the Department of Health received comments from one organization, Ross Products Division, Abbott Laboratories, Inc.

The comments are summarized as follows:

The commentor stated that the concept of generically equivalent formulas is undefined. The Department notes that the federally mandated Healthcare Common Procedure Coding System (HCPCS), begun in 1983, is based on grouping equivalent products and services into generic "catch-all" codes for health care reporting and reimbursement. Medicare's policy and coding contractor, SADMERC, classifies enteral formulas into one of the generically described HCPCS codes. Most Medicaid expenditures for enteral formulas are reimbursed using the two HCPCS codes representing numerous generically equivalent standard enteral formulas. Also, it is public knowledge that HCPCS, SADMERC and Medicaid classify specialized formulas under different HCPCS codes than the standard formulas and do not consider standard formulas and specialized formulas as generically equivalent.

The commentor suggested that the agency has not acknowledged differences within nationally defined coding categories. The Department reminds the commentor that, as stated in Economic and Technological Feasibility, "(S)pecialized formulas for metabolic disorders and targeted supplementation will continue to be manually priced by the Department ". Medicaid claims for specialized formulas categorized under the same HCPCS code will be priced individually, based on the provider's acquisition price for that product.

The commentor argues that the anticipated cost savings are seriously inflated because expenditures have decreased due to the inception in 2003 of a prior authorization system which verifies the medical necessity of enteral formulas. The Department reminds the commentor of the utilization inflation that occurred from 1997-2003, which saw expenditures rise from $11 million to $90 million per year. The cost savings legislation that was enacted in 1997 mandated a reimbursement methodology change that would have saved about $2 million that year. Based on comparison between SFY 2002-2003 and SFY 2003-2004, expenditures have been reduced by 46% to a rate of $48.6 million. This would result in revised projected annual savings of $8.7 million.

The commentor points out that provider groups have previously expressed opposition to regulatory implementation of the 1997 law. The Department has pledged to request suggested representative products and costs from these provider groups to establish acquisition prices for the two HCPCS codes that represent most commonly dispensed standard enteral formulas. This will help to facilitate successful implementation of the legislative mandate by ensuring cost savings, prudent purchasing and patient access.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Regional Professional Education Pools

I.D. No. HLT-48-04-00005-P

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

Proposed action: Amendment of section 86-1.89 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-m(5)

Subject: Supplemental distributions of the regional professional education pools.

Purpose: To create a supplemental professional education pool to be distributed to teaching general facilities that meet certain graduate medical education goals. The law requires that a regulation be promulgated to establish reform goals and specify the distribution methodology.

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

The provisions of the Health Care Reform Act of 2000 (HCRA) create a professional education pool to be funded by specified third-party payors of inpatient hospital services. The legislation requires a portion of this funding (up to $31 million) to be set aside as an annual supplemental pool to be distributed to teaching general hospitals or consortia that meet certain graduate medical education reform goals. The regulation delineates the reform goals and establishes the distribution methodology for the supplemental pool. This amendment makes technical corrections to the regulation and changes the criteria for satisfying reform goals and objectives for distribution periods beginning January 1, 2000 through June 30, 2005.

Provider/Payor Fiscal Impact

The overall funding of the supplemental pool is not affected by this amendment. However, the distribution of funds to teaching general hospitals or consortia may vary depending on their ability to meet reform goals relative to other teaching general hospitals or consortia. Some hospitals or consortia may receive more or less of the $31 million depending on whether they meet one or more of the reform goal criteria.

Reasons for Initiating Regulation

The provisions of HCRA create a professional education supplemental pool to be distributed to teaching general hospitals or consortia that meet certain graduate education reform goals. HCRA also requires that a regulation be drafted establishing reform goal criteria and specifying the distribution methodology. This proposed regulation incorporates amendments to HCRA and provides improved targets and incentives to encourage hospitals and consortia to reform their graduate medical education programs. The proposed amendments will: (1) provide hospitals and consortia with realistic and obtainable reform goals; (2) not significantly burden hospitals and consortia with unnecessary reporting requirements; and (3) maintain and strengthen the overall goals of the program and intent of HCRA.

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 New York Health Care Reform Act of 2000 (HCRA 2000) continued the health care reimbursement methodology for inpatient hospital services, including payments to hospitals for graduate medical education (GME), through June 30, 2003. These provisions were extended again through June 30, 2005 pursuant to chapter 62 of the laws of 2003.

Sections 2807-s and 2807-t of the Public Health Law require specified third-party payers to pay into pools to fund certain public goods. The professional education pool established pursuant to Public Health Law section 2807-m assists hospitals in funding the cost of training interns and residents. Commencing January 1, 2000, up to $31 million is set aside annually to be distributed to teaching general hospitals and/or consortia that achieve GME reform goals specified in section 2807-m (5)(b) of the Public Health Law. Pursuant to section 2807-m (5)(a) of the Public Health Law, the Commissioner of Health is required to distribute these supplemental pool funds to consortia and teaching general hospitals in accordance with a distribution methodology developed in consultation with the New York State Council on Graduate Medical Education and specified in rules and regulations adopted by the Commissioner of Health. In addition, the Commissioner of Health is authorized to specify other reform goals and objectives in such rules and regulations under Public Health Law section 2807-m (5)(b)(vi).

Legislative Objectives:

The legislative objective of Public Health Law section 2807-m (5) is to reform the graduate medical education system and train the required number of physicians in the health care market place. The reform goals set forth in Public Health Law section 2807-m (5)(b) were amended by HCRA 2000 to remove two objectives that relate to training and retaining primary care physicians that duplicate another State initiative. In addition, the legislation stipulates that teaching hospitals shall not be required to reduce residents or eliminate programs in order to qualify for a distribution.

Needs and Benefits:

HCRA 2000 made several changes to the program which was originally created in HCRA 1996. These include: (1) a reduction in the amount of funding distributed through this program; (2) the elimination of two objectives relating to primary care training and low physician retention rates; and (3) stipulating that distributions shall not be conditioned on a teaching hospital or consortia reducing graduate medical education programs or the number of residents in such programs.

The proposed regulatory amendments are necessary to incorporate these statutory changes into the distribution methodology set forth in the regulation. In addition, certain amendments are necessary to improve existing reform goals and establish new ones as follows: (1) teaching hospitals and consortia must not increase the total number of residents from the base year and in the last year it qualified for a distribution in order to receive credit in the current distribution period for reducing the number of graduate medical education programs and/or the number of residents in such programs; (2) the ambulatory care training objective is expanded to include residents from all specialties; (3) two new objectives are added to encourage teaching hospitals and consortia to provide cultural competence training to residents and increase the number of clinical researchers training in academic health centers; and (4) the minority objective is modified by dividing it into three areas which seek to encourage linkages with programs along the entire academic continuum, increase the number of minority faculty with medical school appointments and increase the number of minority residents.

Costs:

Costs to State Government:

There will be no new costs to State or local governments as a result of these amendments. These amendments modify the GME supplemental distribution to teaching general hospitals and/or consortia which meet certain GME reform goals under HCRA 2000.

Costs of Local Government:

See "Costs to State Government" above.

Costs to Private Regulated Parties:

There is no overall cost to private regulated parties. Funding of and the amount of money to be distributed from the professional education supplemental pool shall remain as set forth in Public Health Law section 2807-m. The reform goals and distribution methodology set forth in this proposal determine what monies an individual provider receives from the supplemental pool for the support of graduate medical education reform goals. Based on this amendment, some hospitals or consortia may receive more or less of the funding depending on whether they meet one or more of the reform goals. As in previous years, each hospital's distribution amount is fully dependent on its ability to meet the identified criteria. It should be noted that since the amount of funding was reduced on an annual basis in HCRA 2000, it is anticipated that many teaching hospitals and consortia will receive less funding then in previous years. However, since the requirement that teaching hospitals and consortia must reduce residents in order to qualify for funding was eliminated in HCRA 2000, many more teaching hospitals and consortia may be eligible for a supplemental distribution.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments. Existing staff will support administration of the pool.

Local Government Mandates:

These amendments modify the distribution methodology for payments to teaching hospitals and consortia of monies from the graduate medical education supplemental pool established by section 2807-m (5) of the Public Health Law to support certain reform goals. It poses no program, service, duty or other responsibility upon any other city, town, village, school, fire district or other special district.

Paperwork:

These regulations provide some additional paperwork requirements for hospitals relating to the minority, ambulatory care, cultural competence training and clinical research objectives. Much of the data relating to the proposed regulations is currently retained by hospitals but some additional information may have to be gathered and reported as a result of these amendments. The additional data requirements are off-set by: (1) eliminating the tracking of primary care graduates; (2) simpler tracking of residents practicing in underserved areas; and (3) the use of later base periods for several reform objectives.

Duplication:

These regulations do not duplicate existing State or federal regulations.

Alternatives:

The proposed amendments were discussed with representatives of statewide and regional hospital associations (*i.e.* HANYS and GNYHA) and medical schools (*i.e.* AMS). Alternatives to these amendments were considered by the Department of Health and discussed in public forums by the New York State Council on Graduate Medical Education. Such alternatives included: (1) establishing the same base period for all objectives; (2) creating additional reform objectives; (3) requiring later implementation of reform objectives; (4) establishing a system to report and reimburse for approval costs for clinical research positions; and (5) requiring teaching hospitals and consortia to report additional information for certain reform objectives. In each of these cases, the alternatives were rejected in favor of the proposed amendments in order to minimize unnecessary reporting requirements for teaching hospitals and consortia and to create a program which provides improved and targeted incentives to encourage reforms in GME.

Federal Standards:

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

Compliance Schedule:

There is no mandated compliance schedule. The proposed amendments modify the distribution methodology for the professional education supplemental pool. In addition, hospitals are not required to participate in distribution of the supplemental monies.

Contact Person: Mr. William R. Johnson
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Office of Regulatory Reform
Room 2415
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(518) 473-7488
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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:

For the purpose of this analysis, small businesses to be considered are teaching general hospitals with 100 or fewer full time employees. Based upon recent financial and statistical data from the Institutional Cost Report, no teaching general hospitals were identified as employing 100 or fewer employees.

For the purpose of this analysis, sixteen teaching general hospitals have been identified as having local government sponsorship.

Compliance Requirements:

There are no mandatory compliance requirements as a result of these amendments. These amendments modify the supplemental pool distribution methodology established in accordance with Public Health Law section 2807-m and eliminate certain data collection requirements.

Professional Services:

No new additional professional services are required in order for providers to comply with these amendments.

Compliance Costs:

There are no initial capital costs or new annual costs to local government as a result of complying with these amendments. Revenues distributed to local governments operating teaching general hospitals from the supplemental pool will be determined based upon the reform goal criteria and distribution methodology set forth in this regulation, as amended.

Minimizing Adverse Impact:

The proposed amendments will have no adverse economic impact on local governments, except in so far as revenues are reduced for teaching hospitals operated by local governments. The proposed amendments will be uniformly applied to all teaching general hospitals in accordance with Public Health Law section 2807-m in order to determine individual provider distribution amounts. Variation in these requirements for local governments would be inconsistent with the provisions set forth in Public Health Law section 2807-m. The agency found the approaches for minimizing adverse economic impacts in subdivision 1 of section 202-b of the State Administrative Procedure Act to be inapplicable to these amendments.

Economic and Technological Feasibility Assessment:

Local governments can easily comply with this proposal from an economic and technological viewpoint. Currently, teaching hospitals are required to submit specific data to the Department by dates specified in the regulation to be eligible for pool monies. The data consists of counts of medical residents by program area, training site, ethnicity and year of study, as well as details on clinical research projects and cultural competency training plans.

Opportunity for Small Business and Local Government Participation:

All teaching hospitals were given notice of this proposal in a summary of objectives document distributed in June 2002. The amendments were also discussed at meetings of the New York State Council on Graduate

Medical Education where small businesses and local governments had the opportunity to comment.

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, include towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

There are no mandatory compliance requirements as a result of these amendments. These amendments modify the distribution methodology for the professional education supplemental pool.

Professional Services:

No new professional services will be needed in order for providers to comply with these amendments.

Compliance Costs:

There are no initial capital costs or new annual costs to comply with these amendments. Revenues distributed to teaching general hospitals located in rural areas from the supplemental pool will be determined based upon the reform goal criteria and distribution methodology set forth in this regulation, as amended.

Minimizing Adverse Impact:

The proposed amendments will be applied to all teaching general hospitals uniformly, regardless of hospital size or location. Variation in these requirements for rural hospitals would be inconsistent with the provisions set forth in Public Health Law section 2807-m. The agency found the approaches for minimizing adverse economic impact in subdivision 2 of section 202-bb of the State Administrative Procedure Act to be inapplicable to these amendments.

Opportunity for Rural Area Participation:

All teaching hospitals were given notice of this proposal in a summary of objectives document distributed in June 2002. The amendments were also discussed at meetings of the New York State Council on Graduate Medical Education where providers in rural areas had the opportunity to comment.

Job Impact Statement

Nature of Impact:

None. These amendments modify the reform goals for distribution of the professional education supplemental pool. It is not anticipated that these amendments will substantially modify hospitals' medical practice with regard to residency training programs.

Categories and Numbers Affected:

See above.

Regions of Adverse Impact:

None.

Minimizing Adverse Impact:

These amendments will make it easier for hospitals to qualify for supplemental distributions pursuant to this regulation because a requirement that teaching hospitals and consortia must reduce the number of graduate medical education programs and/or the number of residents in such programs was eliminated.

Self-Employment Opportunities:

These amendments have no anticipated impact on opportunities for self-employment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Syracuse Watershed Rules and Regulations

I.D. No. HLT-48-04-00012-P

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

Proposed action: This is a consensus rule making to amend section 131.1 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 1100

Subject: Minor amendments of the Syracuse Watershed rules and regulations.

Purpose: To correct clerical and typographical errors.

Text of proposed rule: Subdivision (a) of section 131.1 is amended to read as follows:

(a) Application: The rules and regulations set forth in this Section duly made and enacted in accordance with the provisions of Section 1100-1107 of the Public Health Law shall apply to the source of the public water supply of the City of Syracuse. Said water supply is Skaneateles Lake located approximately 19 miles southwest of the City of Syracuse along NYS Route 20. It is situated within parts of Onondaga, Cayuga, and Cortland Counties. The lake is one of the Central New York Finger Lakes and is a multiple use lake/reservoir with a lake surface area of 13.6 square miles and a watershed land drainage area of 58.9 square miles. The watershed drainage area appears on the 7.5-minute quadrangle maps (revised in 1951) for Marcellus, Skaneateles, Owasco, Spafford, Homer, Sempronius and Otisco Valley. The location of the watershed drainage boundary as it applies to these rules and regulations is determined by Geographic Information System maps maintained by the City of Syracuse. Where there is a discrepancy between the maps and field observations, a site evaluation by designated supplier of water personnel will be the method of verifying this boundary. Their determination shall be final. Maps delineating this boundary can be reviewed at the City of Syracuse Water Treatment Plant, 20 West Genesee Street, Skaneateles, New York, or New York State Department of Health, Bureau of Public Water Supply, Flanigan Square, 547 River [Road] *Street*, Troy, New York *12180-2216*.

Subdivision (b), paragraph (51) of section 131.1 is amended to read as follows:

(51) Watercourse shall be considered "waters" or "waters of the state" as defined in Section 17-0105 of the Environmental Conservation Law and further described as being annual or perennial, influent or effluent, continuously or intermittently flowing and include those classified in 6 NYCRR Part 896. The banks of such watercourse shall be identifiable, i.e., defined bed, banks, gullies, ravines, etc., that are capable of, and do under normal conditions, carry water in a manner described above. Road ditches and shallow land depressions generally referred to as grassed waterways, swales, etc., that carry water only immediately (a few to several hours) after a runoff producing event are not considered a watercourse. A map delineating the watercourses of the watershed can be reviewed at the City of Syracuse Water Treatment Plant at 20 W. Genesee St., Skaneateles, NY, and the New York State Department of Health, Bureau of Public Water Supply, Flanigan Square, 547 River [Rd.] *Street*, Troy, NY *12180-2216*.

Subdivision (b), paragraph (53) of section 131.1 is amended to read as follows:

(53) Watershed Protection Zone shall mean the land area, known as Zone III, which is tributary to Zone I and II described in paragraph 59 of this subdivision and is the tributary surface area from which the lake, watercourse, and aquifer are replenished by runoff. Maps delineating this Zone can be reviewed at the City of Syracuse Water Treatment Plant, 20 West Genesee Street, Skaneateles, New York, New York State Department of Health, Bureau of Public Water Supply, Flanigan Square, 547 River [Rd.] *Street*, Troy, NY *12180-2216*.

Subdivision (b), paragraph (55) of section 131.1 is amended to read as follows:

(55) Water Supply Protection Zones shall mean the lake surface areas known as Zones I and II described in paragraphs 57-58 of this subdivision. Maps delineating these Zones can be reviewed at the City of Syracuse Water Treatment Plant, 20 West Genesee Street, Skaneateles, New York, and, New York State Department of Health, Bureau of Public Water Supply, Flanigan Square, 547 River [Rd.] *Street*, Troy, NY *12180-2216*.

Subdivision (f), paragraph (3), subparagraph (i) of section 131.1 is amended to read as follows:

(i) be in conformance with the publication "Agricultural Management Practices Catalogue for Nonpoint Source Pollution Prevention and Water Quality Protection in New York State" [(1992)] *May 1996*, published by the Bureau of Water Quality Management, Division of Water, NYSDEC, 625 Broadway, Albany, NY 12233. The publication is available for public inspection and copying from The Bureau of Public Water Supply Protection, Flanigan Square, 547 River [Road] *Street*, Troy, NY *12180-2216.*

Subdivision (f), paragraph (6) subparagraph (iii) clause (a) of section 131.1 is amended to read as follows:

(a) 'New York State Stormwater Management Design Manual' [(February 2002)] *(August 2003)* prepared by the Center for Watershed Protection, 8391 Main St., Ellicott City, MD 21043 for the NYSDEC, 625 Broadway, Albany, NY 12233 and distributed by Soil and Water Conservation Society, Empire State Chapter, c/o Cayuga County Soil and Water Conservation District, 7413 County House Rd., Auburn, NY 13021.

Subdivision (f), paragraph (6) subparagraph (iii) clause (c) of section 131.1 is amended to read as follows:

(c) "Construction Management Practice Catalogue for Nonpoint Source Pollution Prevention and Water Quality Protection in New York State" [(November 1992)] *2nd Edition, March 1999*, published by the Bureau of Water Quality Management, Division of Water, NYSDEC, 625 Broadway, Albany, NY 12233.

Subdivision (f), paragraph (6) subparagraph (iii) clause (f) of section 131.1 is amended to read as follows:

(f) All publications are available for public inspection and copying from The Bureau of Public Water Supply Protection, Flanigan Square, 547 River [Road] *Street*, Troy, NY 12180-2216.

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.

Consensus Rule Making Determination

Statutory Authority:

The authority for promulgating this regulation is contained in Section 1100 of the Public Health Law, which authorizes the State Commissioner of Health to make rules and regulations for the protection from contamination of public supplies of potable water.

Basis:

The proposed amendments to Section 131.1 of Part 131 Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York merely correct clerical and typographic errors in the regulation. Because these amendments do not impose any burden on any party that exceeds or expands statutory requirements, a consensus regulatory adoption is appropriate.

Job Impact Statement

A Job Impact Statement is not included because these amendments correct minor clerical and typographic errors. None of the corrections will have a substantial adverse impact on jobs and employment opportunities. The corrections refer to the address of the office where copies of documents may be obtained, the correct dates of three of the publications incorporated by reference, and the deletion of the word 'the' from the phrase 'the those'.

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Reimbursement of HCBS Waiver Services

I.D. No. MRD-39-04-00005-A
Filing No. 1276
Filing date: Nov. 16, 2004
Effective date: Dec. 1, 2004

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

Action taken: Amendment of sections 635-10.4 and 635-10.5 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09 and 43.02

Subject: Reimbursement of HCBS waiver services.

Purpose: To establish an hourly unit of service for HCBS waiver respite services

Text of final rule: Subdivision 635-10.4(g) is amended as follows:

(g) Respite services are broadly defined as the provision of intermittent, temporary substitute care of a person on behalf of a primary caregiver who is either a family member, a legal guardian, an advocate, a family care provider or community residence (including IRA) live-in staff. It is a means of providing relief from the responsibilities of daily caregiving.

[(1)] [There shall be two categories of respite care:]

[(i)] [Residential respite includes an overnight stay in an OMRDD operated, certified or approved setting that is not a private residence. This service is limited to recipients living at home, in family care, or in community residences with live-in staff. Locations where the service may be provided would include, but not be limited to, ICF/DDs, family care homes, and community residences.]

[(ii)] [Hourly respite is limited to recipients living at home, in family care, or in community residences with live-in staff. It may be delivered in a person's home, or in ICF/DDs, family care homes, or community residences. When delivered in the person's home, it may be provided for as many as 24 hours in one day.]

(1) Respite may be provided only to persons living at home, in family care, or in community residences (including IRAs) with live-in staff.

(2) Respite may be provided in any setting that is operated, certified, or approved by OMRDD, including a private residence.

(3) Respite may be provided for as many as 24 hours in one day.

[(2)] *(4)* Respite care services in the person's home shall be delivered by parties who are qualified to provide the level of care specified in the person's individualized service plan.

[(3)] *(5)* Respite care provided in a [supervised community residence] *certified residential setting* shall comply with [Part 686 of this Title] *all regulations applicable to that residential setting*.

Note: Rest of subdivision (g) is renumbered accordingly.

Subdivision 635-10.5(h) is amended as follows:

(h) Respite services.

[(1)] [Notwithstanding any other provision of regulation, hourly respite may be delivered in a free-standing respite center.]

[(2)] *(1)* Respite service costs are those costs related to the aggregate of all respite services selected and identified in the individualized service plan (ISP) for each person receiving respite services from an approved provider. Total allowable respite service costs shall be determined in accordance with the provisions of section 635-10.4(g) of this Subpart and Subpart 635-6 of this Part.

[(3)] *(2)* For the purposes of this subdivision, the term approved provider shall mean any party which has entered into a provider agreement with the Department of Health pursuant to OMRDD approval for the reimbursement of costs incurred in delivering allowable respite services as set forth in section 635-10.4(g) of this Subpart.

[(4)] *(3)* Prices for the reimbursement of waiver [residential] respite services shall be determined through a budget review.

(i) In such budget review, OMRDD shall consider the following limitations: provider historical costs for salaries, fringe and administration for such services. If service specific costs are not available, OMRDD shall consider regional salary, fringe and administration costs and the provider's

historical costs for salaries, fringe and administration in other comparable OMRDD programs. In addition, OMRDD will consider specific service requirements documented in the ISPs of persons to be served, approved fringe benefit appeals in other OMRDD programs, levels of staff treatment responsibility, the impact of provider agency expansion on agency administration costs, and the allocation of clinical titles required for the service.

(ii) The unit of service for [residential] respite *other than that for determining the unit capital price for a non-State operated free-standing respite center shall be one hour equaling 60 minutes and may be claimed in 15 minute increments, as documented* [on a per diem basis for a person requiring an overnight stay for a maximum of 24 hours in an approved respite setting in accordance with section 635-10.4(g)(1)(i) of this Subpart. After a 24-hour period, reimbursement shall accrue at the rate of 1/24th the per diem fee for each subsequent full hour of care, unless the person remains overnight, wherein another per diem's reimbursement may be claimed].

(iii) The unit price for [overnight] respite *other than that delivered at a non-State operated free-standing respite center* shall be determined by dividing the OMRDD approved *total annual* budgeted costs by the *corresponding* projected [days] *hours* of utilization.

[(5)] [Prices for the reimbursement of waiver hourly respite shall be determined through a budget review process.]

[(i)][Prices for hourly respite other than that delivered at a free-standing respite center shall be categorized as basic hourly respite and/or skilled hourly respite.]

[(a)] [Basic hourly respite refers to services by anyone other than a registered nurse or licensed practical nurse.]

[(b)] [Skilled hourly respite refers to services needed because of the person's medical or health care condition, and which are provided by parties holding either a registered nurse or licensed practical nurse credential.]

[(ii)] [In such budget review, OMRDD shall consider the following limitations: provider historical costs for salaries, fringe and administration for such services. If service specific costs are not available, OMRDD shall consider regional salary, fringe and administration costs and the provider's historical costs for salaries, fringe and administration in other comparable OMRDD programs. In addition, OMRDD will consider specific service requirements documented in the ISPs of persons to be served, approved fringe benefit appeals in other OMRDD programs, levels of staff treatment responsibility, the impact of provider agency expansion on agency administration costs, and the allocation of clinical titles required for the service.]

[(iii)] [The unit of service for hourly respite other than that for a free-standing respite center shall be one hour equaling at least 30 minutes but less than 90 minutes of service.]

[(iv)] [The unit of service for hourly respite for a free-standing respite center, other than that for determining the unit capital price for a non-State operated free-standing respite center, shall be one hour equaling 60 minutes and may be claimed in 15 minute increments.]

[(v)] [The unit price for hourly respite other than that delivered at a non-State operated free-standing respite center shall be determined by dividing the approved budgeted costs by the corresponding projected hours of utilization.]

[(vi)] *(iv)* The unit [operating] price for [hourly] respite delivered at a non-State operated free-standing respite center shall [be determined by dividing the approved budgeted operating costs by the corresponding projected hours of utilization] *consist of an operating price and a capital price.*

(a) The unit operating price for a non-State operated free-standing respite center shall be determined by dividing the approved annual budgeted operating costs by the corresponding projected hours of utilization.

[(vii)] *(b)* The unit capital price for a non-State operated free-standing respite center shall be determined by dividing the approved annual budgeted capital costs by 12 and shall be paid monthly. *Capital costs for a non-State operated free-standing respite center shall be determined in accordance with Subpart 635-6 of this Title, except that the provider may be reimbursed for debt service in lieu of depreciation and interest, in which case only OMRDD approval is required.*

Note: Rest of subdivision (h) is renumbered accordingly.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 635-10.4(g)(1) and 635-10.5(h)(3)(ii).

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Acting Director, Regulatory Affairs Unit, Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Albany, NY 12229, (518) 474-1830; e-mail: barbara. brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

Regulatory Impact Statement

A revised regulatory impact statement is not being submitted because the nonsubstantial revisions to the originally proposed amendments do not necessitate revisions to the information provided in the original regulatory impact statement. The minor nonsubstantial revisions to paragraph 635-10.4(g)(1) and subparagraph 635-10.5(h)(3)(ii) were made only for purposes of clarification and do not materially alter the purpose, meaning, or effect of the rule.

Regulatory Flexibility Analysis

A revised regulatory flexibility analysis for small businesses and local governments is not being submitted because the nonsubstantial revisions to the originally proposed amendments do not necessitate revisions to the information published in the original regulatory flexibility analysis for small businesses and local governments. The minor nonsubstantial revisions to paragraph 635-10.4(g)(1) and subparagraph 635-10.5(h)(3)(ii) were made only for purposes of clarification and do not materially alter the purpose, meaning, or effect of the rule.

Rural Area Flexibility Analysis

A revised rural area flexibility analysis for these amendments is not being submitted because neither the original amendments, nor the minor nonsubstantial revisions, will impose any adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in rural areas. The amendments only provide necessary revisions to the reimbursement methodology for HCBS waiver services. Specifically, this regulatory proposal will streamline and simplify price setting and agency billing by establishing the same mechanism for price setting for all types of respite, with a unit of service equivalent to one hour. The amendments will not have adverse effects on regulated parties because they will not affect respite service utilization or the overall levels of funding for these services. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the overall reimbursement methodology is primarily based upon budgeted costs of such HCBS waiver services, or of similar services operated by the provider or similar providers in the same area. Thus, the reimbursement methodology has been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that neither the original amendments, nor the minor nonsubstantial revisions, will have an impact on jobs and/or employment opportunities. This finding is based on the fact that the proposed rule making revises the reimbursement methodology for HCBS waiver respite services to simplify price setting and agency billing by establishing the same mechanism for price setting for all types of respite, with a unit of service equivalent to one hour. Because the amendments will not affect respite service utilization or the overall levels of funding for these services, it is reasonable to expect that the rule will not have an adverse impact on jobs and employment opportunities.

Assessment of Public Comment

One county's department of mental health services commented that the proposed regulation does nothing to provide expanded respite services, which are critical to caregivers of developmentally disabled persons. OMRDD does not claim that the proposed regulation will expand these crucial services, rather, it will consolidate and simplify the price setting and billing of such services. The change will streamline the administrative processing for providers of respite services.

One provider agency was concerned that if the former contracted units of service are not adjusted when developing a new HCBS waiver respite price, a negative fiscal impact to the provider will result. OMRDD shares this concern, and has extended considerable outreach to all respite providers to assist them in determining accurate units of service. All respite provider agencies were invited to a teleconference in early October regarding respite conversion. This was followed by letters to all affected agencies

inviting providers to participate in a series of seven detailed training sessions.

The provider also referred to increased workload associated with the enhanced accountability attendant to the provision of HCBS waiver services. OMRDD would respond that the minimal increase in workload is outweighed by the benefits of improved accountability and coordination of services.

In addition, the provider anticipated that more staff resources would be required to accomplish billing. However, OMRDD's experience has been that an automated billing system actually improves efficiency.

Seven counties, the Human Resources Administration of the City of New York, the New York State Conference of Local Mental Hygiene Directors, and one State Senator wrote to object to the proposed regulation in that the proposed regulation will result in a shift of the cost of respite services for certain individuals to the county, with no attempt to hold the county harmless, that is, to reimburse the counties for these expenditures.

One of these counties proposed that relief for the local share be sought through a change to the definition of Overburden.

The proposed regulation anticipates that a $1.4 million local share will be distributed among the State's 62 counties, an average impact of less than $23,000 per county. Further, the regulation change will generate an additional $2.9 million in Federal revenue for these much-needed services to families and caregivers.

The local share issue is not specific to OMRDD. This issue has been addressed comprehensively in that the recently enacted budget provides for a Statewide decrease in the local share of Medicaid. Thus, the relatively small increases in county expenditures that will arise as a result of the proposed regulation must be viewed in the context of overall relief to counties as recognized and addressed in the enacted State budget for fiscal year 2004-05.

Department of Motor Vehicles

NOTICE OF ADOPTION

Abandoned Vehicles

I.D. No. MTV-37-04-00001-A

Filing No. 1275

Filing date: Nov. 16, 2004

Effective date: Dec. 1, 2004

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

Action taken: Amendment of Part 18 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 1224(2)

Subject: Abandoned vehicles.

Purpose: To raise the threshold value of abandoned vehicles from $750 to $1,250 as revised by L. 2002, ch. 540; delete references to obsolete forms; update departmental form numbers; and make other minor clarifying revisions.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-37-04-00001-P, Issue of September 15, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Michele Welch, Counsel's Office, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

EMERGENCY RULE MAKING

Issuance of Long-Term Debt by Brooklyn Navy Yard Cogeneration Partners, L.P.

I.D. No. PSC-48-04-00002-EA
Filing date: Nov. 10, 2004
Effective date: Nov. 10, 2004

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

Action taken: The commission, on Nov. 10, 2004, adopted an order in Case 04-M-1235 approving the proposed financing transaction by Brooklyn Navy Yard Cogeneration Partners, L.P. (BNYCP).

Statutory authority: Public Service Law, sections 69 and 82

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

Specific reasons underlying the finding of necessity: Failure to grant immediate financing to BNYCP's generation facility will delay the schedule for repairs and make it difficult for the facility to meet the energy demand in the New York City area during the summer of 2005.

Subject: Issuance of long-term debt.

Purpose: To ensure an adequate supply of electricity is available for the New York City area.

Substance of emergency rule: The Commission adopted as a permanent rule the request of Brooklyn Navy Yard Cogeneration Partners, L.P. (BNYCP) to issue and provide security for long-term debt, up to a maximum amount of $36 million, subject to the terms and conditions set forth in the Order.

The agency adopted the provisions of this emergency rule as a permanent rule, pursuant to section 202(6)(c) of the State Administrative Procedure Act because the purposes of the emergency measure would be frustrated if subsequent notice procedures were required.

Text of emergency rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-3204

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

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

(04-M-1235SA1)

NOTICE OF ADOPTION

Submetering of Natural Gas by New York City Economic Development Corporation

I.D. No. PSC-44-03-00008-A
Filing date: Nov. 12, 2004
Effective date: Nov. 12, 2004

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

Action taken: The commission, on Nov. 10, 2004, adopted an order in Case 03-G-1157 granting New York City Economic Development Corporation permission to submeter gas at the Fulton Fish Market, Bronx, NY.

Statutory authority: Public Service Law, section 65(1), (2), (3), (4), (5), (8), (9), (10), (12) and (14)

Subject: Submetering of natural gas service.

Purpose: To submeter gas to forty commercial tenants.

Substance of final rule: The Commission approved a request by New York City Economic Development Corporation (NYCEDC) to submeter gas at the Fulton Fish Market at Hunts Point, Borough of Bronx, New York and NYCEDC is required to obtain authorization from the Commission before submetering gas to any additional tenants at the Fulton Fish Market.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-

1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(03-G-1157SA1)

NOTICE OF ADOPTION

Dishonored Check Charge by Fillmore Gas Company, Inc.

I.D. No. PSC-25-04-00018-A
Filing date: Nov. 10, 2004
Effective date: Nov. 10, 2004

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

Action taken: The commission, on Nov. 10, 2004, adopted an order in Case 04-G-0613, approving the amendments to Fillmore Gas, Inc.'s (Fillmore) schedule for gas service—P.S.C. No. 1.

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

Subject: Revisions to Fillmore's tariff schedule.

Purpose: To modify dishonored check charge rules and establish charges for special services.

Substance of final rule: The Commission approved a request by Fillmore Gas Company, Inc. (Fillmore) to revise its charge for any negotiable instrument from an applicant or customer which was rendered to the company as payment of any bill, charge or deposit due, and which was returned as dishonored or uncollectible for any reason and authorized Fillmore to establish charges for special meter reads and for service re-establishment after disconnection for non-payment.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

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

(04-G-0613SA1)

NOTICE OF ADOPTION

New Types of Electricity Meters, Transformers and Auxiliary Devices by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-33-04-00016-A
Filing date: Nov. 12, 2004
Effective date: Nov. 12, 2004

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

Action taken: The commission, on Nov. 10, 2004, adopted an order in Case 04-E-0883 authorizing Consolidated Edison Company of New York, Inc. (Con Edison) to utilize the Kuhlman Electric Company voltage transformer POF-350-2.

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

Subject: Approval of new types of transformers.

Purpose: To use the Kuhlman voltage transformer type POF-350-2 for revenue metering applications in New York State.

Substance of final rule: Commission approved a request by Consolidated Edison Company of New York, Inc. for permission to use the Kuhlman Electric Company Voltage Transformer POF-350-2 for high voltage customers in New York State.

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-0883SA1)

NOTICE OF ADOPTION

Demand Response Programs by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-35-04-00014-A
Filing date: Nov. 10, 2004
Effective date: Nov. 10, 2004

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

Action taken: The commission, on Nov. 10, 2004, adopted an order in Case 04-E-1005 approving revisions to Consolidated Edison Company of New York, Inc.'s (Con Edison) schedule for electric service—P.S.C. No. 9.

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

Subject: Schedule for electric service.

Purpose: To conform the electric tariff schedule to New York Independent System Operator demand response program changes.

Substance of final rule: The Commission approved a request by Consolidated Edison Company of New York, Inc. (Con Edison) to permit customers to use on-site generation to export power and obtain payment under Con Edison's and New York Independent System Operator demand response programs.

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-1005SA1)

NOTICE OF ADOPTION

Working Capital Facility Financing by AES Eastern Energy, L.P.

I.D. No. PSC-37-04-00016-A
Filing date: Nov. 10, 2004
Effective date: Nov. 10, 2004

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

Action taken: The commission, on Nov. 10, 2004, adopted an order in Case 04-E-1009 granting AES Eastern Energy, L.P. (AES) a line of credit for working capital, up to a maximum amount of $75 million.

Statutory authority: Public Service Law, section 69

Subject: Approval of a financial transaction.

Purpose: To operate more effectively in competitive wholesale electric markets.

Substance of final rule: The Commission approved AES Eastern Energy, L.P.'s request for a line of credit for working capital, up to a maximum amount of $75 million, 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-1009A1)

NOTICE OF ADOPTION

Ancillary Procedures by Central Hudson Gas & Electric Corporation

I.D. No. PSC-38-04-00005-A
Filing date: Nov. 10, 2004
Effective date: Nov. 10, 2004

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

Action taken: The commission, on Nov. 10, 2004 adopted an order in Case 04-E-1071 approving revisions to Central Hudson Gas and Electric Corporation's (Central Hudson) schedule for electric service—P.S.C. No. 15.

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

Subject: Tariff filing.

Purpose: To modify ancillary services reimbursement procedures applicable to retail suppliers/direct customers.

Substance of final rule: The Commission approved a request by Central Hudson Gas & Electric Corporation to revise its ancillary services reimbursement procedures applicable to Retail Suppliers/Direct Customers participating in its Retail Access Program.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-E-1071SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Intercarrier Agreement between Verizon New York Inc. and Level 3 Communications, LLC

I.D. No. PSC-48-04-00006-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a modification filed by Verizon New York Inc. and Level 3 Communications, LLC to revise the interconnection agreement effective on April 1, 2004.

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

Subject: Intercarrier agreements to interconnect telephone networks for the provisioning of local exchange service.

Purpose: To amend the agreement.

Substance of proposed rule: The Commission approved an Interconnection Agreement between Verizon New York Inc. and Level 3 Communications, LLC in April 2004. The companies subsequently have jointly filed amendments to clarify the provisions regarding Intercarrier compensation for ISP-bound traffic and local traffic. The Commission is considering these changes.

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.
(01-C-0148SA3)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Retail Service Quality Program by Verizon New York Inc.

I.D. No. PSC-48-04-00007-P

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

Proposed action: The Public Service Commission is considering what actions it will require Verizon New York Inc. (Verizon) to take to improve retail service quality in light of the results and recommendations presented in the Doherty and Company audit report on Verizon's Retail Service Quality Program.

Statutory authority: Public Service Law, sections 91, 96, 97 and 98

Subject: Verizon's Retail Service Quality Program.

Purpose: To implement recommendations.

Substance of proposed rule: The New York Public Service Commission established a proceeding to investigate Verizon New York mc.'s (Verizon's) retail service quality. As part of that proceeding, the Commission directed that an independent audit be performed on Verizon's retail service quality. The audit, performed by Doherty and Company, has been completed. The Commission is considering what actions it will require Verizon to take to improve retail service quality in light of the results and recommendations presented in the Doherty and Company audit report on Verizon's Retail Service Quality Program. A Public Copy of the report is available on the Commission's Web site at http://www.dps.state.ny.us by accessing the Commission Documents section of the homepage and referencing Case number 03-C-0971 or by accessing it through the "Telecommunications" file on the homepage.

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-0971SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Electric Transmission Right-of-Way Management Practices of Central Hudson Gas and Electric Corporation, *et al.*

I.D. No. PSC-48-04-00008-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, recommendations of Department of Public Service (DPS) staff concerning electric transmission right-of-way (ROW) management practices of certain electric corporations.

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

Subject: Recommendations concerning the ROW management practices of certain electric corporations in connection with electric lines in voltage classes of 34.5 kV and above.

Purpose: To consider the recommendations.

Substance of proposed rule: In a memorandum dated October 27, 2004, DPS Staff set forth recommendations concerning the electric transmission right-of-way (ROW) management practices of Central Hudson Gas and Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric and Gas Corporation, Niagara Mohawk Power

Corporation, a National Grid Company, Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation. The Commission is considering these recommendations, in the areas of program management and staffing, program execution, ROW records and reporting, program danger tree management, program cycle length, vegetative buffers and ROW encroachment, so that the electric corporations can achieve the highest possible level of reliability while balancing cost and environmental protection considerations.

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-0822SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Drug and Alcohol Testing of Employees of Pipeline Facility Operators

I.D. No. PSC-48-04-00009-P

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

Proposed action: This is a consensus rule making to amend Parts 10 and 262 of Title 16 NYCRR.

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

Subject: Drug and alcohol testing of employees of pipeline facility operators.

Purpose: To ensure that the commission's rules conform with title 49, Code of Federal Regulations, part 199.

Substance of proposed rule (Full text is not posted on a State website): The proposed rules will bring the Commission's regulations pertaining to drug and alcohol testing of employees of pipeline facility operators into conformance with recent amendments to the Federal Regulations contained in Title 49, Code of Federal Regulations, Part 199, Drug and Alcohol Testing (49 CFR Part 199). The revisions to 16 NYCRR Part 10 will update the applicable incorporated-by-reference materials to the proper editions.

The proposed changes to Title 16 NYCRR Part 262 fall into three categories: reordering and renumbering of paragraphs to be consistent with the formatting of 49 CFR Part 199, updates to reflect the standardized drug and alcohol testing procedures found in 49 CFR Part 40 (DOT Procedures), and grammatical changes to improve understanding and readability.

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.

Consensus Rule Making Determination

This amendment is being proposed as a Consensus Rule because no objection to the rule as written is expected. The proposed changes will bring Commission regulations into compliance with Federal regulations (49 CFR Part 199) and affected persons and entities are already subject to the Federal rules and regulation in 49 CFR Part 199.

Job Impact Statement

This agency finds that the rules will not have a substantial impact on job and employment opportunities. The proposed changes will bring Commission regulations into compliance with Federal regulations (49 CFR Part 199) and affected persons and entities are already subject to the Federal rules and regulation in 49 CFR Part 199.

(02-G-0133SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Transfer of Certain Pipelines by National Fuel Gas Distribution Corporation to Great Lakes Energy Partners LLC

I.D. No. PSC-48-04-00010-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a petition filed by National Fuel Gas Distribution Corporation for approval to transfer certain pipelines used for the gathering of natural gas and appurtenances to Great Lakes Energy Partners LLC.

Statutory authority: Public Service Law, section 70 and 16 NYCRR Part 31

Subject: National Fuel Gas Distribution Corporation's transfer of certain pipelines used for the gathering of natural gas to Great Lakes Energy Partners LLC.

Purpose: To approve the transfer.

Substance of proposed rule: On October 20, 2004, National Fuel Gas Distribution Corporation (NFG) filed a petition seeking Commission approval to transfer certain pipelines used for the gathering of natural gas and appurtenances (collectively, the Facilities) to Great Lakes Energy Partners LLC (Great Lakes), for an amount equal to one dollar plus the cost of certain recent repairs to the Facilities. Great Lakes is an independent oil and gas company engaged in the development, exploration, and acquisition of properties in the Appalachian Basin. 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-G-1299SA1)

Racing and Wagering Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Programming and Naming of Jockeys Entered to Ride Thoroughbred Horses

I.D. No. RWB-48-04-00011-P

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

Proposed action: Amendment of section 4025.33 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 212

Subject: Programming and naming of jockeys entered to ride thoroughbred race horses and the manner and time at which they must be named and programmed.

Purpose: To eliminate the existing requirement that a back up rider be named to ride the second call horse where a jockey is programmed to ride more than one horse in a race.

Text of proposed rule: 4025.33 Programming of jockeys.

(a) [At nonprofit racing associations:

(1)(i)] Each horse to be drawn into the main body of a race or as an also eligible shall have its jockey named by the time established by the racing secretary for drawing of post positions and prior to the publication of the overnights. No jockey may be named to ride more than one horse in a race except that a jockey may be named to ride a horse drawn into the main body of a race and a horse drawn as an also eligible in such race [if a backup-rider is indicated for the horse with second call,], or a jockey may be named to two or more parts of a coupled entry where only one starter from such entry will start.

[ii An apprentice allowance may only be claimed before entries have closed and only if the apprentice has been engaged.

(2) It shall be the responsibility of the trainer to insure compliance with this rule. In this regard, upon request, the racing secretary's office when taking entries shall notify the trainer of the availability of specific jockeys. Should a jockey remain unamed at the time prescribed herein such naming shall be made by their steward or their designee. No jockey, once named, shall be changed except for good cause by the stewards.]

(b) [At other racing associations,] [all] *All* jockeys shall be named by scratch time and no jockey shall be named or changed thereafter except by the stewards for good cause.

[(c) It shall be the responsibility of both jockey and trainer to fulfill their engagements.]

(c) It shall be the responsibility of the trainer to insure compliance with this rule. In this regard, upon request, the racing secretary's office when taking entries shall notify the trainer of the availability of specific jockeys. Should a jockey remain unnamed at the time prescribed herein such naming shall be made by the stewards or their designee. No jockey, once named, shall be changed except for good cause by the stewards.

(d) It shall be the responsibility of both jockey and trainer to fulfill their engagements.

(e) An apprentice allowance may only be claimed before entries have closed and only if the apprentice has been engaged.

Text of proposed rule and any required statements and analyses may be obtained from: Erin E. Dahlmeyer, Racing and Wagering Board, One Watervliet Ave. Ext., Albany, NY 12206-1668, (518) 453-8460, ext. 3300, e-mail: edahlmeyer@racing.state.ny.us

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

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

This action was not under consideration at the time this agency's regulatory agenda was submitted.

Regulatory Impact Statement

1. Statutory Authority and Legislative Objectives of such Authority: The Board is authorized to promulgate these rules pursuant to Racing, Pari-Mutuel Wagering and Breeding Law, § 101 and § 212. Under § 101, the Board has general jurisdiction over all horse racing activities and all pari-mutuel thoroughbred racing activities. Under § 212, the Board is responsible for the promulgation of rules necessary to implement requirements regarding the entry of horses to race and programming of jockeys. Pursuant to Racing Law § 212 there are three stewards assigned to supervise each running race meeting. Those stewards are authorized to exercise powers and perform such duties at each race meeting as may be prescribed by the rules of the State Racing and Wagering Board. This rule amendment is relative to the running of a thoroughbred race meet and involves the duties of the stewards.

2. Legislative Objectives: To enable the New York State Racing & Wagering Board to preserve the integrity of pari-mutuel racing.

3. Needs and Benefits: This rule eliminates the requirement that a back up rider must be named in instances where the jockey is named to ride more than one a horse in a race.

Most jockeys are represented by agents, who contract with horse trainers to obtain mounts in races. These agents coordinate the jockeys' rides, horse preferences and races for each race date.

Horse trainers select the races to enter their horses. Trainers are informed of the calendar of races offered at a track through a condition book, published by the track's racing secretary. 48 hours before a specific race date, the racing secretary's office will accept entry applications. Entries are phoned in by the trainers to the racing secretary's office. Information detailing the horse name, desired race, desired jockey, owner, and trainer's name is entered into a computer database.

There are a certain number of horses that a track can accommodate per race. For example, at Saratoga on the dirt, a race can have a maximum of 12 horses running in the race. The racing secretary will accept a maximum of 12 horses into the race (this is called the "main body"). The selection is based on a seniority preference system. If the race fills, he then will put the next 4 horses on an "also eligible" list. The "also eligible" list horses are essentially wait listed. If there is a late scratch, a horse on the wait list will draw in to run in the main body of the race.

Once the racing secretary is satisfied with the number of horses entered in races scheduled for that date, he will close the entry and conduct the draw. The draw assigns horses to a postposition.

After the postpositions are assigned and the "draw" is completed, the racing secretary finalizes the jockeys' assignments, with the jockeys' agents. If a jockey is listed on 2 horses entered into the main body of the race, the racing secretary will ascertain from the agent which horse the jockey will actually ride. Another jockey will be assigned to the other horse.

Currently, a jockey can be assigned to more than one horse in two instances. First, a jockey can be named to ride a horse entered into the "main body of the race" and a horse that is an "also eligible" horse. When this happens the jockey also has the choice of naming which horse he wants of the two to ride as a first choice, ("first call") and second choice, ("second call"). Some jockeys may want to ride the "also eligible" as first choice (first call) and the horse in the main body as their second call. Second, a jockey may choose to ride the main body horse as his first call and the also eligible horse as second call. In either instance, the rule currently requires that a back up rider be named for the "second call" horse, whether it is the main body horse or the also eligible horse.

Once the draw is closed the racing secretary inputs the final information into the computer system and prints the overnight. The overnight contains all the information that resulted from the entry and draw process. It is distributed by the racing secretary after the draw concludes, to the media, betting public, horsemen and anyone else who wants it. The overnight is published before the final scratch times so it does not contain the late scratch information.

This rule would eliminate the requirement that a back up rider, be named to ride the jockeys' second call. It is premature to name a back up rider to a second call horse 48 hours before the race date post time, because the late horse scratches are not decided until late in the morning of the actual race date. Naming a back up rider at the draw and prior to the publication of the overnight sheet as required is unreasonable. It conveys inaccurate information to the betting public and media because based on the scratches that may occur the morning of the relevant race date, the back up rider on a second call horse could change.

A scratch occurs when a veterinarian, with the trainer, decides the morning of a horse's race, that the racehorse should not run. In the past, the scratch time was late morning the day before the race date. With the earlier scratch time the track program would be printed after the scratch time, avoiding any confusion regarding the back up rider on the overnights. Currently, the late scratch time has been moved up to the morning of the race date. Programs have already been printed. Because of this the requirement that a back up be named rider for a second call horse by the time the overnight and the programs are printed causes false information to be disseminated to the betting public. The racing secretary and stewards would rather have no back up listed than the name of a back up who won't ride.

The reality is that after the draw no jockeys' agents will commit their jockeys as a back up rider on the second call horse, resulting in no back up riders being listed. A jockey cannot be forced to commit to a ride if he does not want to. The racing secretary has to decide whether to name a jockey for the sake of complying with the rule. On race day it then becomes the stewards' responsibility to permit a change in that appointed back up rider on the second call horse if other jockeys become available.

This amendment will still permit a jockey to be named to ride two horses in a race and name his call preference but will eliminate the requirement of naming a backup rider on the second call horse.

In view of the foregoing, that portion of the rule that requires that a back up jockey be named to ride a "second call" horse between draw time and publication of overnights is premature, impractical and doesn't give the trainer and owner of the second call horse the opportunity to avail themselves of the best jockey available for their horse.

The rule change will alleviate the burden on trainers, jockeys' agents, the racing secretary and the stewards of have to comply with an obsolete part of the rule.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: A slight cost in time could be saved by eliminating the requirement of having to name back up jockeys to the second call horses at the draw time. The racing secretary will not have to assume the

burden of assigning back up jockeys to horses. There will be no paper reduction costs as the overnights sheets are not reprinted or amended.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: See (d) below.

(d) Where an agency finds that it cannot provide a statement of costs, a statement setting forth the agency's best estimate, which shall indicate the information and methodology upon which the estimate is based and the reason(s) why a complete cost statement cannot be provided. There will be no cost to the agency.

5. Local Government Mandates: None. See above.

6. Paperwork: None. See above.

7. Duplication: None.

8. Alternatives: One alternative would be to leave the rule as it is. However, naming back up riders to "second call" horses at the time of the draw, approximately 48 hours before the post time of the relevant race date, is premature, unduly burdensome and often conveys inaccurate information to those members of the public, including the media, who make use of the information on the overnight sheets and program.

9. Federal Standards: None.

10. Compliance Schedule: Once adopted, the rule can be implemented immediately.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendment merely eliminates the requirement of naming back up jockeys on the "second call" horses at the time draw of the race and publication of overnight sheets. The second call horse is the one who a jockey, named to ride two horses in a race, wants to ride as his second choice. The rule proposal will continue to mandate that jockeys can be named to ride a "main body" horse and an "also eligible" horse by the draw time. It eliminates the requirement that a back up jockey be named on the second call horse. This does not impact upon State Administrative Procedure Act § 102 (8). Nor does it affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry for the reasons set forth above, because the Board rules have previously required jockeys to be named by the draw with respect to riding two horses and is only eliminating the requirement of naming "back up" jockeys to the second call horses at that time.

Office of Real Property Services

EMERGENCY RULE MAKING

State Reimbursement of Expenses of Local Officials

I.D. No. RPS-48-04-00004-E
Filing No. 1273
Filing date: Nov. 12, 2004
Effective date: Nov. 12, 2004

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

Action taken: Amendment of Subpart 188-2 of Title 9 NYCRR.

Statutory authority: Real Property Tax Law, sections 202(1)(L), 318(4), 1530(4); and L. 2004, ch. 53

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

Specific reasons underlying the finding of necessity: This proposal would allow payment of expenses from appropriated funds.

Subject: State reimbursement of expenses of local officials in satisfying training requirements.

Purpose: To authorize payment of late vouchers if funds are available.

Text of emergency rule: Section 1. Paragraph 4 of subdivision b of section 188-2.9 is amended to read as follows:

Reimbursement for completing components of the basic course of training for attaining certification as a State Certified Assessor and for satisfaction of continuing education requirements shall be made only upon claims submitted no later than 30 days following completion of such training. Submissions by mail shall be deemed to have been submitted when postmarked. *Claims submitted more than 30 days following the completion of such training will be reviewed for possible payment on or before the first day of June of the succeeding fiscal year. If funds remain from the appropriation for training reimbursement in the fiscal year in which the assessor completed such training, claims will be paid in full or, if the remaining funds are insufficient, prorated.*

Section 2. this amendment shall first apply to the State Fiscal Year 2004-2005.

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 February 9, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: James J. O'Keeffe, General Counsel, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, (518) 474-8821, e-mail: internet.legal@orps.state.ny.us

Regulatory Impact Statement

1. Statutory Authority:

Section 202(1)(l) of the Real Property Tax Law (RPTL) authorizes the State Board of Real Property Services to adopt such rules as may be necessary for the exercise of its powers and the performance of its duties.

Section 318(4) of the RPTL provides that travel and other actual and necessary incurred in satisfactorily completing [required training] shall be a state charge upon audit by the comptroller .

Section 1530(3)(f) provides reimbursement of necessary and actual expenses incurred by directors of county real property tax services agencies.

Chapter 53 of the Laws of 2004, at page 592, provides an appropriation for training reimbursement of $350,000.

2. Legislative Objectives:

Payment of expenses of assessors who satisfactorily complete required training.

3. Needs and Benefits:

Section 318(4) RPTL provides that "travel and other actual and necessary expenses incurred by an [assessor] in satisfactorily completing courses of training as required by this title shall be a state charge " Section 1530(3)(f) contains similar language for directors of county real property tax services agencies. The office of Real Property Services (NYSORPS) receives an annual appropriation to satisfy this obligation. The appropriation of $300,000 in Chapter 53 of the Laws of 2002 was accompanied by the language "the amount appropriated herein shall represent fulfillment of the state's obligation for this purpose". In other words, irrespective of the categorical language of sections 318 and 1530, the Legislature capped reimbursement expenditures at $300,000. Based upon past experience, NYSORPS feared that the 2002-2003 appropriation might be insufficient.

The State Board of Real Property Services adopted a proposal establishing a delayed payment system with a possible proration of payments if an annual appropriation was insufficient that is contained in 9 NYCRR 188-2.9(f). Briefly one-half of the annual appropriation is allocated to the first third of the State fiscal year (April 1 to July 31), one-third to the second third of the State fiscal year (August 1 to November 30) and one-sixth to the last third (December 1 to March 31). Throughout the year, basic training, which was deemed to be of a higher importance, is paid as vouchers are received. Vouchers for continuing education received in the first third are held until August 31. If the remainder of the first allotment is sufficient, all continuing education vouchers are paid in full and any surplus is added to the second allotment. If the remainder or "net" allotment is insufficient, a pro-ration factor is calculated. This factor is the net allotment divided by the total of vouchers. The factor is applied to each voucher so that each individual would receive the same percentage of the voucher submitted. To insure the effectiveness of the process, the rules contain a requirement that vouchers be submitted within thirty days of the completion of training.

This process functioned as intended in the face of a slight shortfall in fiscal 2002-2003. In fiscal 2003-2004, the appropriation was increased to $350,000. At the end of that fiscal year, a surplus of $50,087.28 remained. In other words, reimbursement remained about the same, but the increased appropriation removed the pressure of a possible shortfall. This proposal

addresses an issue that has been raised by local officials. As noted, the proration process adopted in 2002 also included a thirty-day submission requirement. Local officials that have missed the requirement, often with good reason, have been denied reimbursement. At the same time, the increased appropriation has left a surplus at the end of the fiscal year. For example, in fiscal 2003-2004, with the $50,000 surplus, $2,310.04 in vouchers was denied for late filing. In 2004-2005, NYSORPS has so far denied $2,836.02 in vouchers. The agency expects a surplus far in excess of this amount.

This proposal would address this situation by allowing payment of late vouchers out of any surplus that might occur. The status of the appropriation and late vouchers would be reviewed after the last date for submitting vouchers (which would be around May 1). This review would take place by June 1. If there is no surplus, no late vouchers would be paid. If the surplus is large enough, all vouchers would be paid. If the surplus is insufficient, payments would be prorated.

4. Costs:
(a) To State Government:
An amount estimated at between $5,000 and $10,000.
(b) To local governments:
None.
(c) To private regulated parties:
None. There are no private regulated parties in this program.
(d) Basis of cost estimates:
The amount of untimely vouchers submitted in the last two year.
5. Local Government Mandates:
None. The initial submission of a voucher is discretionary.
6. Paperwork:
None. The proposal only affects vouchers that have already been submitted.
7. Duplication:
There are no comparable State or Federal requirements.
8. Alternatives:
Continued failure to pay untimely submissions.
9. Federal Standards:
There are no Federal regulations concerning this subject.
10. Compliance Schedule:
None.

Regulatory Flexibility Analysis

The amendment proposed would not impose any adverse economic conditions or any reporting, recordkeeping or other compliance requirements on small businesses. The rule imposes no additional recordkeeping or reporting requirements on local governments. The rule allows for payment, if funds are available at the end of the State fiscal year, of submitted vouchers that were not timely. The rule would only affect those local governments in which assessors sought reimbursement of expenses but did not file vouchers in a timely manner. The rule imposes no additional requirements. The rule does not require any additional expense for compliance.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this rule making because the amendment would not impose any adverse economic conditions, any reporting, recordkeeping or compliance requirements on public or private entities in rural areas. It provides for payment of vouchers from assessors seeking reimbursement of training expenses that were not filed within the existing timing requirement if funds remain from the annual appropriation. The new provision applies to all assessing units. It is intended to benefit all assessing units, including those in rural areas, by providing reimbursement that would not otherwise be available.

Job Impact Statement

A job impact statement is not required for this rule making because the amendment only concerns reimbursement of municipal assessors for training expenses. The amendments thus has no impact on employment opportunities.

State University of New York

NOTICE OF ADOPTION

Traffic and Parking Regulations at the State University of New York College at Old Westbury

I.D. No. SUN-31-04-00010-A
Filing No. 1277
Filing date: Nov. 16, 2004
Effective date: Dec. 1, 2004

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

Action taken: Amendment of section 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 or summary was published in the notice of proposed rule making, I.D. No. SUN-31-04-00010-P, Issue of August 4, 2004.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

Department of Transportation

NOTICE OF ADOPTION

State Public Transportation Safety Board

I.D. No. TRN-25-04-00002-A
Filing No. 1298
Filing date: Nov. 16, 2004
Effective date: Dec. 1, 2004. Amendment to section 990.12 effective one year after publication in the State Register.

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

Action taken: Amendment of sections 990.1 through 990.14; addition of sections 990.16 through 990.20; and repeal of Appendixes B-19 and B-22 of Title 17.

Statutory authority: Transportation Law, section 17-b and art. 9-B

Subject: State Public Transportation Safety Board.

Purpose: To provide consistency with the standards and requirements of the Code of Federal Regulations that have been incorporated by reference and clarify the procedures of the New York State Public Transportation Safety Board to better preserve public safety.

Text or summary was published in the notice of proposed rule making, I.D. No. TRN-25-04-00002-P, Issue of June 23, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Dennison P. Cottrell, Department of Transportation, Passenger and Freight Safety Division, POD 53, 50 Wolf Rd., Albany, NY 12232, (518) 457-6512, e-mail: dcottrel@dot.state.ny.us

Assessment of Public Comment

The agency received no public comment.