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.

Banking Department

EMERGENCY RULE MAKING

Licensed Cashers of Checks

I.D. No. BNK-44-04-00001-E
Filing No. 1169
Filing date: Oct. 14, 2004
Effective date: Oct. 14, 2004

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

Action taken: Amendment of Part 400 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 37(3), 369, 371 and 372

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

Specific reasons underlying the finding of necessity: Chapter 432 of the Laws of 2004 amended art. 9-A of the Banking Law to provide an appropriate regulatory regime for entities engaged in cashing commercial checks. The amendments to Part 400 are necessary to conform the regulations governing check cashers to the changes in the law, which were approved on Sept. 14, 2004 and were effective immediately.

Subject: Licensed cashers of checks.

Purpose: To regulate commercial check cashing.

Text of emergency rule: The title of Part 400 is amended to read as follows:

Part 400
LICENSED CASHERS OF CHECKS
(Statutory authority: Banking Law, §§ 37[3], *369*, 371, 372)

Paragraphs (a) and (b) of Section 400.1 of the Superintendent's Regulations shall be amended to read as follows:

(a) Application [form]. *No person shall engage in the business of cashing checks, drafts or money orders, as principal, broker, agent or otherwise, for a consideration, without first obtaining a license from the superintendent. This licensing requirement applies whether such activities are conducted for customers who are natural persons or for any business, corporation, partnership, limited liability company or partnership, association, or sole proprietorship, or any other entity.* Application for a new license or for a change of control of a licensee shall be made upon forms issued by the superintendent. These forms may be obtained at Banking Department offices [located at Two Rector Street, 21st Fl., New York, NY 10006 and 194 Washington Ave., Albany, NY 12210.] *at the locations specified in Supervisory Policy G-1.* For purposes of this Part, the term person shall include a[n individual,] *natural person or a* partnership, corporation, association or any other entity. The term control shall mean having the power directly or indirectly to direct or cause the direction of the management and policies of a licensee, whether through the ownership of voting stock of a licensee, the ownership of voting stock of any corporation which possesses such power or otherwise and shall be presumed to exist if any person, directly or indirectly, owns, controls, or holds with power to vote 10 percent or more of the voting stock of any licensee or any person owning, controlling or holding with power to vote 10 percent or more of the voting stock of any licensee.

(b) Application procedure. Completed applications should be delivered to the Licensed Financial Services Division of the Banking Department [, Two Rector Street, 21st Fl., New York, NY 10006.] *at the New York City office location specified in Supervisory Policy G-1.* An application for a new license for a fixed location or for a mobile unit must be accompanied by a check for the investigation and license fees specified in Banking Law, section 367. An application by a licensee to operate a limited station must be accompanied by a check for the license and investigation fees required by Banking Law, section 370. An application for change of control of a licensee must be accompanied by a check for the investigation fee specified in Banking Law, section 370-a. In each case, the check must be made payable to the order of "Superintendent of Banks of the State of New York". Applicants for a new license seeking to conduct business under a trade name must file a certificate in the office of the county clerk as required by General Business Law, section 130. A certificate of the county clerk stating that such a document has been filed must be submitted with an application for a new license.

A new Subsection (g) shall be added to Section 400.1 of the Superintendent's Regulations as follows:

(g) The license of a restricted location authorized pursuant to subdivision 1 of the Banking Law shall not be affected by a change of control, pursuant to Section 370-a of the Banking Law, pertaining solely to such restricted location of such licensee, provided that the licensee continues thereafter to engage at that location in the cashing of checks, drafts or money orders only for payees that are other than natural persons and provided further that such license shall bear a legend stating that such location is restricted to the cashing of checks, drafts or money orders only for payees that are other that natural persons.

Paragraph (1) of Subsection (a) of Section 400.6 of the Superintendent's Regulation shall be amended to read as follows:

(a) Every licensee shall:

(1) Post and display at all times in *a* conspicuous place on the premises the license. [and also] *Every licensee that cashes one or more checks, drafts or money orders for any payees that are natural persons must post* the schedule of rates to be charged *with respect to such transactions involving payees that are natural persons.* The schedule shall be made of *durable material*, be no less than 30 inches wide and 36 inches high with letters at least ¾ inch in size and indicate the fee applicable to the full amount of the check to be cashed that corresponds to the amount of the check. *The schedule shall indicate the fee that corresponds to the amount of the check. The amount of the check shall be set forth on the schedule in increments of $25.00 ranging from $25.00 to $2,000. The schedule shall also indicate the percentage charge imposed on all checks and the minimum charge of $1.00 per check.* The schedule shall be in English and in Spanish and posted in the customer's area.

Section 400.12 of the Superintendent's Regulations shall be amended to read as follows:

[The] *Except with respect to the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons,* [licensee] *a licensee* shall be permitted to charge or collect a fee for cashing a check, draft or money order not to exceed (a) 1.5 per centum of the amount of the check, draft or money order, or (b) $1, whichever is greater. Effective January 1, 2005, and annually thereafter, the maximum per centum fee specified in clause (a) of this section, shall be increased by a per centum amount, based upon an increase in the annual consumer price index for the New York—Northern N.J.—Long Island, NY—NJ—CT—PA area for all urban consumers (annual CPI-U), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor for the calendar year preceding the year in which such increase is made compared to such annual CPI-U for the year prior to such preceding year. The maximum per centum fee that may be charged or collected for cashing a check, draft or money order pursuant to this section in effect at such time shall be multiplied by such computed per centum amount and the result added to such maximum per centum fee. The resulting sum shall be the revised maximum per centum fee, which shall be posted upon the internet site of the Banking Department (www.banking.state.ny.us) by the Superintendent not later than forty-five days following the public release of such annual index by the U.S. Department of Labor. Such revised maximum per centum fee shall be calculated and posted to the nearest one-hundredth of a per centum. Such revised maximum per centum fee shall be effective not later than forty-five days after the Superintendent shall have notified the Majority Leader of the Senate, the Speaker of the Assembly, and the Chairperson of both the Senate and Assembly Committees on Banks of his/her intention to change the maximum per centum fee pursuant to the provisions of Section 372.3 of the Banking Law and shall continue in effect until revised and increased in the next succeeding year based upon an increase in such annual index. If such annual CPI-U does not increase in any one year, the maximum per centum fee in effect during the year in which the index does not increase shall remain unchanged in the next succeeding year. Nothing herein shall be deemed to prohibit the Superintendent from setting, by regulation, a different maximum per centum fee at any time where the Superintendent shall find that such a fee is necessary and appropriate to protect the public interest and to promote the stability of the check cashing industry for the purpose of meeting the needs of the communities that are served by check cashers. *No maximum fee shall apply to the charging of fees by licensees for the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons.*

Paragraph (3) of Subsection (h) of Section 400.13 of the Superintendent's Regulations shall be amended to read as follows:

(3) that the check casher is licensed and regulated by the New York State Banking Department located at [Two Rector Street, New York, NY 10006] *the New York City office location specified in Supervisory Policy G-1*; and

Section 400.15 of the Superintendent's Regulations shall be amended to read as follows:

Background. Chapter 546 of the Laws of 1994 altered the licensing criteria applicable to check cashers by substantially amending section 369 of the Banking Law to require, among other things, that the superintendent determine whether there is a community need for a new licensee in the proposed area to be served and to prohibit entirely the granting of a license at a location which is less than three-tenths of a mile from an existing licensee. In so acting, the Legislature adopted a specific statutory finding of legislative intent, to wit, "The legislature hereby finds and declares that check cashers provide important and vital services to New York citizens; that the business of check cashers shall be supervised and regulated through the Banking Department in such a manner as to maintain consumer confidence in such business and protect the public interest; that the licensing of check cashers shall be determined in accordance with the needs of the communities they are to serve; and that it is in the public interest to promote the stability of the check cashing business for the purpose of meeting the needs of the communities that are served by check cashers." However, the legislation left unamended Banking Law, section 370 which permits a licensee to apply to the superintendent for leave to change its place of business to any other location and which does not make explicit the standards to be applied by the superintendent in granting permission to relocate. A licensee must obtain a new license to conduct business at another location. In order to [preserve the bar against issuance of new licenses within three-tenths of a mile of existing licensees] *promote and maintain the stability of the check cashing business* while accommodating the reasonable needs of current licensees to relocate, [and to prevent evasions of the legislative intent behind chapter 546 of the Laws of 1994,] the following standards shall be applied by the superintendent in determining whether to approve applications for relocation to any site which is within three-tenths of a mile of another licensed location:

Paragraph (a) of Section 400.15 of the Superintendent's Regulations shall be amended to read as follows:

(a) No relocation shall be permitted to a site within three-tenths of a mile of another *existing* licensee *location* from a location greater than three-tenths of a mile from such *existing* licensee *location* [.], *unless such other existing licensee engages in the cashing of checks, drafts or money orders only for payees of such checks, drafts or money orders that are other than natural persons at a restricted location authorized pursuant to subdivision 1 of Section 369 of the Banking Law or at any other licensed location whereat the licensee engages solely in the cashing of checks, drafts or money orders only for payees that are other than natural persons.*

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire January 11, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Sam L. Abram, Banking Department, One State St., New York, NY 10004-1417, (212) 709-1658, e-mail: sam.abram@banking.state.ny.us

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

A Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not submitted, but will be published in the *Register* within 30 days of the rule's effective date.

EMERGENCY RULE MAKING

Regulations Governing Credit Unions

I.D. No. BNK-44-04-00004-E
Filing No. 1189
Filing date: Oct. 19, 2004
Effective date: Oct. 21, 2004

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

Action taken: Amendment of Parts 95, 96 and 97; repeal of Part 113; and addition of Parts 326 and 327 to Title 3 NYCRR.

Statutory authority: Banking Law, sections 14(1), 453(5), 454, 454(9), (14), (19), 458(9) and 458-a

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

Specific reasons underlying the finding of necessity: Required to conform the regulations to changes in the Banking Law that have already become effective.

Subject: Changes in the regulations governing credit unions.

Purpose: To conform the regulations to the provisions of L. 2003, ch. 679 which are intended to provide New York chartered credit unions with powers comparable to, and competitive with, federally chartered credit unions; and provide for prior notice of the proposed exercise of new credit union investment powers.

Text of emergency rule: Section 95.2 is REPEALED.

Section 96.1 is REPEALED.

A new Section 96.1 is added to read:

96.1 Definitions

For purposes of this Part:

(a) The term net worth shall have the same meaning as set forth in Section 702.2 of Part 702 of the Regulations of the National Credit Union Administration.

(b) The term loan shall mean any loan made to or guaranteed or endorsed by a member of a credit union.

Section 96.3 is amended to read:

96.3 Fully secured loans.

A credit union may make loans to a member which are secured by the borrower's unhypothecated shares or by shares pledged by another member or members subject to the limitations contained in sections [453(5)] *454(6)* and [454(2)] *456(2)* of the Banking Law.

Section 97.5 is amended to read:

97.5 Aggregate limitation

The aggregate amount of a credit union's investment in the stock, capital notes and debentures of credit union organizations, together with the aggregate amount of loans to such organizations, shall not exceed [one] *three* percent of the amount due to the members of the credit union on shares and deposits. For the purposes of this section, a loan shall include any loan or advance made directly or indirectly to a credit union organization (excluding accounts payable incurred in the ordinary course of business and paid within 60 days).

Part 113 is REPEALED.

A new Part 326 is added to read:

PART 326

MAINTENANCE OF RESERVES BY CREDIT UNIONS

(Statutory Authority: Banking Law Section 458-a)

326.1 Applicability.

The provisions of this Part shall apply to all net worth reserve accounts required to be established and maintained by credit unions.

326.2 Reserve Accounts.

Credit unions shall establish and maintain such net worth reserve accounts as are required for Federally chartered credit unions pursuant to Title 12 U.S.C.1790d and any regulations promulgated thereunder by the National Credit Union Administration.

326.2 Definition.

(a) The term net worth shall mean the retained earnings balance of the credit union at the end of a quarterly period as determined under generally accepted accounting principles. Retained earnings consists of undivided earnings, regular reserves, and any other appropriations designated by the management of a credit union or regulatory authorities. Only undivided earnings and appropriations of undivided earnings shall be included in net worth. Net Worth shall not include the allowance for loan and lease losses account. In the case of a credit union that qualifies to be designated as a low income credit union, net worth shall also include secondary capital accounts that are uninsured and subordinate to all other claims of creditors, shareholders and the National Credit Union Share Insurance Fund.

(b) In the event that a different definition of net worth is contained in 12 CFR 702.2, this section shall be deemed to define net worth as set forth in such section.

A new Part 327 is added to the Superintendent's Regulations to read:

Part 327

INVESTMENTS BY CREDIT UNIONS IN THE SHARES OF CORPORATE CREDIT UNIONS LOCATED IN THIS STATE

(Statutory authority: Banking Law Sections 454, 454(14))

Any credit union that seeks to invest in the shares of a state or Federal corporate credit union located in this state in an amount that exceeds fifty percent of its total capital or the insured limit, whichever is greater, shall give the Superintendent prior written notice of its intent to make such investment. If the Superintendent shall find that the proposed investment is consistent with the declaration of policy set forth in Section 10 of the Banking Law, he or she shall, within thirty days after receipt of such notice, notify the credit union in writing that such investment may be made or that an additional period of time, not to exceed sixty days, is required to properly make a determination.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire January 16, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Sam L. Abram, Secretary of the Banking Board, One State St., New York, NY 10004-1417, (212) 709-1658, e-mail: sam.abram@banking.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Banking Law Section 14(1) gives the Banking Board the power "to make, alter and amend rules and regulations not inconsistent with law." Section 454 of the Banking Law states that the powers of a credit union specified therein shall be subject to any regulations promulgated by the Superintendent or, in certain specified cases, to regulations promulgated by the Banking Board. Section 454(6) of the Banking Law authorizes a credit union to lend money to its members, subject to such regulations and restrictions as the banking board finds necessary and proper. Section 454(9) of the Banking Law authorizes a credit union, subject to such regulations and restrictions as the Banking Board finds necessary and proper, to borrow money form any source in an aggregate amount not exceeding fifty percent of assets without the written approval of the Superintendent. Section 454(14) of the Banking Law permits a credit union to hold shares in and make loans to other credit unions, whether state or federally chartered, subject to the limitations contained in Section 456(7) of the Banking Law. Section 454(19) of the Banking Law provides that investments in and loans to a credit union organization by a credit union shall be subject to regulations and restrictions of the Banking Board. Section 458(9) of the Banking Law gives the Superintendent the power to promulgate regulations or take other measures necessary to provide for and implement the repeal of Section 458. Section 458-a of the Banking law gives the Superintendent the power to prescribe by regulation the net worth reserve categories which a credit union shall contribute to and maintain.

2. Legislative objectives:

As more fully described in response to Item 3, "Needs and benefits" below, the proposed repeal of Section 95.2 of the General Regulations of the Banking Board ("General Regulations"), the proposed amendment to Section 96.1 of the General Regulations, the proposed amendment to Section 96.3 of the General Regulations, the proposed amendment to Section 97.5 of the General Regulations, the proposed adoption of new Superintendent's Regulation Part 326 and the proposed repeal of Part 113 of the General Regulations all implement, or conform the regulations of the Banking Department to, specific changes made by the Legislature in the Banking Law, and thereby presumably accord with the public policy objectives of the Legislature in making such changes. As also more fully described in response to Item 3 below, the proposed adoption of new Superintendent's Regulation 327 addresses safety and soundness concerns which may arise from the repeal of Part 113 of the General Regulations, and thereby accords with the public policy objectives set forth in Section 10 of the Banking Law that the business of all banking organizations be regulated in such a manner as to ensure, among other things, the safe and sound conduct of such business.

3. Needs and benefits:

Chapter 679 of the Laws of 2003, which was approved on October 15, 2003, amended the Banking Law in relation to the powers, limitations and operations of credit unions. The purpose of the legislation was to provide state-chartered credit unions with powers comparable to and competitive with federally-chartered credit unions.

The proposed changes all implement, or conform the regulations of the Banking Department to, specific changes made by the Legislature in Chapter 679, except for the proposed adoption of new Superintendent's Regulation Part 327, which addresses safety and soundness concerns which may arise from the repeal of Part 113 of the General Regulations of the Banking Board. Specifically:

The repeal of Section 95.2 of the General Regulations of the Banking Board will conform the regulation to a change in the law by removing an obsolete limitation contained in the regulation requiring a credit union to obtain the approval of the Superintendent to borrow more than 15 but less than 50 percent of its assets. New Section 454(9) of the Banking Law permits a credit union to borrow up to 50 percent of its assets without the approval of the Superintendent.

The amendment to Section 96.1 of the General Regulations of the Banking Board will implement a change in the law by eliminating references in the regulation to the surplus of a credit union and conforming the definition of "net worth" to the regulations of the National Credit Union Administration. Section 458 of the Banking Law, requiring credit unions to maintain surplus accounts, will be repealed effective October, 2004.

The amendment to Section 96.3 of the General Regulations of the Banking Board modifies the statutory references in the regulation to reflect changes made in Article XI of the Banking Law.

The amendment to Section 97.5 of the General Regulations of the Banking Board conforms the regulation to amended Section 454(19) of the Banking Law, which increases the limit on investments by a credit union in a credit union organization from one percent to three percent of the total sum due to members on shares and deposits.

New Superintendent's Regulation Part 326 implements new Section 458-a of the Banking Law. Section 458-a requires a credit union to maintain such net worth reserves as the Superintendent by regulation shall prescribe and mandates that the regulations prescribe a system of maintaining net worth reserves comparable to that promulgated by the National Credit Union Administration, except as otherwise deemed necessary by the Superintendent.

The repeal of Part 113 of the General Regulations of the Banking Board conforms the regulations to the investment powers of credit unions under Section 454(14) of the Banking Law. Part 113 limits a credit union to investing no more than 50 percent of its capital in shares of a central (i.e., corporate) credit union located in this state. However, Banking Law Section 454(4) authorizes credit unions to hold shares of other credit unions, subject to the limitations in Banking Law Section 456(7). The latter section specifically excludes from its investment limitations investments in state or federal corporate credit unions.

New Superintendent's Regulation Part 327 addresses any possible safety and soundness concerns arising from the repeal of Part 113 by requiring that a credit union which intends to invest in the shares of a state or federal corporate credit union located in this state in an amount that exceeds 50% of its total capital or its insured limit, whichever is greater, give the Superintendent prior written notice of its intent. The regulation gives the Superintendent an opportunity to determine whether the proposed investment is consistent with the policy set forth in Section 10 of the Banking Law, which includes safety and soundness considerations.

4. Costs:

The repeal of Section 95.2 of the General Regulations of the Banking Board is not projected to impose any costs on regulated persons or the state government.

The amendment to Section 96.1 of the General Regulations of the Banking Board will conform the definition of net worth in state's credit union regulations to that of the federal regulator of credit unions, and is not therefore projected to impose any additional costs on regulated persons or the state government.

The amendment to Section 96.3 of the General Regulations of the Banking Board will conform statutory cross-references in the regulation to changes in the Banking Law and is not projected to impose any costs on regulated persons or the state government.

The amendment to Section 97.5 of the General Regulations of the Banking Board raises a limit on certain investments, in accordance with recent legislation, and therefore is not projected to impose any additional costs on regulated persons or the state government.

New Superintendent's Regulation Part 326 implements a statutory mandate that the Superintendent prescribe a system of maintaining net worth reserves comparable to that promulgated by the National Credit Union Administration. The amendment will conform the state's regulation to that of the federal government and therefore is not projected to impose any costs on regulated persons or the state government.

The repeal of Part 113 of the General Regulations of the Banking Board is not projected to impose any costs on regulated persons or the state government.

New Superintendent's Regulation Part 327 requires a credit union provide prior notice to the Superintendent if it seeks to invest more than 50% of its capital or its insured limit, whichever is greater, in a state or federal corporate credit union located in New York, and requires the Superintendent to ascertain whether such notice is consistent with the declared policies of the Banking Law. Prior to the repeal of Part 113 and the adoption of Part 327, credit unions were prohibited from making investments in excess of the 50% notice threshold. An institution need only give the notice if it chooses to exercise the excess investment authority. The cost to institutions of giving the required notice, for which no particular form is prescribed, and the cost to the Department of reviewing such notices is expected to be minimal and is deemed necessary to ensure that the new investment powers are exercised in a safe and sound manner.

5. Local government mandates:

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

6. Paperwork:

The repeal of Section 95.2 of the General Regulations of the Banking Board will not require any new reporting or other paperwork.

The amendment to Section 96.1 of the General Regulations of the Banking Board will reduce reporting burdens on institutions by eliminating the reference to surplus and conforming the definition of net worth to that of the National Credit Union Administration.

The amendment to Section 96.3 of the General Regulations of the Banking Board updating statutory cross-references will not require any new reporting or other paperwork.

The amendment to Section 97.5 of the General Regulations of the Banking Board raising certain investment limits will not require any new reporting or other paperwork.

New Superintendent's Regulation Part 326 will reduce the reporting burden on institutions. This part replaces the current requirement that credit unions maintain a surplus account with a requirement that credit unions maintain a net worth reserve account in the same form as is required by the federal regulator of credit unions.

The repeal of Part 113 of the General Regulations of the Banking Board will not require any new reporting or other paperwork.

New Superintendent's Regulation Part 327 will require institutions seeking to make certain investments to provide the Department with prior notice. Prior to the repeal of Part 113 and the adoption of Part 327, credit unions were prohibited from making investments in the shares of corporate credit unions in excess of the 50% notice threshold. An institution need only give the notice if it chooses to exercise the new investment powers. The paperwork burden of giving the notice is expected to be modest. While the notice is required to be in writing, no particular form of notice is prescribed. The Department believes that the notice requirement is necessary to ensure that the new investment powers are exercised in a safe and sound manner.

7. Duplication:

The repeal of Section 95.2 of the General Regulations of the Banking Board will not result in duplication, overlap or conflict with any rules or other legal requirements of the state and federal governments.

The amendment to Section 96.1 of the General Regulations of the Banking Board will reduce duplication, overlap and conflict with the rules of the federal government by conforming the definition of net worth in the Banking Department's regulations to that in the regulations of the National Credit Union Administration.

The amendment to Section 96.3 of the General Regulations of the Banking Board updating certain statutory cross-references will not result in duplication, overlap or conflict with any rules or other legal requirements of the state and federal governments.

The amendment to Section 97.5 of the General Regulations of the Banking Board raising certain investment limits will not result in duplication, overlap or conflict with any rules or other legal requirements of the state or federal governments.

New Superintendent's Regulation Part 326 will reduce duplication, overlap and conflict with the rules of the federal government by requiring credit unions to maintain the same reserve accounts as are required by the National Credit Union Administration.

The repeal of Part 113 of the General Regulations of the Banking Board will not result in duplication, overlap or conflict with any rules or other legal requirements of the state and federal governments.

New Superintendent's Regulation Part 327, requiring institutions seeking to make certain investments to provide the Department with prior notice, will not result in duplication, overlap or conflict with any rules or other legal requirements of the state and federal governments.

8. Alternative approaches:

As discussed in detail below, the changes in the regulations are necessary to conform the regulations to changes in the Banking Law. Although, in general, these changes are the result of changes in the law, the Banking Department did communicate its plans to the credit union industry, which is supportive of the changes.

The repeal of Section 95.2 of the General Regulations of the Banking Board will conform the regulation to new Section 454(9) of the Banking Law. One alternative would be to take no action; however not conforming the regulation to the statute was not considered to be a viable alternative.

The amendment to Section 96.1 of the General Regulations of the Banking Board implements the repeal of Section 458 of the Banking Law. One alternative would be to take no action; however not conforming the regulation to the statute was not considered to be a viable alternative.

The amendment to Section 96.3 of the General Regulations of the Banking Board updates certain statutory cross-references. One alternative would be to take no action; however failing to provide the proper statutory cross-references was not considered to be a viable alternative.

The amendment to Section 97.5 of the General Regulations of the Banking Board will conform the regulation to amended Section 454(19) of the Banking Law. One alternative would be to take no action; however not conforming the regulation to the statute was not considered to be a viable alternative.

New Superintendent's Regulation Part 326 implements new Section 458-a of the Banking Law. One alternative would be to take no action; however not conforming the regulation to the statute was not considered to be a viable alternative.

The repeal of Part 113 of the General Regulations of the Banking Board conforms the regulations to Section 454(4) and 456(7) of the Banking Law. One alternative would be to take no action; however not conforming the regulation to the statute was not considered to be a viable alternative.

New Superintendent's Regulation Part 327 essentially replaces repealed Part 113. Consideration was given to simply repealing Part 113, thus permitting credit unions to invest in the shares of federal or state corporate credit unions without limitation. However, in light of concerns expressed about potential safety and soundness issues if such a course were followed, it was determined to adopt Part 327.

9. Federal standards:

No minimum standards of the federal government for the same or similar subject areas will be exceeded by the repeal of Section 95.2 of the General Regulations of the Banking Board.

The amendment to Section 96.1 of the General Regulations of the Banking Board will conform the definition of "net worth" to the regulations of the National Credit Union Administration.

No minimum standards of the federal government for the same or similar subject areas will be exceeded by the amendment of Section 96.3 of the General Regulations of the Banking Board updating certain statutory cross-references.

No minimum standards of the federal government for the same or similar subject areas will be exceeded by the amendment to Section 97.5 of the General Regulations of the Banking Board. The National Credit Union Administration regulations applicable to federal credit union investments in credit union service organizations impose more restrictive investment limits.

New Superintendent's Regulation Part 326 requires credit unions to maintain the same reserve accounts as are required by the National Credit Union Administration.

No minimum standards of the federal government for the same or similar subject areas will be exceeded by the repeal of Part 113 of the General Regulations of the Banking Board.

New Superintendent's Regulation Part 327 exceeds minimum standards of the federal government for the same subject area insofar as it imposes a prior notice requirement for certain investments by credit unions whereas no notice or approval requirement for such investments is imposed by federal law or regulations. Part 327 addresses any possible safety and soundness concerns arising from the repeal of Part 113 by requiring that a credit union which intends to invest in the shares of a state or federal corporate credit union located in this state in an amount that exceeds 50% of its total capital or the insured limit, whichever is greater, give the Superintendent prior written notice of its intent. The regulation gives the Superintendent an opportunity to determine whether the proposed investment is consistent with the policy set forth in Section 10 of the Banking Law, which includes safety and soundness considerations.

10. Compliance schedule:

The proposed amendments reflect changes to the Banking Law effected by Chapter 679 of the Laws of 2003. Credit unions are currently required to comply with the statutory changes, most of which have already come into effect.

No time will be necessary to enable regulated persons to achieve compliance with the repeal of Section 95.2 of the General Regulations of the Banking Board, which removes a limitation on borrowing by credit unions.

The amendment to Section 96.1 of the General Regulations of the Banking Board adopts the definition of "net worth" used in the regulations of the National Credit Union Administration (NCUA). Since credit unions are federally insured they are already subject to this NCUA regulation and will not require any time to achieve compliance with this amendment.

No time will be necessary to enable regulated persons to achieve compliance with the amendment to Section 96.3 of the General Regulations of the Banking Board, which updates certain statutory cross-references.

No time will be necessary to enable regulated persons to achieve compliance with the amendment to Section 97.5 of the General Regulations of the Banking Board, which increases the existing limits on credit union investments.

New Superintendent's Regulation Part 326 requires credit unions to maintain the reserve accounts required by the regulations of the National Credit Union Administration (NCUA). Since credit unions are federally insured they are already subject to this NCUA regulation and will not require any time to achieve compliance with this amendment.

No time will be necessary to enable regulated persons to achieve compliance with the repeal of Part 113 of the General Regulations of the Banking Board, which removes a limitation on investments by credit unions.

No time will be necessary to enable regulated persons to achieve compliance with new Superintendent's Regulation Part 327, since it requires that credit unions give prior notice of investments which were previously prohibited.

Regulatory Flexibility Analysis

The amendments to Part 95, Part 96 and Part 97, and the repeal of Part 113, will not impose any adverse economic or technological impact upon small business beyond any such effects that may be caused by changes in the Banking Law, to which the amendments conform the regulations. These amendments will not impose any adverse economic or technological impact upon local governments. These amendments will impose no adverse reporting, recordkeeping or compliance requirements on small businesses or local governments.

New Superintendent's Regulation Part 326 implements a new statutory requirement that the Superintendent promulgate regulations prescribing a system of maintaining credit union net worth reserves comparable to that promulgated by the National Credit Union Administration. Credit unions are federally insured and thus already subject to the relevant NCUA regulations. Thus, Part 326 will impose no adverse economic or technological impact upon small business or local governments and will impose no new reporting, recordkeeping or compliance requirements on small businesses or local governments.

New Superintendent's Regulation Part 327 requires a credit union which intends to invest in the shares of a state or federal corporate credit union in an amount that exceeds specified limits to provide prior written notice to the Superintendent. Such investments were previously prohibited. Thus, the new regulation will not impose any adverse economic or technological impact upon small business or local governments. While Part 327 will impose new reporting and compliance requirements upon all credit unions, large or small, seeking to make certain investments, the Department believes that the requirements are modest and constitute appropriate prudential measures. Part 327 does not impose any reporting, recordkeeping or compliance requirements on local governments.

Rural Area Flexibility Analysis

The amendments to Part 95, Part 96 and Part 97, and repeal of Part 113, do not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

New Superintendent's Regulation Part 326 implements a new statutory requirement that the Superintendent promulgate regulations prescribing a system of maintaining credit union net worth reserves comparable to that promulgated by the National Credit Union Administration. Credit unions are federally insured and thus already subject to the relevant NCUA regulations. Thus, Part 326 will not have any adverse impact on credit unions located in rural areas.

New Superintendent's Regulation Part 327 requires a credit union which intends to invest in the shares of a state or federal corporate credit union in an amount that exceeds specified limits to provide prior written notice to the Superintendent. Such investments were previously prohibited. While Part 327 will impose new reporting and compliance requirements upon all credit unions, including credit unions located in rural areas, seeking to make certain investments, the Department believes that the requirements are modest and constitute appropriate prudential measures.

Parts 326 and 327 do not impose any reporting, recordkeeping or compliance requirements on public entities in rural areas.

Job Impact Statement

A Job Impact Statement is not attached because the amendments to Part 95, 96 and 97, the repeal of Part 113, and the adoption of Parts 326 and 327 will not have any appreciable and/or substantial adverse impact on jobs and employment opportunities.

Department of Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-25-04-00007-A
Filing No. 1160
Filing date: Oct. 13, 2004
Effective date: Nov. 3, 2004

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

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

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

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Audit and Control.

Text was published in the notice of proposed rule making, I.D. No. CVS-25-04-00007-P, Issue of June 23, 2004.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-25-04-00008-A
Filing No. 1163
Filing date: Oct. 13, 2004
Effective date: Nov. 3, 2004

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

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

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

Subject: Jurisdictional classification.

Purpose: To delete a position from and classify a position in the exempt class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-25-04-00008-P, Issue of June 23, 2004.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-25-04-00009-A
Filing No. 1164
Filing date: Oct. 13, 2004
Effective date: Nov. 3, 2004

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

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

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

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-25-04-00009-P, Issue of June 23, 2004.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-25-04-00010-A
Filing No. 1162
Filing date: Oct. 13, 2004
Effective date: Nov. 3, 2004

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

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

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-25-04-00010-P, Issue of June 23, 2004.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-25-04-00011-A
Filing No. 1161
Filing date: Oct. 13, 2004
Effective date: Nov. 3, 2004

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

Action taken: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt and non-competitive classes in the Department of Audit and Control.

Text was published in the notice of proposed rule making, I.D. No. CVS-25-04-00011-A, Issue of June 23, 2004.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment
The agency received no public comment.

Education Department

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

Supplementary Certificate in the Classroom Teaching Service

I.D. No. EDU-24-04-00005-RC

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

Revised action: Repeal of section 80-2.11 and addition of sections 80-5.18 and 80-5.19 to Title 8 NYCRR.

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

Subject: Creation of a supplementary certificate in the classroom teaching service and relocation of the requirements for teachers of adult, community and continuing education.

Purpose: To establish a new teaching certificate, the supplementary certificate, to enable a teacher certified in one classroom teaching title, upon meeting prescribed requirements, to provide instruction in a different title in the classroom teaching service for which there is a demonstrated shortage of certified teachers; and to relocate existing requirements for teachers of adult, community and continuing education to another section of the commissioner's regulations.

Expiration date: June 16, 2005.

Text of revised rule: 1. Section 80-2.11 or the Regulations of the Commissioner of Education is repealed, effective January 6, 2005.

2. Section 80-5.18 of the Regulations of the Commissioner of Education is added, effective January 6, 2005, as follows:

80-5.18 Supplementary certificate.

(a) Purpose. The purpose of the supplementary certificate is to authorize a teacher who is currently certified in a title in the classroom teaching service to teach in a different title in the classroom teaching service for which there is a demonstrated shortage of certified teachers, while the teacher is engaged in study at an institution of higher education to complete the requirements necessary to qualify for the new certificate.

(b) Limitations. The supplementary certificate shall be valid for three years from its effective date and shall not be renewable. The supplementary certificate shall be limited to employment with an employing entity.

(c) Requirements. To be eligible for a supplementary certificate, a candidate shall meet the requirements in each of the following paragraphs:

(1) Application. The candidate shall apply for the supplementary certificate by September 1, 2009, and upon application qualify for the certificate, in a certificate title in the classroom teaching service for which there is a demonstrated shortage of certified teachers as determined by the department.

(2) Certification. The candidate shall hold a valid provisional, initial, permanent, or professional certificate in a title in the classroom teaching service identified in Subparts 80-2 or 80-3 of this Part.

(3) The candidate shall agree to be enrolled in study at an institution of higher education leading to an initial or professional certificate in the certificate title sought.

(4) Education.

(i) The candidate shall hold the minimum degree required for an initial certificate in the certificate title sought.

(ii) The candidate shall have completed coursework as prescribed in this subparagraph. The candidate shall have achieved at least a C or its equivalent in any undergraduate level course and at least a B- or its equivalent in any graduate level course submitted to meet the coursework requirements of this subparagraph.

(a) For candidates seeking a certificate, other than one of the certificates for the instruction of students with disabilities, a certificate for the instruction of the deaf and hard of hearing, a certificate for the instruction of the blind or visually impaired, a certificate for the instruction of literacy, or a certificate for teaching English to speakers of other languages, the candidate shall have completed twelve semester hours of study in the content core required for the initial certificate in the certificate title sought, as prescribed in section 80-3.7 of this Part.

(b) For candidates seeking one of the certificates for the instruction of students with disabilities, the candidate shall have completed nine semester hours of study in the instruction of students with disabilities, as prescribed in the pedagogical core required for the initial certificate in the certificate title sought, set forth in section 80-3.7 of this Part.

(c) For candidates seeking a certificate for the instruction of students who are deaf and hard of hearing, the candidate shall have completed nine semester hours in the instruction of the deaf and hard of hearing, as prescribed in the pedagogical core for the initial certificate in this certificate title, set forth in section 80-3.7 of this Part.

(d) For candidates seeking a certificate for the instruction of the blind or visually impaired, the candidate shall have completed nine semester hours in the instruction of the blind or visually impaired as prescribed in the pedagogical core for the initial certificate in this certificate title, set forth in section 80-3.7 of this Part.

(e) For candidates seeking one of the certificates for the instruction of literacy, the candidate shall have completed nine semester hours of study in literacy education, as prescribed in the pedagogical core required for the initial certificate in the certificate title sought, set forth in section 80-3.7 of this Part.

(f) For candidates seeking a certificate for teaching English to speakers of other languages, the candidate shall have completed six semester hours of coursework in methods of second language teaching in the elementary and secondary grades and six semester hours in teaching literacy skills, as prescribed in the pedagogical core for the initial certificate in this certificate title, set forth in section 80-3.7 of this Part.

(5) The candidate shall submit a statement by the Chancellor, in the case of employment with the City School District of the City of New York; or by the superintendent, in the case of other employing boards; or by the chief school officer, in the case of employment with another entity required by law to employ certified teachers certifying:

(i) the employing entity seeks to employ the candidate in a teaching position in a certificate title in the classroom teaching service with a demonstrated shortage of certified teachers as determined by the department for which the candidate would need the supplementary certificate to qualify;

(ii) the employing entity will require, as a condition of employment under the supplementary certificate, the candidate's enrollment in study at an institution of higher education leading to an initial or professional certificate in the certificate title sought; and

(iii) the employing entity will provide appropriate support to the candidate undertaking a teaching assignment under the supplementary certificate to ensure the maintenance of quality instruction for students.

(6) Examination. The candidate shall submit evidence of having achieved a satisfactory level of performance on the Content Specialty Test in the area of the certificate title sought, if available.

3. Section 80-5.19 of the Regulations of the Commissioner of Education is added, effective January 6, 2005, as follows:

80-5.19 Teachers of adult, community and continuing education.

(a) A person teaching an avocational subject shall have three years of preparation and/or experience in the subject which the individual is employed to teach. When no such prepared and/or experienced person is available after extensive recruitment, an individual with less preparation and/or experience may be employed upon a finding by the chief school officer that such individual has sufficient preparation and/or experience to teach the subject.

(b) A person teaching an occupational education subject for which no high school credit is granted and for which there is no appropriate teaching certificate shall have three years of preparation and/or experience in the subject which the individual is employed to teach. When no such prepared and/or experienced person is available after extensive recruitment, an individual with less preparation and/or experience may be employed upon a finding by the chief school officer that such individual has sufficient preparation and/or experience to teach the subject.

Revised rule compared with proposed rule: Substantial revisions were made in section 80-5.18(c)(3), (5)(ii) and (iii).

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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Deputy Commissioner, Office of Higher Education, Education Department, Rm. 979, Education Bldg. Annex, 879 Washington Ave., Albany, NY 12234, (518) 474-5851, e-mail: hedepcom@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on June 16, 2004, the proposed rule has been revised as follows:

Subdivision (a) of section 80-5.18 of the Regulations of the Commissioner of Education is non-substantially revised to more precisely identify the study that a teacher must engage in while under a supplementary certificate. The phrase "collegiate study" is replaced with the phrase "study at an institution of higher education." The subdivision is also non-substantially revised to insert the word "the" before the word "requirements" for reasons of style.

Paragraph (1) of subdivision (c) of section 80-5.18 is non-substantially revised to correct a typographical error. After the word "classroom" the word "teacher" is replaced with the word "teaching."

Paragraph (3) of subdivision (c) of section 80-5.18 is non-substantially revised to more precisely identify the study that a teacher must engage in while under a supplementary certificate. The phrase "collegiate study" is

replaced with the phrase "study at an institution of higher education." Also, this paragraph is substantially revised to remove the phrase "beginning no later than with the first semester following employment under the supplementary certificate." The State Education Department has determined that the teacher must be enrolled in study at an institution of higher education leading to an initial or professional certificate in the certificate title sought from the outset of employment under the supplementary certificate. This will ensure that the candidate is obtaining education in the subject of the new certificate title from the beginning of employment under the supplementary certificate and making immediate progress toward certification in the new certificate area.

Subparagraph (i) of paragraph (5) of subdivision (c) of section 80-5.18 is non-substantially revised to replace the word "wants" with the word "seeks" for reasons of style. This subparagraph is also non-substantially revised to insert after the word "position" the following phrase: "in a certificate title in the classroom teaching service with a demonstrated shortage of certified teachers as determined by the department." This clarifies the intent of the regulation, as prescribed in subdivisions (a) and (c)(1) of section 80-5.18, to limit the supplementary certificate to titles in the classroom teaching service for which there is a demonstrated shortage of teachers. This subparagraph is also non-substantially revised to remove the word "and" at the end of the subparagraph because this word unnecessary.

Subparagraph (ii) of paragraph (5) of subdivision (c) of section 80-5.18 is non-substantially revised for reasons of style as follows: the phrase, "the employing entity will make it a condition of employment under the supplementary certificate that the candidate will be enrolled," is replaced with the phrase, "the employing entity will require, as a condition of employment under the supplementary certificate, the candidate's enrollment." In addition, the phrase "collegiate study" is replaced with the phrase "study at an institution of higher education" to more precisely identify the study that a teacher must engage in while under a supplementary certificate. This subparagraph is also substantially revised to delete the following phrase after the word "sought": "beginning no later than with the first semester following employment under the supplementary certificate." Based upon discussion with the Regents, the Department has determined that the holder of the supplementary certificate must be engaged in study for the certificate sought from the beginning of employment under the supplementary certificate. This will ensure that the candidate is obtaining education in the subject of the new certificate title from the beginning of employment under the supplementary certificate and making immediate progress toward certification in the new certificate area.

The regulation is also substantially revised to add subparagraph (iii) of paragraph (5) of subdivision (c) of section 80-5.18, as follows: "(iii) the employing entity will provide appropriate support to the candidate undertaking a teaching assignment under the supplementary certificate to ensure the maintenance of quality instruction for students." After discussion with the Regents, the Department determined that the regulation should require the employing entity to provide appropriate support to the teacher who is employed under the supplementary certificate, such as additional supervision, mentoring, and/or on-site training.

The afore-mentioned revisions to the proposed rule require the following changes to the Regulatory Impact Statement:

5. LOCAL GOVERNMENT MANDATES:

The amendment will provide New York State school districts and BOCES a pool of candidates, not otherwise available, from which to draw teachers in a certificate title for which there is a demonstrated shortage of certified teachers. School districts and BOCES that wish to employ a teacher under the supplementary certificate must certify to the State Education Department that the district seeks to employ the candidate in a teaching position in a certificate title in the classroom teaching service with a demonstrated shortage of certified teachers as determined by the Department for which the candidate would need the supplementary certificate to qualify, that the district will require, as a condition of employment the candidate's enrollment in study at an institution of higher education leading to an initial or professional certificate in the certificate title of the supplementary certificate, and that the district will provide appropriate support to the candidate undertaking a teaching assignment under the supplementary certificate to ensure the maintenance of quality instruction for students.

Revised Regulatory Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on June 16, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The revisions require the following changes in the Regulatory Flexibility Analysis for Small Businesses and Local Governments:

2. Compliance requirements:

The purpose of the proposed amendment is to establish a new teaching certificate, the supplementary certificate, to enable a teacher certified in one classroom teaching title, upon meeting prescribed requirements, to provide instruction in a different title in the classroom teaching service for which there is a demonstrated shortage of certified teachers; and to relocate existing requirements for teachers of adult, community and continuing education to another section of Commissioner's regulations.

The amendment will provide New York State school districts and BOCES a pool of candidates, not otherwise available, from which to draw teachers in a certificate title for which there is a demonstrated shortage of certified teachers. School districts and BOCES that wish to employ a teacher under the supplementary certificate must certify to the State Education Department that the district seeks to employ the candidate in a teaching position in a certificate title in the classroom teaching service with a demonstrated shortage of certified teachers as determined by the Department for which the candidate would need the supplementary certificate to qualify, that the district will require, as a condition of employment the candidate's enrollment in study at an institution of higher education leading to an initial or professional certificate in the certificate title of the supplementary certificate, and that the district will provide appropriate support to the candidate undertaking a teaching assignment under the supplementary certificate to ensure the maintenance of quality instruction for students.

Revised Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on June 16, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith. The revisions require the following changes in the Rural Area Flexibility Analysis:

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

The proposed amendment establishes requirements regarding the application for and issuance of a supplementary certificate authorizing a teacher certified in one classroom teaching title to teach in a different title in the classroom teaching service for up to three years while the teacher completes the remaining course requirements for certification in a new certificate title. The amendment establishes clearly defined standards to ensure the qualifications of teachers certified by this route, including the holding of a certificate in a title in the classroom teaching service, having achieved the minimum degree required for the initial certificate in the new certificate title, completing specified coursework requirements in the content core or pedagogical core of the certificate title sought with a C in any such undergraduate course and a B- in any such graduate course, and achieving a satisfactory level of performance on the Content Specialty Test in the area of the certificate sought, if available. In addition, the candidate must be enrolled in study at an institution of higher education leading to an initial or professional certificate in the certificate title sought.

The proposed amendment will not increase reporting or recordkeeping requirements beyond existing requirements. Candidates seeking teaching certification, including those seeking additional certification through this new route, will be required to make written application with the State Education Department. For the new supplementary certificate, candidates will have to document certification in the classroom teaching service, and that they have met the above-referenced education and examination requirements. In addition, candidates must submit a certification to the State Education Department from the employing school district that the district seeks to employ the candidate in a teaching position in a certificate title in the classroom teaching service with a demonstrated shortage of certified teachers as determined by the Department for which the candidate would need the supplementary certificate to qualify, that the district will require, as a condition of employment the candidate's enrollment in study at an institution of higher education leading to an initial or professional certificate in the certificate title of the supplementary certificate, and that the district will provide appropriate support to the candidate undertaking a teaching assignment under the supplementary certificate to ensure the maintenance of quality instruction for students.

The proposed amendment restates the existing requirements for teachers of adult, community and continuing education in a more appropriate Subpart of the Commissioner's regulations that deals with specialized credentials. It does not change these requirements.

The proposed amendment will not require regulated parties, including those located in rural areas, to hire professional services in order to com-

ply, other than educational services needed to complete college coursework for the supplementary certificate.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on June 16, 2004, revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed amendment, as revised, establishes requirements regarding the application for and issuance of a supplementary certificate authorizing a teacher certified in one classroom teaching title to teach in a different title in the classroom teaching service for up to three years while the teacher completes the remaining course requirements necessary to qualify for certification in a new certificate title.

The proposed change is needed to facilitate the Department's continuing ability to certify a sufficient number of properly qualified candidates to fill vacant teaching positions in the State's public schools and BOCES. This proposal, as revised, is intended to increase the supply of teachers in certificate titles for which there is a shortage of certified teachers by increasing the pool of individuals qualified for such teaching positions in the State's public schools. However, it will have no effect on the number of jobs or the number of employment opportunities available in public school teaching.

In addition, the amendment, as revised, relocates the existing requirements for teachers of adult, community and continuing education. The amendment makes no change in these requirements, and will have no effect on the number of jobs or the number of employment opportunities in this field.

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

Assessment of Public Comment

The proposed rule was published in the *State Register* on June 16, 2004. Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the Department's assessment of issues raised by the comments.

COMMENT: Through extensive recruitment efforts, most school districts have been successful in filling many positions with appropriately certified teachers. However, due to persistent shortages of properly certified teachers in certain subject matter areas like mathematics, the sciences, special education and foreign languages, districts have been forced to hire a number of uncertified teachers to fill these vacancies. The proposed supplementary certificate would be a tremendous help to school districts by facilitating the movement of the most qualified teachers possible into the classroom to fill vacancies in these shortage areas.

RESPONSE: The Department agrees that the supplementary certificate will assist school districts in employing the most qualified teachers possible in subject matter shortage areas.

COMMENT: With the elimination of modified temporary licenses at the conclusion of the 2004-2005 school year, the proposed supplementary certificate will provide an essential tool to permit school districts to fill teaching vacancies in subject matter shortage areas.

RESPONSE: The Department agrees that the proposed supplementary certificate will assist school districts in filling persistent vacancies in subject matter shortage areas after the modified temporary licenses expire at the conclusion of the 2004-2005 school year.

COMMENT: This proposal would be of significant assistance to the school districts throughout northern New York as they work to recruit teachers in subject matter shortage areas. The shortage of math, science and special education teachers in our region is particularly acute while our recruitment files are overflowing with elementary education candidates.

RESPONSE: The Department agrees. The proposal will provide a mechanism by which rural school districts may hire teachers in subject matter shortage areas.

COMMENT: We suggest that to begin teaching in a new subject area under a supplementary certificate, candidates should have to complete no more than 12 specified credit hours and pass the content specialty test in the subject area of the certificate sought.

RESPONSE: The Department agrees and notes that the proposed amendment requires the candidate for the supplementary certificates to have successfully completed at least 12 semester hours in the content core of the certificate sought (or 9 semester hours in the pedagogical core for specified certificate titles) as well as a passing score on the appropriate content specialty test, if available.

COMMENT: I strongly urge that the current proposal not be further modified in any way that would restrict access to prospective candidates. The credit requirements as outlined in the proposal are reasonable. They, along with successful completion of the content specialty test, provide assurance that there will be a rigorous content standard for applicants for the supplementary certificate.

RESPONSE: The Department agrees with this comment.

COMMENT: The proposed supplementary certificate should be available to all certified teachers, including initial certificate holders. New teachers holding initial certificates who choose to pursue a supplementary certificate will concentrate their academic studies in their new certification area, rather than in an area of oversupply.

RESPONSE: The Department agrees and notes that the proposal would permit initial certificate holders to apply and qualify for a supplementary certificate.

COMMENT: The provision in the proposal for the superintendent to certify continued collegiate study is sound and will ensure that the holder of the supplementary certificate will move forward toward full certification as quickly as possible.

RESPONSE: The Department agrees, and in response to Regents discussion, has revised the rule to strengthen this requirement by requiring the employing school district to certify as a condition of employment under the supplementary certificate that the candidate is immediately enrolled in study at an institution of higher education leading to an initial or professional certificate in the certificate title sought, rather than by the first semester following employment under the supplementary certificate.

Department of Environmental Conservation

NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED

Emission Standards for Motor Vehicles and Motor Vehicle Engines

I.D. No. ENV-14-04-00003-C

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

The notice of proposed rule making, I.D. No. ENV-14-04-00003-P was published in the *State Register* on April 7, 2004.

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

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

Substance of rule: The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Subpart 200.9, and 6 NYCRR Part 218. The purpose of the rule amendment is to incorporate modifications that California has made to its vehicle emission control program relating to the Zero Emission Vehicle (ZEV) mandate to reduce emissions in New York State and to revise New York's ZEV alternate compliance plan provisions. Adoption of these modifications is necessary to reduce emissions of air contaminants from new motor vehicles and to maintain identical standards with California as required under section 177 of the Clean Air Act (Act). Adoption of these revisions will also provide for continuing advancement of motor vehicle emissions control technology. Specifically the regulations are revised to reflect changes made by California in program dates, credit level and requirements regarding neighborhood electric vehicles, and to include an alternative compliance path for large volume manufacturers which involves placement of a specified number of Type III ZEVs, which are commonly known to be fuel cell vehicles. The alternative compliance plan provisions on New York's regulations are modified to reflect the date changes in the California ZEV program, and credit multipliers are modified to provide a ramp up to full compliance with the California program starting in model year 2009.

6 NYCRR Part 200, General Provisions, is amended to incorporate by reference the relevant Clean Air Act sections and the relevant articles and sections in the California Code of Regulations.

Changes to rule: A Notice of Revised Rule Making was published in the July 21, 2004 issue of the *State Register*, and a public hearing was held on August 25, 2004 to solicit comments on revisions to the rule making. These revisions were based on comments received, and include changes in the Alternative Compliance Plan provisions. Specific revisions are a delay in the ACP start date to 2006, and a change in credit multipliers to more effectively ramp up to full compliance with the California program starting in 2009. The proposed regulations are also revised to clarify that "excess" Partial Zero Emission Vehicle (PZEV) credits from model years 2003, 2004, 2005, and 2006 may be used to meet Advanced Technology PZEV requirements for model years 2007 and 2008.

Expiration date: May 14, 2005

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

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

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Emissions Testing, Sampling, Analytical Determinations and Emissions Statements

I.D. No. ENV-44-04-00012-P

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

Proposed action: Amendment of Parts 200 and 202 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 19-0301, 19-0303 and 72-0303

Subject: Emissions testing, sampling, analytical determinations, and emissions statements.

Purpose: To revise the emission statement rule to reflect the requirements of EPA's Consolidated Emission Reporting Rule and align emission reporting requirements under Subpart 202-2 with the operating permits issued to facilities pursuant to Part 201. The rule will incorporate new EPA test methods and streamline emission reporting procedures. As part of this rule making, Part 200 will be amended to add new definitions, revise the Volatile Methyl Siloxanes table, and update cross references in section 200.9.

Public hearing(s) will be held at: 11:00 a.m., Dec. 7, 2004 at Department of Environmental Conservation Region 8, Conference Rm., 6274 E. Avon-Lima Rd., Avon, NY; 11:00 a.m., Dec. 8, 2004 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rms. 129A and 129B, Albany, NY; 11:00 a.m., Dec. 9, 2004 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

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

6 NYCRR Part 202, Emissions Verification

6 NYCRR Part 200.1, Definitions

6 NYCRR SUBPART 202-1, EMISSIONS TESTING, SAMPLING AND ANALYTICAL DETERMINATIONS

Subpart 202-1 currently lists test methods contained in 40 CFR Part 60, Appendix A and Part 61, Appendix B as acceptable methods when used for sources to which they are applicable. Most of the Environmental Protection Agency's (EPA) newer test methods for hazardous air pollutants (HAPs) are contained in 40 CFR Part 63, Appendix A. Appendix M of 40 CFR Part 51 contains recommended test methods for state implementation plans. Test methods from both of these appendices are frequently used in New York, but under Subpart 202-1 can only be used upon submittal of a special request. The proposed amendment would incorporate Parts 51, Appendix M and Part 63, Appendix A and eliminate the special request requirement.

Subpart 202-1 also requires a notification and test plan to be submitted 30 days before a test is scheduled. Recent State and EPA regulations contain conflicting schedules, requiring such notifications up to 90 days before the test is scheduled. For example, the National Emission Standards for Hazardous Air Pollutants from Source Categories (40 CFR Part 63) usually require test notification 60 days before the test is scheduled. Since these new regulations can require dozens of existing facilities to conduct a performance test by a specific deadline, the additional time is needed to accommodate the sheer quantity of tests. The proposed amendments will clarify that the specific regulatory timelines or those required in a permit or consent order supersede the timeline contained in Subpart 202-1.

6 NYCRR SUBPART 202-2, EMISSION STATEMENTS

The New York State Department of Environmental Conservation (Department) is revising 6 NYCRR Subpart 202-2, Emission Statements, to reflect several legal and regulatory developments. These include a Consent Order the Department entered into to settle litigation commenced by Eastman Kodak Company, revisions to the operating permit program contained in 6 NYCRR Part 201, and the requirements of the EPA's newly promulgated Consolidated Emission Reporting Rule (CERR). More specifically, Eastman Kodak Company sued the Department claiming that Subpart 202-2 exceeded the emission statement reporting requirements contained in Section 182(a)(3)(B) of the federal Clean Air Act (CAA). In settlement, the State of New York Supreme Court issued an order requiring the Department to revise Subpart 202-2 to align a facility's emission reporting requirements under Subpart 202-2 with the operating permit issued to the facility pursuant to Part 201. These revisions address the terms of that consent order. This rulemaking will also address the Department's need to efficiently and effectively track facility information for administrative and regulatory purposes. In addition, the Department is proposing changes to Subpart 202-2 to comply with EPA's CERR. The CERR is designed to establish common reporting dates for various categories of emissions and simplify state emissions reporting requirements. This rulemaking ensures that the Department can comply with the reporting schedule and other requirements of the CERR.

Section 3-0301. This section empowers the Department to promulgate regulations to carry out the environmental policy of New York State set forth in Section 1-0101 and specifically empowers the Department to cooperate with officials and representatives of the federal government, other states and interstate agencies regarding problems affecting the environment of New York State. Section 3-0301 specifically empowers the Department to provide for the prevention and abatement of air pollution.

Section 19-0301. This section declares that the Department has the power to promulgate regulations for preventing, controlling or prohibiting air pollution.

Section 19-0303 of the ECL requires specific justification of regulations that are more stringent than the Clean Air Act or EPA regulations promulgated under the ACT. EPA has promulgated alternative emission test methods and test planning timelines that are not recognized by Subpart 202-1, Emissions Testing, Sampling and Analytical Determinations. In effect, Subpart 202-1 has become more stringent than EPA's regulations by default. The proposed amendments would realign the allowable test methods and timelines.

Title I of the CAA designates that a non-attainment area for ozone collect and report emissions annually from major stationary point sources within the state. CAA Section 182 (a)(3)(B) requires stationary sources of NO_x and VOC emissions (precursors to the formation of ozone) located within any ozone non-attainment area or within the federally designated ozone transport region, to provide the Department with an annual emission statement demonstrating actual emissions of NO_x and VOC. Annual emission statements provide an accurate accounting of all emissions from major stationary sources, and assist the state in tracking progress towards attainment and maintaining the national ambient air quality standards for the criteria pollutants (ozone, SO_2, NO_x,CO, PM_{10}, $PM_{2.5}$ and lead).

Emission statements assist the Department with the administration of its operating permit program for major stationary sources subject to Title V of the CAA. Emission statements are used to determine whether a facility is operating in compliance with its permit and are a critical component of a facility's annual Title V compliance certification. Emission statements provide a means for a Title V facility source owner or operator to document actual annual emissions to the Department for the purpose of determining its annual operating permit fees.

Emission statements are used by the Department to meet its reporting obligations under the CERR for regulated air pollutants including SO_2, NO_x , VOC, CO, PM_{10}, $PM_{2.5}$ and NH_3. The CERR is a compilation of all the current federal emissions reporting requirements which defines report-

ing thresholds and schedules. The Department currently collects most of the data necessary to comply with the CERR but must add $PM_{2.5}$ and $PM_{2.5}$ precursors to the criteria pollutants inventory and emission reporting requirements.

Emission statements are used to track the State's annual progress toward attaining the ozone standard in non-attainment areas and throughout the Ozone Transport Region. Emission statements are also used to compile the three year periodic inventories required by CAA Section 182(a)(3)(A).

The Department utilizes emission statements to compile a HAP inventory in addition to its criteria pollutant inventory. The National Toxics Inventory is an emission inventory developed every three years (1993, 1996, 1999, etc.) by EPA. Emission statements provide the data which is used to develop the State's HAP inventory. The HAP inventory satisfies the Department's obligation under 112(m) of the CAA to assess the atmospheric deposition to the Great Lakes and coastal waters and to provide an overall indication of the level of HAPs in the ambient air.

6 NYCRR PART 200.1, DEFINITIONS

The New York State Department of Environmental Conservation is revising 6 NYCRR Part 200.1, "Definitions" to incorporate two definitions that appear in multiple regulations. These definitions are; maintenance area, and $PM_{2.5}$. Also, the Volatile Methyl Siloxanes (VMS) table is being revised to reflect the correct chemical abstract service numbers for hexamethyldisiloxane and tetradecamethylhexasiloxane.

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

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

Public comment will be received until: five days after the last scheduled hearing required by statute.

Summary of Regulatory Impact Statement

STATUTORY AUTHORITY

Sections 3-0301, 19-0301, 19-0303 of the New York State Environmental Conservation Law (ECL), and section 72-0303 of the ECL as added by the New York State Clean Air Compliance Act, Chapter 608 of the Laws of 1993 authorize the New York State Department of Environmental Conservation (Department) to promulgate this regulation.

The Department is revising 6 NYCRR Subpart 202-1 "Emissions Testing, Sampling and Analytical Determinations" and Subpart 202-2 "Emissions Verification" to reflect several legal and regulatory developments. These developments include a settlement the Department entered in connection with litigation commenced by Eastman Kodak Company, previous modifications to the operating permit program contained in 6 NYCRR Part 201, the promulgation of additional Reference Methods for emissions emission testing, sampling and analysis, and the requirements of the Environmental Protection Agency's (EPA) newly promulgated Consolidated Emission Reporting Rule (CERR). The CERR is designed to establish common reporting dates for various categories of emissions and simplify state emissions reporting requirements. This rulemaking ensures that the Department can comply with the reporting schedule and other requirements of the CERR. In addition, the Department is updating the referenced material in Section 200.9 for Part 202.

Section 3-0301. This section empowers the Department to provide for the prevention and abatement of air pollution.

Section 19-0301. This section declares that the Department has the power to promulgate regulations for preventing, controlling or prohibiting air pollution.

Section 19-0303. This section requires specific justification of regulations that are more stringent than the Clean Air Act or EPA regulations promulgated under the ACT.

LEGISLATIVE OBJECTIVES

The Department is authorized to require emissions reporting from facilities subject to the requirements of obtaining a Title V Operating Permit. This enables the Department to fulfill the State's obligation under Section 182 of the CAA to submit a comprehensive, accurate and current inventory of actual emissions from all sources.

NEEDS AND BENEFITS

Subpart 202-1 currently lists test methods contained in 40 CFR Part 60, Appendix A and Part 61 , Appendix B as acceptable methods when used for sources to which they are applicable. Most of EPA's newer test methods for hazardous air pollutants (HAPs) are contained in 40 CFR Part 63, Appendix A. Appendix M of 40 CFR Part 51 contains recommended test methods for state implementation plans. Test methods from both of these appendices are frequently used in New York, but under Subpart 202-1 can only be used upon submittal of a special request. The proposed amendment would eliminate this requirement.

Subpart 202-1 also requires a notification and test plan to be submitted 30 days before a test is scheduled. Recent State and EPA regulations contain conflicting schedules, requiring such notifications up to 90 days before the test is scheduled. For example, the National Emission Standards for Hazardous Air Pollutants from Source Categories (40 CFR Part 63) usually require test notification 60 days before the test is scheduled. Since these new regulations can require dozens of existing facilities to conduct a performance test by a specific deadline, the additional time is needed to accommodate the sheer quantity of tests. The proposed amendments will clarify that the specific regulatory timelines or those required in an operating permit supersede the timeline contained in Subpart 202-1.

Title I of the CAA designates that a non-attainment area for ozone collect and report emissions annually from major stationary point sources within the state. CAA Section 182 (a)(3)(B) requires stationary sources of NO_x and VOC emissions (precursors to the formation of ozone) located within any ozone non-attainment area or within the federally designated ozone transport region to provide the Department with an annual emission statement demonstrating actual emissions of NO_x and VOC. Annual emission statements provide an accurate accounting of all emissions from major stationary sources, and assist the state in tracking progress towards attainment and maintaining the national ambient air quality standards for the criteria pollutants (ozone, SO_2, NO_x,CO, PM_{10}, $PM_{2.5}$ and lead).

Emission statements assist the Department with the administration of its operating permit program for major stationary sources subject to Title V of the CAA. Emission statements are used to determine whether a facility is operating in compliance with its permit and are a critical component of a facility's annual Title V compliance certification. Emission statements provide a means for a Title V facility source owner or operator to document actual annual emissions to the Department for the purpose of determining its annual operating permit fees.

Emission statements are used by the Department to meet its reporting obligations under the CERR for regulated air pollutants including SO_2, NO_x , VOC, CO, PM_{10}, $PM_{2.5}$ and NH_3. The CERR is a compilation of all the current federal emissions reporting requirements which defines reporting thresholds and schedules. The Department currently collects most of the data necessary to comply with the CERR but must add $PM_{2.5}$ and $PM_{2.5}$ precursors to the criteria pollutants inventory and emission reporting requirements.

Emission statements are used to track the State's annual progress toward attaining the ozone standard in non-attainment areas and throughout the Ozone Transport Region. Emission statements are also used to compile the three year periodic inventories required by CAA Section 182(a)(3)(A).

The Department utilizes emission statements to compile a HAP inventory in addition to its criteria pollutant inventory. The National Toxics Inventory is an emission inventory developed every three years (1993, 1996, 1999, etc.) by EPA. Emission statements provide the data which is used to develop the State' HAP inventory. The HAP inventory satisfies the Department's obligation under 112(m) of the CAA to assess the atmospheric deposition to the Great Lakes and coastal waters and to provide an overall indication of the level of HAPs in the ambient air.

COSTS

There should be no additional cost associated with the amendments to Subpart 202-1. In fact, the clarifications should reduce the amount of time spent by test consultant companies and DEC staff resolving questions about acceptable procedures and applicable notification schedules.

It is difficult to accurately estimate the cost for a facility to complete an annual emission statement. In 1992 the Department conducted a telephone poll of 48 facilities that completed the emission statements for the 1990 State Implementation Plan (SIP) inventory. According to the polled facilities, costs to complete an emission statement ranged from $20 to $7,000. The mean average cost was $628. This converts to approximately $812 in 2002 dollars applying the U.S. Department of Labor, CPI inflation calculator. The emission statement format in this regulation requires the reporting of individual chemicals by chemical abstract service number (CAS) and therefore will be more time consuming and more costly to complete than the 1990 emission statement.

PAPERWORK

No additional paperwork is required by the amendments to Subpart 202-1.

The Department has minimized paperwork by consolidating the emission statement reporting requirement with the periodic emission inventory requirement, the annual permit compliance certification required by Title

V of the CAA and the annual point source emissions reporting submittal to the EPA.

LOCAL GOVERNMENT MANDATES

Subpart 202-1 already potentially applies to all air contamination sources in the State. No additional local government mandates are included in the amendments.

Subpart 202-2 requires local governments operating facilities that trigger the reporting thresholds to complete annual emission statements. Otherwise, no local government mandates will ensue from this regulation.

DUPLICATION BETWEEN THIS REGULATION AND OTHER REGULATION AND LAWS

Several other state and EPA air regulations contain emission testing requirements, but none apply to all sources in the State as does Subpart 202-1. The amendments seek in part to clarify when the other regulations supersede Subpart 202-1.

There are no other state air emissions reporting requirements. Some facilities which are required to report annual emissions pursuant to this regulation are also required to report these emissions for the annual federal SARA toxic release inventory. The Department considered consolidating these two reporting requirements but determined that it was not feasible to do so because of timing considerations and the differences in the nature of the two reports. The SARA report includes emissions into the air, land or water, while the emission statement includes only air emissions. The reportable toxic chemicals under SARA do not correspond with the hazardous air pollutants or VOCs required to be reported on the emission statement. The SARA reports are required to be submitted not later than July 1 each year while the emission statements are due by April 15 each year.

ALTERNATIVES

The alternative to the amendments of Subpart 202-1 is to not change the rule. This would leave the current, somewhat confusing, requirements in place. This change clarifies the currently existing requirements.

Emission statements are a requirement of the CAA and therefore, there is no alternative to promulgating a regulation to meet the CAA Title I requirements for reporting VOC and NO_x emissions. 40 CFR Part 51, CERR, requires states to submit emissions information to EPA on an annual and three year cycle. This regulation allows the Department to collect the information to comply with these federal reporting requirements.

FEDERAL STANDARDS

Subpart 202-1 allows EPA test methods to be used for emissions controlled under state regulations. These methods are in fact required under some EPA regulations. Allowing their use at other sources (for example those sources smaller than a an EPA applicability threshold) will encourage uniformity in emissions information.

Subpart 202-2 combines the reporting requirements of Title I and Title V of the CAA. The Title I requirements are concerned with the annual emissions of VOC and NO_x for ozone pollution abatement. Title V is concerned with the provisions for a federally enforceable operating permit program for "major" facilities. 40 Part 51, CERR, requires New York State to add $PM_{2.5}$ and $PM_{2.5}$ precursors (*i.e.*, ammonia) to the criteria pollutants inventory.

COMPLIANCE SCHEDULE

Subpart 202-1 does not contain any requirements that must be complied with. Subpart 202-2 requires facility owners subject to the regulation to submit a statement of emissions for the previous calendar year not later than April 15 each year.

Regulatory Flexibility Analysis

DESCRIPTION OF ACTION

The New York State Department of Environmental Conservation (Department) is revising 6 NYCRR Subpart 202-2 , "Emission Statements", to reflect several legal and regulatory developments. These developments include an agreement the Department entered into to settle litigation commenced by Eastman Kodak Company, previous modifications to 6 NYCRR Part 201 (operating permit program), and the requirements of the Environmental Protection Agency's (EPA) newly promulgated Consolidated Emission Reporting Rule (CERR). Eastman Kodak Company sued the Department claiming that Subpart 202-2 exceeded the emission statement reporting requirements contained in Section 182(a)(3)(B) of the federal Clean Air Act (CAA). The Supreme Court issued an order requiring the Department to revise Subpart 202-2 to align a facility's emission reporting requirements under Subpart 202-2 with the operating permit issued to the facility pursuant to Part 201. These revisions address the terms of that order. This rulemaking will also address the Department's need to efficiently and effectively track facility information for administrative and regulatory purposes. The Department is also proposing changes to Subpart 202-2 to comply with EPA's CERR, which establishes common reporting dates for various categories of emissions and simplify State emissions reporting requirements. This rulemaking ensures that the Department can comply with the reporting schedule and other requirements of the CERR.

The Department is revising 6 NYCRR Subpart 202-1, "Emissions Testing, Sampling and Analytical Determinations", to add the new EPA Reference Methods for emission testing, sampling and analysis, and allow specific regulations and permit conditions to supersede the 30-day advance notice requirement for emission tests. In addition, the Department is updating the referenced material in section 200.9 pertaining to Part 202.

EFFECTS ON SMALL BUSINESSES

Subpart 202-1 allows the Department to require emission testing. Most facilities that are required to test their emissions, large and small businesses alike, hire an emission testing consultant. Many of the emission testing firms are themselves small businesses. The amendments to Subpart 202-1 will clarify the notification requirements and acceptable test methods that they can use without submitting a special request. This will provide the facilities and testing firms with additional flexibility. The clarifications of already existing notification deadlines will also help them avoid costly rescheduling.

Revised Subpart 202-2 specifies which facilities are subject to emission reporting, what information must be included in an emission statement, including facility level and process level information and certification requirements, procedures for submitting emission statements and calculating facility emissions, and recordkeeping and reporting requirements.

All small businesses that meet the source requirements as defined in CAA Section 182 (a)(3)(B) will be required to submit an annual emission statement that reports the facility's actual air emissions for the prior calendar year. Most of the facilities affected by the requirement to report are either apartment buildings or small manufacturing operations which are located in areas where the applicability thresholds are lower.

To aid small businesses in meeting the requirements of the CAA, the Clean Air Act Small Business Stationary Source Technical and Environmental Compliance Assistance Program was established. This collaborative effort between the Department, the New York State Department of Economic Development and the New York State Environmental Facilities Corporation provides free assistance to small businesses to help them understand and comply with the Clean Air Act requirements. Small businesses are encouraged to seek out the confidential help available through the small business assistance program to help in preparing the documentation needed for capping to comply with this regulation.

COMPLIANCE REQUIREMENTS

Subpart 202-1 describes the Department's authority to require emission testing in order to determine compliance with any air pollution control regulation. It currently requires notification be provided by the facility to the Department 30 days in advance of the scheduled test date; requires submittal of reports of results within 60 days of completion of the tests; requires the facility to bear the cost of testing; and prohibits using dilution air to meet a concentration limit. It also requires use of test methods found in two EPA regulations that have been incorporated by reference. If those methods are impractical or no test method is available, then the source owner may request acceptance of other methods.

The amendments will clarify when other regulations or permit conditions conflict with the 30-day advance notification requirement, those regulations and conditions will take precedence. The amendments will also incorporate additional USEPA test methods by reference, eliminating the need for many case-by-case requests for alternatives.

Subpart 202-2 specifies which facilities are subject to emission reporting, what information must be included in an emission statement, including facility level and process level information and certification requirements, procedures for submitting emission statements and calculating facility emissions, and recordkeeping and reporting requirements.

Any owner or operator of a facility in New York State must submit an emission statement to the Department for any calendar year in which the facility is determined to be a major source as defined in CAA Section 182(a)(3)(B) and required to obtain a Title V permit as identified in Subpart 201-6.

The emission statement consists of two sections: a fuel use section and a process emissions section. In the fuel use section, the facility total annual fuel use by fuel type from all stationary combustion installations at the facility must be reported. The facility must allocate the quantity of fuel that is used at each permitted process. The efficiency of any control equipment

and operational data for each permitted process must also be reported. The remaining fuel use is reported based on the facility's ability to separate its end use. Operational data for the remaining fuel is also required.

In the industrial process section, the facility's total process emissions must be reported. The facility must allocate the quantity of emissions produced at each permitted process. Additionally, efficiency of any control equipment, operational data and process rate must be reported.

In both the fuel use and process emissions portions of the emission statement, a facility with up-to-date permits will not have to determine which segments and contaminants to report. This information will be preprinted on the survey forms provided by the Department. Facilities which receive emission statements with out-of-date or erroneous information are required to correct the information regarding processes and emissions. This in no way constitutes an application for a permit modification or relieves the facility of the requirement to submit a permit revision application in accordance with 6 NYCRR Part 201.

Each facility must maintain both the emission statement and records indicating how the information (including calculations, data, measurements, and estimates) submitted in the emission statement was determined. This information must be kept on file for a period of five years by each facility.

PROFESSIONAL SERVICES

As stated above in the "Effect on Small Businesses" section, most facilities that are required to test their emissions hire an emission testing consultant to write the pre-test protocol and post-test report, as well as perform at least the sampling portion of the test. Often, these same firms conduct the analyses of the samples as well. Sometimes, especially when very complicated procedures and expensive equipment are involved, the samples will be sent to a separate analytical laboratory. These costs already pertain under the existing language of Subpart 202-1. The amendments should not adversely affect them.

For most small businesses, the reporting requirements for fuel use are relatively simple and primarily deal with the amount of fuel burned and when it was burned. Monthly fuel bills and an estimation of average hours of operation in summer and winter months usually provide sufficient information to complete the emissions statement. Emissions from industrial process can be calculated using a wide variety of calculation methodologies. This involves balancing the process inputs with the outputs to determine emissions. These calculations require a knowledge of the process, the material inputs to that process, and the material outputs of the process. Many small businesses will have the in-house knowledge to make these calculations.

At surface-coating facilities the calculations for emission determination are relatively simple since all volatile organic compounds present in the coating are emitted during the surface coating operation. The allocation of emissions to processes should also be a relatively simple matter for many small businesses since they will generally be aggregated by type of operation.

COMPLIANCE COSTS

The cost associated with the emission statement program will vary dependent on the size and number of sources at a facility. It will also vary according to staffing levels, recordkeeping procedures and technology levels at a facility. It has been determined by the Department that the cost of compliance with this regulation is not expected to increase as a result of this proposal. The Department anticipates that the changes will provide more flexibility and clarification to the recording requirements and may actually result in a net decrease in the cost to facilities. Factors which would decrease the cost of compliance include the level at which the facility already maintains operating and emission records containing information required to be reported under the regulation and whether the facility already has qualified staff available to collect and record the required information.

The Department investigated the costs of compliance for subject facilities. In 1992, the Department conducted a telephone poll of 48 facilities that completed the emission statements for the 1990 State Implementation Plan (SIP) inventory. The facilities chosen were of diverse characterization and ranged from small to large. The mean average cost was $628. This converts to approximately $812 in 2002 dollars applying the U.S. Department of Labor, CPI inflation calculator.

MINIMIZING ADVERSE IMPACT

This rule is not expected to significantly impact small businesses. Very few small businesses have emissions at or above the reporting thresholds. As described under "compliance costs" and "professional services," costs for small businesses will be minimized, and as described in "effects on small business," most small businesses will never have to complete the emission statement because they do not meet the thresholds.

To minimize adverse impacts, the Department is requiring emissions to be reported on an annual basis only. It is not requiring facilities to determine their peak daily ozone and carbon monoxide season emissions. Although this information is required to be reported to EPA, the Department can determine these emissions based on the summer and winter operating hours reported by the facility. This simplifies and abbreviates the report not only for small businesses, but for all facilities. Apartment building owners for example, are allowed to submit fuel delivery records to the Department instead of emission calculations. The Department uses this information to perform relevant calculations utilizing approved emission factors for these particular sources to estimate actual emission rates. Landfills are also allowed to submit characteristic data (average annual refuse acceptance rate total, concentration of landfill gases, methane generation potential (if applicable), methane generation rate constant, quantity of landfill gas burned by a control device, etc.) Specific to their site. The Department can utilize this information (or default values where necessary) to calculate emissions from the landfill using the EPA Landfill Emissions Model (LandGEM).

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The emissions statement program applies to facilities throughout the state. Through the application of the reporting thresholds, the Department has developed an accurate list of affected facilities and will notify each one as a result of this promulgation. Because the number of affected parties is clearly defined, outreach activities will consist of a mass mailing at the time of proposal. This will allow for the greatest penetration of the rule and will provide all small business and local government with the opportunity to comment prior to its adoption.

Rural Area Flexibility Analysis

DESCRIPTION OF ACTION

The New York State Department of Environmental Conservation (Department) is revising 6 NYCRR Subpart 202-2 , "Emission Statements", to reflect several legal and regulatory developments. These developments include an agreement the Department entered into to settle litigation commenced by Eastman Kodak Company, previous modifications to 6 NYCRR Part 201 (operating permit program), and the requirements of the Environmental Protection Agency's (EPA) newly promulgated Consolidated Emission Reporting Rule (CERR). Eastman Kodak Company sued the Department claiming that Subpart 202-2 exceeded the emission statement reporting requirements contained in Section 182(a)(3)(B) of the federal Clean Air Act (CAA). The Supreme Court issued an order requiring the Department to revise Subpart 202-2 to align a facility's emission reporting requirements under Subpart 202-2 with the operating permit issued to the facility pursuant to Part 201. These revisions address the terms of that order. This rulemaking will also address the Department's need to efficiently and effectively track facility information for administrative and regulatory purposes. The Department is also proposing changes to Subpart 202-2 to comply with EPA's CERR, which establishes common reporting dates for various categories of emissions and simplify State emissions reporting requirements. This rulemaking ensures that the Department can comply with the reporting schedule and other requirements of the CERR.

The Department is revising 6 NYCRR Subpart 202-1, "Emissions Testing, Sampling and Analytical Determinations", to add the new EPA Reference Methods for emission testing, sampling and analysis and allow specific regulations and permit conditions to supersede the 30-day advance notice requirement for emission tests. In addition, the Department is updating the referenced material in section 200.9 pertaining to Part 202.

ESTIMATED NUMBERS OF RURAL AREAS AFFECTED

Subpart 202-1 applies to all stationary air contamination sources in the State of New York. The number of affected sources statewide is approximately 10,000. However, in any given year, about 150 to 200 emission tests are expected to be performed statewide.

Revised Subpart 202-2 will require facilities that are subject to the rule to complete an annual emissions statement. The number of affected facilities statewide is approximately 530. Approximately 180 of these facilities are located in rural areas (based on current ozone non-attainment designations).

This regulation will be implemented on a statewide basis and will apply to all rural areas within the State of New York. While the rule does not apply to the rural area itself, it will apply to the facilities within its boundaries.

REPORTING, RECORDKEEPING AND OTHER REQUIREMENTS

The post-test report requirements of Subpart 202-1 are not being changed. However, the pre-test notification deadlines are being amended to clarify that specific deadlines set by other regulations and permit conditions take precedence over the default 30-day advance notification.

Each facility subject to Subpart 202-2 is required to submit an emission statement each year for the previous calendar year's air emissions. These statements will vary depending on the type, size and number of processes at each facility. In establishing reporting thresholds, the Department has attempted to ensure that only large sources of air contaminants are affected. Smaller facilities have been and will continue to be encouraged to accept federally enforceable permit limitations on their potential to emit air contaminants which would otherwise make them subject to the regulation.

As this regulation is applied statewide, the reporting requirements will apply to all facilities that exceed the thresholds in both rural and urban areas throughout the State. Whether a facility requires professional services will be dependent on staffing and expertise, not on location. In addition, since the majority of the information being requested by the Department consists of information that most facilities currently track, the need for professional services will be limited to smaller sources that do not have the staff or time to compile the data.

COSTS

The cost associated with the emission statement program will vary depending on the size and number of processes at a facility. It will also vary according to staffing levels, recordkeeping procedures and technology levels at a facility. It has been determined by the Department that the cost of compliance with this regulation is not expected to increase as a result of this proposal. The Department anticipates that the changes will provide more flexibility and clarification to the recording requirements and may actually result in a net decrease in the cost to facilities. Factors which would decrease the cost of compliance include the level at which the facility already maintains operating and emission records containing information required to be reported under the regulation and whether the facility already has qualified staff available to collect and record the required information.

The Department investigated the costs of compliance for subject facilities. In 1992, the Department conducted a telephone poll of 48 facilities that completed the emission statements for the 1990 State Implementation Plan (SIP) inventory. The Department polled both large and small facilities from diverse industries. The mean average cost was $628. This converts to approximately $812 in 2002 dollars applying the U.S. Department of Labor, CPI inflation calculator.

MINIMIZING ADVERSE IMPACT

The amendment of Subpart 202-1 is being undertaken to unify deadlines to simplify and to make the rule consistent with other regulations.

The revision of Subpart 202-2 is being undertaken to comply with terms of a settlement agreement, unify reporting dates for various categories of inventories and simplify State emissions reporting consistent with EPA's CERR. The changes to Part 202 provide facilities with more flexibility when testing and reporting emissions; clarify existing language to make the regulation easier to comprehend; and make the language consistent with other air pollution regulations. The revision of this regulation to include the above modifications will not have an adverse impact on rural areas. The rule therefore does not contain special provisions for rural areas.

PUBLIC PARTICIPATION

The emission testing program applies to all facilities but is mainly implemented by testing consultants and laboratories. Outreach activities will consist of a mailing to EPA's list of emission testing companies.

The emission statement program applies to facilities throughout the State. Through the application of the reporting thresholds, the Department has developed an accurate list of affected facilities and will notify each one as a result of this promulgation. Because the number of affected parties is clearly defined, outreach activities will consist of a mass mailing at the time of proposal. This will allow for the greatest penetration of the rule and will provide all affected parties with the opportunity to comment prior to its adoption.

Since this regulation does not specifically impact rural areas but instead impacts facilities located in rural areas, special provisions have not been made to conduct outreach activities other than those described above.

Job Impact Statement

1. Nature of impact: The Department proposes to amend 6 NYCRR Part 202, "Emissions Verification," which will not have an adverse impact on job and employment opportunities. The amendment of Subpart 202-1, Emissions Testing, Sampling and Analytical Determinations, is being undertaken to add references to new EPA Reference Methods for emission testing, sampling and analysis, and to allow specific regulations to supersede the notification requirement. The Department is revising Subpart 202-2, "Emission Statements," to comply with terms of a settlement agreement, unify reporting dates for various categories of inventories and simplify state emissions reporting consistent with The Environmental Protection Agency's (EPA) Consolidated Emissions Reporting Rule (CERR). The changes to the regulation provide facilities with more flexibility when reporting emissions, clarify existing language to make the regulation easier to comprehend, and make the language consistent with other air pollution regulations. The revision of this regulation to include the above modifications will not have an adverse impact on rural areas. The rule therefore does not contain special provisions for rural areas.

2. Categories and numbers affected: The Department expects that this regulation will not have an effect on the number of jobs within the State. The affected facilities already collect and submit the required information.

3. Regions of adverse impact: There is no adverse employment opportunity impact attributable to the promulgation or revision of the regulations which are the subject of this rule making.

4. Minimizing adverse impact: Not applicable.

5. Self-employment opportunities: Not applicable.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Regulating Sulfur Content of Motor Vehicle Diesel Fuel

I.D. No. ENV-44-04-00013-P

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

Proposed action: Amendment of Parts 200 and 225 of Title 6 NYCRR.

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

Subject: Regulating the sulfur content of motor vehicle diesel fuel.

Purpose: To establish a backstop to Federal motor vehicle diesel fuel sulfur content regulations.

Public hearing(s) will be held at: 11:00 a.m., Dec. 7, 2004 at Department of Environmental Conservation Region 8, Conference Rm., 6274 E. Avon-Lima Rd., Avon, NY; 11:00 a.m., Dec. 8, 2004 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rms. 129A and 129B, Albany, NY; 11:00 a.m., Dec. 9, 2004 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Text of proposed rule: (Sections 200.1 through 200.8 remains unchanged)

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

225-4.2(b)	40 CFR 80.2(z) (July 1, 2003) page 580 as amended by 69 FR pages 56780-56781 (October 2, 2003)	+++
	40 CFR 80.2(nn) (July 1, 2003) page 581	*
	40 CFR 80.2(t) (July 1, 2003) pages 579-580	*
	40 CFR 80.2(w) (July 1, 2003) page 580	*
	40 CFR 80.2(x) (July 1, 2003) page 580	*
	40 CFR 80.2(l) (July 1, 2003) page 579	*
	40 CFR 80.2(r) (July 1, 2003) page 579	*
	40 CFR 80.2(y) (July 1, 2003) page 580	*
	40 CFR 80.2(xx) (July 1, 2003) page 581	*
	40 CFR 80.2(i) (July 1, 2003) page 579	*
	40 CFR 80.2(h) (July 1, 2003) page 579	*
	40 CFR 80.2 (n) (July 1, 2003) page 579	*
	40 CFR 80.2(k) (July 1, 2003) page 579	*
	40 CFR 80.2(j) (July 1, 2003) page 579	*
	40 CFR 80.2(bb) (July 1, 2003) page 580	*
	40 CFR 80.2(ss) (July 1, 2003) page 581	*
	40 CFR 80.2(o) (July 1, 2003) page 579	*
225-4.3	40 CFR Part 80, Subpart I (July 1, 2003) pages 826-865	*

+++ Available from the U.S. Government Printing Office website, http://www.gpoaccess.gov/fr/index.html

A new subpart 225-4 is adopted as follows:

225-4.1 Applicability

This subpart applies to motor vehicle diesel fuel, and additives blended into, or intended to be blended into motor vehicle diesel fuel.

225-4.2 Definitions

(a) For the purposes of this subpart the general definitions of Part 200 apply.

(b) For the purposes of this subpart the following definitions apply:

(1) 'Aromatic content' means aromatic content as defined in 40 CFR 80.2(z) (see Table 1, section 200.9 of this Title).

(2) 'Batch of motor vehicle diesel fuel' means batch of motor fuel as defined in 40 CFR 80.2(nn) (see Table 1, section 200.9 of this Title).

(3) 'Carrier' means carrier as defined in 40 CFR 80.2(t) (see Table 1, section 200.9 of this Title).

(4) 'Cetane index or "Calculated cetane index'" means 'Cetane index or "Calculated cetane index'" as defined in 40 CFR 80.2(w) (see Table 1, Section 200.9 of this Title).

(5) 'Diesel fuel' means diesel fuel as defined in 40 CFR 80.2(x) (see Table 1, section 200.9 of this Title).

(6) 'Distributor' means distributor as defined in 40 CFR 80.2(l) (see Table 1, section 200.9 of this Title).

(7) 'Importer' means importer as defined in 40 CFR 80.2(r) (see Table 1, section 200.9 of this Title).

(8) 'Motor vehicle diesel fuel' means motor vehicle diesel fuel as defined in 40 CFR 80.2(y) (see Table 1, section 200.9 of this Title).

(9) 'Motor vehicle diesel fuel additive' means motor vehicle diesel fuel additive as defined in 40 CFR 80.2(xx) (see Table 1, section 200.9 of this Title).

(10) 'Refiner' means refiner as defined in 40 CFR 80.2(i) (see Table 1, section 200.9 of this Title).

(11) 'Refinery' means refinery as defined in 40 CFR 80.2(h) (see Table 1, section 200.9 of this Title).

(12) 'Reseller' means reseller as defined in 40 CFR 80.2 (n) (see Table 1, section 200.9 of this Title).

(13) 'Retailer' means retailer as defined in 40 CFR 80.2(k) (see Table 1, section 200.9 of this Title).

(14) 'Retail outlet' means retail outlet as defined in 40 CFR 80.2 (j) (see Table 1, section 200.9 of this Title).

(15) 'Sulfur percentage' means sulfur percentage as defined in 40 CFR 80.2(bb) (see Table 1, Section 200.9 of this Title), except that any sulfur test method acceptable to the Administrator may be used.

(16) 'Tank truck' means a tank truck as defined in 40 CFR 80.2(ss) (see Table 1, section 200.9 of this Title).

(17) 'Wholesale purchaser-consumer' means wholesale purchase-consumer as defined in 40 CFR 80.2(o) (see Table 1, section 200.9 of this Title).

225-4.3 Motor Vehicle Diesel Fuel and Motor Vehicle Diesel Fuel Additive Standards

No Motor Vehicle Diesel Fuel may be sold or supplied in New York State unless it complies with applicable provisions of 40 CFR Part 80, Subpart I (see Table 1, Section 200.9 of this Title) commencing June 1, 2006 for all refiners and importers supplying diesel fuel to the State of New York, commencing July 15, 2006 for locations in the diesel fuel distribution system downstream from refineries and import facilities except retail outlets and wholesale purchaser-consumer facilities, and commencing September 1, 2006 for retail outlets and wholesale purchaser-consumer facilities.

225-4.4 Severability

Each provision of this Subpart shall be deemed severable, and in the event that any section of this Subpart is held to be invalid, the remainder of this Subpart shall continue in full force and effect.

Text of proposed rule and any required statements and analyses may be obtained from: David Barnes, Department of Environmental Conservation, 625 Broadway, 2nd Fl., Albany, NY 12233-3255, (518) 402-8292, e-mail: dlbarnes@gw.dec.state.ny.us

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

Public comment will be received until: five days after the last scheduled public hearing required by statute.

Additional matter required by statute: Pursuant to Article 8 of the (State Environmental Quality Review Act), a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file. This rule must be approved by the Environmental Board.

Summary of Regulatory Impact Statement

The New York State Department of Environmental Conservation (NYSDEC) is proposing to amend 6 NYCRR Part 225 "Fuel Composition and Use" by adding a new Subpart 225-4 "Fuel Composition - Motor Vehicle Diesel Fuel." The purpose of the rule is to adopt sulfur content standards for diesel fuel used in highway motor vehicles, effective in 2006. The proposed standards are identical to federal standards also effective in 2006.

The statutory authority for this proposal is the Environmental Conservation Law (ECL) Sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 71-2103 and 71-2105. Section 1-0101 outlines the policy declaration for the Department of Environmental Conservation regarding the protection of New York State's environment and natural resources. Pursuant to Sections 3-0301(1)(a) and 3-0301(1)(b) of the Environmental Conservation Law (ECL), the Commissioner has the authority to coordinate and develop policies, planning and programs related to the environment of the state and regions thereof promoting and protecting the air resources of New York including providing for the prevention and abatement of air pollution. Section 3-0301(1)(i) authorizes the Commissioner to "[p]rovide for the prevention and abatement of all . . . air pollution . . ." Section 3-0301(2)(a) permits the Commissioner to adopt rules and regulations to carry out the purposes and provisions of the ECL. Section 3-0301(2)(g) allows the Commissioner to enter and inspect sources of air pollution and to verify compliance.

Section 3-0301(2)(m) provides the Commissioner with authority to "[a]dopt such rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purposes of this chapter." Under Section 3-0301(2)(n) of the ECL, the Commissioner has the authority to "study, monitor, control and regulate pollution from motor vehicle exhaust emissions." The Commissioner's authority under Section 3-0301(2)(n) is expressly granted to further the State's policy to "[c]onserve, improve and protect its natural resources and environment and control . . . air pollution, in order to enhance the health, safety and welfare of the people of the state . . . " (ECL Section 1-0101[1]).

19-0103 is a declaration of the State's policy with specific reference to air pollution. "It is declared to be the policy of the State of New York to maintain a reasonable degree of purity of the air resources of the State . . . and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution." Section 19-0105 sets out the purpose of Article 19, "to safeguard the air resources of the State from pollution . . .

Sections 19-0301(1)(a) and (b) state that:

1. Consistent with the policy of the state as it is declared in section 19-0103, the department shall have power to:

a. Formulate, adopt and promulgate, amend and repeal codes and rules and regulations for preventing, controlling or prohibiting air pollution in such areas of the state as shall or may be affected by air pollution . . .

b. Include in any such codes and rules and regulations provisions establishing areas of the state and prescribing for such areas (1) the degree of air pollution or air contamination that may be permitted therein, (2) the extent to which air contaminants may be emitted to the air by any air contamination source . . .

Section 19-0301(2)(a) further provides:

2. It shall be the duty and responsibility of the department to: Prepare and develop a general comprehensive plan for the control or abatement of existing air pollution and for the control or prevention of any new air pollution recognizing various requirements for different areas of the state.

In addition, Section 19-0301(2)(e) provides authority for the Commissioner to "[p]romulgate standards for the use of fuels for use in motor vehicles or motor vehicle engines, taking due recognition of federal standards and requirements." Section 19-0305 provides the Commissioner with general enforcement power. In addition, sections 71-2103 and 71-2105 include provisions for the civil and criminal enforcement of Article 19 of the ECL.

Ground level ozone is formed by the chemical reaction of the precursor emissions of volatile organic compounds (VOC) and oxides of nitrogen (NO_x), in combination with sunlight. It has long been recognized that heavy duty diesel vehicles cause or contribute to elevated ozone concentrations. Today, heavy duty trucks and buses account for about one-third of the NO_x emissions from mobile sources in the United States.

When ozone levels are elevated, otherwise healthy people may experience both a decrease in lung function and chest pain. For people with respiratory ailments such as asthma and emphysema, hospital admissions

have been shown to increase. Longer exposures to high ozone levels can result in permanent lung damage. Generally, those most affected by high ozone levels are children and the elderly, and those already having health problems.

Diesel engines also emit particulate matter (PM), much of it smaller than 2.5 microns in diameter (called $PM_{2.5}$). In addition to PM formed during combustion and emitted directly, mobile sources contribute to secondary nitrate, sulfate and carbonaceous PM formation roughly in proportion to their contribution to NO_x, sulfur oxides (SO_x) and VOC emissions. In particular, heavy-duty trucks and buses today account for one-quarter of PM emissions from mobile sources in the United States.

Several studies indicate that exposure to high levels of particulate air pollution is associated with: 1) increased mortality rates; 2) increased hospitalization for respiratory disease; 3) exacerbation of asthma; 4) increased incidence and length of respiratory conditions; 5) a decline in lung function; 6) restricted activity. These health effects have been shown to increase in near linear relationship with pollution levels.

Toxic substances, such as sulfur oxides and polycyclic aromatic hydrocarbons (PAHs), may attach themselves to PM. Some PAHs are known carcinogens such as 1-nitropyrene and benzo[a]pyrene. Diesel PM has been labeled a Toxic Air Contaminant by the California Air Resources Board (CARB), and a Mobile Source Air Toxic by the EPA.

The current proposal for a New York State motor vehicle diesel fuel program is identical to the EPA motor vehicle diesel fuel regulations signed on December 21, 2000. Compliance with that federal regulation constitutes compliance with this rule. The EPA motor vehicle diesel fuel regulation is an integral part of EPA regulations establishing new emission standards that will begin to take effect in model year 2007 and will apply to heavy-duty highway engines and vehicles greater than 8,500 pounds Gross Vehicle Weight Rating (GVWR). These standards are based on the use of high efficiency catalytic exhaust emission control devices or comparably effective advanced technologies. Because these devices are damaged by sulfur, it is necessary to reduce the level of sulfur in motor vehicle diesel fuel by 97 percent, to 15 ppm. This rule provides for production of 15-ppm motor vehicle diesel fuel beginning on June 1, 2006. The rule is effective at downstream locations (such as terminals) on July 15, 2006, and at retail locations and wholesale purchaser-consumer facilities on September 1, 2006.

When combined with the engine emissions standards facilitated by this rule, the health benefits are substantial. EPA, in its Regulatory Impact Analysis estimated some $70 billion dollars in health and welfare benefits nationwide by the year 2030. These benefits include, again nationwide, several thousand premature deaths avoided per year, and several million asthma attacks prevented per year.

EPA estimates that fuel production and distribution costs will increase approximately 4.5 cents per gallon during the initial years of the program, rising to 5 cents per gallon when the program is fully implemented in 2010. These per gallon costs translate to an average of $187 per year per diesel vehicle, $390 per year for heavy heavy-duty vehicles which tend to accumulate more miles per year and consume more fuel. Market conditions will determine the extent to which these costs are passed on to consumers. Statewide these costs amount to approximately $ 61.2 million per year once the program is fully implemented in 2010.

These costs are partially offset by a reduction in maintenance expenses for diesel vehicle owners and operators. These cost reductions are estimated to be equivalent to approximately 1 cent per gallon of diesel fuel. The cost reductions stem from increased oil change intervals, and a reduction in corrosion related damage to engine and exhaust system components.

The proposed motor vehicle diesel fuel rule is not expected to cause a noticeable change in New York employment because the state has no refineries within its borders, and fuel distribution businesses account for only a small share of the State's service employment.

The primary impact on local government is that the diesel fuel used by their motor vehicle fleets will be covered by the rule. They will be subject to the same price changes, and receive the same maintenance benefits as private diesel motor vehicle owners and operators.

Alternatives to this proposal include: (1) take no action, and (2) regulate other diesel fuel properties in addition to sulfur content.

If the Department takes no action, there is no certainty that the necessary diesel fuel sulfur reductions incorporated in the rule will occur, as the federal rule may be delayed or weakened.

The other alternative is to regulate other diesel fuel properties, such as aromatic content, cetane number, or polycyclic aromatic hydrocarbon content. Currently, the Department views pursing a backstop rule incorporating the sulfur requirements of the federal motor vehicle diesel fuel rule without regulating any additional diesel fuel properties as the most prudent course.

Regulatory Flexibility Analysis

1. Effect of the rule:

The proposed regulation entitled Fuel Composition - Motor Vehicle Diesel Fuel (6 NYCRR Part 225-4) impacts diesel fuel distributors, retailers, and consumers in New York State. State and local governments are consumers of diesel fuel whose sulfur content will be regulated under the proposed amendments. Local governments who own or operate diesel-fueled vehicles in New York State are subject to the same requirements as private owners and operators of diesel fueled vehicles in New York.

The proposed rule is a backstop to the federal motor vehicle diesel fuel rule published January 18, 2001, and is identical to the federal rule. If the federal rule is implemented as promulgated the proposed state rule will have no additional impact.[1] Small business motor vehicle diesel fuel distributors, retailers, and consumers are subject to the same requirements as their larger competitors.

2. Compliance requirements:

There are no specific requirements in the proposed regulation which apply exclusively to small businesses or local governments. Reporting, recordkeeping and compliance requirements are effective statewide. Fuel dealers, many of whom are small businesses, who sell motor vehicle diesel fuel are required to sell compliant motor vehicle diesel fuel. Local governments motor vehicle diesel fuel purchases must be fuel that complies with this regulation.

3. Professional services:

No additional professional services will be required to comply with this rule.

4. Compliance costs:

In support of its rulemaking EPA estimated the incremental production and distribution cost of motor vehicle diesel fuel to be 4.5 to 5.0 cents per gallon.[2] Market forces will determine to what extent costs are passed on to distributors and consumers.

5. Economic and technological feasibility:

Producing ultra low sulfur diesel fuel (ULSD) requires capital and operating changes for oil refiners. Distributing ULSD will require operating changes, and perhaps some capital changes, in the distribution system to minimize contamination of ULSD by higher sulfur content products. Diesel fuel with a similar sulfur content to that proposed has been produced and distributed extensively in Europe, particularly Sweden, and has been used by US fleets, such as New York City Transit, for several years. EPA extensively investigated production and distribution feasibility during the development of the federal motor vehicle diesel fuel rule.[3]

6. Minimizing adverse impacts:

The proposed rule is a backstop to the federal motor vehicle diesel fuel rule published in 2001, and is identical to that rule.[4] If the federal rule is implemented as promulgated the proposed state rule will have no additional impact.

7. Small business and local government participation:

Since this regulation does not uniquely affect small businesses or local governments, no special outreach efforts will be undertaken. However, small businesses and local governments will have an opportunity to participate in the rulemaking through public hearings and written comments.

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[1] 40 CFR Part 80, Subpart I, published in Federal Register Volume 66, Page 5135.

[2] Heavy Duty Standards/Diesel Fuel Regulatory Impact Regulatory Impact Analysis, December 2000, United States Environmental Protection Agency, EPA 420-R00-026, Chapter V.

[3] Heavy Duty Standards/Diesel Fuel Regulatory Impact Regulatory Impact Analysis, December 2000, United States Environmental Protection Agency, EPA 420-R00-026, Chapter IV.

[4] 40 CFR Part 80, Subpart I, published in Federal Register Volume 66, Page 5135.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed regulation entitled Fuel Composition - Motor Vehicle Diesel Fuel (6 NYCRR Part 225-4) applies to all diesel fuel importers, distributors, retailers, and consumers in New York State. There are no requirements in the regulation of motor vehicle diesel fuels which apply only to rural areas.

2. Compliance requirements:

The implementation of this regulatory proposal is not expected to be burdensome in terms of paperwork to suppliers of ultra low sulfur diesel in

New York State. The proposed rule is identical to federal motor vehicle diesel fuel regulations published January 18, 2001,[1] and is intended as a backstop to that federal rule. All entities already comply with the 1993 US EPA rule to produce and distribute fuel with a maximum sulfur content of 500 ppm.

3. Costs:

In support of its rulemaking EPA estimated the incremental production and distribution cost of motor vehicle diesel fuel to be 4.5 to 5.0 cents per gallon.[2] Market forces will determine to what extent costs are passed on to distributors and consumers.

4. Minimizing adverse impact: The proposed rule is a backstop to the federal motor vehicle diesel fuel rule published in 2001, and is identical to that rule.[3] If the federal rule is implemented as promulgated the proposed state rule will have no additional impact.

5. Rural area participation:

Since this regulation does not particularly affect rural areas, no special rural outreach will be undertaken. However, both public and private interests in rural areas will have an opportunity to participate in the rulemaking through public hearings and written comments.

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[1] 40 CFR Part 80, Subpart I, published in Federal Register Volume 66, Page 5135.

[2] Heavy Duty Standards/Diesel Fuel Regulatory Impact Regulatory Impact Analysis, December 2000, United States Environmental Protection Agency, EPA 420-R00-026, Chapter V.

[3] 40 CFR Part 80, Subpart I, published in Federal Register Volume 66, Page 5135.

Job Impact Statement

1. Nature of Impact:

This regulation entitled Fuel Composition - Motor Vehicle Diesel Fuel (6 NYCRR Part 225-4) is not expected to negatively impact jobs and employment opportunities in New York State. The proposed rule is a backstop to the federal motor vehicle diesel fuel rule published January 18, 2001,[1] and is identical to the federal rule. If the federal rule is implemented as promulgated the proposed state rule will have no impact on jobs or employment opportunities. In any case a significant impact is not anticipated.

2. Categories and Numbers Affected:

This regulation will impact crude oil refiners, diesel fuel distributors and retailers, as well as motor vehicle diesel fuel consumers. New York State does not have refineries operating within its borders. The fuel distribution state employment is a small share of total employment. According to the US Department of Commerce, New York State employment in gas stations and fuel dealerships was 80,694 in 1998, or 1.2 percent of total manufacturing jobs in the state. The rule's impact on these jobs as well as on job opportunities in this sector will depend on the rule's impact on demand for diesel fuel. While these motor vehicle diesel fuel standards may cause an increase in the price of motor vehicle diesel fuel, demand is not expected to decrease significantly because of the low price elasticity of demand of this product. The potential price increase that is expected will not significantly dampen growth in demand for this fuel.

3. Regions of Adverse Impact:

None.

4. Minimizing the Adverse Impact:

The proposed rule is a backstop to the federal motor vehicle diesel fuel rule published in 2001, and is identical to that rule.[2] If the federal rule is implemented as promulgated the proposed state rule will have no additional impact.

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[1] 40 CFR Part 80, Subpart I, published in Federal Register Volume 66, Page 5135.

[2] 40 CFR Part 80, Subpart I, published in Federal Register Volume 66, Page 5135.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

National Emission Standards for Hazardous Air Pollutants (NESHAP) Regulations

I.D. No. ENV-44-04-00014-P

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

Proposed action: This is a consensus rule making to amend Parts 200 and 219 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 19-0311, 19-0319 and 70-0109

Subject: NESHAP rules and reference test method.

Purpose: To incorporate NESHAPS contained in the most recent Code of Federal Regulations and to add a reference test method.

Public hearing(s) will be held at: 11:00 a.m., Dec. 7, 2004 at Department of Environmental Conservation Region 8, Conference Rm., 6274 E. Avon-Lima Rd., Avon, NY; 11:00 a.m., Dec. 8, 2004 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rms. 129A and 129B, Albany, NY; 11:00 a.m., Dec. 9, 2004 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Substance of proposed rule (Full text is posted at the following State website: www.dec.state.ny.us): 6 NYCRR Part 200 (Part 200) is being amended in order to correct the tables referencing Federal New Source Performance Standards (40 CFR Part 60), National Emission Standards for Hazardous Air Pollutants (40 CFR Part 61), National Emission Standards for Hazardous Air Pollutants regulations (40 CFR Part 63), and other miscellaneous Federal regulations.

Table 2 of Part 200.10 lists the Federal New Source Performance Standards for which New York State has accepted delegation for implementing and enforcing. This rulemaking will clarify the table by removing repetitive symbols for footnotes and citing to the 2003 Code of Federal Regulations.

Table 3 lists the National Emission Standards for Hazardous Air Pollutants regulations found in 40 CFR Part 61. This rulemaking will update the Table to reference regulations found in the 2003 Code of Federal Regulations.

Table 4 lists the National Emission Standards for Hazardous Air Pollutants regulations found in 40 CFR Part 63. This rulemaking will add a number of recently promulgated NESHAP regulations to Table 4, clarify which 40 CFR Part 63 regulations the U.S. Environmental Protection Agency has delegated to the Department, and update the Table to reference the 2003 Code of Federal Regulations.

Table 5 lists miscellaneous Federal regulations. Where indicated, this rulemaking will update the Table to reference the 2003 Code of Federal Regulations.

6 NYCRR Part 200.9, Table 1 will be amended to reflect these updated references in Part 200.10.

This rulemaking also includes technical corrections to the recently adopted 6 NYCRR Part 219 Incinerators rule-making. The incorporation of the mercury test method was omitted from Table 1 (Referenced Material) in 6 NYCRR Part 200.9 and a cross reference to this method was not included in the express terms of 219.2.2(f) and 219-7.2. The Department will correct these technical omissions in this proposed consensus rulemaking.

Text of proposed rule and any required statements and analyses may be obtained from: Edward Pellegrini, Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, e-mail: eapelleg@gw.dec.state.ny.us

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

Public comment will be received until: five days after the last scheduled public hearing required by statute.

Consensus Rule Making Determination

6 NYCRR Subpart 200.10 is an incorporation by reference of the Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations (40 CFR Part 63). Pursuant to Section 112 of the Clean Air Act of 1990, New York State will implement and enforce all requirements under Section 112 for the National Emission Standards for Hazardous Air Pollutants (NESHAPs). The proposed rulemaking will update 6 NYCRR Title 6 to incorporate by reference the NESHAP regulations. Federal standards only are being included in the rulemaking. No new standards will be imposed on the regulated public. 6 NYCRR Part 200.9, Table 1 will also be updated to reflect the new references in Part 200.10

This rulemaking also includes technical corrections to the recently adopted 6 NYCRR Part 219 Incinerators rule-making. The incorporation of the mercury test method was omitted from Table 1 (Referenced Mate-

rial) in 6 NYCRR Part 200.9 and a cross reference to this method was not included in the express terms of 219.2.2(f) and 219-7.2. The Department will correct these technical omissions in this proposed consensus rulemaking.

Job Impact Statement

1. Nature of impact:

The Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Section 200.9 and Part 219 to correctly incorporate by reference a federal test method for mercury that was omitted from a previous rulemaking change. The Department also proposes to update the reference in Tables in 6 NYCRR Section 200.10 to reference regulations found in the 2003 Code of Federal Regulations and to reflect the current delegation status from the U.S. Environmental Protection Agency of the National Emission Standards for Hazardous Air Pollutants (NESHAPs) for major stationary sources. This is an administrative action and will not have an adverse impact on job and employment opportunities.

2. Categories and numbers affected:

Not Applicable.

3. Regions of adverse impact:

This rulemaking will affect any facility which belongs to one of the source categories listed in Table 4 without regard to geographical region. Therefore, this rulemaking change impacts the entire state of New York.

4. Minimizing adverse impact:

There will be no adverse impacts attributable to the revisions to the regulation which is the subject of this rulemaking.

5. Self-employment opportunities:

There will be no self-employment opportunities as the result of the revisions to the regulation which is the subject of this rulemaking.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Sanitary Condition of Shellfish Lands

I.D. No. ENV-44-04-00002-P

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

Proposed action: Amendment of Part 41 of Title 6 NYCRR.

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

Subject: Sanitary condition of shellfish lands.

Purpose: To reclassify underwater lands for shellfishing purposes in accordance with Environmental Conservation Law sections 13-0307 and 13-0319, and clarify existing descriptions of areas that are closed to shellfishing.

Text of proposed rule: 6 NYCRR Part 41, Sanitary Condition of Shellfish Lands, is amended to read as follows:

Section 41.0 through subparagraph 41.2(b)(2)(i) remains unchanged.

Clause 41.2(b)(2)(i)(‘a’) is amended to read as follows:

(‘a’) All that area of South Oyster Bay, including tributaries, creeks and canals, lying north of a line extending easterly from the northeasternmost point of land of Great Island (west of Great Island Channel and south of The Run) to the southeasternmost point of land of Goose Island (southwest of Massapequa Creek); thence continuing easterly to a point of intersection located [approximately] 900 yards southeast of Unqua Point (Nassau Shores), immediately north of Old Winnehook Channel (local name); and continuing easterly to a point of intersection located [approximately] 900 yards southwest of Bergen Point (Great South Bay, Town of Babylon).

Clause 41.2(b)(2)(i)(‘b’) through subparagraph 41.3(b)(1)(i) remains unchanged.

Clause 41.3(b)(1)(i)(‘a’) is amended to read as follows:

(‘a’) All that area of Great South Bay, including tributaries, creeks and canals, lying north of a line extending southwesterly from the southernmost point of land at Conklin Point (immediately east of the northern end of the twin spans of the Robert Moses Causeway) to light pole number 103 (second aluminum light pole south of the base of the bridge on the west side of the west span, approximately 200 yards south of the base of the bridge and adjacent to the 14th bridge support south of the shoreline on the west span); thence proceeding westerly to the southernmost point of land at Sampawams Point; and, all that area of Great South Bay lying north of a line extending southwesterly from the northern concrete base of the twin spans of the Robert Moses Causeway to a point of intersection located [approximately] 900 yards southwest of Bergen Point and [approximately] 900 yards southeast of the mouth of the Neguntatogue Creek; thence proceeding westerly to a point of intersection located [approximately] 900 yards southeast of Unqua Point (Nassau Shores); thence proceeding westerly to the southeasternmost tip of Goose Island (South Oyster Bay).

Clause 41.3(b)(1)(i)(‘b’) through subparagraph 41.3(b)(2)(i) remains unchanged.

Clause 41.3(b)(2)(i)(‘a’) is amended to read as follows:

(‘a’) All that area of Great South Bay, including tributaries, creeks and canals, lying north of a line extending southwesterly from the southernmost point of land at Conklin Point (immediately east of the northern end of the twin spans of the Robert Moses Causeway) to light pole number 103 (second aluminum light pole south of the base of the bridge on the west side of the west span, approximately 200 yards south of the base of the bridge and adjacent to the 14th bridge support south of the shoreline on the west span); thence proceeding westerly to the southernmost point of land at Sampawams Point; and, all that area of Great South Bay lying north of a line extending southwesterly from the northern concrete base of the twin spans of the Robert Moses Causeway to a point of intersection located [approximately] 900 yards southwest of Bergen Point and [approximately] 900 yards southeast of the mouth of the Neguntatogue Creek; thence proceeding westerly to a point of intersection located [approximately] 900 yards southeast of Unqua Point (Nassau Shores); thence proceeding westerly to the southeasternmost tip of Goose Island (South Oyster Bay).

Clause 41.3(b)(2)(i)(‘b’) through clause 41.3(b)(2)(i)(‘c’) remains unchanged.

Subclause 41.3(b)(2)(i)(‘d’)(‘1’) is amended to read as follows:

(‘1’) During the period May 1 through December 14 (both dates inclusive), all that area of Nicoll Bay, Connetquot River, Brickiln Creek (local name) and tributary creeks and canals between Nicoll Point and Blue Point lying north of a line extending easterly from the southern side of the entrance to the creek serving the Timber Point West Marina and the Suffolk County Marine Police Boat Basin (said creek is located on the eastern side of Nicoll Point) to a point of intersection located [approximately] 1250 yards southeast of the southeasterly corner of the town dock at the foot of West Avenue in West Sayville (local landmark); thence continuing northeasterly to a point of intersection located [approximately] 250 yards south of Blue Point; and thence continuing northerly to the southeasternmost point of land at Blue Point.

Subclause 41.3(b)(2)(i)(‘d’)(‘2’) through clause 41.3(b)(3)(i)(‘a’) remains unchanged.

Subclause 41.3(b)(3)(i)(‘b’)(‘1’) is amended to read as follows:

(‘1’) During the period May 1 through December 14 (both dates inclusive), all that area of Nicoll Bay, Connetquot River, Brickiln Creek, (local name) and tributary creeks and canals lying north of a line extending easterly from the southern side of the entrance to the creek serving the Timber Point West Marina and the Suffolk County Marine Police Boat Basin (said creek is located on the eastern side of Nicoll Point) to a point of intersection located [approximately] 1250 yards southeast of the southeasterly corner of the town dock at the foot of West Avenue in West Sayville (local landmark); thence continuing northeasterly to a point of intersection located [approximately] 250 yards south of Blue Point; and thence continuing northerly to the southeasternmost point of land at Blue Point.

Subclause 41.3(b)(3)(i)(‘b’)(‘2’) through subparagraph 41.3(b)(3)(iii) remains unchanged.

Subparagraph 41.3(b)(3)(iv) is amended to read as follows:

(iv) *Narrow Bay.*

Clause 41.3(b)(3)(iv)(‘a’) is repealed, and a new clause 41.3(b)(3)(iv)(‘a’) is adopted to read as follows:

(‘a’) During the period January 1st through December 31st, both dates inclusive, all creeks, canals, coves and tributaries, including Shirley Basin, Unchachogue Creek, Johns Neck Creek, Sheeppen Creek (Section 5 Marina), Pattersquash Creek, and Mastic Beach Yacht Club Canal (Section 1 Marina), located along the shoreline between Smith Point and Floyd Point (local names, local landmarks).

Clause 41.3(b)(3)(iv)(‘b’) is repealed, and a new clause 41.3(b)(3)(iv)(‘b’) is adopted to read as follows:

(‘b’) During the period January 1st through December 31st, both dates inclusive, all that area of Narrow Bay and its tributaries lying westerly of a line extending southerly from the westernmost point of the landward side of the public fishing dock located at the foot of Cranberry Drive, Mastic Beach (local name, local landmark) to an orange painted wood marker located on the opposite southern shoreline (local landmark).

New clause 41.3(b)(3)(iv)(‘c’) is adopted to read as follows:

('c') During the period January 1st through December 31st, both dates inclusive, all that area of Narrow Bay lying northerly of a line extending easterly from the northeastern corner of the residence at 542 Riviera Drive, Mastic Beach (said residence is a two-story structure painted dark green with a tan-colored turret) to the northwestern corner of the residence at 205 Riviera Drive, Mastic Beach (said residence is a pink two-story structure located at the intersection with Locust Drive; local names, local landmarks).

New clause 41.3(b)(3)(iv)('d') is adopted to read as follows:

('d') During the period April 15th to December 31st, both dates inclusive, all that area of Narrow Bay and its tributaries lying easterly of a line extending southerly from the westernmost point on the landward side of the public fishing dock located at the foot of Cranberry Drive, Mastic Beach (local landmark) to an orange painted wood marker located on the opposite southern shoreline (local landmark); and westerly of a line extending southerly from the tip of the gable of the residence at 39 Washington Drive (said residence is located on the western side of the southern foot of Washington Drive, Mastic Beach; local names, local landmarks) to an orange painted wood marker located on the opposite southern shoreline (local landmark).

Clause 41.3(b)(3)(v)('a') through clause 41.3(b)(3)(v)('e') remains unchanged.

Clause 41.3(b)(3)(v)('f') is amended to read as follows:

('f') During the period January 1st through December 31st, both dates inclusive, all that area, including Hart Cove, Seatuck Cove and all other creeks, canals, rivers and coves, lying north of a line extending northeasterly from the northeastern corner of the residence at 73 Moriches Island Road (said residence is located approximately 100 yards north of the foot of Moriches Island Road, East Moriches, Town of Brookhaven) to the southernmost point of land at [havens] *Havens* Point and thence continuing to the flagpole located at the residence at 39 Basketneck Lane (local landmark[),]*; said residence is* located approximately 100 yards southeast of the entrance to Fish Creek on the eastern shoreline of Seatuck Cove [(], Town of Southampton).

Clause 41.3(b)(3)(v)('g') remains unchanged.

Clause 41.3(b)(4)(i)('a') is amended to read as follows:

('a') During the period January 1st through December 31st, both dates inclusive, all that area, including Hart Cove, Seatuck Cove and all other creeks, canals, rivers and coves, lying north of a line extending northeasterly from the northeastern corner of the residence at 73 Moriches Island Road (said residence is located approximately 100 yards north of the foot of Moriches Island Road, East Moriches, Town of Brookhaven) to the southernmost point of land at Havens Point and thence continuing to the flagpole located at the residence at 39 Basketneck Lane (local landmark[),]*; said residence is* located approximately 100 yards southeast of the entrance to Fish Creek on the eastern shoreline of Seatuck Cove [(], Town of Southampton).

Clause 41.3(b)(4)(i)('b') through clause 41.3(b)(9)(v)('b') remains unchanged.

Clause 41.3(b)(9)(v)('c') is repealed, and a new clause 41.3(b)(9)(v)('c') is adopted to read as follows:

('c') All that area of Stony Brook Harbor and tributaries lying southerly of a line extending southeasterly from an orange painted wood marker located near the shoreline below the residence at 25 Spring Hollow Rd (Village of Nissequogue) to an orange painted wood marker located at the northwestern end of the unpaved road known locally as Hitherbrook Extension, local names and local landmarks).

Clause 41.3(b)(9)(v)('d') through clause 41.3(b)(10)(ii)('b') remains unchanged.

Clause 41.3(b)(10)(ii)('c') is repealed, and a new clause 41.3(b)(10)(ii)('c') is adopted to read as follows:

('c') All that area of Stony Brook Harbor and tributaries lying southerly of a line extending southeasterly from an orange painted wood marker located near the shoreline below the residence at 25 Spring Hollow Rd (Village of Nissequogue) to an orange painted wood marker located at the northwestern end of the unpaved road known locally as Hitherbrook Extension, local names and local landmarks).

Clause 41.3(b)(10)(ii)('d') through subparagraph 41.3(b)(11)(v) remains unchanged.

Subparagraph 41.3(b)(11)(vi) is repealed, and a new subparagraph 41.3(b)(11)(vi) is adopted to read as follows:

(vi) Lloyd Harbor and Huntington Bay. All that area of Lloyd Harbor and Huntington Bay lying southerly and within the boundaries of a line extending northeasterly from the northernmost point of the concrete seawall protecting the shoreline of the property at 1 Lighthouse Point, Village of Lloyd Harbor (the residence on said property is a large, two-story brick structure with four twin-vented chimneys and is the second residence lying easterly of the northern foot of Southdown Road; local names and local landmarks), to the highest point of the Lloyd Harbor Horn and thence continuing southeasterly to the eastern end of the small boat house with painted vertical siding (located on the southern shoreline of Huntington Bay, 300 yards easterly of the entrance to Huntington Harbor, local landmark).

Subparagraph 41.3 (b)(11)(vii) through the end of Part 41 remains unchanged.

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

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

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

Regulatory Impact Statement

Statutory authority:

The statutory authority for designating shellfish lands as certified or uncertified is Environmental Conservation Law (ECL) Section 13-0307. Subdivision 1 of Section 13-0307 of the ECL requires the Department to periodically conduct examinations of shellfish lands within the marine district to ascertain the sanitary condition of said lands. Subdivision 2 of this section requires that the Department certify which shellfish lands are in such sanitary condition that shellfish may be taken for food. Such lands are designated as certified shellfish lands. All other shellfish lands are designated as uncertified.

The statutory authority for promulgating regulations with respect to the harvest of shellfish is Section 13-0319 of the ECL.

Legislative objectives:

There are two purposes of the legislation: to protect public health and to ensure that shellfish lands are appropriately classified as certified or uncertified for the harvest of shellfish. This legislation requires the Department to examine shellfish lands and determine which shellfish lands meet the sanitary criteria for a certified shellfish land, as set forth in regulation, Part 47 of Title 6 NYCRR, promulgated pursuant to Section 13-0319 of the ECL. Shellfish lands which meet criteria must be designated as certified. Shellfish lands which do not meet criteria must be designated as uncertified to prevent the harvest of shellfish from those lands.

Needs and benefits:

To protect public health and to comply with ECL 13-0307, the Bureau of Marine Resources' shellfish sanitation program conducts and maintains sanitary surveys of shellfish growing areas (SGA) in the marine district of New York State. Maintenance of these surveys includes the regular collection and bacteriological examination of water samples to monitor the sanitary condition of shellfish growing areas.

Annually, water quality evaluation reports are prepared by the staff of the shellfish sanitation program for each SGA which contains certified shellfish lands. These reports present the results of statistical analyses of water quality data gathered by the program, and annual updates to the shoreline pollution source surveys. Each report includes a summary and recommendations for the appropriate classification of that particular shellfish growing area. The report summary may state that all or portions of an SGA should be designated as uncertified for the harvest of shellfish or that all, or portions of, an SGA should be designated as certified for the harvest of shellfish based on criteria in 6 NYCRR Part 47. These reports are on file at the Bureau of Marine Resources office in East Setauket, NY.

In "2004 Annual Water Quality Update for the Moriches Bay West Shellfish Growing Area," dated February 2004, data analyses demonstrate that water quality in the Narrow Bay portion of the growing area now meets bacteriological criteria for certified shellfish lands during a portion of the year as specified in 6NYCRR Part 47, "Certification of Shellfish Lands." It recommends that a portion of Narrow Bay be designated as certified for the harvest of shellfish during the months when water quality meets criteria (January 1 through April 14).

Regulations which designate shellfish lands as certified, as is proposed for the Narrow Bay portion of the Moriches Bay SGA, benefit the general welfare by ensuring that shellfish resources on underwater lands which meet the sanitary criteria are available for both commercial and recreational use. The classification of previously uncertified lands as certified may provide additional sources of income to shellfish diggers by increasing the amount of harvest area available.

The ten technical amendments are included to improve the description of closure line landmarks for proper harvesting and enforcement purposes, and will not result in classification changes.

Costs:

There will be no costs to State or local governments. No direct costs will be incurred by regulated commercial shellfish harvesters in the form of initial capital investment or initial non-capital expenses, in order to comply with these proposed regulations. The reopening of uncertified shellfish lands is likely to provide economic benefit to commercial shellfish harvesters whose livelihoods depend on access to certified shellfish lands.

The Department cannot provide an estimate of potential lost income to shellfish harvesters when areas are designated as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened. Those variables are listed in the following three paragraphs.

As of September 8, 2004, the Department had issued 1,703 New York State shellfish digger's permits. However, the actual number of those individuals who harvest shellfish commercially full time is not known. Recreational harvesters who wish to harvest more than the daily recreational limit of 100 hard clams, with no intent to sell their catch, can only do so by purchasing a New York State digger's permit. The number of individuals who hold shellfish diggers permits for that type of recreational harvest is unknown. The Department's records do not differentiate between full-time and part-time commercial or recreational shellfishing.

The number of harvesters working in a particular area cannot be estimated for the reason stated above. In addition, the number of harvesters in a particular area is dependent upon the season, the amount of shellfish resource in the area, the price of shellfish and other economic factors, unrelated to the Department's proposed regulatory action.

Estimates of the existing shellfish resource in a particular embayment are not known. Recent shellfish population assessments have not been conducted by the Department. Without this information, the Department cannot determine the effect a closure or reopening would have on the existing shellfish resource.

The Department's actions to designate areas as certified or uncertified are not dependent on the resources in a particular area. They are based solely on public health concerns and legal mandates.

There is no cost to the Department. Administration and enforcement of the proposed amendment are covered by existing programs.

Local government mandates:

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

Paperwork:

No new paperwork is required.

Duplication:

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

Alternatives:

There are no significant alternatives. By law (ECL, Section 13-0307), once the Department has determined that an uncertified shellfish land meets the sanitary criteria, the Department must designate the land as certified and open the area to shellfish harvesting.

Federal standards:

There are no federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the National Shellfish Sanitation Program (NSSP) which provides guidelines intended to promote uniformity in shellfish sanitation standards among members. The NSSP is a cooperative program consisting of the federal government, states and the shellfish industry. Participation in the NSSP is voluntary - each state adopts its own standards. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards relative to NSSP guidelines. Substantial non-conformity with NSSP guidelines can result in sanctions being taken by FDA and the NSSP, including removal of a state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This would effectively bar a non-conforming state's product from interstate commerce.

Compliance schedule:

Immediate compliance with any regulation designating shellfish lands as uncertified is necessary to protect public health. Shellfish harvesters are notified of changes to SGA classification by mail either prior to, or concurrent with, the adoption of new regulations.

Compliance with new regulations designating areas as certified or uncertified does not require additional capital expense, paperwork, record keeping or any action by the regulated parties in order to comply, except that harvesters must observe the new closure lines. Therefore, immediate compliance can be readily achieved.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. ENV-18-04-00003-P, Issue of May 5, 2004.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. ENV-18-04-00003-P, Issue of May 5, 2004.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. ENV-18-04-00003-P, Issue of May 5, 2004.

Department of Health

EMERGENCY RULE MAKING

Part-Time Clinics

I.D. No. HLT-32-04-00007-E
Filing No. 1190
Filing date: Oct. 19, 2004
Effective date: Oct. 19, 2004

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

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

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

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

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

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

The provision of radiology services in stationary sites and mobile vans where shielding may be inadequate.

The provision of a full range of primary care services where minimum physical plant standards may not be met, as part-time clinics are exempt from most physical plant requirements. Inadequate space to provide the range of services safely compromised patient safety with narrow corridors which, if an emergency arises, would not provide for stretcher or wheelchair access or egress.

The provision of a variety of complex services where more extensive supervision would be expected.

The provision of services to all the residents in a given location, such as an Adult Home, raises questions about appropriate utilization.

The provision of specialty services, such as pediatric cardiology utilizing sophisticated equipment, is considered inappropriate for a part-time

clinic setting, since a comprehensive, integrated plan of care is needed to treat these patients effectively.

The use of part-time clinics by some patients as their main source of health care compromises the continuity of their care, as the link to emergency and after-hours treatment becomes problematic.

The improper application of infection control principles for sterilizing equipment.

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

The principal changes in the proposed rules are:

A more detailed description of the types of services permitted in part-time clinics.

Explicit exclusion of certain types of locations and premises as acceptable sites for part-time clinics.

Addition of a requirement that part-time clinics be in sufficient proximity to the sponsoring hospital or diagnostic an treatment center to ensure adequate supervision.

Enhanced operating standards, including requirements for quality assurance and improvement and for credentialing of staff.

Addition of a requirement for prior limited review of all new part-time clinic sites and the continuation or proposed relocation of existing clinics.

Recognition that part-time clinics which are operated by city and county health departments are governed by section 614 of the Public Health Law.

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

Subject: Part-time clinics.

Purpose: To clarify and enhance requirements and require prior limited review of all part-time clinic sites.

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

Section 703.6 Part-time clinics

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

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

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

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

(b) Department approval and/or notification.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ing services at such site was not submitted to the department by November 13, 2000, shall cease operations by December 31, 2000.

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

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

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

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

(iv) disposal of solid wastes and sharps;

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

(vi) a fire plan consistent with local laws;

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

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

(ix) utilization review;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(7) smoking is prohibited within patient care areas.

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

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

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

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

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

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

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

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

(4) Proposals not requiring an application.

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

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

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

* * *

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-32-04-00007-P, Issue of August 11, 2004. The emergency rule will expire December 17, 2004.

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

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

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

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

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

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

An emergency regulation addressing part-time clinics was adopted effective August 15, 2000. Additional emergency regulations were adopted effective on November 13, 2000, February 12, 2001, May 14, 2001, August 10, 2001, November 8, 2001, February 7, 2002, May 6, 2002, August 1, 2002, October 29, 2002, January27, 2003, April 25, 2003, July 24, 2003, October 22, 2003, January 20, 2004, April 20, 2004 and July 19, 2004. The last emergency adoption is scheduled to expire on October 17, 2004. This new emergency regulation will repeal and/or amend the regulations which would have gone back into effect upon the expiration of the July 19, 2004 emergency regulation.

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

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

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

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

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

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

Cost to State and Local Government:

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

Cost to the Department of Health:

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

Local Government Mandates:

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

Paperwork:

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

Duplication:

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

Alternative Approaches:

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

Federal Requirements:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect of rule:

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

Compliance requirements:

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

Professional services:

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

Compliance costs:

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

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

Economic and technological feasibility:

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

Minimizing adverse impact:

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

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

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

Small business and local government participation:

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

Rural Area Flexibility Analysis

Effect on Rural Areas

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements

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

Professional Services

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

Compliance Costs

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

Minimizing Adverse Impact

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

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

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

Opportunity for Rural Area Participation

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

Job Impact Statement

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

Assessment of Public Comment

The Department of Health received a total of 581 written comments on a different version of the proposed regulation during the 45-day public comment period which expired on September 27, 2004. Because the text of this emergency adoption differs significantly from the text of the "permanent" proposal and the comments are directed toward provisions appearing exclusively in the "permanent" version, they clearly are not germane to this emergency action. In light of this fact and that the Department is still in the process of evaluating the comments (due to the recent expiration of the comment period) the publication of a detailed assessment will be deferred until either the next emergency adoption or the next published action the "permanent" proposal. A full assessment of public comment published at that time, will provide a comprehensive review of all the issues raised, comments received and the Department's response, which is neither possible nor appropriate at this time, in conjunction with this adoption.

EMERGENCY RULE MAKING

Payment for Psychiatric Social Work Services

I.D. No. HLT-32-04-00008-E
Filing No. 1167
Filing date: Oct. 14, 2004
Effective date: Oct. 14, 2004

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

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

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

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

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

Based upon the Department's interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in Article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

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

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

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

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

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-32-04-00008-P, Issue of August 11, 2004. The emergency rule will expire December 12, 2004.

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

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objective:

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

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

Needs and Benefits:

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

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

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

Costs:

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

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

Cost to the Department of Health:

There will be no additional costs to DOH.

Local Government Mandates:

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

Paperwork:

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

Duplication:

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

Alternatives:

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

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

No impact on small businesses or local governments is expected.

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Economic and Technological Feasibility:

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

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Small Business Participation:

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

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

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

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Rural Area Participation:

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

Job Impact Statement

Nature of Impact:

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

Categories and Numbers Affected:

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

Regions of Adverse Impact:

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

Minimizing Adverse Impact:

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

Self-Employment Opportunities:

The rule is expected to have no impact on self-employment opportunities since

the change affects only services provided in a clinic setting.

EMERGENCY RULE MAKING

Nursing Home Pharmacy Regulations

I.D. No. HLT-44-04-00011-E
Filing No. 1191
Filing date: Oct. 19, 2004
Effective date: Oct. 19, 2004

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

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

Statutory authority: Public Health Law, section 2803

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

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

Subject: Nursing home pharmacy regulations.

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

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

Section 415.18 Pharmacy Services.

* * *

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

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

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

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

(ii) Controlled substances contained in emergency medication kits may be administered by authorized personnel pursuant to an order of an authorized practitioner to meet the immediate need of a resident. Personnel authorized to administer controlled substances shall include registered professional nurses, licensed practical nurses or other practitioners, licensed/registered under Title VIII of the Education Law and authorized to administer controlled substances.

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

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

(i) sublingual nitroglycerine; and

(ii) up to five noninjectable, prepackaged medications not to exceed a 24-hour supply; [which are the same noninjectable, prepackaged

medications in all emergency kits throughout the facility.] *The total number of noninjectables may not exceed 25 medications for the entire facility;*

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

* * *

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 16, 2005.

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

Regulatory Impact Statement

Statutory Authority:

These regulation revisions of 10 NYCRR Section 415.18, Pharmacy Services, in nursing homes, are proposed under the authority granted to the Commissioner of Health under PHL Section 2803. The PHL outlines the responsibility to conduct inspections of health care facilities to determine compliance with statutes and regulations promulgated under the provisions of those statutes and authorizes the commissioner to propose rules, regulations and amendments thereto for consideration by the State Hospital Review and Planning Council "the Council". The Council, by a majority vote of its members, shall amend rules and regulations, subject to the approval of the commissioner, to effectuate the provisions and purposes as stated in the PHL.

Legislative Objectives:

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

Needs and Benefits:

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

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

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

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

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

Costs:

Costs to Regulated Parties:

There will be no additional costs to regulated parties.

Costs to State and Local Government:

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

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

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

Duplication:

The regulation does not duplicate any federal or state regulation.

Alternative Approaches:

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

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

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

Compliance Requirements:

The regulation would impose no additional record keeping or other affirmative acts.

Professional Services:

The regulation would impose no additional professional services.

Compliance Costs:

The regulation would impose no additional costs.

Economic and Technical Feasibility Assessment:

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

Minimizing Adverse Impact:

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

Small Business and Local Government Input:

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

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

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

Professional Services:

The regulation would not require additional professional services.

Compliance Costs:

The regulation would not impose additional costs.

Minimizing Adverse Impact:

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

Opportunity for Rural Area Participation:

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

New York Association of Homes and Services for the Aging

Nursing Home Community Coalition

New York State Health Facilities Association

New York State Office for Aging Long Term Care Ombudsman

Health Facility Association of New York

New York State Board of Pharmacy

New York Chapter of the American Society of Consulting Pharmacists

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

Job Impact Statement

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

EMERGENCY RULE MAKING

Controlled Substances in Emergency Kits

I.D. No. HLT-44-04-00015-E
Filing No. 1192
Filing date: Oct. 20, 2004
Effective date: Oct. 20, 2004

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

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

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

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

Specific reasons underlying the finding of necessity: We are proposing that these regulations be adopted on an emergency basis because immediate adoption is necessary to protect the public health and safety. Having consulted closely with administrators, nursing personnel and consultant pharmacists of Class 3a health care facilities (nursing homes, and other long-term facilities), the Department has determined that the current Part 80 and Part 400 regulations do not ensure timely access to controlled substances by practitioners and patients when immediate administration is medically necessary. However, for purposes of this emergency justification, Class 3a institutional dispenser, Class 3a facility, and Class 3a health-care facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490. The proposed regulations exempt such adult care facilities from its provisions.

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

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

Subject: Controlled substances in emergency kits.

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

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

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

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

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

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

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

(1) Except in an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490, a pharmacy may distribute a controlled substance to a practitioner in a Class 3a institutional dispenser limited solely for stocking in sealed emergency medication kits Such distribution shall be pursuant only to a written request by the Class 3a facility indicating the name and address of the facility, the name and address of the pharmacy, the date of the request, the type and quantity of the drug requested and the signature of the authorized person making the request. With each distribution, the pharmacy shall provide the Class 3a facility with an itemized list indicating the name and address of the pharmacy, the name and address of the Class 3a facility, the date of the distribution, the

type and quantity of the drug distributed, and the signature of the pharmacist.

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

Section 80.47 Institutional dispenser, limited. *(a)* Nursing homes, convalescent homes, health-related facilities, *adult care facilities subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490* [homes for the aged], dispensaries or clinics not qualifying as institutional dispensers in license class 3 shall apply for an institutional dispenser, limited license. Such institutional dispensers qualifying for controlled substances privileges shall obtain a class 3a license from the department.

(b) An institutional dispenser licensed in class 3a may administer controlled substances to patients only pursuant to a prescription issued by an authorized physician or other authorized practitioner and filled by a registered pharmacy; except that [an] *controlled substances in emergency medication kits may be administered to patients as provided in Section 80.49(d) of this Part, except in an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.*

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

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

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

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

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

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

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

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

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

(1) Except for adult care facilities subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490, institutional dispensers limited may possess limited supplies of controlled substances in sealed emergency medication kits for use as provided in section 80.49 (d) of this Part. Each kit may contain up to a 24-hour supply of a maximum of ten different controlled substances in unit dose packaging, no more than three of which may be in an injectable form. Each kit shall be secured in a stationary, double-locked system or other secure method approved by the Department.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 17, 2005.

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

Regulatory Impact Statement

Statutory Authority:

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

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

Legislative Objectives:

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

Needs and Benefits:

This regulation effectuates the above stated legislative purpose of section 3300-a of the New York State Controlled Substances Act. It will ensure timely access to controlled substances by practitioners and patients for emergency situations in extended care facilities and other health care facilities licensed by the Department as Class 3a, institutional dispenser limited. (See section 3302(18) of the Public Health Law for the definition of "institutional dispenser".) However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

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

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

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

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

The federal Drug Enforcement Administration (DEA) also recognizes the need for storing controlled substances in emergency kits for administration to patients during urgent situations in long-term care facilities that are not eligible to hold a DEA registration. Since 1980, the DEA has issued

a Statement of Policy containing guidelines for state regulatory agencies to follow when authorizing long-term care facilities to maintain such kits. Such guidelines have been incorporated in the proposed regulatory amendments.

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

Costs:

Costs to Regulated Parties

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

Costs to State and Local Government

There will be no costs to state or local government.

Costs to the Department of Health

There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

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

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

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

Duplication:

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

Alternatives:

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

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect of Rule on Small Business and Local Government:

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

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

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

Of the 1,282 healthcare facilities licensed by the department as Class 3a institutional dispensers limited, the rule will affect only those facilities that choose to maintain controlled substances in emergency medication kits. However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

Compliance Requirements:

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

Professional Services:

No additional professional services are necessary.

Compliance Costs:

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

Economic and Technological Feasibility:

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

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

Minimize Adverse Impact:

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

Small Business and Local Government Participation:

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

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

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

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

Compliance Requirements:

There are no compliance requirements. The proposed amendment authorizes pharmacies to distribute limited supplies of controlled substances to Class 3a facilities for maintaining in emergency medication kits. The regulation also authorizes those healthcare facilities to possess and administer controlled substances to patients from such kits in an emergency situation. However, these actions are undertaken on a voluntary basis by

both pharmacy and healthcare facility. The regulation does not require either party to participate.

Present regulations require pharmacies and Class 3a facilities to maintain specified records of dispensing, receipt, and administration of controlled substances. The proposed regulation requires a minimum of additional recordkeeping to ensure limited access to emergency medication kits and safeguarding of the controlled substances contained therein. However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

Professional Services:

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

Compliance Costs:

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

Economic and Technological Feasibility:

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

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

Minimizing Adverse Impact:

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

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

Rural Area Participation:

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

Job Impact Statement

Nature of Impact:

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

NOTICE OF ADOPTION

Emergency Ambulance Service Vehicles

I.D. No. HLT-17-04-00002-A
Filing No. 1169
Filing date: Oct. 14, 2004
Effective date: Nov. 3, 2004

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

Action taken: Amendment of section 800.26 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3032

Subject: Emergency ambulance service vehicles.

Purpose: To allow EMS agencies greater flexibility in the deployment of personnel and vehicles to medical emergencies in the pre-hospital environment.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-17-04-00002-P, Issue of April 28, 2004.

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

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

Assessment of Public Comment

The agency received no public comment.

Insurance Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

New York State Partnership for Long Term Care Program

I.D. No. INS-44-04-00003-P

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

Proposed action: Amendment of Part 39 (Regulation 144) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 3201, 3217, 3221, 3229, 4235, 4237 and art. 43; and Social Services Law, section 367-f

Subject: New York State Partnership for Long Term Care Program.

Purpose: To add three new plan designs, change the existing plan design to incorporate Evolution Board resolutions and recommendations of the Governor's Working Group on Healthcare Reform, and reflect the adoption of the demonstration project as a program.

Substance of proposed rule (Full text is posted at the following State website: www.ins.state.ny.us): The Second Amendment to Regulation 144 makes various changes to and expands the New York State Partnership for Long Term Care program. This amendment adds minimum standards for three new plan designs (1.5/3/50, 4/4/100 and 2/2/100), changes the existing plan design (3/6/50) to incorporate Evolution Board resolutions, and reflects the permanence of the demonstration project as a program. Two of the new plan designs (1.5/3/50 and 2/2/100) offer more affordable long-term care coverage. The third new plan design (4/4/100) provides greater coverage for residential facility care and home care and provides greater choice of optional additional benefits (*e.g.,* home modification, informal caregiver training, etc.).

The title of Part 39 of Title 11 is amended to revise the name of the program and to reflect the permanence of the demonstration project as a program as enacted under chapter 659 of the Laws of 1997.

The table of contents of Part 39 of Title 11 is amended to reflect the permanence of the demonstration project as a program, to identify the existing plan design as the "3/6/50" plan and to reflect the addition of the three new plan designs identified as the "1.5/3/50", "4/4/100", and "2/2/100" plans.

Section 39.0 is revised to change the name of the program and to indicate the demonstration project was made a permanent program as enacted under chapter 659 of the Laws of 1997. Also added to this section is a statement that the special eligibility for long-term care protection through the New York State Medicaid program may vary depending upon the particular plan design purchased.

Section 39.1 is amended to refer to the name of the permanent program.

Section 39.2 is amended to refer to the name of the permanent program and to correct the reference to limitations outside of the United States and its possessions in compliance with Section 52.25(b)(2)(vi) of Regulation 62.

Section 39.3 is amended to identify the existing plan design as the "3/6/50" plan to distinguish it from the new plan designs being established in sections 39.4, 39.5, and 39.6.

Subdivision 39.3(a) is amended to change "project" to "program" and to change "Part" to "section". Added to this section is a requirement that participating insurers selling a "3/6/50" product must also offer products meeting the minimums of the "1.5/3/50" and "2/2/100" plan designs under sections 39.4 and 39.6 to the prospective insured at the same time.

Subdivision 39.3(b) is amended to identify the existing minimum benefit standards apply to the "3/6/50" plan design. Also, the word "Part" is changed to "section".

Paragraph 39.3(b)(1) updates the minimum issue benefit amount to $171 per day for 2004 and adds the minimum daily benefit beginning January 1, 2013.

Within paragraph 39.3(b)(2), item (i) is revised to substitute "provided" for "payable", to correct the reference to applicable Department of Health regulations, and to delete the reference to an insured as a "patient". Item 39.4(b)(2)(iii) is amended to substitute "provided" for "payable" and to change the reference to "Part" to "section". Item 39.4(b)(2)(iv) is changed to substitute "provided" for "paid".

A new paragraph 39.3(b)(3) is added establishing the minimum standard for a bed reservation benefit coverage at an amount equal to the nursing home daily benefit in effect under the policy/certificate for at least 20 days annually as set forth in the resolution approved by the Evolution Board of the Partnership in February 2000.

Former paragraph 39.3(b)(3) is renumbered to 39.3(b)(4).

A new paragraph 39.3(b)(5) is added establishing the minimum standard for a hospice care benefit in an amount equal to the nursing home daily benefit in effect under the policy/certificate in an inpatient setting and at the home care daily benefit in effect under the policy/certificate in all other settings as set forth in the resolution approved by the Evolution Board of the Partnership in February 2000.

Former paragraph 39.3(b)(4) is renumbered to 39.3(b)(6).

A new paragraph 39.3(b)(7) is added establishing the minimum standard for a care management benefit in an amount equal to the nursing home daily benefit in effect under the policy/certificate for at least two days per year as set forth in the resolution approved by the Evolution Board of the Partnership in February 2000.

Former paragraph 39.3(b)(5) is renumbered to 39.3(b)(8).

Former paragraph 39.3(b)(6) is renumbered to 39.3(b)(9).

Former paragraph 39.3(b)(7) is renumbered to 39.3(b)(10).

Former paragraph 39.3(b)(8) is renumbered to 39.3(b)(11).

Former paragraph 39.3(b)(9) is renumbered to 39.3(b)(12).

A new paragraph 39.3(b)(13) is added establishing that an insurer may sell a policy/certificate on an indemnity, prepaid, or any basis other than expense incurred. However, an insurer selling such a policy/certificate must also offer a policy/certificate providing coverage on an expense incurred basis at the same time to the prospective insured.

A new section 39.4 adds the "1.5/3/50" plan design. This new plan design is based on the existing "3/6/50" plan design set forth in section 39.3 but provides for minimum coverage for a lesser period of time. Section 39.4 contains the same provisions as section 39.3 except for the following differences:

Subdivision 39.4(a) establishes the maximum coverages for a policy/certificate issued under this section at 2.5 years of nursing home coverage and 5 years of home care coverage. In addition, this paragraph establishes a requirement that participating insurers selling a "1.5/3/50" product must also offer a product meeting the minimum of the "2/2/100" plan design under section 39.6 to the prospective insured at the same time.

Subdivision 39.4(b) provides that a policy/certificate issued under this section must provide coverage on an expense incurred basis only.

Paragraph 39.4(b)(1) establishes the minimum period of coverage for nursing home care at 18 months for each covered person.

Within paragraph 39.4(b)(2), item (ii) sets forth that a complete substitution of home care benefits for nursing home care benefits would result in a lifetime maximum total of 36 months of home care benefits and item (iv) establishes that home care coverage that exceeds the minimum benefit standards of this section will not affect the requirement for a lifetime maximum total of 36 months of home care benefits.

Paragraph 39.4(b)(12) establishes the maximum elimination period for a policy/certificate issued under this section at 60 days.

Subdivision 39.4(c) sets forth an additional and optional feature that may be offered in a policy/certificate issued under this section. Paragraph 39.4(c)(1) establishes that, at the discretion of an insurer, home care benefit days may be combined to pay an amount in excess of the home care daily benefit amount in the policy/certificate. Where home care benefit days are combined, no more than the equivalent of 31 days of home care benefits will be provided in any one-month period. If the insurer offers this payment feature, each insured must also be offered a minimum 1.5/3/50 plan without this payment feature.

Subdivision 39.4(d) requires that a policy/certificate issued under this section must meet the standards required under federal and New York State laws and regulations for favorable tax qualification status for expense-incurred coverage. A policy/certificate offering coverage on a per diem or other periodic basis (as permitted by the Internal Revenue Code) does not meet the standard set forth in subdivision (b) of this section for expense incurred coverage and is not permitted in this plan design.

A new section 39.5 adds the "4/4/100" plan design. This new plan design is similar to the "3/6/50" plan design set forth in section 39.3, as amended herein, but establishes that all levels of coverage (including nursing home, residential care facility services, assisted living (facility and non-facility), and home and community-based care) will be provided at the same minimum benefit level for a minimum of a four-year period. Section 39.5 contains the same provisions as section 39.3 except for the following differences:

Paragraph 39.5(b)(1) requires that a policy/certificate issued under this section will provide at least a lifetime maximum total of 4 years coverage for each covered person. The policy/certificate may express the 4 years of coverage in monetary terms. The monetary expression will be at least a lifetime maximum total of 1,460 days of coverage for each covered person multiplied by the minimum daily benefit amount under this section.

Paragraph 39.5(b)(2) eliminates the requirement in the existing plan design that two home care days be substituted for one nursing home day.

Paragraph 39.5(b)(3) requires coverage for residential care facility services that include but are not limited to nursing care, maintenance or personal care, therapy services, and room and board accommodations. Services must be rendered by an entity that is legally operating as a residential care facility under the laws of its jurisdiction. Examples include an assisted living facility or adult care facility. The minimum benefit for residential care facility services such as in an assisted living facility for adult day care facility is the minimum daily benefit amount in this section.

Paragraph 39.5(b)(4) establishes the minimum benefit standards for community-based care as well as home care. Item (i) establishes that home and community-based care includes assisted living care provided in a non-facility setting. Item (ii) establishes that the minimum home and community-based care coverage benefit will equal to the minimum daily benefit amount stated in this section. Item (iii) establishes that home and community-based care coverage that exceeds the minimum benefit standards of this section not affect the requirement for a lifetime maximum total of 48 months of home and community-based care benefits.

Paragraph 39.5(b)(6) establishes minimum coverage for bed reservation in a residential care facility at the minimum daily benefit amount in effect under the policy/certificate for at least 20 days annually.

Paragraph 39.5(b)(7) establishes the minimum respite care coverage benefit for nursing home, residential care facility, and/or home and community-based care services provided in lieu of informal caregiver services at the daily benefit amount in effect under the policy/certificate for at least 14 days regardless of where the respite care services are actually rendered and regardless of the actual cost.

Paragraph 39.5(b)(8) establishes the minimum hospice care coverage benefits at an amount equal to the daily benefit amount in effect under the policy/certificate regardless of where the services are actually rendered and regardless of the actual cost.

Paragraph 39.5(b)(9) establishes the alternate care benefits recognizes the inclusion of residential care facility services and home and community-based care services and provides the alternate care benefits at the daily benefit amount in effect under the policy/certificate issued under this section.

Subdivision 39.5(c) sets forth a list of additional and optional benefits from which one or more of the long term care services may be offered in a policy/certificate issued under this section up to a required aggregate lifetime maximum per covered person equal to but not exceeding the minimum daily benefit amount as stated in this section multiplied by 50.

Paragraph 39.5(c)(1) sets forth the list of long term care services as: additional nursing home care and residential care facility bed reservation benefits, additional respite care benefits, additional care management benefit, home modification benefit, informal caregiver training benefit, emergency response system benefit, therapeutic device benefit, supportive/durable medical equipment benefit, and specialized transportation benefit, such as specialized transportation to and from adult day care.

Paragraph 39.5(c)(2) requires that the additional and optional benefits provided will be deducted from the policy/certificate lifetime maximum coverage of at least 4 years per covered person subject to the limit stated in this subdivision.

Subdivision 39.5(d) requires that a policy/certificate issued under this section must meet the standards required under federal and New York State laws and regulations for favorable tax qualification status.

A new section 39.6 adds the "2/2/100" plan design. This new plan design is based on the new "4/4/100" plan design set forth in section 39.5, as amended herein, but provides for minimum coverage for a lesser period of time. Section 39.6 contains the same provisions as section 39.5 except for the following differences:

Subdivision 39.6(a) establishes the maximum coverages for a policy/certificate issued under this section at 3 years of nursing home coverage and 3 years of home and community-based care coverage. In addition, this paragraph establishes a requirement that participating insurers selling a "2/2/100" product must also offer a product meeting the minimum of the "1.5/3/50" plan design under section 39.4 to the prospective insured at the same time.

Paragraph 39.6(b)(1) requires that a policy/certificate issued under this section will provide at least a lifetime maximum total of 2 years coverage for each covered person. The policy/certificate may express the 2 years of coverage in monetary terms. The monetary expression will be at least a lifetime maximum total of 730 days of coverage for each covered person multiplied by the minimum daily benefit amount.

Paragraph 39.6(b)(15) establishes the maximum elimination period for a policy/certificate issued under this section at 60 days.

Paragraph 39.6(c)(1) sets forth a list of additional and optional benefits from which one or more of the long term care services may be offered in a policy/certificate issued under this section up to a required aggregate lifetime maximum per covered person equal to but not exceeding the minimum daily benefit amount as stated in this section multiplied by 25.

Paragraph 39.6(c)(2) requires that the additional and optional benefits provided will be deducted from the policy/certificate lifetime maximum coverage of at least 2 years per covered person subject to the limit stated in this subdivision.

Paragraph 39.6(c)(3) establishes that, at the discretion of an insurer, home care benefit days may be combined to pay an amount in excess of the daily benefit amount in the policy/certificate. Where home care benefit days are combined, no more than the equivalent of 31 days of home care benefits will be provided in any one-month period. If the insurer offers this payment feature, each insured must also be offered a minimum 2/2/100 plan without this payment feature.

Subdivision 39.6(d) requires that a policy/certificate issued under this section must meet the standards required under federal and New York State laws and regulations for favorable tax qualification status for expense-incurred coverage. A policy/certificate offering coverage on a per diem or other periodic basis (as permitted by the Internal Revenue Code) does not meet the standard set forth in subdivision (b) of this section for expense incurred coverage and is not permitted in this plan design.

Text of proposed rule and any required statements and analyses may be obtained from: Mike Barry, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5265, e-mail: mbarry@ins.state.ny.us

Data, views or arguments may be submitted to: Doris Kullman, Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 474-4899, e-mail: dkullman@ins.state.ny.us

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

This action was not under consideration at the time this agency's regulatory agenda was submitted.

Regulatory Impact Statement

1. Statutory authority: The authority for the amendment to 11 NYCRR 362 is derived from Sections 201, 301, 3201, 3217, 3221, 4235, 4237, and Article 43 of the Insurance Law as well as Section 367-f of the Social Services Law. Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations. Section 3201 authorizes the superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state. Section 3217 authorizes the superintendent to issue regulations to establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies. Section 3221 sets forth the standard provisions to be included in group or blanket accident and health insurance policies written by commercial insurers. Section 4235 defines group accident and health insurance and the types of groups to which such insurance may be issued. Article 43 sets forth the requirements for not-for-profit corporations to offer health insurance contracts. Section 367-f of the Social Services Law defines Medicaid extended coverage available through the New York State Partnership for Long-Term Care program upon exhaustion of policies or certificates meeting the minimum benefit standards set forth by the superintendent of insurance.

2. Legislative objectives: The rising cost of health care and the increasing demand for, and cost of, the long term care system in New York provide long range risk to the stability of the Medicaid program. Additionally, the costs in long-term care could rise astronomically as the "baby boomer" generation soon begins to need such services as home care and nursing homes. Long-term care insurance is a viable choice in the broader range of financial options available to consumers to exercise responsible, independent planning for their future long term care needs rather than relying on a governmental program. Any private investment in long-term care insurance has the potential for saving the resources of the Medicaid program. The New York State Partnership for Long-Term Care is an initiative designed to provide special eligibility for long-term care protection through the Medicaid program to residents who purchase a long-term care insurance policy/certificate that qualifies under this Part and who exhaust the benefits under such a policy/certificate.

3. Needs and benefits: This amendment to Part 39 of 11 NYCRR is necessary to expand the plan design options under the New York State Partnership for Long-Term Care Program that currently contains one plan design. These amendments modify the current plan to incorporate past resolutions by the Evolution Board of the Partnership and to accommodate the additional plan designs.

The current plan design (referred to as the 3/6/50 plan) provides minimum coverage of 3 years for nursing home benefits, or 6 years for home care benefits at half the nursing home benefit rate, and full asset protection under Medicaid upon exhaustion of policy benefits.

Two new plan designs (referred to as the 1.5/3/50 plan and the 2/2/100 plan) are included in these amendments. They provide more limited benefit periods, are more affordable, and provide partial asset protection under Medicaid. As minimum standards, these plan designs also allow the flexibility of offering greater benefits within the same structure.

The third plan design (referred to as 4/4/100) offers the longest benefit periods, the most comprehensive benefits with greater flexibility that may extend a consumer's ability to remain living in their own homes, and provides full asset protection under Medicaid. This amendment should provide more options for New York residents both in terms of covered benefits, flexibility, affordability, and asset protection under Medicaid upon exhaustion of policy benefits. The enhancement of the Partnership program through this amendment is expected to effectuate a more attractive product that will broaden the long-term care insurance market and encourage independent financial responsibility on the part of consumers.

4. Costs: To assure that consumers have the option of more affordable coverage, this amendment requires a participating insurer who offers a more comprehensive plan design (3/6/50 or 4/4/100) must also offer the more affordable 1.5/3/50 and 2/2/100 plan designs. Participating insurers will incur expenses related to development of new products meeting the new standards, sales promotion materials, and agent training. At the same time, by offering both more affordable and more comprehensive long-term care insurance protection to consumers, this amendment will avert costs to the State through the Medicaid program. This enhanced access to long-term care insurance coverage will result in an introduction of private dollars into the New York's healthcare system along with savings to the State Medicaid program.

5. Local government mandates: This amendment imposes no new mandates on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: This amendment will not impose any new reporting requirements. Insurers who choose to participate in the New York Partnership for Long-Term Care Program will have to file their new products with the Insurance Department. Additionally, insurers will need to develop or adapt their marketing information to accommodate the new plan designs.

7. Duplication: There are no known federal or other states' requirements that duplicate, overlap, or conflict with this regulation.

8. Alternatives: Throughout the consideration of these changes to the New York Partnership for Long-Term Care Program, input has been obtained from interested parties including consumer groups, insurers, business groups, and academics. Based on input from these sources, the Governor's Working Group on Healthcare issued a report reviewing the New York State Medicaid program and make recommendations for program

improvement. In addition, industry participants in the New York State Partnership for Long-Term Care Program developed the most extensive plan design (referred to as the 4/4/100 plan design) contained in this amendment over the last few years. The industry participants, as part of the Evolution Board for the Partnership, also provided input on the more affordable plan designs (referred to as the 1.5/3/50 and 2/2/100 plan designs). The alternative to introducing the new plan designs would be continuing the current structure of offering a single benefit package option. This alternative was rejected in order to provide individuals with choice of plan designs that best meets their needs and to provide for a lower cost alternative.

9. Federal standards: The three new plan designs in this amendment require that the policies/certificates are intended to meet the requirements for qualified long-term care insurance contracts pursuant to Section 7702B of the Internal Revenue Code.

10. Compliance schedule: This rule making will be effective upon adoption. Since participating insurers developed the 4/4/100 plan design and these parties are aware of the regulatory provisions, insurers will be able to develop new products in compliance with the new minimum standards.

Regulatory Flexibility Analysis

1. Effect of rule: The amendment will affect only those small employers, including individual proprietors, who offer group long-term care insurance to their employees. Employers will be provided with more choices in plan designs to meet their needs, two of which are more affordable. Insurance agents who sell Partnership policies, many of whom are small businesses themselves, will be impacted because they will need to spend time to become educated on the additional plan designs and the need to offer the lower cost options to each prospective applicant. Although agents will have to devote this additional time, the enhancements will provide the agents with more flexible products and an expanded base of prospective applicants. These modifications should encourage the purchase of long-term care insurance coverage through the New York State Partnership for Long-Term Care Program. In turn, this will diminish resident reliance on the New York State Medicaid program for long-term care needs. The amendment will not affect local governments. The amendment will affect insurers participating in the Partnership in New York State, none of which fall within the definition of small business as found in Section 102(8) of the State Administrative Procedure Act.

2. Compliance requirements: There are no compliance requirements for small employers and individual proprietors.

3. Professional services: Since there are no compliance requirements for small employers and individual proprietors, no professional services will be needed to comply with the amendment.

4. Compliance costs: This regulatory amendment does not impose any additional costs on small businesses or sole proprietors. The amendment should reduce insurance costs for small businesses that offer group long-term care insurance to their employees. The amendment imposes no costs to local governments.

5. Economic and technological feasibility: The amendment is designed to make Partnership long-term care insurance premiums more affordable to small businesses who elect to offer coverage to their employees. Compliance with the amendment should be economically and technologically feasible for small businesses since it requires no action on their part.

6. Minimizing adverse impact: The amendment minimizes the adverse impact on small employers by lowering premium rates and increasing the options for more affordable long-term care coverage.

7. Small business and local government participation: This notice is intended to provide small businesses, local governments, and public and private entities in rural and non-rural areas with the opportunity to participate in the rule making process.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers participating in the New York State Partnership for Long-Term Care Program to which this regulation is applicable do business in every county of the state, including rural areas as defined under Section 102(13) of the State Administrative Procedure Act. Small businesses and individuals eligible for participation in the New York State Partnership for Long-Term Care Program are located in every county of the state including rural areas as defined under Section 102(13) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: This amendment will not add any new reporting requirements. Nothing in this revision distinguishes between rural and non-rural areas.

3. Costs: The New York State Partnership for Long-Term Care Program is funded from state monies. There are no costs to local governments. Small businesses that may provide group coverage and individuals will benefit from the revisions to Part 39 due to the reduced premium rates for 1.5/3/50 and 2/2/100 plan designs. This benefit will endure to those businesses and individuals in both rural and non-rural areas of the State. Additionally, this amendment should facilitate the program's goals of increasing individual responsibility for long-term care needs and decreasing reliance on the New York State Medicaid program by encouraging individuals to purchase long-term care insurance on their own behalf and encouraging businesses to purchase long-term care insurance on behalf of their employees. This regulation has no impact unique to rural areas.

4. Minimizing adverse impact: Because the same requirements apply to both rural and non-rural entities, the amendment will impact all affected entities the same. Furthermore, the result of the amendment should ultimately be a favorable one since it decreases premium rates and increases the number of options available to residents.

5. Rural area participation: This notice is intended to provide small businesses, local governments, and public and private entities in rural and non-rural areas with the opportunity to participate in the rule making process.

Job Impact Statement

This amendment will not adversely affect jobs or employment opportunities in New York State. This amendment is intended to improve access to long-term care protection insurance for residents of New York. This amendment increases the number of plan designs available, provides more affordable plan designs, and increases flexibility of coverage by allowing coverage for benefits such as home modification, informal caregiver training, etc.

Public Service Commission

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

New Types of Electricity Meters by General Electric Energy

I.D. No. PSC-44-04-00005-P

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

Proposed action: The commission is considering whether to approve or reject, in whole or in part, a petition dated Oct. 4, 2004 by General Electric Energy for commission approval of the General Electric I-210 line of solid state electricity meters.

Statutory authority: Public Service Law, section 67(1)

Subject: Approval of new types of electricity meters.

Purpose: To permit electric utilities in New York State to use the General Electric I-210 line of electricity meters.

Substance of proposed rule: The Commission will consider a request filed by General Electric Energy for the approal of the I-210 line of solid state electricity meters. Niagara Mohawk Power Corporation has submitted a letter to the Commission stating its intent to use the I-210 meters in New York for customer billing applications, if the meters are approved. The cost of the I-210 meters will range from $75 - $175 depending on the quantity, type, and modules selected.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-1220SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Accounting Authorization by Corning Natural Gas Corporation

I.D. No. PSC-44-04-00006-P

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

Proposed action: The commission is considering a petition from Corning Natural Gas Corporation for permission to defer the incremental uncollected account expense incurred in the fiscal year ended Sept. 30, 2004. The commission may approve, modify or reject, in whole or in part, the relief requested.

Statutory authority: Public Service Law, section 66(9)

Subject: Request for accounting authorization Case 9218.

Purpose: To defer expenses beyond the end of the year in which they were incurred.

Substance of proposed rule: The Commission will consider a petition from Corning Natural Gas Corporation to defer incremental uncollectible account expense incurred in the fiscal year ended September 30, 2004. The Commission may approve, modify or reject, in whole or in part the relief requested.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-1183SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Accounting Authorization by Corning Natural Gas Corporation

I.D. No. PSC-44-04-00007-P

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

Proposed action: The commission is considering a petition from Corning Natural Gas Corporation for permission to defer the costs incurred in re-opening the joint proposal of Aug. 26, 2002. The commission may approve, modify or reject, in whole or in part, the relief requested.

Statutory authority: Public Service Law, section 66(9)

Subject: Request for accounting authorization Case 9218.

Purpose: To defer expenses beyond the end of the year in which they were incurred.

Substance of proposed rule: The Commission is considering a petition from Corning Natural Gas Corporation to defer the extraordinary legal and consulting costs incurred in re-opening the Joint Proposal of August 26, 2002. The Commission may approve, modify or reject, in whole or in part the relief requested.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-1184SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Daily Balancing Service by Niagara Mohawk Power Corporation

I.D. No. PSC-44-04-00008-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Niagara Mohawk Power Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 219.

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

Subject: Daily balancing provisions applicable under Service Classification No. 11—load aggregation.

Purpose: To clarify the eligibility requirements of daily balancing service.

Substance of proposed rule: Niagara Mohawk Power Corporation (the company) proposes to make clarifying changes to the company's Daily Balancing eligibility requirements which are applicable under S.C. No. 11—Load Aggregation Service.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-1274SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Annual Reconciliation of Gas Expenses and Gas Cost Recoveries

I.D. No. PSC-44-04-00009-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, the filings of various LDCs and municipalities regarding their annual reconciliation of gas expenses and gas cost recoveries.

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

Subject: Annual reconciliation of gas expenses and gas cost recoveries.

Purpose: To consider the filings of various LDCs and municipalities.

Substance of proposed rule: The Commission is considering whether to approve, reject, or modify the filings by fifteen local distribution companies and two municipalities reconciling purchased gas costs and gas cost adjustment recoveries for the twelve months ended August 31, 2004.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-1278SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Rates and Charges by H and H Budd Earth Moving and Excavating Co., Inc.

I.D. No. PSC-44-04-00010-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed by the H and H Budd Earth Moving and Excavating Co. Inc. to make various changes in the rates and charges contained it its tariff schedule, P.S.C. 1—water, to become effective Nov. 23, 2004.

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

Subject: Water rates and charges.

Purpose: To increase annual revenues.

Substance of proposed rule: On July 23, 2004, the H and H Budd Earth Moving and Excavating Co., Inc. (H and H) filed to become effective November 23, 2004, First Revised Leaf No. 8 to its tariff schedule P.S.C. No. 1—Water. H and H currently provides water service to 37 customers and is located in the Town of Mamakating, Sullivan County. The proposed filing would increase the rates by 443% and annual revenues by approximately $18,592. The company also proposes that the name of the company be changed from H and H to Spring Glen Lake Water Company LLC (Spring Glen) and that Spring Glen adopts its tariff. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-0983SA1)

Racing and Wagering Board

NOTICE OF ADOPTION

Voluntary Exclusion from Certain Pari-Mutuel Wagering Venues

I.D. No. RWB-34-04-00003-A
Filing No. 1188
Filing date: Oct. 18, 2004
Effective date: Nov. 3, 2004

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

Action taken: Amendment of Parts 4044, 4123, 4237 and 5212 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, section 108, as amd. by L. 2002, ch. 434

Subject: Voluntary exclusion from certain pari-mutuel wagering venues.

Purpose: To establish a procedure whereby persons may voluntarily exclude themselves from entering the premises thoroughbred and harness racetracks, simulcast theaters and off-tack betting simulcast facilities. The operators of such tracks or facilities would not be liable to any self-excluded person as a result of such person's gambling activity while on the list of self-excluded persons. The rule would also implement a procedure so that a person with a telephone wagering account may voluntarily place limits on the amounts of his or her potential wagers on a daily or weekly basis. All of the aforementioned exclusions and limitations would remain effective until seven days after the individual removes the voluntary order of limitation.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. RWB-34-04-00003-EP, Issue of August 25, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Erin Dahlmeyer, Racing and Wagering Board, One Watervliet Ave. Ext., Albany, NY 12206-1668, (518) 453-8460, e-mail: edahlmeyer@racing.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of State

NOTICE OF ADOPTION

Cease and Desist Zone for Real Estate Brokers and Salespersons

I.D. No. DOS-30-04-00007-A
Filing No. 1170
Filing date: Oct. 18, 2004
Effective date: Nov. 3, 2004

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

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

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

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 or summary was published in the notice of proposed rule making, I.D. No. DOS-30-04-00007-P, Issue of July 28, 2004.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.