

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 Correctional Services

NOTICE OF ADOPTION

Library Services in Protective Custody

I.D. No. COR-20-04-00001-A
Filing No. 801
Filing date: July 12, 2004
Effective date: July 28, 2004

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

Action taken: Amendment of section 330.4(f)(1) of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Library services in protective custody.

Purpose: To correct limits for library books possessed by protective custody inmates.

Text or summary was published in the notice of proposed rule making, I.D. No. COR-20-04-00001-P, Issue of May 19, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Pelt-Sealing and Reporting Requirements for Coyote and Marten **I.D. No.** ENV-30-04-00002-P

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

Proposed action: Amendment of sections 2.20, 6.3 and 180.10 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0917 and 11-1103

Subject: Pelt-sealing and reporting requirements for coyote and marten.

Purpose: To make it easier for hunters and trappers to report a harvested coyote and enable the collection of biological data on harvested pine marten.

Text of proposed rule: Part 2 of Title 6 of the Codes, Rules and Regulations of the State of New York (NYCRR) is amended as follows:

Amend subdivision 2.20(c) to read as follows:

(c) Tagging of bobcat [and coyote].

(1) A person taking a bobcat [or coyote] must comply with the regulations pertaining to the tagging and sealing of [these] *this* species given in section 6.3 of this Title.

(2) To legally possess or transport the unskinned carcass or unprocessed pelt of a bobcat [or coyote] which was taken outside New York State, a person must comply with section 6.3 of this Title.

Part 6 of Title 6 of the Codes, Rules and Regulations of the State of New York (NYCRR) is amended as follows:

Amend subdivision 6.3(b) to read as follows:

(b) Special pine marten permit. No person shall trap pine marten unless he/she possesses a special free permit. A pine [martin] *marten* permit may be obtained by mail or in person from the [Regional Wildlife Manager,] Department of Environmental Conservation, Route 86, Ray Brook, NY 12977, or Hudson Street, Box 220, Warrensburg, NY 12885. The department may suspend a pine [martin] *marten* permit where there is probable cause to believe that the holder of the permit has violated the regulations governing the taking of pine marten as contained in this section or in section 6.2, or has violated any provisions of article 11 of the Environmental Conservation Law. The department shall revoke a pine marten permit where it has determined that the holder has violated such regulations or such law. The special regulations contained in this subdivision shall apply to the trapping of pine marten pursuant to this special free permit.

Paragraphs 6.3(b)(1) and 6.3(b)(2) remain unchanged.

Amend subdivision 6.3(c) to read as follows:

(c) Tagging and sealing requirements for beaver, otter, [coyote,] bobcat, fisher and pine marten taken in New York State.

Paragraphs 6.3(c)(1) and 6.3(c)(2) remain unchanged.

Amend Paragraph 6.3(c)(3) to read as follows:

(3) Except as provided in paragraph (2) of this subdivision, no one except the taker may possess an unsealed, unprocessed pelt or unskinned

carcass of a beaver, otter, bobcat, [coyote,] fisher or pine marten taken in New York State unless is accompanied by a completed furbearer possession tag in accordance with paragraph (2) of this subdivision.

Paragraph 6.3(c)(4) remains unchanged.

Amend paragraph 6.3(c)(5) to read as follows:

(5) For beaver [and coyote] only, a completed furbearer possession tag must be mailed or hand-delivered to an authorized department office. Part two of the furbearer possession tag must remain with the pelt (or unskinned carcass) of a beaver [or coyote] at all times until the pelt (or unskinned carcass) is sealed. The department will deliver a seal to the taker for each beaver [or coyote] reported and the taker must immediately affix the seal on the pelt (or unskinned carcass). The seal must be obtained by the taker and affixed to the pelt (or unskinned carcass) prior to any of the four conditions pursuant to paragraph (4) of this subdivision.

Paragraph 6.3(c)(6) remains unchanged.

Amend paragraph 6.3(c)(7) through paragraph 6.3(c)(9) to read as follows:

(7) No one may buy and no one except the taker may possess an unprocessed pelt or unskinned carcass of a beaver, otter, bobcat, [coyote,] fisher or pine marten taken in New York unless it has an appropriate, intact and closed New York State pelt seal attached to it in accordance with paragraph (4) of this subdivision, except that a person, acting as an agent for the taker, may temporarily possess the taker's pelts or unskinned carcasses for the purpose of skinning or taking them for sealing, provided that the taker's license under which the furbearer was taken, or a copy (front and back) of the taker's license under which a furbearer was taken, accompanies the pelts or unskinned carcasses and the pelts or unskinned carcasses also are accompanied by their furbearer possession tags as provided in paragraph (2) of this subdivision.

(8) To have a pine marten sealed by the department, the taker must give an authorized department sealer [at least the tip of the lower jaw (including both canine teeth)] *the entire skinned carcass* of the animal to be sealed.

(9) The taker of a pine marten who wishes to obtain written temporary exemption from requirements for submission of the [lower jaw] *skinned carcass*, so that a taxidermist can skin the animal, must at the time of sealing:

Subparagraph 6.3(c)(9)(i) through clause 6.3(c)(9)(ii)(a) remains unchanged.

Amend clause 6.3(c)(9)(ii)(b) to read as follows:

(b) if the taker retains ownership of the marten pelt, agree in writing to submit or have submitted to the department, within 90 days of sealing, the [tip of the lower jaw] *entire skinned carcass* and the written temporary exemption [that was issued for the animal from which the lower jaw was taken].

Paragraph 6.3(c)(10) through paragraph 6.3(c)(11) remain unchanged.

Amend paragraphs 6.3(c)(12) and (13) and subdivision 6.3(d) to read as follows:

(12) A taxidermist who receives an unskinned pine marten from a taker for the taxidermist's future use must submit to the department within 90 days of sealing the [tip of the lower jaw] *entire skinned carcass* and the written temporary exemption originally issued to the taker.

Note: The written temporary exemption remains with the [lower jaw] *skinned carcass* as proof of legal possession, and must be surrendered to the department with the [lower jaw] *skinned carcass*. Responsibility for submission of the written temporary exemption and [lower jaw] *skinned carcass* follows ownership. If the taker retains ownership during processing, the taker remains responsible for submission even if the taxidermist agrees to submit the written temporary exemption and [jaw] *skinned carcass* directly. If a taxidermist becomes the owner, whether by purchase or not, the taxidermist becomes responsible for submission of the written temporary exemption and [lower jaw] *skinned carcass*.

(13) Freeze-dried mounts of the pine marten may not be made because of the [jaw] *skinned carcass* submission requirement.

(d) To legally possess or transport an unskinned carcass or unprocessed pelt of a beaver, otter, [coyote,] bobcat, fisher or pine marten taken outside New York State, a person must comply with the following:

Paragraph 6.3(d)(1) through end of Part 6 remains unchanged.

Part 180 of Title 6 of the Codes, Rules and Regulations of the State of New York (NYCRR) is amended as follows:

Amend Subdivision 180.10(b) to read as follows:

(b) Deer, bear, *coyote* and turkey. A hunter who has taken a deer, bear, *coyote* or turkey or a trapper who has taken a *coyote* [must] *shall*, within 48 hours of taking the animal, report the harvest via one of the following methods:

Paragraphs 180.10(b)(1) through 180.10(b)(3) remain unchanged.

Amend subdivision 180.10(c) to read as follows:

(c) [Coyote and beaver] *Beaver*. [Coyotes harvested by hunting or trapping or beaver] *Beaver* harvested by trapping may be reported via the same methods applicable to deer, bear, *coyote* and turkey or as described in subdivision 6.3(c) of this title.

Text of proposed rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8885, e-mail: grbatche@gw.dec.state.ny.us

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

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

Additional matter required by statute: State Environmental Quality Review Act (SEQR; ECL art. 8). Establishment of regulations pertaining to the possession and transportation of game species are covered by a final programmatic impact statement (FPIS) on wildlife game species management (DEC 1980) and supplemental findings (DEC 1994). The proposed action does not involve any significant departure from established and accepted practices as described in the FPIS and is therefore classified as a "type II" action pursuant to the department's SEQR regulations (6 NYCRR § 618.2[d][5]).

Regulatory Impact Statement

1. Statutory Authority

Section 11-0917 of the Environmental Conservation Law states that the possession, transportation, and disposal of coyotes may only be permitted by Department regulation. Section 11-1103 authorizes the Department to regulate the taking, possession, and disposition of pine marten and coyotes taken by trappers.

2. Legislative Objectives

The legislative objective behind the statutory provisions listed above is to authorize the Department to establish by regulation certain basic wildlife management tools, including provisions for monitoring the status of harvested species. These tools are used by the Department to maintain sound management practices, including the establishment of appropriate hunting and trapping regulations.

3. Needs and Benefits

The Department of Environmental Conservation (Department) proposes the elimination of the requirement that harvested coyotes (pelts or carcasses) be sealed with a plastic seal for continued legal possession by hunters or trappers. Coyote pelt sealing served an important function over the last 30 years. Through pelt sealing, the Department was able to accurately document the expansion of coyote populations in New York, and monitor the changes in occupied range. These data have been important as the Department monitored the status of coyotes. The Department proposes to establish a new rule which will require hunters and trappers to report harvesting a coyote within 48 hours via the DEC Automated Licensing System (DECALS). With the coyote population now established throughout the state (except Long Island), DECALS provides a less expensive and more convenient manner to meet long-term coyote population monitoring needs. Furthermore, elimination of the pelt sealing requirement will save the Department time and money, while providing more convenience to hunters and trappers by allowing them to fulfill all the legal reporting requirements with one phone call to DECALS.

The harvest of marten is very carefully regulated, and a special marten trapping permit is required. The current requirement to submit only the lower jaw is insufficient for monitoring marten populations, because only age may be determined. To more fully determine the status of marten and evaluate the effects of harvest, the following data are required: age, sex, and reproductive condition. The entire carcass is needed for these analyses. The proposed regulation would require marten trappers to submit the entire carcass to the Department for continued legal possession, transportation, or sale.

4. Costs

Adoption of regulations that establish methods of taking, possessing, transporting, and disposing of coyote and marten do not result in increased expenditures by state or local governments, or the general public. Normal expenses of the management program and the enforcement of hunting and trapping regulations are not affected. The Legislature establishes fees for sporting licenses by statute.

5. Local Government Mandates

This rule making does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

6. Paperwork

The proposed regulations do not impose additional reporting requirements upon the regulated public (trappers and hunters).

7. Duplication

There are no other local, state or federal regulations concerning the possession, transporting, or disposal of coyote and marten. The Department is the only governmental entity with the legal authority to regulate the managed harvest of coyote and marten in New York.

8. Alternatives

An alternative to making the proposed changes is to leave the regulations intact. However, this would perpetuate the unnecessary requirement to pelt seal coyotes, and reduce the Department's ability to manage marten.

9. Federal Standards

There are no federal government standards for the possession, transportation, and disposal of coyote and marten.

10. Compliance Schedule

Trappers and hunters will be expected to comply with the new regulations as soon as they take effect.

Regulatory Flexibility Analysis

This proposed rule making will revise regulations concerning the possession, transportation, and disposal of coyotes taken by hunters and trappers, and marten taken by trappers. The Department has determined that this rule making will not impose an adverse economic impact on small businesses or local governments. The proposed revisions are not expected to significantly change the number of participants or the frequency of participation in the regulated activities.

The Department has also determined that these amendments will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. All reporting or recordkeeping requirements associated with trapping are administered by the Department.

Therefore, the Department has concluded that a regulatory flexibility analysis is not required.

Rural Area Flexibility Analysis

This proposed rule making will revise regulations concerning the possession, transportation, and disposal of coyotes taken by hunters and trappers, and marten taken by trappers. The Department has determined that this rule making will not impose an adverse economic impact on rural areas. The proposed revisions are not expected to significantly change the number of participants or the frequency of participation in the regulated activities.

The Department has also determined that these amendments will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. All reporting or recordkeeping requirements associated with trapping and hunting are administered by the Department.

Therefore, the Department has concluded that a rural area flexibility analysis is not required.

Job Impact Statement

The purpose of this rule making is to amend the requirements for the possession, transportation, and disposal of coyotes taken by hunters and trappers, and marten by trappers. Based on the Department's past experience in implementing similar regulations to those herein proposed, and based on the professional judgement of staff in the New York State Department of Environmental Conservation (DEC), the proposed regulatory changes included in this rule making are not expected to have any adverse impacts on jobs or employment opportunities in New York State. This rule making will remove the pelt seal requirements for coyote, which should have a positive impact on those engaged in trapping or hunting coyotes by making reporting easier and less time-consuming. The proposal to require submission of the entire marten carcass should not have any effect on or cause the loss of any jobs or employment opportunities. Therefore, DEC has concluded that a Job Impact Statement is not required.

Department of Health

**EMERGENCY
RULE MAKING**

Expedited HIV Testing of Women and Newborns

I.D. No. HLT-12-04-00012-E

Filing No. 798

Filing date: July 9, 2004

Effective date: July 9, 2004

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

Action taken: Amendment of section 69-1.3 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 576, 2500-a and 2500-f

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

Specific reasons underlying the finding of necessity: Immediate adoption of this amendment is necessary to protect the public health and welfare and to prevent harm to infants born in New York State. The New York State Department of Health is actively engaged in the prevention of mother-to-child HIV transmission. Recent advances in medical knowledge concerning the prevention of perinatal HIV transmission have demonstrated that antiretroviral therapy, given to prevent HIV transmission, is most efficacious when given prenatally, during labor, or within the first 12 hours of an infant's birth. Although approximately 94 percent of women are tested for HIV during prenatal care, the HIV status of six percent is unknown at presentation for delivery. Women at high risk for HIV who have received no prenatal care are over-represented within this group. In 1999, the Department implemented expedited HIV testing in the labor and delivery setting so that providers can initiate partial antiretroviral regimens either to the mother in labor or to the infant immediately after birth. The turn-around-time for reporting the result was 48 hours from the drawing of blood from the mother (with her consent) or from the newborn (no consent required).

Heretofore, the program has been limited by the lack of a point-of-care rapid HIV test. In cases of HIV-exposure in a newborn where prenatal and/or intrapartum antiretroviral therapy (ART) were not given, studies have shown that therapy must be started for the newborn within 12 hours of birth to be effective in reducing the risk of transmission. The expedited HIV testing protocols in most New York State birth facilities did not meet this 12-hour timeline for initiating prophylactic newborn ART. In 2001 to 2002, over 1400 HIV-infected women gave birth in New York State. Of these, one hundred mother/infant pairs were first identified as HIV-infected/exposed through expedited HIV testing in the labor, delivery or in the immediate newborn period. In the vast majority of cases (98 of 100), the median time from the mother's admission to the collection of the specimen for expedited HIV testing was 2.5 hours. However, even when testing was performed on-site, results were not returned for at least 20 hours, and treatment was not initiated in the newborn until 22.5 hours after birth. Clearly, achieving timelier reporting of expedited HIV test results is hampered by the lack of a point-of-care rapid test.

In November 2002, the U.S. Food and Drug Administration approved the first of a new generation of point-of-care rapid HIV tests. The test is waived under the Clinical Laboratories Improvement Act (CLIA) and may be performed under the supervision of a licensed physician, nurse practitioner or physician assistant, provided the facility performing the test has obtained a CLIA number and is registered with the Clinical Laboratories Evaluation Program (CLEP).

The availability of point-of-care HIV testing offers providers the opportunity to intervene during this most critical time frame for perinatal HIV transmission: labor and delivery. The purpose of this emergency and proposed rule making, which amends 10 NYCRR, Subpart 69-1.3(1)(2), is to ensure that the HIV exposure status is available as soon as possible for all newborns whose mothers have not been tested for HIV during the current pregnancy or for whom HIV test results are not available at delivery. By requiring a maximum turn-around-time of twelve hours from the time the mother consents to testing or from the time of the infant's birth to the receipt of the result of the expedited HIV test, medical providers and patients will have information that is critical for the administration of antiretroviral medication during labor and delivery and to the newborn immediately after birth.

As a result of the Expedited HIV Testing regulations (effective August 1999) and the consequent increase of prenatal and expedited HIV testing, along with the prompt initiation of treatment to HIV-infected mothers, the rates of perinatal HIV transmission in New York State have decreased: from 10.9% in 1997 to 3.9% in 2001. New, rapid, point-of-care HIV testing technology can provide test results within 20 to 40 minutes. In most cases, this technology will allow obstetricians to have preliminary HIV test results before the mother delivers, when the initiation of antiretroviral therapy can be of significant benefit. In light of the advances in testing technology, the Department is proposing a regulatory change to 10NYCRR 69-1.3 (1)(2) that would apply in cases where a woman presents for delivery with no documentation of her HIV status. In these cases, the amended regulation would require the birth facility to arrange an immediate HIV screening test of the mother with her consent or of her newborn without consent with results available as soon as possible, but in no event longer than 12 hours after the mother provides consent for testing or, if she does not consent, 12 hours after the time of the infant's birth. Reducing the turn-around-time for expedited HIV testing allows health care providers to provide antiretroviral therapy in time to reduce the risk of mother-to-child transmission of HIV.

The emergency rule will take effect upon filing with the Secretary of State.

Subject: Expedited HIV testing of women and children.

Purpose: To amend the current comprehensive program in response to recent advances in medical knowledge and the rapid HIV testing technology to enhance protection of newborns.

Text of emergency rule: Paragraph (2) of Subdivision (1) of Section 69-1.3 of NYCRR is amended to read as follows:

(2) if no HIV test result obtained during the current pregnancy is available for the mother not known to be HIV-infected, arrange an immediate screening test of the mother with her consent or of her newborn for HIV antibody with results available as soon as practicable, but in no event longer than [48 hours] *12 hours after the mother provides consent for testing or, if she does not consent, 12 hours after the time of the infant's birth.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-12-04-00012-P, Issue of March 24, 2004. The emergency rule will expire September 6, 2004.

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

Regulatory Impact Statement

Statutory Authority:

Public Health Law (PHL) section 2500-f requires the commissioner to promulgate regulations to implement a comprehensive program for the testing of newborns for HIV and/or the presence of HIV antibodies. The proposed revision to the regulation amends the current comprehensive program in response to recent advances in medical knowledge concerning the prevention of perinatal HIV transmission and the availability of rapid HIV testing technology, with at least one device suitable for "point-of-care use.

Legislative Objectives:

In the memorandum accompanying the comprehensive newborn testing bill (Chapter 220 of the Laws of 1996), the legislature indicated its purpose was "to ensure that newborns who are born exposed to HIV receive prompt and immediate care and treatment and counseling that can enhance, prolong and possibly save their lives. Transmission of HIV from mother to newborn can be prevented in many cases by the administration of antiretroviral medications, which are recommended to be given to the mother starting during the second trimester of pregnancy, continued during labor, and given to the newborn after birth. The proposed amendment to 10 NYCRR, Subpart 69-1.3(2) will ensure that the HIV exposure status is available for all newborns whose mothers have not been tested for HIV during the current pregnancy or for whom HIV test results are not available at delivery. By requiring that HIV test results be available as soon as is practicable but in no case later than twelve hours from the time of the mother's consent to testing or the time of the infant's birth, the Department intends to ensure that medical providers and patients have the information they need to make decisions about preventive treatment in a timely manner.

Needs and Benefits:

Improvements in medical knowledge and major advances in medical technology have occurred since the current program for the Expedited HIV Testing of Women and Newborns was implemented in August 1999. To date, the success of New York State's efforts to reduce perinatal HIV transmission to the lowest possible level has resulted in a decrease in the rate of perinatal HIV transmission for all HIV-exposed infants born in New York from 10.9% in 1997 to 3.9% in 2001. However, transmission is still occurring in instances where the HIV exposure status of an infant was identified too late to provide effective intervention. In such infants therapy must begin within 12 hours of birth to be effective in reducing the risk of transmission. In an addendum to the NYSDOH PCR study, published in the New England Journal of Medicine on 4/1/99, it was demonstrated that when ARV was given to the newborn within 12 hours of birth there was a 5.9% rate of HIV transmission. There was no significant benefit if ARV was begun after 12 hours birth as the transmission rate increased to 25%. The ability to have results from expedited HIV testing as soon as possible in cases where there was no history of prenatal HIV testing, coupled with the administration of prophylactic antiretroviral therapy, ideally during labor but no later than 12 hours of birth, is of vital importance in further reducing perinatal HIV transmission. To reduce perinatal HIV transmission to the greatest extent possible, facilities are urged not to view the 12-hour turn-around-time as the goal of testing, but as the outside limit for offering effective therapeutic interventions to prevent transmission of HIV from the mother to her newborn.

Costs:

Costs to State and Local Governments:

The cost to State Government is minimal and can be covered by existing programs and staff. There is no cost to local government except to the extent they own and operate maternity hospitals. Any cost to the State and local governments will be reduced by the savings to the Medicaid program by reducing the costs of care as fewer incidences of HIV transmission to newborns occur. Local governments that operate medical facilities will incur costs as described in the section on Costs to Regulated Parties noted below.

Costs to Regulated Parties:

The approved rapid test is CLIA- waived due to low complexity and may be performed either in the centralized laboratory or at the point-of-care, subject to appropriate NYSDOH approvals. The Department will work closely with facilities to assist them in meeting the turn-around-time requirements of this proposal.

The vast majority (141) of the 159 birthing facilities currently hold a clinical laboratory permit in HIV testing or are eligible for fast-track approval for a permit in HIV testing. These facilities already have or could readily develop the capability of generating HIV test results on-site within twelve hours without additional costs. This is especially true for facilities with around-the-clock centralized laboratory services. Reagent, equipment, personnel and overhead costs for testing a single specimen using an instrument-based method (i.e., EIA) are approximately \$15 for routine testing, but up to ten times that amount for 'on demand' (STAT) testing. Birth facilities would incur costs directly related to this proposal whenever expedited testing needed to be performed in the laboratory outside normal testing hours, and qualified staff needed to be called in specifically to run one test. Facilities using such an on-call staffing approach to expedited newborn HIV testing would incur up to 1.5 times the usual hourly wage for a medical technologist, which is estimated to be \$40 per hour (including benefits) or \$50 per hour (including benefits) if the technologist is a supervisor.

The Department will work closely with facilities that do not have current capacity to consistently generate results in 12 hours or less, and assist them in meeting regulatory requirements. Costs of introducing in-house HIV testing include costs of reagents, devices and human resources necessary to validate the test method and write protocols, at an estimated maximum one-time cost of \$1000. Facilities that conduct testing at point of care, i.e., in the labor and delivery department, would also incur minimal costs associated with initial training and ongoing competency assessment of non-laboratory testing personnel, i.e., labor and delivery nursing staff, although technologists may also travel to patient floors to lend their expertise in the performance of tests and interpretation of results. The cost of conducting initial training for a group of 8 or fewer nurses can be estimated by multiplying the hourly wage of a supervisor-qualified technologist by 8 hours of training in device use, troubleshooting, recordkeeping and quality assurance activities, and adding the cost of 25 test devices. The device designated for point-of-care testing has a list price of \$10.00-\$15.00 for each test kit.

Overall, the Department estimates that the costs of performing tests at the point-of-care are likely to be less than, or equal to, the costs of expedited HIV tests currently performed in a centralized laboratory. This estimate is based on the fact that rapid HIV tests do not require the purchase or maintenance of expensive laboratory equipment and that the cost of testing devices (OraQuick®, SUDS®) and the salaries of personnel conducting the tests are comparable. The cost of expedited HIV testing done in a reference laboratory (cost at one commercial laboratory is \$75.00/ expedited test) may not change, but birth facilities using these laboratories will have to ensure that they will be able to report results within the 12-hour turn-around-time. The cost to the birth facility in time spent to provide pre-test HIV counseling is not expected to differ from the current cost of expedited HIV testing, which includes reimbursement rates of \$52 for testing and \$44 for counseling (\$96.00/expedited test).

In light of the advances in testing technology, and the benefits of early initiation of antiretroviral therapy to prevent mother-to-child transmission of HIV, many birth facilities will opt to use a rapid HIV test device that generates results in a half-hour or less. Facilities may perform rapid HIV testing either in the laboratory itself or at the point-of-care subject to appropriate NYSDOH approval. Laboratories with an HIV testing permit may choose to conduct "stat testing 24 hours a day, 7 days a week using a standard instrument-based (e.g., EIA) testing technology within the 12 hour time limit. However, testing using rapid testing devices is encouraged to obtain HIV tests results as soon as possible. While procedures such as immediate transport of specimens by courier to a near-by laboratory, may, in theory, be effective for meeting a 12-hour turn-around-time, the Department's experience with such complex arrangements shows them to usually be an unacceptable alternative for on-site expedited testing.

Of the 159 regulated hospitals and birthing centers affected by this amendment, 141 hold laboratory permits that include HIV and/or diagnostic immunology testing, the latter of which would be allowed, in response to the adoption of this amendment, to add HIV testing through a fast-track mechanism. For any of these 141 facilities that choose to add a new test to an existing HIV or fast-tracked diagnostic immunology permit, costs for protocol development, staff training, test validation and implementation of quality assurance measures are expected to be approximately \$1000. There are no additional costs associated with modifying an existing permit to add a category or test. The remaining 18 birth facilities would incur an additional cost if they seek to provide HIV testing on-site, including an initial cost of \$1000 plus annual fees based on gross annual receipts.

Facilities offering on-site testing at the point-of-care, i.e., in the labor and delivery suite under the auspices of an existing permitted laboratory, would incur minimal costs for initial training and ongoing competency assessment of non-laboratory testing personnel, i.e., labor and delivery nurses. The cost of conducting initial training for a group of 8 or fewer nurses can be estimated by multiplying the hourly wage of a supervisor-qualified technologist by 8 hours of training (on average approximately \$50.00/hour by 8 hours equating to \$400.00) in device use, troubleshooting, recordkeeping and quality assurance activities, and adding the cost of 25 test devices (\$15 per test by 25 = \$375). Therefore, the total training costs would be approximately \$775. Cost attributable to periodic competency assessments of one to two hours could be calculated using the same formula. A materials cost of approximately \$10.00 - \$15.00 a test would be attributable to one single-use device and control materials.

Costs would be offset by revenue generated from third party billing, including Medicaid. Costs of expedited HIV testing in labor, delivery and newborn nursery settings will continue to diminish as efforts to increase prenatal HIV counseling and testing succeed. Any other provider costs associated with rapid HIV testing in the labor and delivery settings are medically appropriate and must continue to be considered part of labor and delivery costs.

Costs to the Department of Health:

The Department will use existing staff to review and approve HIV testing applications, and to conduct on-site surveys of applicant facilities.

Local Government Mandates:

This amendment to the current regulation will not impose any new program services, duties or responsibilities upon any county, city, town, village, school district, fire district or any other special district, except for those local governments operating hospitals with maternity services.

Paperwork:

Paperwork related to point-of-care rapid HIV tests does not significantly differ from that currently required by expedited testing regulations. This paperwork includes the clinician's written order for testing, notation of the completion of pre- and post-test counseling, documentation of the acquisition of the test specimen and recording the test result in the medical

record. Some paperwork will be required of birth facilities that seek an addition to an existing permit, and for those that choose to seek a new HIV testing permit.

Duplication:

None.

Alternatives:

There are no alternatives to the 12-hour time limit proposed by this amendment because a longer time period would result in some HIV-exposed infants not being detected in time to administer therapy to prevent HIV transmission. Because advances in scientific knowledge and medical technology allow for rapid HIV testing, the Department determined that the proposed revision to the regulation is the best approach to protect the public health.

Federal Standards:

There are currently no Federal regulations related to prenatal or newborn testing. The Federal government has provided only recommendations and guidelines for these activities. The proposed regulatory change is consistent with current federal recommendations.

Compliance Schedule:

The Department has already advised regulated parties that this emergency amendment is in place. The Department understands that many facilities previously initiated activities to implement rapid HIV testing. The Department understands that facilities have been in compliance since the first emergency regulation's November 2003 effective date.

Regulatory Flexibility Analysis

Effect on Small Businesses:

The proposed rule will impact an estimated three birth hospitals and four birthing centers that meet the definition of a small business (independently owned and employs 100 or fewer individuals). No real impact on small businesses is expected, since regulations requiring expedited HIV testing are already in place. No new costs to local governments are anticipated, except for those operating hospitals with maternity services.

Compliance Requirements:

The reporting, recordkeeping and other affirmative acts that impact small businesses or local governments would not change with this proposed amendment. Current regulations require hospitals and birthing centers to assess whether mothers who present for delivery have a negative HIV test result from the current pregnancy or a positive HIV test result during or prior to the pregnancy. If no test result is documented, the mother is offered consented expedited HIV testing. If she declines, an expedited HIV test is performed on her infant, without consent. Current regulations require a turn-around-time for preliminary HIV test results of no more than 48 hours from the time the specimen is collected. The proposed rule change would decrease the turn-around-time to within 12 hours after the mother's consent for testing, or if she does not consent, within 12 hours of the infant's birth.

Professional Services:

Impacted small businesses and local governments would need the same staff of health care providers (doctors, nurses, nurse practitioners, physicians assistants), counseling and support staff as they currently employ. No additional staff would be needed.

Compliance Costs:

The percentage of women receiving prenatal counseling and testing is steadily increasing, and the need for expedited HIV testing in the intrapartum period is decreasing. As of December 2002, hospital data indicate that approximately 94% of all women giving birth have documentation of their HIV status before delivery. This rate was 62% in July 1999, one month before expedited testing in delivery settings was implemented. Using these data, the need for expedited HIV testing has clearly decreased through the years, from an estimated 120,000 mothers/infants in 1999 to less than 15,000 in 2002. At \$52 per test, the total statewide testing cost in 1999, estimated to be \$6.24 million per year, has decreased to \$780,000 per year. This number is expected to continue to decline as more women accept prenatal HIV testing. The cost for expedited HIV testing using rapid, point-of-care testing kits is not expected to exceed the cost of expedited testing as currently performed and would be considerably less if facilities choose to take advantage of point-of-care rapid testing.

Economic and Technological Feasibility:

The proposed amendment to the regulatory program is economically and technologically feasible since it is not anticipated that additional staff would be required and rapid, point-of-care testing technology is readily available.

Minimizing Adverse Impact:

Provider costs associated with rapid, point-of-care expedited HIV testing are medically appropriate and must be considered part of labor and

delivery costs. Current reimbursement rates for expedited HIV testing subsidize the costs incurred by the delivery facility (\$44 for counseling and \$52 for testing), and will continue. Since preventing HIV transmission saves the high treatment costs for HIV-infected persons, expedited HIV testing in the labor and delivery setting is actually cost effective. Hospitals and birthing centers also realize savings as a result of this program by not having to employ outreach staff to find mothers after discharge since post-test counseling can be done while the mother is still in the hospital.

Small Businesses and Local Government Participation:

In advance of publication, the proposed amendment to the regulation was discussed at a two hour meeting held on March 23, 2003 by the Greater New York Hospital Association with representatives from 31 birthing facilities and the Health and Hospitals Corporation attending, and on April 30, 2003 at a videoconference hosted by the Hospital Association of New York State and broadcast to birthing facilities statewide.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

Forty-four counties meet the definition of a rural area (population less than 200,000) and an additional 11 counties have towns that are classified as rural (towns with population densities of 200 persons or less per square mile). The proposed amendment to the current regulation applies to hospitals and birthing facilities in 55 counties. These facilities already follow the Expedited HIV Testing regulation; significant program expansion is not expected. There are no birth facilities in the remaining seven counties.

Reporting, Recordkeeping and Other Compliance Requirements:

The reporting, recordkeeping and other affirmative acts that will impact hospitals in rural areas have already been undertaken to comply with the Expedited HIV Testing regulation. Current regulations require maternity hospitals and freestanding birthing centers to ensure that all women who present for delivery with no documentation of HIV status are counseled about expedited HIV testing, and, arrange that an immediate HIV screening test of the mother with her consent or of her newborn without consent is performed. Technological advances mean that rapid HIV screening tests can now be performed at the point-of-care. Birth facilities can choose to use the new technology for rapid HIV testing, or to continue with the expedited HIV testing program already in place at their facilities. If the new technology is not chosen, the decreased turn-around-time for the return of preliminary test results will have to be negotiated with either the hospital-based or the commercial laboratories that perform expedited HIV testing.

Professional Services:

Hospitals in rural areas would not need additional professional staff to provide this service for women without known HIV test results.

Costs:

According to current annualized data, fewer than 50 maternity patients or newborns in any hospital or birthing center operated in rural areas require expedited HIV testing. This number will continue to diminish as efforts to promote prenatal HIV testing succeed. If an average of \$52 (the total per test average cost of ELISA or SUDS testing, exclusive of counseling) for each expedited HIV test is used to estimate the total cost of expedited testing (test device, equipment and personnel), the total annual cost for rapid expedited HIV testing in each rural birth facility will be approximately \$2,600, or less, depending on the number of maternity patients or newborns needing rapid testing.

Minimizing Adverse Impact:

Additional provider costs associated with testing are medically appropriate and must be considered part of labor and delivery costs. However, preventing HIV transmission is cost effective because of the high cost of treatment for HIV-infected persons. Hospitals and birthing centers will realize savings as a result of this program by not having to employ outreach staff to find mothers after discharge since post-test counseling can be done while the mother is still in the hospital.

Rural Area Participation:

In advance of publication, the proposed amendment to the regulation was discussed at a two hour meeting held on March 23, 2003 by the Greater New York Hospital Association with representatives from 31 birthing facilities and the Health and Hospitals Corporation attending, and on April 30, 2003 at a video conference hosted by the Hospital Association of New York State and broadcast to birthing facilities statewide.

Job Impact Statement

A Job Impact Statement is not attached because this amended rule will not have a substantial adverse impact on jobs and employment opportunities as apparent from its nature and purpose.

Assessment of Public Comment

Two individuals sent in comments regarding the proposed regulatory change.

Comment:

One commentator focused on perceived inaccuracies and inconsistencies in the regulatory impact statement (RIS) and regulatory flexibility analysis (RFA) that were filed concurrent with this amendment's express terms on September 10, 2003 and March 24, 2004, further suggesting that the RIS and RFA be revised and republished.

Response:

No revisions were made to the published regulation's expressed terms, RIS or RFA as a result of this commentator's suggestions as noted in this assessment.

Comment:

The commentator stated that the Department does not have the statutory authority to sanction point-of-care expedited maternal/newborn HIV testing at sites not holding clinical laboratory permits. The commentator further suggested that adoption of this proposed amendment be postponed until such time as regulations are adopted to establish standards for laboratories that limit their test menus to simple, CLIA-waived tests.

Response:

The concerns raised by the commenter have become moot and, accordingly, no revisions to the regulation or its supporting documentation are deemed necessary at this time. As of the date of this assessment, all birthing facilities that perform expedited maternal/newborn HIV testing on-site do so pursuant to a valid clinical laboratory permit issued by the Department, in full compliance with Public Health Law Article V Title 5. Postponing enactment of this regulation is therefore unnecessary and not in the interest of the public health.

Comment:

The same commentator noted that there are differences between costs and compliance requirements filed in September 2003 and March 2004, specifically that costs and compliance requirements specific to point-of-care testing were filed with the initial emergency adoption in September 2003, but were omitted from subsequent filings.

Response:

This difference is attributable to the Department's evolving approach to oversight of point-of-care testing. In 2003, the laboratory-licensing program anticipated statutory amendment to PHL that would have exempted from existing permit requirements any laboratory that limited its testing to simple, CLIA-waived tests, and would have required such facilities to register with the Department. That proposal for registration was subsequently abandoned. The impact statement accompanying the 2004 filing for the subject amendment was modified accordingly in order to provide an up-to-date assessment of expected costs. Other costs, such as those incurred for training and on-going competency assessment of testing personnel are detailed in both the RIS published on September 10, 2003 and the RIS published on March 24, 2004.

Comment:

The commentator stated that there is no justification in the amendment's impact statement or the flexibility analyses for the extensive requirements for laboratories that currently have permits.

Response:

The Department believes that no such justification is necessary. The issue at hand is to minimize the time in which HIV test results are made available to medical personnel attending the delivery and caring for the newborn, not whether Subpart 58-1 requirements for a permit are justified.

Comment:

The same commentator stated that there are no compliance requirements detailed for birthing facility's laboratories that do not have permits.

Response:

The Department has determined that birthing facilities that had not made an affirmative decision to bring HIV testing in-house by the time this rule's second emergency filing was published had no intention of doing so. Such facilities have expressed to the Department that they can and will use alternative means to meet the proposed 12-hour turn around time for HIV test results. Given that the Department's primary concern is the timely availability of HIV test results, it is evident that no purpose would be served by outlining permit requirements for twenty or fewer laboratories, none of which intend to apply for an initial permit.

Comment:

The second commentator, from an HIV-related community advisory group, stated that this advisory group realized the importance of this amendment and were in full support of the proposed changes. She stated that having expedited test results available within 12 hours would ensure that medical providers and patients had the information needed to make

decisions in a timely manner regarding treatment to prevent transmission of HIV to the infant.

Response:

Since this commentor strongly supports the proposed changes, no revisions were needed to the published regulation's terms, RIS or RFA.

**EMERGENCY
RULE MAKING**

Arboviral Infection Reporting

I.D. No. HLT-18-04-00002-E

Filing No. 795

Filing date: July 7, 2004

Effective date: July 7, 2004

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

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

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

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

Specific reasons underlying the finding of necessity: Immediate adoption of this rule is necessary to monitor the magnitude and scope of illness caused by arthropod-borne viruses, and enable timely case reporting and investigation, as well as the implementation of control interventions, as needed.

Arboviral infections are usually transmitted to people by arthropod vectors (primarily mosquitoes and ticks), and include viruses capable of causing symptoms ranging from asymptomatic or mildly symptomatic infection, to encephalitis, coma and death. Current communicable disease reporting requirements specify the reporting of encephalitis and meningitis but do not require the reporting of specific arboviral infections. Arboviral infections are of increasing importance to public health officials as evidenced by the ongoing West Nile virus outbreak.

West Nile virus was introduced to the metropolitan New York City area in 1999. The virus has rapidly dispersed across the United States and now only four states currently remain free of evidence of West Nile virus in various surveillance systems. This untreatable, potentially fatal mosquito-borne virus has affected every county in New York State. Late August through November is the time of year when the virus is most likely to be transmitted from mosquitoes to humans. A significant and further alarming discovery was made in 2002 when public health investigations determined that West Nile virus can be transmitted from person to person through blood transfusion. During the 2002 West Nile virus outbreak in the United States, a total of 23 persons were reported to have acquired West Nile virus infection after receiving blood components.

Because of the possibility of recurrent West Nile virus epidemics, some blood collection agencies across the country now voluntarily screen for the presence of West Nile virus and may identify individuals with asymptomatic or mild West Nile viral infection. Through the end of August 2003, the CDC is aware of over 150 presumptive West Nile virus-viremic blood donors reported from 11 states. Reporting of these viremic donors to State and local health departments will provide critical information about the presence and spread of West Nile virus in the State, and will allow timely implementation of prevention efforts.

In addition to West Nile virus, several arboviruses, such as Eastern equine encephalitis virus, Jamestown Canyon encephalitis virus, LaCrosse encephalitis virus, and Powassan encephalitis virus, have been found in various locations across New York State. Other mosquito-borne arboviruses, such as St. Louis encephalitis virus, have been introduced into New York State as a result of significant dispersal of native United States strains through major geographic expansion of infected mosquito populations that started along the Mississippi River valley. These viruses are currently known to be transmitted to people only through the bite of an infected mosquito and usually cause severe neurological symptoms in symptomatic individuals. Health care providers who suspect arboviral infection in these symptomatic patients can submit serum or cerebrospinal fluid specimens for arboviral laboratory diagnostic tests.

The rule change will enable the New York State Department of Health to identify potential mosquito- and tick-borne virus- associated infections in blood donors and other individuals who may not have encephalitis or meningitis symptoms. Requiring the reporting of these individuals will prevent further serious human infection through the earliest possible recognition of a problem, assist in defining the incidence and clinical spec-

trum of illness, and instituting recommendations for disease prevention on a timely basis.

Subject: Arboviral infection reporting.

Purpose: To add arboviral infection to the list of communicable diseases.

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

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

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

- Amebiasis
- Anthrax
- Arboviral infection
- Babesiosis
- Botulism
- Brucellosis
- Campylobacteriosis
- Chancroid
- Chlamydia trachomatis infection
- Cholera
- Cryptosporidiosis
- Cyclosporiasis
- Diphtheria
- E. coli 0157:H7 infections
- Ehrlichiosis
- Encephalitis
- Giardiasis
- Glanders
- Gonococcal infection
- Group A Streptococcal invasive disease
- Group B Streptococcal invasive disease
- Hantavirus disease
- Hemolytic uremic syndrome
- Hemophilus influenzae (invasive disease)
- Hepatitis (A; B; C)
- Hospital-associated infections (as defined in section 2.2 of this Part)
- Legionellosis
- Listeriosis
- Lyme disease
- Lymphogranuloma venereum
- Malaria
- Measles
- Melioidosis
- Meningitis
 - Aseptic
 - Hemophilus
 - Meningococcal
 - Other (specify type)
- Meningococemia
- Mumps
- Pertussis (whooping cough)
- Plague
- Poliomyelitis
- Psittacosis
- Q Fever
- Rabies
- Rocky Mountain spotted fever
- Rubella
- Congenital rubella syndrome
- Salmonellosis
- Severe Acute Respiratory Syndrome (SARS)
- Shigellosis
- Smallpox
- Staphylococcal enterotoxin B poisoning
- Streptococcus pneumoniae invasive disease
- Syphilis, specify stage
- Tetanus
- Toxic Shock Syndrome
- Trichinosis

Tuberculosis, current disease (specify site)
 Tularemia
 Typhoid
 Vaccinia disease (as defined in section 2.2 of this Part)
 Viral hemorrhagic fever
 [Yellow Fever]
 Yersiniosis

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-18-04-00002-P, Issue of May 5, 2004. The emergency rule will expire September 4, 2004.

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

Regulatory Impact Statement

Statutory Authority:

Sections 225(4) and 225(5)(a), (h), and (i) of the Public Health Law ("PHL") authorize the Public Health Council to establish and amend State Sanitary Code provisions relating to designation of communicable diseases dangerous to public health and the nature of information required to be furnished by physicians in each case of communicable disease. PHL Section 206(1)(d) authorizes the commissioner to "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health." PHL Section 206(1)(e) permits the commissioner to "obtain, collect and preserve such information relating to marriage, birth, mortality, disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state." PHL Article 21 requires local boards of health and health officers to guard against the introduction of such communicable diseases as are designated in the sanitary code by the exercise of proper and vigilant medical inspection and control of persons and things infected with or exposed to such diseases. PHL Section 2102 requires laboratories to report the results of laboratory examinations disclosing evidence of communicable disease to local or state health officials.

Legislative Objectives:

This regulation meets the legislative objective of protecting the public health by adding arboviral infections to the list of reportable disease. This change will permit enhanced disease monitoring and vector population intervention measures, if necessary, to prevent further transmission.

Needs and Benefits:

Arthropod-borne viruses (arboviruses) are transmitted to people primarily by the bite of an infected arthropod, typically by a mosquito or tick. Arboviruses can cause asymptomatic infections or a clinical illness that ranges in severity from a self-limited febrile illness to a severe neurologic illness with high fever, malaise, photophobia, encephalitis, meningitis, coma or death.

Arboviruses have been present in New York State for decades and include Eastern equine encephalitis virus, California encephalitis viruses and Powassan encephalitis virus. Over the past thirty years, other mosquito-borne viruses normally found in other areas of the country or the world, were introduced into New York State and resulted in epidemic illness. Examples are St. Louis encephalitis virus in 1975 and West Nile virus in 1999. Since its introduction in New York State, there have been over 175 human West Nile virus cases with 15 fatalities.

In 2002, public health investigations documented that West Nile virus can be transmitted from person to person via infected blood donations and organ transplants. In response to this new mode of West Nile virus transmission, some blood collection agencies in 2003 voluntarily implemented a West Nile virus-screening program of blood donors. Testing for West Nile virus is not mandatory. If, however, a blood collection agency tests for West Nile virus and the result is positive, the laboratory performing the test is required to report the result to the New York State Department of Health. Due to the increased testing of donors, it is anticipated that individuals with asymptomatic or mild West Nile viral infection will be detected but the number of cases is expected to be low.

For those blood donors testing positive for West Nile virus, the rule change will enable the NYSDOH and local health departments to receive identifying information. Local health department staff will follow-up with the West Nile virus positive donors to counsel them, determine their travel history and evaluate geographic areas of risk.

The rule change will also require the reporting of other arboviral diseases. Existing communicable disease reporting requirements only include the reporting of encephalitis and meningitis. Encephalitis and meningitis are the most severe symptoms associated with a variety of arthropod borne diseases, as well as other communicable diseases. The change will enable the New York State Department of Health (NYSDOH) and local health departments to detect and document diagnosed cases of mosquito and tick-borne viral infections, even those cases that do not progress to encephalitis or meningitis.

It should be understood that these regulations do not mandate testing for arboviral infections, including West Nile virus, but require physicians and laboratories that voluntarily conduct testing to report positive test results to the New York State Department of Health. Requiring the reporting of all arboviral infections will prevent further serious human infection through the earliest possible recognition of a problem and assist in defining the incidence and clinical spectrum of illness and instituting recommendations for disease prevention as early as possible.

In summary, adding arboviral infections to the reportable disease list will permit the NYSDOH to more comprehensively monitor these diseases, and permit case reporting, investigation, and intervention to be made on a timely basis.

COSTS:

Arthropod-borne diseases primarily cause encephalitis and/or meningitis symptoms in patients. Encephalitis and meningitis are already included on the communicable disease list in 10 NYCRR Section 2.1. This change will require all arboviral infections to be reported and will clarify the NYSDOH's authority to investigate these cases, including mild or asymptomatic cases. The number of additional cases of arboviral infections that will be reported is expected to be low. It is expected that there will be increased costs related to investigating cases and, potentially, implementing control strategies.

Costs to Regulated Parties:

It is imperative to the public health that cases of arboviral infection be reported immediately and investigated thoroughly to curtail additional exposure and potential morbidity and mortality and to protect the public health.

The costs associated with implementing the reporting of this disease are expected to be minimal as reporting processes and forms already exist. Hospitals, practitioners and clinical laboratories are accustomed to reporting communicable disease to public health authorities.

Costs to Local and State Governments:

Costs associated with the reporting of arboviral infections are expected to be mitigated because the staff who are involved in reporting this disease at the local and State health departments are the same as those currently involved with reporting of other communicable diseases listed in 10 NYCRR Section 2.1. Arbovirus enhanced surveillance activities are long-standing and ongoing in most local health departments partially as a result of the importation of West Nile virus into the Western hemisphere in 1999. Local health department staffs have been aggressively monitoring and investigating reports of arboviral infection in their jurisdiction.

Additional costs to local or state governments are associated with investigating and implementing control strategies to curtail the spread of arthropod-borne disease. It is expected that the number of additional cases reported as a result of this change will be low. It is not known how this information will influence county control measures. Control efforts include enhanced vector surveillance, vector population reduction measures and implementation of comprehensive educational campaigns. These intensive efforts are critical to minimize spread.

By potentially decreasing the spread of arthropod-borne virus infections, savings may include reducing costs associated with public health control activities, hospitalization, morbidity, treatment and premature death.

Costs to the Department of Health:

The New York State Department of Health already collects communicable disease reports from local health departments, checks the reports for accuracy and transmits them to the federal Centers for Disease Control and Prevention. The addition of arboviral infections to the list of communicable diseases should not lead to substantial additional costs for data entry, particularly as the Department adopts systems for electronic submission of case reports.

There are additional costs associated with ongoing arbovirus enhanced surveillance; these activities are long-standing and ongoing. New York State Department of Health has been aggressively monitoring and investigating reports of arboviral infection in New York State.

Paperwork:

The existing general communicable disease reporting form (DOH-389) will be revised to include arboviral infections. This form is familiar to and already used by regulated parties.

Local Government Mandates:

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

Duplication:

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

Alternatives:

No other alternatives are available.

Reporting of cases of specified arboviral infections is of critical importance to public health. There is an urgent need to conduct surveillance, identify human cases in a timely manner, and reduce the potential for further exposure to other individuals.

Federal Standards:

This proposed action is consistent with current CDC standards for reporting of vector-borne diseases.

Compliance Schedule:

This regulation will be effective upon filing of a Notice of Emergency Adoption with the Secretary of State and made permanent by publication of a Notice of Adoption in the *New York State Register*.

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

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

It is expected that the proposed rule will have minimal impact on small business (hospitals, clinics, nursing homes, physicians, and clinical laboratories) and local government since encephalitis and meningitis symptoms are already reportable. The number of additional cases of arboviral infections that will be reported is estimated to be low. Existing report forms and systems will be used.

Compliance Requirements:

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

Professional Services:

No additional professional services will be required since providers are expected to be able to utilize existing staff to report occurrences of arboviral infections.

Compliance Costs:

No initial capital costs of compliance are anticipated. Annual compliance costs will depend upon the number of cases of arboviral infections which is expected to be low because existing reporting forms and mechanisms will be used. The reporting of arboviral infections should have a minimal effect on the estimated cost of disease reporting by hospitals. The cost would be less for physicians and other small businesses.

Minimizing Adverse Impact:

Adverse impacts have been minimized since familiar forms and existing reporting staff can be utilized by regulated parties. Electronic reporting will save time and expense. The approaches suggested in the State Administrative Procedure Act Section 202-b(1) were rejected as inconsistent with the purpose of the regulation.

Feasibility Assessment:

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

Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

Effect on Rural Areas:

The proposed rule will apply statewide. A rural area is a county of under 200,000 population or an area with a population density of 175 persons or less per square mile. There are 42 rural counties in New York State and all are in Upstate New York. The number of cases that will be

reported from rural areas is estimated to be low and have minimal impact on local health units, physicians, hospitals and laboratories that are located in rural areas.

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

Adverse impacts have been minimized since familiar forms and existing reporting staff will be utilized by regulated parties. The approaches suggested in State Administrative Procedure Act Section 202-bb(2) were rejected inconsistent with the purpose of the regulation.

Rural Area Input:

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

Job Impact Statement

This regulation will not have a substantial adverse impact on jobs and employment opportunities. It adds arboviral infection to the list of diseases that health care providers must report to public health authorities. The staff who will be involved in reporting arboviral infections at the local and State health departments are the same as those currently involved with reporting, monitoring and investigating other communicable diseases. Although it is not possible to predict the extent of arboviral infection outbreaks, the number of additional cases that will be detected, or the degree of additional demands it will place on existing staff, all are expected to be low and the impact on jobs to be minimal if there is any impact at all.

Insurance Department

NOTICE OF ADOPTION

Unfair Claims Settlement Practices and Claim Cost Control Measures

I.D. No. INS-20-04-00007-A

Filing No. 797

Filing date: July 8, 2004

Effective date: July 28, 2004

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

Action taken: Amendment of section 216.8 (Regulation 64) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2601 and 3412

Subject: Unfair claims settlement practices and claim cost control measures.

Purpose: To replace the reference to the National Insurance Crime Bureau (NICB) with an unspecified "central organization" designated by the superintendent, which will receive and investigate automobile total losses. The central organization may also contract with another reporting entity acceptable to the superintendent to assist it in executing its responsibilities pursuant to this Part.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-20-04-00007-P, Issue of May 19, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Buffy Cheung, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5587, e-mail: BCheung@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Fee Setting for Various HCBS Waiver Habilitation Services

I.D. No. MRD-16-04-00020-A

Filing No. 800

Filing date: July 13, 2004

Effective date: July 28, 2004

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

Action taken: Amendment of sections 635-10.5, 635-99.1 and 686.99 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09 and 43.02

Subject: Fee setting for various HCBS waiver habilitation services provided under the auspices of OMRDD.

Purpose: To clarify the provisions governing the reimbursement of HCBS waiver residential habilitation services and supported employment services, and make various other technical and conforming amendments to update affected glossary definitions.

Text of final rule: Clauses 635-10.5(b)(8)(ii)(a) and (b) are amended as follows:

(a) The full month supervised IRA residential habilitation price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(i) of this subdivision and who receives face-to-face residential habilitation service(s) *in accordance with the consumer's Individualized Service Plan (ISP) and residential habilitation plan* on each of the 22 days of the enrollment requirement. These are known as countable service days.

(b) One-half of the full month supervised IRA residential habilitation price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(ii) of this subdivision and who receives face-to-face residential habilitation services *in accordance with the consumer's ISP and residential habilitation plan* on each of the 11 days of the enrollment requirement. These are known as countable service days.

Clauses 635-10.5(b)(9)(ii)(a) and (b) are amended as follows:

(a) The full month supportive IRA residential habilitation services price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(i) of this subdivision and who receives face-to-face residential habilitation service(s) *in accordance with the consumer's ISP and residential habilitation plan* on 4 of the 22 days of the enrollment requirement. Services provided on these 4 days must be delivered, initiated or concluded at the site. No more than 2 days of service within a week may be counted toward the 4 day requirement. These 4 days are countable service days.

(b) One-half of the full month supportive IRA price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(ii) of this subdivision and who receives face-to-face residential habilitation services *in accordance with the consumer's ISP and residential habilitation plan* on 2 of the 11 days of the enrollment requirement. Services provided on these 2 days must be delivered, initiated or concluded at the site. No more than 1 day of service within a week may be counted toward the 2 day requirement. These 2 days are countable service days.

Clauses 635-10.5(b)(10)(ii)(a)-(d) are amended as follows:

(a) The full month site-specific supervised IRA price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(i) of this subdivision and who receives face-to-face residential habilitation service(s) *in accordance with the consumer's ISP and residential habilitation plan* on each of the 22 days of the enrollment requirement. These 22 days are countable service days.

(b) One-half of the full month site-specific supervised IRA price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(ii) of this subdivision and who receives face-to-face residential habilitation services *in accordance with the consumer's ISP and residential habilitation plan* on each of the 11

days of the enrollment requirement. These 11 days are countable service days.

(c) The full month site-specific supportive IRA price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(i) of this subdivision and who receives face-to-face residential habilitation service(s) *in accordance with the consumer's ISP and residential habilitation plan* on 4 of the 22 days of the enrollment requirement. The services provided on these 4 days must be delivered, initiated or concluded at the site. No more than 2 days of service within a week may be counted toward the 4 day requirement. These 4 days are countable service days.

(d) One-half of the full month site-specific supportive IRA price shall be paid for services provided to a consumer who meets the enrollment requirement in subparagraph (11)(ii) of this subdivision and who receives face-to-face residential habilitation services *in accordance with the consumer's ISP and residential habilitation plan* on 2 of the 11 days of the enrollment requirement. The services provided on these 2 days must be delivered, initiated or concluded at the site. No more than 1 day of service within a week may be counted toward the 2 day requirement. These 2 days are countable service days.

Subparagraph 635-10.5(b)(12)(v) is amended as follows:

(v) Services provided on countable service days must be documented. *On any countable service day there must be documentation of at least one residential habilitation service delivered to the person by IRA staff on that day.*

Subparagraph 635-10.5(d)(2)(i) and (ii) are amended as follows:

(i) A provider may claim the monthly supported employment service fee, as calculated in clause (1)(ii)(c) of this subdivision, for an eligible person who is employed and to whom the provider has rendered, on separate days, at least two face-to-face documented supported employment services [as specified] *in accordance with the person's individualized service plan (ISP) and supported employment plan.*

(ii) A provider may claim the monthly supported employment service fee, as calculated in clause (1)(ii)(c) of this subdivision, for an eligible person for whom the provider is actively engaged in preparatory and placement activities leading to competitive employment or reemployment. The provider must have rendered, on separate days, at least four such documented supported employment services, [as specified] *in accordance with the person's ISP and supported employment plan*, of which at least two are face-to-face contacts.

Paragraph 635-10.5(d)(3) is amended as follows:

(3) Reimbursement shall be contingent upon OMRDD's prior approval of HCBS waiver supported employment service to the person and documentation that the service is provided in accordance with the person's [individualized service plan (ISP)] *ISP and supported employment plan.*

Subdivision 635-99.1(be) is amended as follows:

(be) Plan, individualized service (ISP). [Within a home and community-based service (HCBS) waiver district, the] *The* written document that is developed by a person's chosen [case manager] *service coordinator*, the [waiver participant] *person* and/or his or her advocate [. It] , which describes the services, activities and supports, regardless of funding source, *and* which constitutes the person's individualized service environment. The goal of the individualized service plan is to ensure the provision of those things necessary to sustain the person in his/her chosen environment and preclude movement to an ICF/MR. These services, activities and supports, identified in the ISP, are to reflect the preferences, capabilities and capacities of the person and emphasize the development of self-determination (i.e., making personal choices), independence, productivity, and integration into the community. The [individualized service plan] *ISP*, identified by personal descriptive and identification information, contains at a minimum:

(1) assessment information and recommendations;

(2) an identification of each service, service provider (including type), the amount, frequency, and duration of each service, and effective dates for service delivery;

(3) an identification of the person's personal goals, preferences, capabilities, and capacities which are then related to habilitation or support needs stated in terms of outcomes to be achieved within specified timeframes; and

(4) [case management waiver services] *service coordination*, including assessment, service planning and coordination, linkage and referral, follow-up and monitoring.

It is the responsibility of the person's chosen [case manager] *service coordinator* to ensure that the ISP is reviewed at least semi-annually and includes consideration of the information obtained from other-than-

OMRDD providers (if any), who are providing services (i.e., as appropriate, the individualized written rehabilitation plan (IWRP) or the individualized education plan (IEP)). The [case manager] *service coordinator* should also ensure that a review of the ISP occurs when the person and/or his or her advocate request it; or when the capabilities, capacities or preferences of the person have changed and warrant a review; or when it is determined by the [case manager] *service coordinator* that the prevailing plan (or portions thereof) is/are ineffective. *If habilitation services are provided (i.e. residential habilitation, day habilitation, supported employment, pre-vocational services), the relevant habilitation plan(s) must be developed, and on a semiannual basis thereafter, reviewed and revised as necessary by the habilitation service provider. The service coordinator shall attach the relevant habilitation plan(s) to the ISP. With the following documents as attachments to the ISP, the ISP is complete:*

(1) *all relevant habilitation plans (for persons receiving habilitation services); and*

(2) *the individual plan for protective oversight (for residents of an individualized residential alternative (IRA), see section 686.16(a)(6)).*

The ISP is equivalent to a clinical record for the purposes of [Parts 604 and 636 of this Title, and their requirements, relative to] confidentiality and access.

Subdivision 686-99(ab) is amended as follows:

(ab) Plan, individualized service (ISP). [Within a home and community-based service (HCBS) waiver district, the] *The written document that is developed by a person's chosen [case manager] service coordinator, the [waiver participant] person and/or his or her advocate (see [glossary.] section 635-99.1 of this Title) [It], which describes the services, activities and supports, regardless of funding source, and which constitutes the person's individualized service environment. The goal of the individualized service plan is to ensure the provision of those things necessary to sustain the person in his/her chosen environment and preclude movement to an ICF/MR. These services, activities and supports, identified in the ISP, are to reflect the preferences, capabilities and capacities of the person and emphasize the development of self-determination (i.e., making personal choices), independence, productivity, and integration into the community. The [individualized service plan] ISP, identified by personal descriptive and identification information, contains at a minimum:*

(1) *assessment information and recommendations;*

(2) *an identification of each service, service provider (including type), the amount, frequency, and duration of each service, and effective dates for service delivery;*

(3) *an identification of the person's personal goals, preferences, capabilities, and capacities which are then related to habilitation or support needs stated in terms of outcomes to be achieved within specified timeframes; and*

(4) *[case management waiver services] service coordination, including assessment, service planning and coordination, linkage and referral, follow-up and monitoring.*

It is the responsibility of the person's chosen [case manager] *service coordinator* to ensure that the ISP is reviewed at least semi-annually and includes consideration of the information obtained from other-than-OMRDD providers (if any), who are providing services (i.e., as appropriate, the individualized written rehabilitation plan (IWRP) or the individualized education plan (IEP)). The [case manager] *service coordinator* should also ensure that a review of the ISP occurs when the person and/or his or her [correspondent] *advocate* request it; or when the capabilities, capacities or preferences of the person have changed and warrant a review; or when it is determined by the [case manager] *service coordinator* that the prevailing plan (or portions thereof) is/are ineffective. *If habilitation services are provided (i.e. residential habilitation, day habilitation, supported employment, pre-vocational services), the relevant habilitation plan(s) must be developed, and on a semiannual basis thereafter, reviewed and revised as necessary by the habilitation service provider. The service coordinator shall attach the relevant habilitation plan(s) to the ISP. With the following documents as attachments to the ISP, the ISP is complete:*

(1) *all relevant habilitation plans (for persons receiving habilitation services); and*

(2) *the individual plan for protective oversight (for residents of an individualized residential alternative (IRA), see section 686.16(a)(6)).*

The ISP is equivalent to a clinical record for the purposes of [Parts 604 and 636 of this Title, and their requirements, relative to] confidentiality and access.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 635-99.1(be) and 686.99(ab).

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 minor nonsubstantive changes to clarify the amendments at subdivisions 635-99.1(be) and 686.99(ab) do not necessitate revision to the previously published RIS. The changes only clarify that the habilitation plan does not have to be developed semiannually.

Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted because the minor nonsubstantive changes to clarify the amendments at subdivisions 635-99.1(be) and 686.99(ab) do not necessitate revision to the previously published RFASB. The changes only clarify that the habilitation plan does not have to be developed semiannually.

Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis for these amendments is not being submitted because neither the proposed amendments nor the minor nonsubstantive 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. This is because the amendments only clarify existing requirements concerning the reimbursement of HCBS waiver residential habilitation and supported employment services. Specifically, the amendments clarify that in order for the provider to claim payment for these and other habilitation services, they must be delivered to the consumer according to the specifications in the consumers Individualized Service Plan (ISP) and in the relevant habilitation plan. The amendments do not affect levels of reimbursement or service frequency and will therefore not have an adverse economic impact on regulated entities whether they operate in rural or urban settings.

Job Impact Statement

A revised 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 originally proposed amendments nor the nonsubstantive revisions will have an impact on jobs and/or employment opportunities. This finding is based on the fact that the rule only clarifies existing requirements concerning the reimbursement of HCBS waiver residential habilitation and supported employment services. Since the amendments do not affect levels of reimbursement or service frequency, the amendments will not have any effect on and jobs or employment opportunities in New York State.

Assessment of Public Comment

Three regulated providers of services sent comments to OMRDD on the proposed rule making. The specific issues and OMRDD's responses are as follows:

One provider observed that the amendments at paragraph 635-99.1(be) and subdivision 686-99(ab) could be interpreted to mean that the habilitation plan must be both developed and reviewed on a semiannual basis.

Response: OMRDD concedes that the current wording may allow for some ambiguity and has made a minor revision in the adopted language to clarify.

One provider requested clarification that nothing in the proposed regulation precludes an agency from utilizing the same person for preparing both the Individualized Service Plan (ISP), and the habilitation plan(s).

Response: While the proposed amendments do not affect this issue, it is OMRDD policy that the same person can not be responsible for both the ISP and the habilitation services plan(s). The service coordination function is, and was prior to the amendments, specifically designed to be separate and distinct from all other service delivery activities.

Several comments addressed issues associated with the forwarding of required plans and documentation between the service coordinator and the provider(s) of the various habilitation services. This exchange of required documents could pose problems when two or more agencies are responsible for the provision of habilitation services and service coordination.

Response: OMRDD appreciates that service arrangements involving two or more agencies may need more attention. Habilitation service providers who unsuccessfully request an ISP, or Service Coordinators who unsuccessfully request a habilitation plan, should ask their supervisor or administrator to request the document from their counterpart at the non-compliant agency. If the non-compliant agency subsequently fails to send the documents, the applicable OMRDD Developmental Disabilities Services Office (DDSO) or the New York City Regional Office (NYCRO) may be contacted to request their help. As needed, the DDSO or NYCRO may request the OMRDD Division of Quality Assurance to assess the severity of the problem.

One provider suggested that the process of reviewing and updating the various service plans could be facilitated if ISP and habilitation plan development and reviews were synchronized to take place within the month of the service recipient's date of birth, with due dates for the production and forwarding of the documentation.

Response: OMRDD believes that it should allow provider agencies maximum flexibility in the management and scheduling of required plan development and review, and will therefore not impose a requirement for specific timeframes.

Finally, there were other comments and questions that were either unrelated to the proposed amendments or that addressed administrative details that are not and would not be appropriately articulated in regulation. These topics will be discussed directly in separate responses to the correspondents. OMRDD would also point out that it has, and will continue to issue administrative guidance regarding the operation of habilitation services.

Public Service Commission

NOTICE OF ADOPTION

Refinancing of Existing Debt by Heritage Hills Water Works Corporation

I.D. No. PSC-15-04-00031-A

Filing date: July 9, 2004

Effective date: July 9, 2004

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

Action taken: The commission, on July 8, 2004, adopted an order in Case 04-W-0366, approving Heritage Hills Water Works corporation's (Heritage Hills) request to enter into a loan agreement for \$2,500,000 of long-term debt.

Statutory authority: Public Service Law, section 89-f

Subject: Issuance of long-term debt.

Purpose: To refinance a maturing security and provide Heritage Hills with additional long-term financing.

Substance of final rule: The Commission authorized Heritage Hills Water Works Corporation to issue and sell \$2.5 million of aggregate principal amount of long-term debt, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

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

(04-W-0366SA1)

NOTICE OF ADOPTION

Request for Lightened Regulation by NYC Energy, LLC

I.D. No. PSC-16-04-00005-A

Filing date: July 9, 2004

Effective date: July 9, 2004

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

Action taken: The commission, on July 8, 2004, adopted an order in Case 04-E-0428, approving a request by NYC Energy LLC for lightened regulation as an electric corporation.

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

Subject: Declaratory ruling on regulatory regime.

Purpose: To provide lightened regulation for NYC Energy LLC's combined-cycle electric generating facility.

Substance of final rule: The Commission granted lightened regulation for NYC Energy LLC's proposed 79.9 megawatt dual fueled combined-cycle, barge-mounted power generating facility in the Borough of Brooklyn, New York, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

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

(04-E-0428SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Ogden Telephone Company and Corporatepage.com, Inc. d/b/a Upstate Telephone and Cellular

I.D. No. PSC-30-04-00003-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Ogden Telephone Company and Corporatepage.com, Inc. d/b/a Upstate Telephone and Cellular for approval of an interconnection agreement executed on April 26, 2004.

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

Subject: Interconnection of networks and local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Ogden Telephone Company and Corporatepage.com, Inc. d/b/a Upstate Telephone and Cellular have reached a negotiated agreement whereby Ogden Telephone Company and Corporatepage.com, Inc. d/b/a Upstate Telephone and Cellular will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until April 26, 2005, or as extended.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-C-0820-SA1)

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

Submetering of Electricity by Elad Properties

I.D. No. PSC-30-04-00004-P

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

Proposed action: The Public Service Commission is considering a request filed by Elad Properties to submeter electricity at 21 Astor Place, New York, NY.

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

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

Purpose: To permit electric submetering at 21 Astor Place, New York, NY.

Substance of proposed rule: The Commission will consider individual submetering proposals on a case-by-case basis in the category of new, renovated or existing residential properties owned or operated by private or government entities according to established guidelines. The Owner at 21 Astor Place, New York, New York, Elad Properties, has submitted a proposal to master meter and submeter this new residential complex that is undergoing renovation. The total electric building usage for this complex will be master metered and each residential unit will be individually submetered.

The submetering plan sets forth proposals on electric rates, security, grievance procedures and dispute resolution, economic benefits and metering systems in compliance with the Home Energy Fair Practices Act (HEFPA). The Commission may accept, deny or modify, in whole or in part, the proposal to submeter electricity at 21 Astor Place, New York, New York.

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

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

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

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

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

(04-E-0756SA1)

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

Business Incentive Rate Program by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island

I.D. No. PSC-30-04-00005-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 1.

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

Subject: Business Incentive Rate Program.

Purpose: To extend the program for another three years.

Substance of proposed rule: KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island proposes to extend the Business Incentive Rate Program, which is designed to help attract and retain businesses

to Long Island, for another three years. The current program is due to expire on September 30, 2004.

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

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

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

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

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

(04-G-0797SA1)

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

Water Rates and Charges by United Water New York Inc.

I.D. No. PSC-30-04-00006-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, or modify, a petition filed by United Water New York Inc. for a reconciliation of revenues for the 12 months ended April 30, 2004.

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

Subject: Water rates and charges.

Purpose: To recover a net amount of \$893,920 from the customers through a surcharge.

Substance of proposed rule: On June 30, 2004, United Water New York Inc. filed a petition in Case 04-W-0801 to recover a net revenue undercollection of \$893,920 from its customers, resulting from a reconciliation of revenues for the twelve months ended April 30, 2004. The Commission may approve or reject, in whole or in part, or modify the company's petition.

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

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

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

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

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

(04-W-0801SA1)

Department of State

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

Cease and Desist Zone for Real Estate Brokers and Salespersons

I.D. No. DOS-30-04-00007-P

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

Proposed action: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

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

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

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

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

*Cease and Desist Zone
(Canarsie)*

<i>Zone</i>	<i>Expiration Date</i>
<i>County of Kings (Brooklyn)</i>	<i>May 31, 2008</i>

Within the County of Kings as follows:

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

Beginning at a point at the intersection of Ralph Avenue and the Long Island Railroad right-of-way (between Chase Court and Ditmas Avenue); thence northeasterly along the Long Island Railroad right-of-way to the northern prolongation of Bank Street; thence southeasterly along Bank Street to a point at the intersection of Bank Street and Foster Avenue; thence northeasterly continuing to a point at the intersection to Stanley Street and East 108 Street; thence southeasterly along East 108 Street to Flatlands Avenue; thence northeasterly along Flatlands Avenue to the northern prolongation of Fresh Creek Basin; thence southeasterly along Fresh Creek Basin to Short (Belt) Parkway; thence southwesterly along Shore (Belt) Parkway to Paerdegat Basin; thence northwesterly along Paerdegat Basin, and the northern prolongation of Paerdegat Basin to Flatlands Avenue; thence southwesterly along Flatlands Avenue to Ralph Avenue; thence northwesterly along Ralph Avenue to the Long Island Railroad right-of-way and the point of beginning.

Text of proposed rule and any required statements and analyses may be obtained from: Bruce Stuart, Department of State, Division of Licensing Services, 84 Holland Ave., Albany, NY 12208, (518) 473-2728

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

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

Regulatory Impact Statement

1. Statutory authority:

Section 442-h(3)(a) of the Real Property Law (“RPL”) provides that the Secretary of State may adopt a rule establishing a cease-and-desist zone if the Secretary determines that some homeowners within a defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to list their homes for sale. Upon the establishment of such a zone, a homeowner may file with the Secretary a statement of desire not to be solicited. Thereafter, the Secretary will publish a list of the names and addresses of the persons who have filed the statement, and brokers and salespersons are then prohibited from soliciting persons on that list. That list is commonly referred to as a “cease-and-desist list”.

Section 442-h(3)(a) of the RPL provides that no rule establishing a cease and desist zone shall be effective for more than five years; provided, however, that the Department of State may re-adopt the rule to continue a cease and desist zone for additional periods not to exceed five years.

Based testimony received at a public hearing on December 14, 2000, the Secretary of State has determined that some homeowners within the Brooklyn community of Canarsie are subject to intense and repeated solicitations from real estate brokers and salespersons. As a result, the Secretary has express statutory authority to propose and adopt a cease-and-desist zone for that community.

2. Legislative objectives:

According to the Statement of Legislative Findings for section 442-h of the Real Property Law, the Legislature has found that, from time to time, homeowners in some neighborhoods have been subject to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale, with the implication that property values would be decreasing because persons of different ethnic, social or religious backgrounds were moving into the neighborhood in greater numbers. The Statement of Legislative Findings also concluded that this type of solicitation technique constitutes a churning of the market and generated panic selling in the neighborhood. By enacting § 442-h, the Legislature sought to provide a means by homeowners could effectively express their wish not to be solicited by real estate brokers or salespersons. The Secretary has found that some homeowners in the Brooklyn community of Canarsie are subject to intense and repeated solicitations to list their homes for sale. Therefore, this rule accords with the public policy objectives which the Legislature sought to advance by enacting § 442-h of the Real Property Law.

3. Needs and benefits:

A public hearing was held in the Brooklyn Community of Canarsie on December 14, 2000. At the public hearing testimony was given by community leaders who spoke on behalf of their constituents. Speakers included two State Senators, a Member of the Assembly, the Deputy Borough President, members of Community Board 18, representatives of homeowners associations and representatives of civic associations. Each of the speakers spoke in support of the proposed cease-and-desist zone citing the need to curb the aggressive solicitation practices of real estate agents in the Canarsie community. The speakers cited frequent telephone calls, unwanted mail and flyers, as well as door-to-door solicitations, as intrusive and unwanted solicitation practices by real estate brokers and salespersons. Accordingly, the Secretary of State has determined that homeowners in the Brooklyn community of Canarsie have no practical means of stopping the unwanted and intrusive solicitations and that the homeowners need immediate relief. This rule will provide those homeowners who do not wish to be solicited with an effective and practical means of so notifying real estate brokers and salespersons. One thousand sixty-eight homeowner’s statements were filed for the previous cease-and-desist list, which expired on February 27, 2001.

On June 29, 2001, the United States District Court for the Eastern District of New York issued a decision and judgement in the matter of *Anderson, et al. v. Treadwell, as Secretary of State of the State of New York* declaring the cease-and-desist rules of the Department of State to be invalid as an unconstitutional restriction of free speech. That decision was appealed by the Department of State, and on June 25, 2002, the United States Court of Appeals for the Second Circuit issued a decision reversing the District Court’s decision and judgement, and ordering the District Court to enter judgement in favor of the Secretary of State. See *Anderson et al. v. Treadwell*, 294 F. 3rd 453 (2d Circuit 2002). On October 8, 2002, the District Court entered judgement in favor of the Secretary of State. The entry of judgement by the District Court effectively reinstated the cease-and-desist rule, which had been invalidated by the District Court’s previous decision and judgement.

4. Costs:

a. Costs to regulated parties:

Regulated parties include licensed real estate brokers and salespersons who do residential sales in the Brooklyn community of Canarsie. There are approximately 1,200 real estate brokers and approximately 1,800 real estate salespersons with offices in Brooklyn.

The Department of State will have the cease-and-desist list available, at no cost, on its web site, www.dos.state.ny.us. The cease-and-desist list will also be sold to the public, including real estate brokers and salespersons, for \$10 per copy, in accordance with existing 19 NYCRR Section 175.17(c)(5). Copies will also be made available for inspection and copying at Department of State offices.

We expect that most licensees who do business in Canarsie will access the list, at no cost, on the Department’s web site. We expect that some licensees will purchase one or more copies. Some will share the expense by sharing a copy. Others will not access or purchase a copy because they do not solicit residential listings in Canarsie.

In addition, some real estate brokers may use commercial mailing lists to solicit. For those brokers, the cease-and-desist list may increase the cost of using a commercial mailing list. The list will have to be checked against the addresses in the cease-and-desist list, and the broker will have to delete the addresses that appear in the homeowner list. The Department of State is not able to estimate the cost to those brokers because the cost will depend on a number of factors, such as the number of names on the mailing list, the number of addresses in the cease-and-desist list, the technology to the licensee, and the licensee’s cost for technology and labor. On the other hand, there may be some reductions in the total cost of the mailing when the “unproductive addresses” are eliminated from the list.

Also, if a licensee uses the telephone, delivery services and personal contact to solicit residential listings, the licensee may have to spend time checking the cease-and-desist list to avoid contact with any person at an address listed. There is, of course, an expense associated with that expenditure of time. On the other hand, there may be savings associated with elimination of unproductive calls or deliveries. Whether there is a net cost or savings will depend on the circumstances and practices of each licensee. Therefore, the Department of State is not able to estimate those costs.

b. Costs to the Department of State:

The estimated costs for preparing the cease-and-desist list are as follows:

Printing owners statements	\$2,200
Mailing owners statements	640
Processing statements:	

Staff: SG-14 @ \$29,110	
10 weeks	5,600
Data entry:	
Staff: SG-6 (NYC) @ \$23,385	
10 days	900
Fringe benefits @ 36.5%	2,372
Total:	\$11,712

The costs for printing and mailing are unknown. The Department anticipates that most licensees will access the list, at no cost, on the Department's website. For those few who want to purchase a paper copy, the Department will likely print a copy, on an order-by-order basis, on existing equipment. The mailing costs will be dependent on the number of copies that are ordered. However, the Department expects that the costs for printing and mailing will be incidental to the costs of preparing the list.

The Department of State expects that revenues from the sale of the list will be incidental to the costs of preparing, printing and mailing.

5. Local government mandates:

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

6. Paperwork:

Homeowners who do not want to be solicited will have to file an "owner's statement" with the Department of State. The owner's statement will indicate the owner's desire not to be solicited and will set forth the owner's name and the address of the property within the cease-and-desist zone. The Department of State will provide homeowners with a standard form although use of the form is not mandatory. Owner's statements will be provided to community leaders for distribution to their constituents. In addition, owner's statements will be available from the Department of State on request, as well as available on the Department's web site. The Department of State will prepare a cease-and-desist list containing the names and addresses of all of the homeowners who filed an owner's statement. The list will be available, at no cost, on the Department's website. The publication will also be sold to the public, including real estate brokers and salespersons. The price will be \$10 per copy. Except for orders submitted by mail, real estate brokers and salespersons will not have to complete any paperwork or file any paperwork as a result of this rule.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

The Department of State did not consider any other alternatives.

9. Federal standards:

There are no federal standards regulating the frequency or intensity of solicitations by real estate brokers or salespersons. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

Real estate brokers and salespersons can comply with the cease-and-desist order immediately upon publication of the list.

Regulatory Flexibility Analysis

1. Effect of rule:

This cease-and-desist rule applies to an area generally known as Canarsie in the Borough of Brooklyn. There are approximately 1,170 real estate brokers and approximately 1,852 real estate salespersons in the Brooklyn. Most of those licensees are small businesses, or they work for a small business. This rule will apply to most of the licensees. The exceptions will be those who do not deal in residential properties, and those who do not deal in properties located within the cease-and-desist zone.

The cease-and-desist rule will also apply to licensed real estate brokers and salespersons who are located outside of the Brooklyn but who solicit residential properties within the designated area. The Department of State does not have a practical way of estimating how many brokers and salespersons fall within this category.

The rule does not apply to local governments.

2. Compliance requirements:

The rule does not impose any reporting or recordkeeping requirements on the licensees. The rule does prohibit each licensee from soliciting the sale, rental or listing from any homeowner whose name appears of a cease-and-desist list published by the Department of State.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

A licensee will not need professional services in order to comply with the rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The cost of compliance and the variations in the costs of compliance are detailed in section 4(c) of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the names and addresses of the homeowners who do not want to be solicited will be published by the Department of State and since the cost of the publication is \$10 per copy or free if accessed on the Department's website, it will be economically and technologically feasible for real estate brokers and salespersons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

To provide homeowners in the designated area with relief from intense and repeated solicitations from real estate brokers and salespersons, the rule must apply equally to all licensees regardless of the size of their business or the size of their employer's business. Consequently, the rule does not make special accommodations for different classes of licensees.

7. Small business and local government participation:

The Department of State conducted an open public hearing on December 14, 2000, at School 211, Avenue J, Brooklyn, New York. The time, date and place of the public hearing was well advertised within the Canarsie community. Testifying at the hearing on behalf of their constituents in Canarsie were two State Senators, a Member of the Assembly, the Deputy President of the Borough of Brooklyn, members of Community Board 18, representatives of homeowners associations and representatives of civic associations.

There were no real estate brokers or real estate salespersons who identified themselves at the public hearing, and no real estate broker or salesperson spoke at the hearing. In addition, no real estate broker or salesperson submitted any written testimony regarding the proposed re-adoption of the cease-and-desist zone.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

This rule establishes a cease-and-desist zone in the Brooklyn community of Canarsie, and this rule only affects those real estate brokers and salespersons who do business in that community.

Canarsie is not a rural area and, therefore, a rural area flexibility analysis is not required for this rule.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for real estate brokers or real estate salespersons.

The rule provides a means by which homeowners in the designated community can notify real estate brokers and real estate salespersons that the homeowners do not want to be solicited for the purchase, sale or rental of their homes.

Since the homeowners who file a homeowner's statement with the Department of State are not interested in receiving solicitations from real estate brokers or real estate salespersons, publication of names and addresses of those homeowners and the resulting notification to real estate

brokers and salespersons will not have any substantial impact on jobs or employment opportunities for real estate brokers or salespersons.

Department of Taxation and Finance

NOTICE OF ADOPTION

Fuel Use Tax

I.D. No. TAF-20-04-00003-A

Filing No. 796

Filing date: July 7, 2004

Effective date: July 7, 2004

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

Action taken: Amendment of section 492.1(b)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); and 528(a)

Subject: Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

Purpose: To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning July 1, 2004, and ending Sept. 30, 2004, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-20-04-00003-P, Issue of May 19, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

Assessment of Public Comment:

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

Workers' Compensation Board

EMERGENCY RULE MAKING

Filing Written Reports of Independent Medical Examinations (IMEs)

I.D. No. WCB-30-04-00001-E

Filing No. 799

Filing date: July 12, 2004

Effective date: July 12, 2004

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

Action taken: Amendment of section 300.2(d)(11) of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 137

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

Specific reasons underlying the finding of necessity: Recent Decisions issued by Board Panels have interpreted the current regulation as requiring reports of independent medical examinations (IMEs) be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal

holidays, Saturdays and Sundays, and that U.S. Post Offices are not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is precluded and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, workers' compensation insurance carrier/self-insured employer, claimant's treating provider and representative, and the claimant it is not possible to send the report by facsimile or electronic means. The recent Decisions have greatly, negatively impact the professionals who conduct IMEs, the IME entities, insurance carriers and self-insured employers. When untimely reports are precluded, the insurance carriers and self-insured employers are prevented from adequately defending their position. Accordingly, emergency adoption of this rule is necessary.

Subject: Filing written reports of independent medical examinations (IMEs).

Purpose: To amend the time for filing written reports of IMEs with the board and furnished to all others.

Text of emergency rule: Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 9, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Workers' Compensation Board, 20 Park St., Rm. 401, Albany, NY 12207, (518) 473-8626, e-mail: office-of-generalcounsel@wcb.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such

examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision. By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

7. Duplication:

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

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of

WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured local governments will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that are self-insured will also be affected by the proposed rule. These small businesses will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers, independent medical examiners, and entities that derive income from independent medical examinations will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.